

NEW MEXICO PUBLIC REGULATION COMMISSION

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DATE October 28, 2009

TO: Business entities covered under the Patients Compensation Fund, and Medical Malpractice Insurers Writing or Intending to Write Policies to Qualify Non-Individual Health Care Providers under the New Mexico Medical Malpractice Act

Re: Coverage of business entities by the NM Patients Compensation Fund (PCF)

As you may know, "health care providers" may qualify under the NM Medical Malpractice Act for coverage by the NMPCF by obtaining the appropriate insurance policy and paying the appropriate surcharge to the NMPCF. The definition of "health care provider" contained in Section 41-5-3 of the Act specifies who may qualify:

"As used in the Medical Malpractice Act:

A. "health care provider" means a person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant; ..."

As is clearly stated, a license or certification by the State of New Mexico is required for each health care provider seeking to qualify. Questions have been raised recently about the propriety of the PCF accepting surcharges from providers (individuals or business entities) without verification by the PCF of the licensure or certification of the provider as one the types of providers listed in the definition above. Numerous questions regarding the legal consequences of accepting surcharge from unlicensed or uncertified providers have arisen.

Questions have also been raised about the propriety of accepting surcharges from any business entities other than hospitals or outpatient health care facilities that are licensed or certified by the State of New Mexico. Note that hospitals and outpatient health care facilities are the only non-individual categories of provider listed in the definition of "health care provider." Also note that MD licenses, for example, are granted by the New Mexico Medical Board only to individuals, and are not granted to corporations or other business entities. Also note that certification by a Federal agency may or may not qualify as certification by the State of New Mexico.

Despite the remedial nature of the Medical Malpractice Act, despite the provisions of the Professional Corporation Act, and despite over thirty years of liberally construing the provisions of the Act quoted above, we have no rulemaking authority to clarify or interpret the law, and we are aware of no statutory provision or case law clarifying the quoted section of the law. Because the legislature has provided no guidance, and because the courts may decide to strictly read and apply the quoted definition to apply only to business entities that are licensed by this state in the name of the entity, we feel that it is incumbent upon us to notify insurers, providers that have previously qualified, and potential qualified health care providers, that the law is unclear in this regard, and that providers that do not meet the specific terms of the above-quoted definition may ultimately be determined by the courts to be ineligible to qualify under the Act for the protections afforded by the Act, and may apply this ruling to unlicensed business entities that have paid surcharges to the PCF for the purpose of qualifying under the Act in such a manner as to determine that the protections of the limitation on damages are not available to those entities.

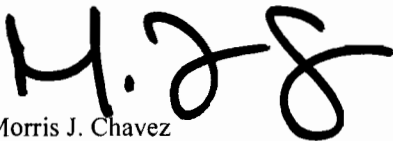
For this reason, **after December 31, 2009, we will no longer accept surcharges** from, and will no longer accept new or renewal submissions for coverage by the New Mexico Patients Compensation Fund from, any health care provider, whether an individual or an entity, that does not provide a valid license or certificate number from an appropriate agency of the State of New Mexico issued in the name of the qualifying health care provider for a class of license listed in the definition of "health care provider" quoted above. We hope that this provides sufficient time for those providers with imminent renewals to make alternative coverage arrangements.

Existing PCF coverage will not be terminated by the PCF, but may or may not be affected by future court decisions, as noted above. Upon the expiration of the existing term of coverage, any renewal after December 31, 2009, will be subject to the requirement of a valid license issued by this state in the name of the provider.

Licensed or certified hospitals and outpatient health care facilities seeking to qualify need to be aware of the special rating provisions of Section 41-5-5(B) NMSA 1978, and the need for an assessment of the risk characteristics of each such entity in order for the Superintendent to determine the surcharge for PCF coverage, and that such assessments may take time to be accomplished prior to the determination and submission of the surcharge, which may delay the date of qualification under the Act.

I hereby direct insurers writing coverage for qualified health care providers to promptly notify each of their insureds that may be affected by this action of the need to make other insurance arrangements, as appropriate to their circumstances. Such notice shall include a copy of this document. The insurers shall also assure that all future filings with the PCF contain accurate license information for the providers seeking to qualify under the Act, which licenses correspond to one of the categories listed in the definition of "health care provider" quoted above.

Sincerely,

A handwritten signature in black ink, appearing to read "M. J. Chavez", written in a cursive style.

Morris J. Chavez
Superintendent of Insurance