



## Capital Update

News of legislative, regulatory, and other matters of interest to New York's physicians

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**Dear Physicians:**

**As you may be aware, the State Legislature ended its formally scheduled 2017 Legislative Session late Wednesday (though it is possible for them to return to Albany on a limited basis). Despite being besieged with numerous adverse proposals in the final weeks of Session, we are happy to report that the Session ended with MSSNY, working together with many other allies, able to assure that the scores of the adverse legislative proposals were rejected, including legislation that would have:**

- **Enabled corporate-owned Retail Clinics staffed by physician extenders**
- **Significantly expanded the information required to be included in the Physician Profile**
- **Limited injured worker choice of physician in Workers Compensation, expanded the role of Non-Physicians under Workers Compensation, and eliminated the county medical society role in processing applications**
- **Imposed burdensome new requirements on the prescribing of pain medications to patients;**
- **Required urgent care office –based surgery centers to use electronic health records**
- **Expanded the scope of practice of numerous non-physicians, including podiatrists, Nurse-anesthetists, optometrists, psychologists, chiropractors, and naturopaths; and**
- **Formally permitted non-physicians to perform laser hair removal with virtually no physician oversight.**

**Moreover, working with many other public health groups, we scored an important public health victory by assuring that e-cigarettes are regulated similar to other tobacco products.**

**However, as you will note below, we are very disappointed that the Legislature chose to pass a one-sided liability expansion bill at a time when physicians and hospitals already face exorbitant liability costs, and potentially significant cuts from Washington. With Governor Cuomo waging on aggressive public campaign to warn the public about the threat to our health care system and New Yorkers generally if cuts arising from various proposals to repeal the ACA are enacted, please let him know that further increases in liability costs would make these health care access problems even worse.**

**We thank the many of you who responded to our call throughout the Session to contact your legislators when requested.**

**Sincerely,  
Your MSSNY Division of Government Affairs Team**

## **Tell Governor Cuomo to Reject Medical Liability Expansion Bill and Call for Comprehensive Liability Reform**

All physicians are urged to call Governor Cuomo at 518-474-8390 and send a letter here [Click Here](#): urging that he veto a purported “cancer only” medical liability statute of limitations expansion bill (S.6800/A.8516) that passed the Legislature over the strong objections of MSSNY, the specialty societies, the hospital industry and MLMIC. Please urge that instead he work towards enacting comprehensive medical liability reform.

The bill, introduced in the final days and passed in the final hours of the 2017 Legislative Session, would expand the medical liability statute of limitations for cases involving “alleged negligent failure to diagnose a malignant tumor or cancer”. The bill would permit lawsuits 2.5 years from the “date of discovery” of such alleged negligence, up to an outside limit of 7 years.

While it is likely that a more narrowly focused bill will reduce the premium increase needed for this legislation (if signed) from the 15% projected to be needed for an earlier version of this bill, there is great ambiguity in the language that could generate significant litigation as to which cases it would apply. Moreover, the bill does not just apply to cases that may arise in the future but has a retroactive impact. The ambiguities are likely the result of the bill being “rushed into print” late Sunday night to meet the constitutional “3-day aging” requirement before a bill can be considered by the Legislature, as the Legislature was planning to adjourn its 2017 Session Wednesday.

The bill passed the State Senate by a 56-6 vote (those voting no included Senators Hannon, Klein, Murphy, Ortt, O’Mara, and Valesky) and the Assembly by a 112-27 vote (to see how your Assembly member voted, [Click Here](#):

In response to the passage, Dr. Rothberg issued the following statement ([Click Here](#)) expressing MSSNY’s great concerns with proposals to expand liability when are in desperate cost decreases:

*“New York’s physicians are extremely concerned about the ultimate impact to New Yorkers’ access to care if the statute of limitations expansion bill (S.6800/S.8516) considered by the Legislature today is ultimately signed into law. Many New York hospitals and physicians are already struggling to keep their doors open.*

*New York State has already earned the dubious distinction as the absolute worst state in the country in which to practice medicine, in large part due to its overwhelming liability costs. The bill will add significantly to these costs that have already driven physician after physician out of private practice, and in many cases driving them out of New York altogether. It will also discourage countless others from coming here to practice. We urge Governor Cuomo to veto this legislation and bring parties together to pass comprehensive, not one-sided, medical liability reform. New Yorkers’ access to health care is at stake.”*

- Dr. Rothberg’s concerns here noted in both the Daily News and Crains Health Pulse.

We thank all of you who took the time to contact their legislators over the last several days to oppose these and the myriad of other liability expansion bills that were also being aggressively pushed by the Trial Bar in the Session’s final days (for example, the attorney contingency fee limit removal was also under serious consideration but was defeated:

[Click Here](#)

Again, please urge the Governor to veto the bill and encourage your colleagues to do the same! Please let the Governor how patient access to care will be harmed if this bill were to be enacted. **(DIVISION OF GOVERNMENTAL AFFAIRS)**

## **New York State Legislature Approves Bill Banning E-Cigarettes From Bars, Restaurants**

The New York State Legislature has approved A. 516A/S. 2543A expanding the state’s Clean Indoor Air Act so that it now bans e-cigarettes from bars and restaurants. Assembly member Linda Rosenthal and Senator Kemp Hannon were the sponsors of the measure. The Medical Society of the State of New York strongly supported this measure and worked with other health organizations on the bill’s passage. Governor Andrew Cuomo, who proposed the measure in his budget earlier this year, is expected to sign the bill. **(CLANCY)**

## **Legislature Does Not Take Up Retail Clinic Legislation**

The Legislature ended its regularly scheduled session Wednesday night without taking action on legislation strongly opposed by MSSNY (A.958, Paulin) that would permit corporate-owned retail clinics, which would have veered New York away from its long history of opposition to corporately owned care delivery. Big box store interests were aggressively pursuing this legislation. The bill advanced from the Assembly Health Committee to the Assembly Codes Committee earlier this year, but moved no further. This legislation was also opposed by the New York State Nurses Association. **(AUSTER)**

## **Anti-Physician Workers Compensation “Reform” Proposals Not Taken Up**

The Legislature left Albany without taking action on legislation (A.8387, Pretlow and S.6349, Alcantara) that could have significantly impaired injured workers access to care from WC-authorized physicians including giving greater discretion to the Board to penalize physicians, expanding the scope of numerous non-physicians to treat injured workers without requiring coordination with a physician, and limiting the ability of your county medical society to assist physicians in completing applications to become WC-authorized. Moreover, MSSNY expressed concerns that the bill does nothing to

address the myriad of administrative hassles that physicians have experienced with the Workers Compensation system that have forced many physicians to leave the program. Similar legislation was considered during negotiations of the State Budget, but was ultimately rejected. Discussions on this topic are likely to continue over into next year.

(AUSTER, BELMONT)

### **Legislature Does Not Take Up Bill to Empower Non-Physicians to Perform Laser Hair Removal**

The Legislature left Albany without taking action on legislation (S.6088-A, Savino/A.7977-A, Paulin) to expressly permit estheticians and others to perform laser hair removal with only minimal physician oversight. The bill, strongly opposed by MSSNY and other specialty societies, had advanced from the Senate Consumer Protection to the Rules Committee, but moved no further.

MSSNY has adopted policy that vigorously opposes certification of non-physicians (including non-medical personnel) to perform laser and intense pulsed light source skin enhancement procedures. That is because lasers have the potential to cause painful burns and permanent scarring if not used properly. With laser hair removal largely unregulated in New York, legislation to provide strong physician oversight of this process would be appropriate. However, the only physician oversight this legislation would have required is a once per year audit of policies and procedures.

(AUSTER)

### **Legislature Rejects Scope of Practice Changes**

Working together with the affected specialty societies MSSNY was successful in convincing the legislature to reject various bills that would have expanded the scope of practice for various professions. These bills include:

- **Certification of Certified Registered Nurse Anesthetists (CRNAs)**  
A.442 (Paulin) / S.1385 (Gallivan) - This measure would provide for the certification by the education department of certified registered nurse anesthetists (CRNAs). Because this bill fails to define a scope of practice we had concerns that it could have given the Education Dept authority to enable independent practice for CRNA's.
- **Broadens scope of practice of dentistry**  
A.4543 (Morelle) / S.3551 (Golden) - This measure would permit dentists to perform a wide range of medical surgical procedures involving the oral and maxillofacial area. This bill would expand the current scope of practice for dentist which is currently limited to the oral and maxillofacial area relating to restoring and maintaining dental health.
- **Podiatric Scope of Practice**  
A.1880 (Pretlow) - This bill would expand the scope of practice of podiatrists to allow podiatrists to "diagnose, treat, operate or prescribe for cutaneous conditions of the ankle to the level of the distal tibial tuberosity" (knee).
- **Allows PA's to Operate Fluoroscopy Imaging Technology**  
A.4716 (Gottfried) - This bill would allow physician assistants (PAs) who have completed a training program approved by the Department of Education to operate fluoroscopy imaging technology as part of a diagnostic or treatment procedure.
- **Psychologists Prescribing**  
A.2851(Mcdonald) / S.4498 (Lanza) - would permit Psychologists to prescribe medications

(BELMONT)

### **Assembly and Senate Pass Legislation Designed to Regulate Biosimilar Substitutions**

The Assembly and Senate passed legislation (S.4788-A/A.7509-A) this week that would establish rules regarding the substitution of interchangeable biological products. While New York State law regulates the substitution by pharmacists of generic drugs for their branded counterparts, the existing law has not been updated to set forth the circumstances under which a biologic products can be substituted with a FDA approved interchangeable biologic. Importantly, it would prohibit a pharmacist from substituting an interchangeable biological product (as defined by the FDA) prescribed by a physician if the physician affirmatively requests that the product be dispensed as written. If the physician does not specify that the biological medication should be dispensed as written, then the pharmacist may substitute an interchangeable biological product but only if the pharmacist provides notice to the physician within 5 days of the substitution. It would also establish a 5-year sunset on these provisions.

(AUSTER)

### **New York State Legislature Approves Bill Allowing Medical Marijuana For Treatment Of PTSD**

The New York State Senate approved legislation A.7006/S.5629, sponsored by Assembly member Richard Gottfried and Senator Diane J. Savino, that allows medical marijuana to be used to treat post-traumatic stress disorder [PTSD]. The Assembly had passed the bill in May. The measure now heads to Gov. Andrew M. Cuomo for signature. The Medical Society of the State of New York opposes the use of marijuana in treatment for PTSD. Furthermore, MSSNY has expressed concerns about the law due to possible federal prosecution of physicians.

(CLANCY)

## **Public Health Issues**

**Sepsis Awareness Program** – The New York State Legislature has passed a bill which would establish a sepsis awareness, prevention and education program to educate students, parents and school personnel about sepsis awareness on sepsis has passed the state Assembly. This measure, A. 6053/S.4971, sponsored by Assemblywoman Catherine Nolan and Senator Carl Marcellino, also amends New York State's amends Public Health Law to require that information on sepsis be part of course work in infection control practices already taken by all healthcare providers and would require that this coursework be completed on or before July 1, 2022.

**Raise the Age for Tobacco Purchase**—S.3978/A.273, which would increase the purchasing age for tobacco products from eighteen to 21 years of age remained in the Assembly Codes Committee and the Senate Finance Committee. MSSNY continues to support this measure.

**Three Day Limitation on Pain Medication**— There was no action taken on A. 7741/S.6246, sponsored by Assemblyman John McDonald and Senator Kemp Hannon, which would have limited the initial prescription of a Schedule II or III for the alleviation of acute pain from a seven-day supply to a three-day supply for someone suffering from acute pain. Most importantly, patients throughout New York State who are suffering acute pain, such as acute postoperative pain; acute back or chest pain; acute pain related to an injury, post-herpetic neuralgia, or acute pain related to disease or condition, could be significantly impacted. The Medical Society of the State of New York continues to strongly oppose this measure.

**Conversion Therapy**—A.3977/S.263, sponsored by Assemblywoman Deborah Glick and Senator Brad Hoylman, would prohibit mental health professionals from engaging in sexual orientation change efforts with a patient under the age of eighteen years and expands the definition of professional misconduct with respect to mental health professionals. The measure had passed the New York State Assembly, but remained in the in the Senate's Mental Health and Development Disabilities Committee. (CLANCY)

### **Bill Passes to Prohibit Medical Record Charges When Needed to Support a Patient's Government Benefit Application**

The Senate and Assembly passed legislation (S.6078, Valesky/A.7842, Gottfried) that would prohibit health care providers and entities from charging patients for copies of medical records when such records are needed "for the purpose of supporting an application, claim or appeal for any government benefit or program". The purpose of the legislation is to respond to numerous complaints lodged by patients where they were charged for medical records necessary to assist applications and appeals for government programs assisting lower income patients such as Social Security Disability Insurance (SSDI) and the Supplemental Nutritional Assistance Program (SNAP), despite provisions in existing law that prohibit charging a fee for medical records where a patient is unable to pay. MSSNY had expressed concerns that the terminology "any government benefit or program" was too broad, and suggested that the bill be amended to identify specifically those low-income government benefit programs to which this fee prohibition should apply. However, that change was not made. (AUSTER)

### **US Senate Releases Its Own Health Care Reform Proposal**

The US Senate this week released its own proposal to repeal substantial portions of the Affordable Care Act, entitled the "Better Care Reconciliation Act of 2017", with a vote possibly before the July 4 recess.

While the framework of the legislation mirrors the American Health Care Act (AHCA) passed in May by the US House of Representatives, there are some important differences, including with respect to the length of time for the existing Medicaid expansion to be phased out, as well as the distribution of the tax credits to be provided to subsidize the cost of health insurance coverage.

The bill would continue the current tax credit structure provided under the ACA through 2019. Beginning in 2020, advanceable refundable tax credits would be available for those with incomes up to 350% FPL, down from the existing 400% FPL. It would not base the size of the tax credit on a person's age, as was proposed in the House's AHCA bill. The benchmark for determining the subsidy would be based on 58% of a health insurance plan's actuarial value.

Similar to the House's AHCA legislation, it would contain provisions supported by MSSNY to eliminate the current limitations on a person's contribution to their HSA, as well as delaying until 2026 enforcement of the "Cadillac Tax" on comprehensive health insurance coverage.

However, of significant concern, it would repeal existing cost-sharing subsidies similar to the AHCA. That would have the effect of repealing funding for New York's Essential Plan, which provides low out-of-pocket cost coverage for over 600,000 New Yorkers who make between 138-200% FPL. It would also phase out from 2021-2024 the existing option to have Medicaid cover individuals who make unto 138% FPL.

Moreover, the bill also contains the "Faso-Collins amendment" contained in the AHCA that would shift \$2.3 billion in county Medicaid costs to New York State, which could result in additional cuts or an expansion of risk-based payments in Medicaid to make up the difference.

Next week, Governor Cuomo will host a series of regional forums across New York State to discuss the potential impact of these proposals on New York's health care system and its citizens. MSSNY Treasurer and Cobleskill Internist/Pediatrician Dr. Joseph Sellers will participate at the forum on Monday, June 26 in Hudson. The Governor issued a statement on Thursday expressing great concerns with the US Senate's proposal. MSSNY working together with the AMA and state medical societies across the country are continuing their review of this proposal and will follow up with more detailed information about this proposal and whether the Senate will be able to pass it. **(AUSTER)**

### **CMS Proposes Simplifications to the MIPS Program to Ease Physician Compliance**

This week CMS proposed a revised rule implementing the Medicare Quality Payment Program (QPP) as required under MACRA. According to a summary provided by the AMA, CMS is proposing a number of policies to help small practices, including a significant expansion of the "low-volume" exemption threshold to \$90,000 (up from \$30,000) or less in Medicare Part B allowed charges OR 200 or fewer Medicare Part B patients (up from 100 patients). CMS estimates that, under this proposed rule, more than 94% of eligible clinicians would earn either a positive or neutral payment adjustment.

In addition to increasing the low volume exemptions, other highlights articulated by the AMA include:

#### **Additional accommodations for small practices**

- Creates virtual groups to assist small practices;
- Adds 5 bonus points to the final MIPS scores for practices of 15 or fewer clinicians; and
- Adds a hardship exception from the Advancing Care Information (previously Meaningful Use) category for practices of 15 or fewer clinicians.

#### **Advancing Care Information Category**

- Allows the use of 2014 edition certified electronic health records technology (CEHRT) past 2017 – CMS will not mandate that physicians update their EHRs in 2018;
- Permits physicians to continue to report on Modified Stage 2 measures in 2018 instead of new Stage 3 measures.

#### **Quality Category**

- Increases the quality performance category weight to 60% in 2018 (due to the Cost category weight remaining at zero in 2018);
- No additional cross-cutting measure requirements added in 2018;

#### **Cost Category**

- CMS proposes a zero weight for costs again in the 2018 performance/2020 payment year, which would rise to 30% for 2019/2021.
- Physicians will receive information on how they would have scored under the two current value-based modifier measures (total costs per beneficiary and spending from 3 days before to 30 days after hospital admission)

#### **Improvement Activities (IAs)**

- CMS continues to allow physicians to report on IAs through simple attestation;
- The proposed rule creates stability in program requirements by not changing the number of IAs physicians must report; and
- It also develops additional IAs, including adding two activities related to diabetes prevention programs, and clarifies existing IAs to be inclusive of additional activities. **(AUSTER)**

For more information, [Click Here](#)

### **DOH Attestation Process for Pain Management CME Must Be Completed by July 1, 2017! One WEEK LEFT!**

The New York State Department of Health has announced the attestation process for prescribers required to complete Pain Management CME. Prescribers must attest to the completion of the pain management, palliative care and addiction course work or training by July 1, 2017, and again every three years thereafter. The prescriber should only attest after completion of at least three hours of course work or training covering all eight topics. A prescriber with a Health Commerce System (HCS) account will attest online using the Narcotic Education Attestation Tracker (NEAT) application. **Complete the steps to access the NEAT (Narcotic Education Attestation Tracker) application in the NYS Health Commerce System (HCS):**

1. Log into the HCS [here](#).
2. Under "My Content" click on "All Applications"
3. Click on "N"

4. Scroll down to NEAT (Narcotic Education Attestation Tracker) and double click to open the application. You may also click on the “+” sign to add this application under “My Applications” on the left side of the Home screen.

**Complete the steps to ATTEST to the completion of the education requirement. A full set of instructions can be found [here](#).**

Prescribers that do not have access to a computer can request a paper attestation form by calling the Bureau of Narcotic Enforcement (BNE) toll-free at 1-866-811-7957. They may then complete the form and return it by mail to the address provided in the form. The Bureau of Narcotic Enforcement has also released a Frequently Asked Questions (FAQs) on the prescriber mandate. A copy of the FAQs can be found [here](#).

In certain limited circumstances, the New York State Department of Health may grant an exemption to the required course work or training to an individual prescriber who clearly demonstrates to the department that there is no need to complete such training. Exemptions will be granted only in very limited circumstances, and not solely on the basis of Economic hardship, technological limitations, prescribing volume, practice area, specialty, or board certification. Prescribers may apply for an exemption through the Health Commerce System. Further information may be obtained by contacting BNE at 1-866-811-7957 or [narcotic@health.ny.gov](mailto:narcotic@health.ny.gov). **(CLANCY)**

### **Physicians Have One Week To Meet the Pain Management Mandatory Education By July 1, 2017**

The Medical Society of the State of New York *Pain Management, Palliative Care and Addiction* modules are now available on-line [here](#). **These modules are being offered free of charge to all MSSNY members.** Physicians who are new users to the MSSNY CME site will be required to register as a new user. As a new user, physicians and non-physicians will be required to enter fields that include: position; name (the name should be what you want to appear on the CME certificate); email address; and then create a password. MSSNY members who encounter a payment page or have difficulty registering, please email [cme@mssny.org](mailto:cme@mssny.org) for technical support. Directions for creating a new account/or logging in can be found [here](#). **Non-MSSNY physicians will be charged \$50 per module.**

The MSSNY CME is a new site and while many MSSNY members have an account with [mssny.org](http://mssny.org) a MSSNY member may not necessary have an account with [cme.mssny.org](http://cme.mssny.org) If in doubt, try to create an account and if it tells you that the email address is unavailable or in use, an account exists. Passwords can be reset if you don't know it. Physicians who have previously had an account at the MSSNY CME site will need to log into the site using their email and password. The MSSNY CME site provides the ability for physicians and other prescribers to view the archived webinar at their leisure, take the required test, and download their certificate. The online program covers all eight topics required in the New York State statute. MSSNY developed the program with the NYS Office of Alcoholism and Substance Abuse Services (OASAS). MSSNY is listed as an accrediting organization by the NYS DOH Bureau of Narcotic Enforcement. Information on the three CME modules is available [here](#). Additional information or technical support may be obtained by contacting [cme@mssny.org](mailto:cme@mssny.org). **(CLANCY)**

**For more information relating to any of the above articles, please contact the appropriate contributing staff member at the following email addresses:**

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