

Memo to: Pat Murdo
From: Bob Olsen
John W. Flink

RE: Proposed Changes to LC 38 April 29 Draft

We've reviewed your proposed "stripped down" version of LC 38 and offer the following comments.

- Section 1
 - As modified, Section is much improved.
 - MHA continues to oppose disclosure of employee or contract status related to the referral.

- Section 2
 - Section 2 is titled Kickbacks, but Section 2(2)(b)(i), (ii) and (iii) are not kickbacks.
 - MHA would agree to extending the federal prohibition on kickbacks to non-Medicare and non-Medicaid patients.
 - However, we suggest that you accomplish this by incorporating the federal statutes and rules. Federal law in this area is very well-defined, and, for consistency and uniformity, we suggest incorporating this into Montana law.
 - As proposed, Section 2(2)(b)(ii) asserts that generally accepted business practices violate the law.
 - We suggest you consider referencing 37-1-316 back to this section. This gets at the issue of differentiating the expectation that an employee will be loyal to the employer, but not impair the physician's medical judgment.

Physicians seek employment or contract status for a variety of reasons, for example, as a way to handle the administrative burdens of their practices. We don't know of any other state that has this kind of provision. Thus, it would have a chilling effect on physician recruitment and retention, in effect, putting Montana at a disadvantage when trying to ensure an adequate supply of physicians.

There are times you employ a practitioner precisely to operate the business, or provide services. It's unreasonable to outlaw the exact reason you would employ someone.

Perhaps there is some confusion about expecting physicians to refer patients to a hospital when medically appropriate and exclusive referrals. Under federal law, hospitals cannot require that physicians refer exclusively to their hospital employer. However, physicians can be expected to refer where medically appropriate, however.

- Section 3
 - MHA suggests this section should be deleted and 50-4-104 handle this – as suggested in your memo. A health care provider would be in violation of the law under other sections of the statutes, which makes this section unnecessary.
- New Section 3
 - We could agree to this section if the changes we proposed for Section 2 are incorporated.
- New Section 4
 - We agree with your recommendation to leave as is and renumber to New Section 4.
- New Section 5
 - MHA recommends deletion of Section 5(2). We don't think this language is workable because it requires a finder of fact to establish a provider's motivation, which is a pretty difficult standard to meet.
 - Instead, MHA suggests inserting a definition of "financial interest" in Section 1, as follows: "A financial interest exists if a licensed health care professional or an immediate family member as defined in 15-30-602, partner or employee of the professional directly or indirectly holds through business or investment an ownership interest in or with another licensed health care professional, health care facility or other person or entity which is the beneficiary of the referral."
- New Section 6
 - MHA recommends deletion of Section 7(19) and replacing it with the following language: "(19) Entering into or continuing to practice under the terms of an arrangement which forfeits the ability of a health care practitioner as defined in 50-5-101(46) to exercise their independent, professional judgment in a manner that does not adversely affect the health care provider's ability to render care."
- New Section 7
 - MHA recommends making the same changes as in New Section 6.
- New Section 8
 - No changes.
- New Section 9
 - MHA recommends striking this language in its entirety and replacing it with the following:

Section 5. Section 50-5-117, MCA, is amended to read:

“50-5-117. ~~(Temporary)~~ Economic credentialing of physicians prohibited -- definitions. (1) Except to the extent necessary to determine physician competency or to comply with any applicable federal or state law or regulation, the requirements of any applicable certification or accreditation organization and the requirements of applicable payors, Aa hospital or outpatient center for surgical services may not engage in economic credentialing by:

(a) ~~except as may be required for medicare certification or for accreditation by the joint commission on accreditation of healthcare organizations, requiring a physician requesting medical staff membership or medical staff privileges to agree to make referrals to that hospital, or to any facility related to the hospital;~~

~~(b) refusing to grant staff membership or medical staff privileges or conditioning or otherwise limiting a physician's medical staff participation because the physician or a partner, associate, or employee of the physician:~~

~~(i)(a) provides medical or health care services at, has an ownership interest in, or occupies a leadership position on the medical staff of a different hospital, hospital system, outpatient center for surgical services, or health care facility; or~~

~~(ii)(b) participates or does not participate in any particular health plan~~

~~——(c) refusing to grant participatory status in a hospital or hospital or hospital system health plan to a physician or a partner, associate, or employee of the physician because the physician or partner, associate, or employee of the physician provides medical or health care services at, has an ownership interest in, or occupies a leadership position on the medical staff of a different hospital, hospital system, or health care facility.~~

(2) ~~Notwithstanding the prohibitions in subsection (1), a hospital may refuse to appoint a physician to the governing body of the hospital or to the position of president of~~

~~the medical staff or presiding officer of a medical staff committee if the physician or a partner or employee of the physician provides medical or health care services at, has an ownership interest in, or occupies a leadership position on the medical staff of a different hospital, hospital system, or health care facility~~

~~(3)~~ For the purposes of this section, the following definitions apply:

~~(a)~~ (i) "Economic credentialing" means the denial of a physician's application for staff membership or clinical privileges to practice medicine in a hospital on criteria other than the individual's education, training, current competence, experience, ability, personal character, and judgment.

~~(ii)~~ This term does not mean use by the hospital of:

~~(i)(A)~~ exclusive contracts with physicians, if the contracts do not violate the unfair trade practices act under Title 30, chapter 14, part 2;

~~(ii)(B)~~ medical staff on-call requirements;

~~(C)~~ disciplinary actions taken in accordance with the hospital's or outpatient center for surgical services' medical staff bylaws;

~~(D)~~ disciplinary actions upon a finding of unprofessional conduct by the board of medical examiners provided for in 2-15-1731;

~~(iii)(E)~~ adherence to a formulary approved by the medical staff; or

~~(iv)(F)~~ other governing body or medical staff policy adopted to manage health care costs or improve quality.

(b) "Health care facility" has the meaning provided in [50-5-101](#) and includes diagnostic facilities.

(c) "Health plan" means a plan offered by any person, employer, trust, government agency, association, corporation, or other entity to provide, sponsor, arrange for, indemnify another for, or pay for health care services to eligible members, insureds, enrollees, employees, participants, beneficiaries, or dependents, including but not limited to a health plan provided by an insurance company, health service organization, health

maintenance organization, preferred provider organization, self-insured health plan, captive insurer, multiple employee welfare arrangement, workers' compensation plan, medicare, or medicaid.

(d) "Outpatient center for surgical services" has the meaning provided in 50-5-101 and includes facilities for ambulatory surgical care.

~~(d)~~(e) "Physician" has the meaning provided in [37-3-102](#).

(4) For the purposes of this section, the provisions of [50-5-207](#) do not apply.
(~~Terminates June 30, 2009—sec. 6, Ch. 351, L. 2007.~~)”