

# Akerman Practice Update

HEALTHCARE

August 2009

## 2009 Legislative Changes Impacting Home Health Agencies

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The Florida legislature has enacted two new bills, SB2658 and SB1986, which severely impact the home health agency industry in South Florida. Both bills went into effect on July 1, 2009, and were passed for the purpose of deterring health care fraud, abuse and waste throughout the state. The bills designate Miami-Dade County as a health care fraud crisis area and call for the implementation of increased oversight and scrutiny of home health agencies ("HHAs") and other health care providers in the county.

### HHA Moratorium

As a result of the bills, a moratorium is now in effect for HHAs in Miami-Dade and Broward counties whereby:

- The Florida Agency for Health Care Administration ("AHCA") may not issue **initial licenses** for new home health agencies until July 1, 2010, unless:
  - (i) AHCA received the initial license application prior to July 1, 2009, (ii) AHCA deems the application to be complete except for proof of accreditation, and (iii) the applicant applied for accreditation, from an AHCA approved accrediting organization, prior to May 1, 2009
- AHCA may not issue a **change of ownership license** from October 1, 2009 until July 1, 2010, unless: (i) AHCA receives the application prior to October 1,

“The legislative bills designate Miami-Dade County as a health care fraud crisis area and call for the implementation of increased oversight and scrutiny of home health agencies...”

2009, (ii) the application is deemed by AHCA to be complete except for proof of accreditation, and (iii) the applicant applied for accreditation before August 1, 2009

Despite the moratorium on changes of ownership (“CHOWs”), HHA owners may nevertheless be able to sell their ownership interest in their HHAs, as SB1986 modified the definition of what constitutes a CHOW. Prior to July 1, 2009, a CHOW was defined as the transfer of 45% or more of the HHA ownership over the course of a 2-year period. Effective July 1, 2009, a CHOW is now defined as either: (a) The sale or transfer of ownership to a different individual or entity which results in a change in the HHA’s federal tax identification number; or (b) The sale or transfer of 51% or more of the ownership of the HHA. The new CHOW definition means that: (i) Owners of an HHA may transfer less than 51% of the ownership interest without triggering a CHOW, as long as the federal tax identification number does not change; and (ii) Owners who want to sell or transfer more than 51% of their ownership in the HHA may do so by way of two separate transactions without triggering the CHOW.

### **HHA Renewal Licenses**

SB1986 further provides that AHCA may not issue a renewal license to an HHA in Miami-Dade County if, during the 2 years prior to the submission of the renewal application, the agency, or an owner, officer or board member of the agency, has been administratively sanctioned by AHCA for certain acts, including:

- An intentional or negligent act that materially affects the health or safety of a patient
- Preparing or maintaining fraudulent patient records, borrowing patients or patient records from other HHAs to pass a survey or inspection, or falsifying signatures
- Failing to provide at least one service directly to a patient for a period of 60 days
- Demonstrating a pattern of billing any payor for services not provided
- Demonstrating a pattern of failing to provide a service specified in the HHA’s written agreement with a patient or in the patient’s plan of care
- Giving cash, or its equivalent, to a Medicare or Medicaid beneficiary
- Providing staff to an assisted living facility for which the HHA does not receive fair market value remuneration

“Effective July 1, 2009, facilities that only perform waived laboratory testing, and that do not perform any tests under microscopy, are no longer required to obtain a State of Florida laboratory Certificate of Exemption.”

### **Changes Affecting Medicaid**

With respect to home health services that HHAs provide to Medicaid beneficiaries, SB1986 establishes that:

- AHCA may deny, revoke, or suspend the license of an HHA and shall impose a \$5,000 fine if the agency demonstrates a pattern of billing Medicaid for services which are medically unnecessary
- AHCA shall require prior authorization for visits that are not associated with skilled nursing visits when the HHA's billing rates exceed the state average by 50 percent or more
- AHCA may require prior authorization of care based on diagnosis, utilization rates, or billing rates
- AHCA may not pay for services unless they are medically necessary and certain requirements are met, including:
  - o The services are ordered by a physician
  - o The written prescription for the services is signed and dated by the recipient's physician before the development of a plan of care and before any request requiring prior authorization
  - o The physician ordering the services is not employed, under contract with, or otherwise affiliated with the HHA rendering the services, unless an exception applies
  - o The physician ordering the services has examined the patient within the 30 days preceding the initial request for the services and biannually thereafter

### **Laboratory Certificate of Exemption Change**

One requirement that SB1986 has removed is that, effective July 1, 2009, facilities that only perform waived laboratory testing, and that do not perform any tests under microscopy, are no longer required to obtain a State of Florida laboratory Certificate of Exemption. A “waived test” is a laboratory test that the federal Centers for Medicare and Medicaid (CMS) have determined qualify for a certificate of waiver under the federal Clinical Laboratory Improvement Amendments of 1988 (CLIA). Facilities, including HHAs, which only perform “waived” tests will nevertheless continue to be required to obtain the federal CLIA Certificate of Waiver. Applications and changes for the CLIA Certificate of Waiver should be submitted to the AHCA Laboratory Unit.

### Summary

As a result of the increased scrutiny placed on Florida's home health agencies by both the state and federal governments, HHAs must pay close attention to both existing and new laws and regulations. Failure to do so may result not only in sanctions and overpayments, but also in the loss of licensure to operate the home health agency. In addition, HHAs and other parties affected by the new laws may choose to contact legal counsel to explore challenging the constitutionality of the moratorium on new licenses and on change of ownership applications in Miami-Dade and Broward counties, as well as the constitutionality of the new restrictions on renewing HHA licenses in Miami-Dade County.

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