



CALIFORNIA RADIOLOGICAL SOCIETY

The following explanation of AB 2794 is provided by CRS's legal counsel, Laurence Kessenick of Kessenick Phillips & Gamma, LLP. (www.kpglegal.com). This is presented for its educational value only. It is not intended to be legal advice for the reader and should not be relied upon by anyone attempting to determine the legality of a particular imaging center arrangement. Imaging centers operate under a large variety of legal structures, many of which have subtle, but legally important differences, and it is essential, in view of AB 2794, that the owners of such ventures seek competent legal advice to determine whether their particular arrangement may violate this new law. The hypothetical arrangement described below is necessarily simplified and is not intended to describe any particular arrangement currently in existence.

Effective, January 1, 2009, the changes in a new law, contained in AB 2794, sponsored by Assemblyman Blakeslee, and supported by the California Radiological Society, will go into effect. AB 2794 was designed to provide protections to the consuming public against the practice of certain physicians to self refer (i.e. diagnosing a patient's need for a scan and then referring to or utilizing an imaging facility in which the diagnosing physician has a financial interest). Under a self referral arrangement, the diagnosing and ordering physician stands to profit financially from referrals to an imaging center. Most of these centers provide MRI, CT, or PET procedures. Although the federal "Stark" legislation was designed, in part, to prohibit such practices, the federal legislation contains enough exceptions to arguably justify the continuation of many self referral arrangements in the imaging area. The primary targets of AB 2794 were a variety of schemes which arguably have been permitted to exist under loopholes (generally called "exceptions") in the current federal and state antireferral laws. Before discussing the specifics of AB 2794, it is useful to understand the type of scheme that AB 2794 was designed to reach.

BACKGROUND:

When a patient undergoes an imaging examination at a freestanding imaging center, there are two parts to the charge. These are known as the technical and professional components. The technical component consists of the charge for all of the non-professional costs associated with operating the imaging center, including the equipment, supplies, and the cost of the technical personnel who perform the scan. The professional component refers to the charge of radiologist or other professional who provides the professional interpretation of the scan. These components may be separately billed, or they may be combined and billed by one entity under a "global fee."

In order to encourage physicians to refer to such an imaging center, a common scheme involves a financial arrangement between the imaging center and the referring physician. These financial arrangements take the form of part-time and time-sharing leases, space

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sharing arrangements, and service contracts - or a combination of these. When the patient is scanned at the imaging center, the referring physician globally bills - appearing to be the diagnosing professional. From the revenues received from the global billing, the referring physician reimburses the imaging center a portion only of the technical component, retaining the rest for himself. Often, since the referring physician may not be competent to provide the professional interpretation, the scheme provides for the availability of a group of radiologists to provide a “back-up” reading. The scheme may also permit the referring physician to pocket a portion of the professional component through a separate arrangement with the radiological group. Through such schemes, the referring physician, who generally provides the diagnosis which results in the imaging procedure, stands to retain a portion of the technical and professional components and thus financially benefit from the performance of the procedure, the medical necessity of which he has determined.

QUESTIONS AND ANSWERS REGARDING AB 2794:

1. Who will be affected by AB 2794 and what are the consequences of violations?

AB 2794 potentially affects the legality of the conduct both of any radiological facility providing MRI, CT or PET and a large number of licensed professionals, principally physicians, podiatrists, dentists, and chiropractors (“Covered Professionals”). Covered Professionals who violate the terms of AB 2794 risk committing an act of unprofessional conduct and thereby are placing their professional licenses at risk. They are also potentially committing a misdemeanor, as described below.

With certain notable exceptions, AB 2794 also covers all radiological facilities that provide CT, MRI or PET imaging scans (“Imaging Centers.”) Imaging Centers and Covered Professionals that violate the legislation subject themselves to potential misdemeanor charges. Convictions against violators carry potential penalties of six-months in jail and a fine of up to \$2500 per violation.

2. What kind of Imaging Centers will be unaffected by AB 2794?

Imaging Centers that will not be affected include imaging facilities that exist within a physician’s office practice, facilities operated by health care services plans, those operated by public entities, and those operated by licensed charitable community clinics.

3. How does AB 2794 affect the legality of arrangements such as the one described above?

It contains two basic prohibitions:

First, it prohibits a Covered Professional from billing for the technical component of the imaging service unless the Covered Professional actually provides the service or unless the service is provided by someone under the Covered Professional’s “supervision.” The term, “supervision” is defined as that level of supervision required by Medicare regulations for the service being billed. Including persons who provide the technical component under the supervision of the Covered Professional was important since more often the scan would be performed or provided by a technician under the supervision of a Covered Professional, rather than directly by the Covered Professional.

Second, it prohibits the Imaging Center from billing the technical component to any person or entity, other than the patient or the “responsible third-party payer.” It is important to understand how this second prohibition complements and strengthens the first prohibition, discussed above. The first prohibition arguably might permit an arrangement in which the physician, in our Background example, was characterized in an agreement with the Imaging Center as the “supervising physician,” thereby arguably permitting him to bill for the technical component even though the person he is supervising is not an employee of his medical practice. The second prohibition makes this far more difficult by forcing the Imaging Center to obtain reimbursement directly from the patient or the patient’s payor, thus closing the door on this type of arrangement.

Note that the statute also permits Covered Professionals and professional entities, such as a medical corporation or general professional partnership, to bill globally under certain circumstances. For a more complete discussion of this exception, see answer to question five below.

4. Does AB 2794 prohibit a physician group, such as a group of radiologists, from owning the imaging facilities as part of their medical practice and globally billing?

No, this legislation does not prohibit any physician group, including a radiology group, from owning an imaging facility as part of its medical practice and billing globally.

5. Does AB 2794 prohibit a physician group, such as a group of radiologists, from continuing to globally bill if it contracts with a separate entity that, in turn, owns the equipment and hires the technicians?

No, under a special exception contained in subsection 655.8(d), AB 2794 will continue to permit a medical group to contract with another entity that will own the equipment and hire the technicians, provided no member of the medical group has ordered the patient to the Imaging Center and provided that the professional interpretation is performed by the physician or a member of the physician’s medical group. Since a radiology group would ordinarily meet both of these conditions, this provision should not adversely impact on the ability of radiology groups to globally bill under these circumstances. When the conditions of Section 655.8(d) exception are met, subsection (d) acts as an implicit exception to the prohibition against an Imaging Center billing any entity other than the “responsible third-party payer” (see answer to Question three, above) since an outside

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Imaging Center would need to be able to charge the medical group in order for the medical group to bill globally.

6. Does this legislation restrict the ability of Imaging Centers, providing MRI, CT or PET, to contract with certain types of Workers Compensation networks?

In all likelihood, it does. Today, in California, a number of businesses (scan networks) act as middlemen of sorts between Workers Compensation insurers and Imaging Centers. In exchange for a contract with the network, the Imaging Center accesses a flow of Workers Compensation patients, but at a steep discount. Rather than directly billing the insurance carrier, as one would normally expect, the Imaging Center instead bills the scan network. The scan network then bills the carrier, and, when the reimbursement is received by the scan network, the scan network remits a portion of it to the Imaging Center, keeping the rest for itself. These schemes have existed in a legally gray area. To the extent that they have provided legitimate services to Imaging Centers, they may have been lawful; to the extent that they have been extracting consideration from the Imaging Center in exchange for the referral of patients, they most likely have been operating unlawfully (See Business and Professions Code § 650; Health and Safety Code § 445; Labor Code §3215; Insurance Code §750; Attorney General Opinion 00-206, and Legislative Counsel Opinion, 1995, No. 33375). Nevertheless, they have proliferated.

AB 2794 potentially impacts on these arrangements. It requires, for example, that an Imaging Center that is billing the technical component, bill the patient or “the responsible third-party payer” “directly.” The “responsible third-party payer” is defined as “. . . any person or entity who is responsible to pay for CT, PET or MRI services. . . .” Unless the third-party network has incurred a legal responsibility to pay the Imaging Center’s bill, as would be the case with a legitimate Workers Compensation insurance carrier, it would not be lawful for the Imaging Center to send a bill through or to one of these scan networks. In our experience, it would not be reasonable to conclude that these scan networks incur any responsibility for payment of the imaging services since they are only responsible to reimburse the Imaging Center if the actual third-party payer pays the scan network; nevertheless, the legality of each arrangement is going to depend on the facts of the particular contract between the Imaging Center and the scan network. Any Imaging Center that has contractual relationship with one of these networks should have the terms of that agreement reviewed by legal counsel.