PANNONE
LOPES
DEVEREAUX &
WEST LLC

counselors at law

Legislative Update
Hospitals and Health Care Providers

Below you will find a brief summary of legislation impacting operational and governance issues for hospitals in Rhode Island. Included in this outline please find the following:

- Hospital Legislation
- Regulation of Hospitals
- Employment Issues
- Civil Liability
- Medical Records
- Board Governance

1. Hospital Legislation

Recent legislation passed by the Rhode Island Legislature relating to Hospitals and Health Care is summarized below:

A. Health Care Quality - RIGL § 23-17.17 - Licensed hospitals are required submit a core-staffing plan to the RI Department of Health during the month of January each year, specifying for each patient care unit and shift, the number of registered nurses, LPNs, or CNAs who will ordinarily be assigned to provide direct patient care and the average number of patients upon which the staffing levels are based.

B. Hospital Events Reporting - RIGL § 23-17-40 - Reportable events as defined in the statute must be reported to the Department of Health Division of Facilities Regulation. Hospitals are required to report all incidents defined in subsection (b) within twenty-four (24) hours of occurrence, and if later, within twenty-four (24) hours of receipt of information causing the hospital to believe that a reportable event has occurred.

C. Safe Patient Handling Act - RIGL § 23-80-1 - Hospitals are required to develop a policy and implementation plan which designed to ensure safe patient handling and avoiding injuries. This legislation details the requirements are highlighted in the statute.

D. Amendment to Duties and Functions of Board of Directors - RIGL § 27-19.2-4(6) Physicians receiving 1compensation from the non-profit hospital for services rendered in their professional capacity, directly or indirectly, may serve on board committees which address compensation matters; however, no such physician may participate in or vote on matters relating to physician compensation.

E. Licensing - 2006 RIGL § 23-17-19.1 - Legislation deals with informed consent issues regarding; (i) human subjects for research involving the investigation of lifesaving devices; (ii) medications or treatments in which the patient is unable to grant consent due to life threatening situations; and (iii) consent is not possible from the agent. Filing with the Department of Health is required in such circumstances.

F. Insurance - 2006 RIGL§ 27-19-2.1 - In certain circumstances it is permissible for a subsidiary of a non-profit hospital service corporation to develop, underwrite, and offer for sale life insurance, disability insurance, long term care, employee assistance

programs, and other health related programs; provided that prior to underwriting the risk the hospital first demonstrates that underwriting such risk is consistent with the hospital's mission statement and secures prior written approval form the Health Insurance Commissioner prior to underwriting the insurance program.

2. Regulation of Hospitals

Legislation impacting the governance of hospitals:

A. Licensing - Licensing issues for hospitals are generally within the purview of Rhode Island the Department of Health which governs hospital licensing through and the Board of Licensure and Discipline. RIGL § 5-37.

B. Accreditation - Hospitals seek accreditation by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO). Accreditation is based upon the adherence to strict standards published by JCAHO and monitored through comprehensive site visits. Federal and State governments rely upon JCAHO standards and generally require adherence for accreditation procedures.

C. Medicare Act - Federal insurance for elderly and disabled is codified at 42 USC § 301. Part A of the act outlines the nature and scope of insurance for hospital services based upon diagnosis and location of hospital. Part B provides for reasonable costs which exceed the level of Part A payments. Part C covers post hospital extended care services.

The Medicare regulations range from building safety to patient care standards and accreditation requirements. The Act is extensive and scope and application and in order to ensure efficiency, hospitals must maintain agreements with Peer Review Organizations (PROs). A PRO is a group of physicians charged with the responsibility to review the professional activities of physicians and hospitals in an effort to determine the quality of the services provided.

D. Medicaid - Title XIX of the Social Security Act, 41 USC § 1396, makes federal grants available to states to enable the state to furnish medical assistance on behalf of families with dependent children, and assistance for aged, blind, or disabled individuals who insufficient resources. In Rhode Island, the body that administers Medicaid is the Department of Human Services.

F. Fraud - Falsifying Medicaid or Medicare filings is a felony under 42 USC § 1320. The primary area reviewed by the government is reimbursement for referrals of Medicare or Medicaid patients. Such referrals are considered "kickbacks".

G. Controlled Substances Act - Regulation of controlled substances has increased exponentially on the state and federal level through the Controlled Substances Act, 21 USC § 801 and the Uniform Controlled Substance Act. The manufacture, distribution and dispensing of controlled substances is strictly regulated and the issuance of annual Certificates of Registration is one manner in which hospitals are monitored for this activity. Hospitals are required to develop and implement effective control measures.

3. Employment Issues

As a general proposition, physicians are considered independent contractors who obtain staff "privileges" at hospitals and in such capacity they are permitted to use the equipment owned by the hospital. The board of directors of a hospital is generally responsible for contracts with physicians and it has a duty to periodically evaluate the medical

staff through the application of a peer review process (JCAHO, Medicaid). The board has the ultimate responsibility of assuring that physicians maintain proper credentials, licenses, memberships, and privileges at other hospitals.

The denial of privileges is a major area of litigation and dispute between hospitals and medical staff.

4. Civil Liability

Traditional tort theories apply to hospital care. The most common theory is that of simple negligence in which the reasonable person standard is adjusted to account for the specialized knowledge or skill of the physician. Charitable immunity is no longer the shield used by hospitals against claims of negligent care and hospitals are liable for the negligence of agents and in many cases independent contracting physicians as well. Courts have found hospitals liable for the negligent acts of its physicians notwithstanding the independent contractor claim as a defense.

5. Medical Records

Hospitals have a duty to prepare, maintain confidential medical records of its patients. The maintenance of medical records must strictly adhere to JCAHO standards. (42 CFR § 482.24).

Medical records are confidential and may be removed only in accordance with a court order, subpoena, or statute. The written consent of the patient is required for the release of any medical information not otherwise authorized to receive it and only in special circumstances is disclosure permitted. (42 CFR § 1301).

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) was designed to encourage the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information. 42 USC § 1301. The Act encourages the electronic transfer of medical information while ensuring the confidentiality of that information though the use of unique identifiers and other encryption standards.

6. Board Governance

A. Board Membership - Best practices dictate that the periodic evaluation of the composition of the board is prudent. The optimum size of a hospital board is between ten (10) and fifteen (15); however, the primary factor in making this determination is what size will be most effective to govern the institution. [1] The quality of the board is an important factor in its makeup and modern governance practice dictates that expertise should be broadly viewed as critical to effective governance.

Consideration should be given to the implementation of a board nominating process in which candidates are evaluated based upon expertise in the business and non-profit community.

B. Ethical Considerations - General counsel to a non-profit hospital has a responsibility to assure that the board is taking the necessary steps to preserve ethical standards at all times.

C. Auditing - The board of a hospital must include a qualified audit committee responsible for interfacing with its outside auditors in reviewing the organization's financial data.

Audit committee independence is as essential in the nonprofit context as it is in the for profit business world. In addition, requiring financial literacy of

[1] Lorman

at least one member of the audit committee is considered a "best practices" step in board governance.

D. Quality of Care - Medical error will occur notwithstanding the highest standards of care in the hospital environment.[2] Quality of care standards are heavily regulated by the legislature and administrative agencies. Board members have a fiduciary duty to require the hospital staff to maintain the highest level of care possible and a primary aspect of fulfilling this duty is in the area of credentialing the medical staff.

F. Training on the Fiduciary Duties - The board of directors of non-profit corporations are tasked with broad management responsibility relating to operating procedures, budgets and financial controls, strategic planning, monitoring of performance of executives and staff, etc.

The business judgment rule is "best practices" for all non-profits includes professional training on all aspects of these duties, writing the duties into company procedures, bylaws, and conduct codes, and establishing procedures by which compliance with the fiduciary duty is ensured.

This update is a summary for general information and discussion only. It is not a complete analysis and may not be relied upon as legal advice. Please contact Gary R. Pannone, Esquire for further consultation at 401-824-5115 or send an email to him at *gpannone@pldw.com*

[2] Kazemek, Knecht, Westfall, *Effective Boards: Working Smarter to Meet Challenge,* Trustee (May 2000).