

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

House Bill 1253 (Delegates Manno and Feldman)
Health and Government Operations

Physicians - Professional Liability Coverage - Proof and Notification

This bill requires a licensed physician who performs outpatient surgical services in a freestanding ambulatory care facility to provide the board with verification that the licensee maintains professional liability insurance or is covered by the Federal Tort Claims Act or the Maryland Tort Claims Act (MTCA). Any licensed physician in the State must notify a patient in writing, and on each visit, if the licensee does not carry professional liability insurance coverage or if the physician's coverage has lapsed for any period of time and has not been renewed.

Fiscal Summary

State Effect: The Department of Health and Mental Hygiene (DHMH) advises that it can handle enforcement with existing resources.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: Physicians performing outpatient surgical procedures in a freestanding ambulatory care facility have to provide the Board of Physicians with proof of insurance when applying for an initial, renewal, or reinstated license and upon board request. If the physician does not provide the required proof of insurance, the board, after providing notice to the licensee, may subject the licensee to disciplinary action by the board, including suspension or revocation of a license and/or civil fines. The board may enforce this provision by randomly auditing a portion of the licensees subject to it. An applicant

for renewal or reinstatement who falsifies his or her insurance coverage as required under the bill is also subject to disciplinary action by the board.

The bill requires the notification of a doctor's lack of liability coverage to be signed by the patient at the time of his or her visit and kept in the patient's records. The board must devise language regarding the notification requirements. In addition, the bill requires licensed physicians who do not carry medical liability insurance to conspicuously post such information where they practice.

A "surgical service" means any invasive procedure, whether therapeutic or diagnostic, involving the use of microscopic, endoscopic, arthroscopic, or laparoscopic equipment; or a laser for the removal or repair of an organ or other tissue. A "surgical service" does not include outpatient services that (1) are limited to the skin and mucous membranes; (2) do not extend deeper than the skin and mucous membranes; and (3) are performed with local or topical anesthesia.

Current Law: Health care practitioners working in ambulatory care facilities must be licensed or certified by the appropriate occupational licensing board. DHMH-licensed freestanding ambulatory care facilities include an ambulatory surgical facility, a freestanding endoscopy facility, a freestanding facility utilizing major medical equipment, a kidney dialysis center, or a freestanding birthing center.

Under the Maryland Tort Claims Act, State personnel are immune from liability for acts or omissions performed in the course of their official duties, so long as the acts or omissions are made without malice or gross negligence. Under MTCA, the State essentially waives its own common law immunity. However, MTCA limits State liability to \$200,000 to a single claimant for injuries arising from a single incident. MTCA covers a multitude of personnel, including some local officials and nonprofit organizations. In actions involving malice or gross negligence or actions outside of the scope of the public duties of the State employee, the State employee is not shielded by the State's color of authority or sovereign immunity and may be held personally liable.

As previously stated, if an individual is eligible for coverage under MTCA, the State's tort liability is capped at \$200,000. However, for causes of action arising during calendar 2010 that are not covered by MTCA, State law limits noneconomic damages to \$680,000 for health care malpractice claims and \$850,000 for claims of wrongful death that meet certain criteria. These limits increase annually as specified in statute.

The Federally Supported Health Centers Assistance Act of 1992 and 1995 granted medical malpractice liability protection through the Federal Tort Claims Act to Health Resources and Services Administration-supported health centers. Under the Act, health

centers are considered federal employees and are immune from lawsuits, with the federal government acting as their primary insurer.

In 2004 and 2005, the General Assembly adopted legislation in response to increasing concern that medical malpractice insurance had become unaffordable for individuals practicing in certain high-risk specialties such as emergency surgery, obstetrics, neurosurgery, and orthopedic surgery. One provision of the legislation placed a four-year moratorium on the annual increase of \$15,000 in the cap on noneconomic damages for medical malpractice awards.

In health care malpractice actions, noneconomic damages include payment for pain, suffering, and disfigurement, while economic damages include payment for loss or earnings and medical expenses. Studies by the U.S. Government Accountability Office have indicated that recent sharp increases in medical malpractice insurance rates are due in part to insurer losses on medical malpractice claims. Other contributing factors include decreased investment income, artificially low premium rates adopted while insurers competed for market share during boom years, and higher overall costs due largely to increased reinsurance rates for medical malpractice insurers.

At least six states (Colorado, Connecticut, Kansas, Massachusetts, New Jersey, and Wisconsin) require physicians to carry minimum levels of professional liability insurance. In addition, at least five states require physicians to carry minimum levels of coverage to qualify for state liability reforms, including caps on damages. The American Medical Association advises that, while many states do not require liability insurance coverage, physicians must have minimum levels of coverage to obtain hospital staff privileges and participate in health plans. In addition, at least five states (Alaska, Florida, Montana, Ohio, and Oregon) require physicians or similar providers to notify a patient if they do not have medical liability insurance.

In Maryland, doctors who carry liability insurance typically carry limits of \$1 million per occurrence and \$3 million per annual aggregate. Policies generally have to be renewed on an annual basis. The Maryland Insurance Administration advises that medical liability insurance was more affordable in 2008 than it was in 2004.

The Board of Physicians regulates about 25,000 physicians. However, it does not know how many of the 25,000 work in freestanding ambulatory care facilities.

Additional Comments: Legislative Services notes that, as drafted, the bill does not authorize the board to deny an initial license to an applicant who falsifies his or her insurance coverage.

Additional Information

Prior Introductions: HB 155 of 2009, a similar bill which did not require patient notification, passed the House but received an unfavorable vote in the Senate Education, Health, and Environmental Affairs Committee.

Cross File: None.

Information Source(s): Department of Health and Mental Hygiene, Department of Legislative Services

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