

HEALTH LAW UPDATE

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Closing The Books On Another Session: A Round-Up Of 2011 Tennessee Legislative Developments

July 21, 2011

The 2011 Tennessee legislative session officially adjourned in May. In a previous edition of *Health Law Update*, we highlighted this year's legislative changes to the physician non-compete provisions in Tennessee.¹ This issue of *Health Law Update* will briefly highlight some of the other significant updates to Tennessee's healthcare laws during the 2011 legislative session.

1. Patient Safety and Quality Improvement Act

The Tennessee Patient Safety and Quality Improvement Act of 2011 ("Quality Improvement Act")² was enacted in response to a recent Tennessee Supreme Court decision that limited the protections available to healthcare facilities pursuant to the Tennessee Peer Review Statute.³ In order to restore these protections, the Quality Improvement Act deletes the former Tennessee Peer Review Statute, which appeared solely in a title of the Tennessee Code Annotated governing licensed professionals,⁴ and replaces it with two new sections, one applicable to hospitals and other healthcare facilities⁵ and the other applicable to physicians and professionals.⁶ This restructuring clarifies that protected peer review activities are not confined simply to a physician's professional conduct (the Tennessee Supreme Court had earlier found that the privilege extended only to "proceedings involving a physician's professional conduct, competence, or ability to practice medicine," and it was this finding that prompted the push for the new legislation). The Quality Improvement Act contains a list of protected activities that involve evaluation of the safety, quality, processes, costs, appropriateness or necessity of healthcare services.

¹ See "Putting Physician Non-Competes On The Same Page (Sort Of)," June 24, 2011, [available here](#).

² See 2011 Tenn. Pub. Acts 67, available at <http://www.tn.gov/sos/acts/107/pub/pc0067.pdf>.

³ See *Lee Medical Inc. v. Beecher*, 312 S.W.3d 515 (Tenn. 2010).

⁴ See former Tenn. Code Ann § 63-6-219.

⁵ See new Tenn. Code Ann. § 68-11-272.

⁶ See new Tenn. Code Ann. § 63-1-150.

2. Regulation of Pain Management Clinics

A new law⁷ that becomes effective January 1, 2012 requires pain management clinics⁸ to obtain a certification from the Tennessee Department of Health. The certification will remain in effect for two years from the date of issuance, and the Department of Health has the authority to grant a 90-day grace period to renew the certificate. A change of majority ownership of a certified pain management clinic requires the submission of a new application for a certificate. Failure to notify the department within 10 business days of such a change may constitute a basis for summary suspension of the clinic's certification.

Under the new law, each pain management clinic must have a medical director who is a licensed physician or osteopathic physician who is responsible for all of the requirements relative to the certification of the clinic. The medical director of the pain management clinic is required to be on-site at the clinic for a minimum of eight hours per week. In the event that the medical director, for whatever reason, no longer meets the new requirements, the pain management clinic must notify the department within 10 business days of another physician who will serve as medical director.

The new law also establishes special documentation requirements for certain doses of controlled substances. Any practitioner providing services at a pain management clinic that dispenses or prescribes more than a 72 hour dose of controlled substances for the treatment of chronic nonmalignant pain must document in the patient's record the reason for prescribing or dispensing that quantity.

The boards of medical examiners, osteopathic examination and nursing, and the committee on physician assistants, will have the authority to inspect a pain management clinic that utilizes the services of a practitioner licensed by that board. During such inspections, the authorized representatives of the board may inspect all necessary documents and medical records to ensure compliance with the new pain management rules. In addition, each board has authority to investigate a complaint alleging a violation of the new pain management rules or alleging that a facility utilizing the services of a healthcare practitioner licensed by that board is not properly certified by the Department of Health.

3. Tort Reform and Damages Caps

The Tennessee legislature passed the Tennessee Civil Justice Act of 2011 (the "Civil Justice Act"), which takes effect on October 1, 2011 and imposes caps for non-economic and punitive damage.⁹ Specifically, the Civil Justice Act sets a \$750,000 cap for non-economic damages per injured plaintiff in all civil actions. The definition of non-economic damages includes pain and suffering, disfigurement, mental anguish and emotional distress. The cap is increased to \$1,000,000 for "catastrophic injuries," such as spinal cord injury resulting in paraplegia or quadriplegia. The Civil Justice Act caps punitive damages at the greater of two times compensatory damages or \$500,000. With respect to products liability actions, the Act limits

⁷ See 2011 Tenn. Pub. Acts 340, available at <http://www.tn.gov/sos/acts/107/pub/pc0340.pdf>

⁸ "Pain Management Clinic" is defined as a privately-owned facility in which a medical doctor, an osteopathic physician, an advanced practice nurse, and/or a physician assistant provides pain management services to patients, a majority of whom are issued a prescription for, or are dispensed, opioids, benzodiazepine, barbiturates, or carisoprodol, but not including suboxone, for more than 90 days in a 12-month period. *see* Tenn. Code Ann. § 63-1-301(5).

⁹ 2011 Tenn. Pub. Acts 510, available at <http://www.tn.gov/sos/acts/107/pub/pc0510.pdf>

the ability to bring such an action against a seller of a product (other than the manufacturer), and limits the ability to obtain punitive damages from a seller of a product (other than the manufacturer) except in certain identified circumstances. The Act also contains certain protections for manufacturers whose drugs or devices are manufactured and labeled in relevant and material respects in accordance with applicable laws and regulations.

4. Authentication of Verbal Orders

The Tennessee legislature passed into law a requirement, effective July 1, 2011, that all hospitals licensed in Tennessee must require verbal orders to be authenticated by a physician or authorized individual who has the authority to issue verbal orders under the hospital's policies or medical staff bylaws.¹⁰ The policies or bylaws must require that the authentication of a verbal order be made within 48 hours after the time the order is made unless a "read-back and verify process," as described below, is established. The individual receiving a verbal order must record the date and time of the verbal order and sign the verbal order in accordance with hospital policies or medical staff bylaws.

If the hospital implements a "read-back and verify process," it must require that the individual receiving the order immediately read back the order to the physician or other authorized individual, who must immediately verify that the read-back order is correct. The individual receiving the verbal order shall record that the order was read back and verified. If the read-back and verify process is followed, the verbal order must be authenticated no later than 14 days after the date of the verbal order.

5. Annual Coverage Assessment Act

The Annual Coverage Assessment Act, effective July 1, 2011, establishes an annual coverage assessment on covered hospitals of 4.52 percent of the hospital's annual coverage assessment base.¹¹ The Tennessee Hospital Association has lobbied for this assessment for the last two years as a way to stave off TennCare cuts for its member hospitals. TennCare will notify hospitals 30 days prior to the date in which payment is due, and failure to pay on the due date will result in a penalty of \$500 per day of nonpayment. The Annual Coverage Assessment Act also prohibits a hospital from increasing charges or adding surcharges based on or as a result of the annual coverage assessment.

6. Other Legislative Developments

Nursing Homes: The Tennessee legislature extended the moratorium on the issuance of certificates of need for new nursing home beds until June 30, 2012.¹² The legislature also extended the application of the nursing home tax from July 1, 2009 to July 1, 2011.¹³

Mental Health and Developmental Disabilities: Effective May 5, 2011, the Tennessee legislature redefined the definitions of developmental disability and intellectual disability.¹⁴ In addition,

¹⁰ See 2011 Tenn. Pub. Acts 258, available at <http://www.tn.gov/sos/acts/107/pub/pc0258.pdf>

¹¹ See 2011 Tenn. Pub. Acts 189, available at <http://www.tn.gov/sos/acts/107/pub/pc0189.pdf>. Critical access hospitals, state mental hospitals, rehabilitation and long-term acute hospitals, St. Jude Children's Research Hospital, and state and local government hospitals are exempt from the annual coverage assessment.

¹² See 2011 Tenn. Pub. Acts 479, available at <http://www.tn.gov/sos/acts/107/pub/pc0479.pdf>

¹³ See 2011 Tenn. Pub. Acts 478, available at <http://www.tn.gov/sos/acts/107/pub/pc0478.pdf>

pursuant to a new law effective July 1, 2011, developmental centers or other entities providing mental health or developmental disabilities services must check the abuse registry maintained by the Department of Health prior to the hiring of applicants for employment or volunteers.¹⁵ The new law prohibits any individual who is listed on the registry from being permitted to provide services at the organization.

Transferring of Schedule II prescriptions: Effective May 20, 2011, a new law facilitates compliance with federal and state requirements regarding separate prescriptions for Schedule II controlled substances.¹⁶ The law facilitates compliance by authorizing pharmacists, pharmacy interns and pharmacy technicians to transfer from a prescription containing a Schedule II controlled substance any drug that is a non-scheduled prescription drug or any prescribed supply to another prescription form. This transfer may be achieved by scanning, photocopying or transcribing by hand or other means, and must include all information regarding each drug or supply being transferred.

Proof of Licensure: Effective January 1, 2012, Tennessee law adds certain new categories of healthcare practitioners to those who must communicate proof of their license or certificates of registration by placing such proof in each office, by wearing certain identification, by providing written notice to patients at initial office visits, and by posting proof on the practitioner's website, if applicable.¹⁷ The new categories include podiatrists, advanced practice nurses, physician assistants, psychologists, acupuncturists and certified professional midwives.

Implementation of Telemedicine: The House passed a joint resolution to encourage the implementation and use of telemedicine in Tennessee. The joint resolution advocates the expanded use of telemedicine in Tennessee in order to improve various aspects of the delivery of healthcare services in Tennessee. These improvements include increasing access to necessary medical services for patients in all regions in Tennessee, improving patient choices and experiences in interacting with healthcare services, and improving the reach of physicians and healthcare personnel in ways that improve quality and efficiency.

¹⁴ See 2011 Tenn. Pub. Acts 158, available at <http://www.tn.gov/sos/acts/107/pub/pc0158.pdf>.

¹⁵ See 2011 Tenn. Pub. Acts 165, available at <http://www.tn.gov/sos/acts/107/pub/pc0165.pdf>.

¹⁶ See 2011 Tenn. Pub. Acts 201, available at <http://www.tn.gov/sos/acts/107/pub/pc0201.pdf>.

¹⁷ See 2011 Tenn. Pub. Acts 75, available at <http://www.tn.gov/sos/acts/107/pub/pc0075.pdf>.

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