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House Bill 1777 Protects Certificate of Need Exempt Status of Certain ASFs

House Bill 1777, which amends Washington’s certificate of need law¹ to protect the exempt status of certain ambulatory surgical facilities, passed the Legislature on April 3, 2019. HB 1777 was introduced on January 30, 2019 and was sponsored by Representative Eileen Cody, among other legislators, in response to a significant change in the Department of Health’s interpretation of its statutory authority to grant exemptions announced last year.

House Bill 1777

A certificate of need (“CN”) issued by the Certificate of Need Program of the Washington State Department of Health (the “Department”) is required for construction, development, or establishment of an ambulatory surgical facility (“ASF”). Under the CN program, the Department reviews a proposed project under specific criteria related to community need, quality of services, financial feasibility, and the impact on health care costs in the community.

Under HB 1777, however, an ASF is exempt from CN review requirements if the facility meets three criteria. The exemption requires that “the facility is an individual or group practice.” If the facility is a group practice, the privilege of using the facility cannot be extended to physicians outside the group practice. The exemption also requires that the facility was operated, or received approval to operate, prior to January 19, 2018. Finally, the exemption requires that the facility was exempt from CN requirements prior to January 19, 2018, because the facility *either* was determined to be exempt from CN requirements pursuant to a determination of reviewability issued by the Department *or* was a single-specialty endoscopy center in existence prior to January 14, 2003.²

The exemption in HB 1777 applies regardless of future changes of ownership, corporate structure, or affiliations of the individual or group practice, as long as the use of the facility remains limited to physicians in the group practice. The exemption does not apply to any change in services or specialties offered at the facility or to any increase in the number of operating rooms at the facility.

The Intent of House Bill 1777

Certain facilities are exempt from the CN review requirement. For decades, through a regulation adopted to implement Washington’s CN law, the Department exempted certain ASFs. That regulation states, in relevant part:

¹ Chapter 70.38 RCW.

² Prior to January 14, 2003, the Department did not consider endoscopy procedures surgeries for purposes of certificate of need.

“Ambulatory surgical facility” means any free-standing entity, including an ambulatory surgery center that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization. *This term does not include a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using the facility is not extended to physicians or dentists outside the individual or group practice.*³

Since the CN law was enacted in 1979, the Department has interpreted the italicized portion of this definition as an exemption for certain ASFs from the CN review requirement. Specifically, it has interpreted the exemption to apply to any facility that operated primarily for the purpose of performing surgical procedures if a private physician or a group of private physicians owned and exclusively used the facility.

On January 19, 2018, the Department issued an interpretive statement regarding the ASF exemption.⁴ According to the Interpretive Statement, any decision to exempt an ASF operating primarily to perform surgical procedures from the CN review requirement “would have been in error because such a decision is inconsistent with the Department’s statutory authority.”⁵

The Department reasoned that, under the CN law, the Legislature requires a new health care facility to obtain a CN.⁶ Under the CN law, the term “health care facility” includes ASFs.⁷ The Department concluded that the Legislature did not authorize it to exempt any ASF from the CN review requirement and that, instead, only rooms in private offices used *intermittently* and *exclusively* by physicians to perform minor surgery as an incident to their clinical practice are eligible for an exemption.

The Department indicated, however, that its Interpretive Statement would not affect any exemption issued prior to the date of the statement – January 19, 2018, unless the existing owner relocates the facility, adds operating rooms, adds specialties, or transfers ownership. In the case of any of these changes, an owner would be required to apply for and obtain a CN; alternatively, it would need to qualify for an exemption – a near impossibility under the Interpretive Statement.

While the grandfathering language in the Interpretive Statement offered some comfort to the ambulatory surgery industry, some also questioned how the concept would be implemented by the Department and whether it would be applied consistently over time. To an extent, HB 1777 addresses these concerns, as the grandfathering concept outlined in the Interpretive Statement will now be law, and not merely an agency interpretation subject to change.

³ WAC 246-310-010(5) (emphasis added).

⁴ Department of Health Office of Community Health Systems Interpretive Statement #CN 01-18.

⁵ *Id.*

⁶ RCW 70.38.105(4)(a).

⁷ RCW 70.38.025(6).

Practical Takeaways

- A CN-exempt ASF should determine whether it operated, or received approval to operate, prior to January 19, 2018 and whether the exemption was issued because the facility was determined to be exempt from CN review requirements or was a single-specialty endoscopy center in existence prior to January 14, 2003.
- A CN-exempt ASF considering changing the services or specialties offered at the facility or increasing the number of operating rooms at the facility should consider whether the changes may affect its ability to rely on the protections in HB 1777.
- A CN-exempt ASF considering extending the privilege of using the facility to physicians outside its affiliated group practice should consider whether the changes may affect its ability to rely on the protections in HB 1777.

For more information, please contact Emily R. Studebaker, Esq. at (425) 279-9929 or estudebaker@studebakernault.com.

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