



Health Law Alert

New Jersey law now requires that a Surgical Practice (i.e., a one operating room surgical suite that is “Registered” with the New Jersey Department of Health (“DOH”)) to secure licensure as an Ambulatory Care Facility within one year from the date of enactment. Some of the highlights of the new law are as follows:

- I. To facilitate the licensure of Surgical Practices, the legislature exempted Surgical Practices, which meet certain Medicare-Certification or national accrediting body accreditation requirements, from stringent State physical plant requirements applicable to Ambulatory Surgical Facilities.
- II. Unlike an Ambulatory Surgical Facility (a facility that historically included more than one operating room and was licensed by the DOH), a Surgical Practice will not be subject to the Ambulatory Care Facility Assessment on Gross Receipts (commonly known as the “ACF tax”).
- III. The legislature exempted a Surgical Practice that complies with the new law from initial and renewal licensure fees (to which Ambulatory Surgical Facilities are subject).
- IV. A Surgical Practice may combine with other Surgical Practices to form and become licensed as Ambulatory Surgical Facilities, despite the existence of a moratorium on the issuance of licenses for Ambulatory Surgical Facilities.

Some of the potential benefits of licensure are:

- I. Surgical Practices and Ambulatory Surgical Facilities will be subject to uniform standards governing their operations, licensure, etc., and will be regulated by the DOH, an agency that is best-suited to regulate entities that provide surgical and related services.
- II. Recognition by payors as being qualified for reimbursement. Certain payors (e.g., Cigna) have taken the position (arbitrarily and capriciously, in my opinion) that a Surgical Practice is not entitled to reimbursement under certain plans’ Summary Plan Descriptions, as they are not licensed by the DOH. With the licensure of Surgical Practices as Ambulatory Care Facilities, the argument in favor of reimbursement may be bolstered.
- III. Based on DOH guidance¹, a Surgical Practice’s status as an Ambulatory Care Facility will avail it of the flexibility enjoyed by Ambulatory Surgical Facilities. Specifically, just like an Ambulatory Surgical Facility, a Surgical Practice, once licensed by the DOH, may be owned by non-physicians (pursuant to a regulation of the New Jersey Board of Medical Examiners (“BME”) applicable to general business corporations licensed as Ambulatory Care Facilities (“ACF Exception”)) and need not grant equity to physicians who perform procedures at the Surgical Practice (i.e., they may have non-owner medical staff members).

¹ While I believe that the new law includes an ambiguity that may adversely affect a Surgical Practice’s ability to claim compliance with the ACF Exception, the DOH’s position on this has been that a Surgical Practice, once licensed by the DOH, may be owned by non-physicians and have non-owner medical staff members.



There are many issues to consider before you license your Surgical Practice, including the corporate entity to be used for the ownership and operation of the same post-licensure. Because of their historical status as a medical practice, many Surgical Practices were originally formed as Professional Corporations. The Professional Corporation is a restrictive entity by statute (e.g., it must be owned by physicians or closely-allied health professionals, regardless of whether or not it is licensed by the DOH as an Ambulatory Care Facility). Accordingly, the Professional Corporation form will preclude the Surgical Practice from enjoying the benefits of the ACF Exception. Accordingly, it may be prudent to establish an LLC to own and operate the Surgical Practice post-closing. Other issues to consider will be the need to amend existing shareholders'/operating agreements to re-allocate shares/control of the entity, given the greater flexibility that may be afforded to Surgical Practices under the ACF Exception.

The Healthcare Practice Group at Mandelbaum Salsburg has substantial experience in handling and advising clients on licensure/corporate/regulatory matters involving Surgical Practices, Ambulatory Surgical Facilities, Laboratories and other healthcare facilities, and has recently secured, on behalf of a client, what is likely to be the State's first Ambulatory Care Facility license for an entity that historically operated as an MD/DC practice, thereby relieving the client of the restrictions to which MD/DC practices are subject under the law (i.e., the "51/49 requirement") and bestowing upon the client greater recognition by the payor community.

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