



**STATE OF NEW YORK
INSURANCE DEPARTMENT**
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NEW YORK, NEW YORK 10004

George E. Pataki
Governor

Howard Mills
Acting Superintendent

The Office of General Counsel issued the following opinion on March 21, 2005, representing the position of the New York State Insurance Department.

Re: Payment for Physician Independent Contractors, No-Fault

Inquiry:

Based upon interpretations of the Medicare statute, 42 U.S.C.A. § 1395 et seq (West 1992 and 2003 Supplement), by the Center for Medicare and Medicaid Services (CMS) of the United States Department of Health and Human Services and of the Internal Revenue Code, 26 U.S.C.A. § 1 et seq. (West 2002 and 2003 Supplement), by the Internal Revenue Service, with relation to independent contractors, will the Insurance Department modify its previous opinions that a Professional Corporation (PC) may not, under the New York Comprehensive Motor Vehicle Insurance Reparations Act (No-Fault Law), New York Insurance Law Article 51 (McKinney 2000), bill for the services of an independent contractor?

Conclusion:

The Insurance Department does not believe that the interpretations by the CMS or the Internal Revenue Service compel a modification of its previously expressed position.

Facts:

By letter of February 21, 2001, the Insurance Department opined that a PC may not bill for the services of an independent contractor under No-Fault, relying on the potential for fraud because the PC may bill as a specialist rather than as a general practitioner and because the patient may wrongfully believe that the independent contractor's actions are under the supervision of the PC. By letter of February 5, 2002, while acknowledging that under the Medical Fee Schedule adopted by the Chair of the Workers' Compensation Board (which has been adopted for No-Fault by the Insurance Department) there is no different fee schedule for specialists and general practitioners, the Department reiterated the February 2001 position. In the February 2002 opinion, the Department again relied on the lack of control by the PC and added as a reason a regulation, 42 C.F.R. § 424.73 (2001), promulgated by CMS which prohibited assignments under Medicare.

In support of the inquirer's assertion that the Department should modify its previously expressed position, the

inquirer claims that CMS has modified its position on billings by independent contractors and that a status of independent contractors for physicians is mandated by regulations issued pursuant to the Internal Revenue Code.

Analysis:

The No-Fault Law includes within the benefits that are to be provided as part of basic economic loss payment for necessary medical services. New York Insurance Law §5102(a)(1) (McKinney 2000). In order to effectuate the requirements of the No-Fault Law, the Superintendent of Insurance has promulgated Regulation 68-C, which provides:

An insurer shall pay benefits for any element of loss, other than death benefits, directly to the applicant or, when appropriate, to the applicant's parent or legal guardian or to any person legally responsible for necessities, or, upon assignment by the applicant or any of the aforementioned persons, shall pay the providers of health care services as covered under section 5102(a)(1) of the Insurance Law, or the applicant's employer directly. Death benefits shall be paid to the estate of the eligible injured person. (emphasis added) N.Y. Comp. R. & Regs., tit. 11, §65-3.11(a) (2003).

New York Business Corporation Law Article 15 (McKinney 2000) authorizes the incorporation of Professional Service Corporations. New York Business Corporation Law §1504 (McKinney 2000) provides, in pertinent part:

(a) No professional service corporation may render professional services except through individuals authorized by law to render such professional services as individuals.

New York Business Corporation Law §1507 (McKinney 2003) restricts issuance of shares in a professional service corporation to individuals licensed to practice the profession and New York Business Corporation Law §1511 (McKinney 2000) similarly restricts transfer of shares in the corporation.

New York Business Corporation Law §1515 (McKinney 2003) provides that the regulation of, inter alia, the health professions shall be in accordance with the Education Law. New York Education Law §6509-a (McKinney 2000), which denominates fee sharing as unprofessional conduct, provides, inter alia, that the prohibition shall not be deemed to prohibit a professional service corporation from receiving or sharing in the fees earned by its shareholders and employees.

It is therefore clear that a PC could financially benefit from the services of its owners and employees in the authorized treatment of No-Fault patients. Accordingly, such a corporation could be considered a "licensed provider" within the purview of Insurance Department Regulation 68-C and be eligible for reimbursement for health services it provided.

As to independent contractors, I surmise the term is used as it is usually construed in New York:

One who, in exercising an independent employment, contracts to do certain work according to his or her own methods, and without being subject to the control of the employer ... , *G.D. Searle & Co. v. Medicare Communications, Inc.*, 843 Fed

Because of the lack of control, the principal is not usually held liable for the negligence of the independent contractor. *Beck v. Woodward Affiliates*, 226 App. Div. 2d 328, 640 N.Y.S. 2d 205 (2d Dept. 1996).

Accordingly, the Department has opined that, when the services are provided by an independent contractor, the PC should not be considered as the "licensed provider" authorized to bill under No-Fault.

As indicated in the Department's February 2002 opinion, the United States Department of Health and Human Services had promulgated a regulation regarding assignment of Medicare benefits, 42 C.F.R. § 424.73 (2001):

Prohibition of assignment of claims by providers. (a) Basic prohibition. Except as specified in paragraph (b) of this section, Medicare does not pay amounts that are due a provider to any other person under assignment, or power of attorney, or any other direct payment arrangement.

Payment to an independent contractor is not encompassed within any of the exceptions listed in 42 C.F.R. § 424.73(b). A similar prohibition regarding Medicaid was found in 42 C.F.R. § 447.10 (2001) Neither provision has since been modified by CMS.

The inquirer has now furnished an e-mail message from a Clinical Education Coordinator of an insurer that administers Medicare Part B on behalf of CMS to a member of the inquirer's firm indicating:

In response to the inquiry, yes a healthcare provider may bill Medicare directly for the services of a Radiologist PC where the services are the interpretation of medical imagery and where the equipment and facility is owned by the Healthcare Provider PC.

Since the individual who furnished the message is not an attorney, nor is he/she authorized by CMS to make a pronouncement on behalf of the agency, and since the insurer is not authorized to bind CMS, the message has very little probative value.

While CMS has, by regulation, 42 C.F.R. § 410.26 (2001), authorized a physician or PC to bill for services of an auxiliary professional, such authorization is limited to situations where the supplies or services are included within the physician's or PC's bill. While there is one instance where an independent contractor's services may be billed through a physician or PC, 42 C.F.R. § 410.150(a)(15) (2001), that authorization is limited to the services of a physicians assistant.

Accordingly, it does not appear that CMS has changed its position.

The inquirer has mischaracterized the position of the Internal Revenue Service vis a vis independent contractors. 26 C.F.R. §§ 31.3121(d)-1(c) (2002), dealing with contributions for Social Security, and 31.3306(i)-1(b), dealing with the Federal Unemployment Tax both provide:

(c) Common law employees. (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (2)

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. . . . In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Further, 26 C.F.R. § 31.3401(c)-1 (2002), dealing with deductions from the wages of employees, provides:

(c) Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are not employees.

(d) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(e) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

. . .

Reading the above quoted provisions in context, it is clear that the Internal Revenue Service is setting forth general rules dealing with physicians practicing for the public, not relationships between two physicians, and is not intended to state that physicians are always independent contractors. In fact, the Department is aware of several situations where individual practicing law or medicine within a PC are considered employees, not independent contractors.

Accordingly, no reason has been presented that would compel the Department to modify its previous conclusions. In any event, even if CMS allowed unlimited payment to PCs for the services of Independent Contractors and the Internal Revenue service considered physicians to be independent contractors under all circumstances, such interpretations would not control the Insurance Department's interpretation of the No-Fault statute.

As to health care providers functioning as leased employees and No-Fault, New York Labor Law § 916(3) (McKinney 2005 Supplement) provides:

'Professional employer agreement' means a written contract whereby: . . . (c) Employer responsibilities for worksite employees, including those of hiring, firing and disciplining, are expressly allocated by and between the professional employer organization and the client in the agreement; and (d) The professional employer organization expressly assumes the rights and responsibilities as required in section nine hundred twenty-two of this article.

New York Law § 922(1) (McKinney 2005 Supplement) provides:

A professional employer organization shall meet the following standards (a) Have a written professional employer agreement between the client and the professional employer organization setting forth the responsibilities and duties of each party. The professional employer agreement shall contain a description of the type of services to be rendered by the professional employer organization and the respective rights and obligations of the parties and the professional employer agreement shall also provide that the professional employer organization: (i) reserves a right of direction and control over the worksite employees. However, the client shall maintain such direction and control over the worksite employees as is necessary to conduct the client's business and without which the client would be unable to conduct its business, discharge any fiduciary responsibility which it may have, or comply with any applicable licensure;

New York Education Law § 6524 (McKinney 2001 and 2005 Supplement) restricts licensure as a physician to individuals and New York Education Law § 6522 (McKinney 2001) generally allows only licensed physicians to practice medicine. While in accordance with New York Business Corporation Law Article 15 (McKinney 2003 and 2005 Supplement) a PC may practice medicine through licensed physicians, there is no provision for a PEO to so practice.

While there is no prohibition in New York Labor Law Article 31 (McKinney 2005 Supplement) on a PEO leasing physicians, given the provisions of New York Labor Law § 922(1)(a)(i), the Insurance Department will not, until an opinion on all relevant issues has been rendered by the New York Education Department, permit leased professionals to be considered employees of the lessee for the purposes of No-Fault reimbursement.

For further information you may contact Principal Attorney Alan Rachlin at the New York City Office.