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## Employing Foreign Nationals—Legislative Update

Recently passed legislation makes significant changes in the law regarding employment of foreign national physicians and other medical professionals. Some foreign trained physicians who entered the United States with a “J” visa (for purposes of completing their medical education residence requirements) will continue to be eligible for waivers of the two-year home residence requirement if they qualify for state “Conrad 30” or other federal agency programs. Significant changes in the law also resulted from the recent H1-B legislation, including changes in the types of employees subject to the H1-B “cap” and increases in filing fees for H1-B applications.

### *Extension and Changes in J Visa Waiver Programs for Physicians*

President George Bush signed legislation on December 3, 2004, that extends and modifies state “Conrad 30” J visa waiver programs for certain foreign born physicians. Foreign born physicians who enter the United States to complete their medical education residence requirements on an exchange program normally must depart the U.S. and return to their home country for a two-year period. However, under a “Conrad 30” J waiver program, foreign born physicians may be exempted from that two-year foreign residence requirement if they agree to practice medicine for a period of at least three years in an area designated by the

Department of Health and Human Services (“HHS”) as an area with a shortage of health care professionals.

The legislation permits qualifying foreign born physicians to work in medically underserved areas in either a primary care or a specialty medicine. Each state currently has 30 waivers that it may offer to doctors who practice medicine in areas designated by HHS as an area that has a shortage of health care professionals. Under the new legislation, five of those state waivers may be given to doctors who practice in facilities that serve patients who reside in the shortage areas, regardless of whether the medical practice facility is located in the area.

### *Medical Professionals and H1-B Visas*

Under the new legislation, a doctor who is sponsored for a J waiver is exempt from the H1-B cap. Currently, the overall cap on the number of H1-B visas available in the U.S. each year is only 65,000. Medical professionals who seek H1-B visas often cannot obtain the visas because the cap has been reached. The H1-B cap for fiscal year 2005, which began October 1, 2004, has already been reached. Unless Congress increases the number of H1-B visas available, it is expected that the H1-B cap will also be reached quickly for fiscal year 2006.

Congress also recently implemented substantial revisions to the H1-B visa program (H1B Visa Reform Act of

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## Employing Foreign Nationals—Legislative Update

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2004). That legislation modifies certain of the exemptions from the H1-B cap. Thus, applications for certain employees may not be subject to the cap and may qualify for an H1-B visa under the revised laws.

Generally, employers must now pay an additional filing fee of \$1,500 for *each* H1-B application they file. Employers with 25 or fewer full-time U.S. employees will only be responsible for one-half of that amount. Employers must also pay a new \$500 fraud prevention and detection fee in addition to other fees.

Foreign born physicians and other medical personnel present an attractive pool of human resources for many medical facilities that have a medical personnel shortage and are having trouble finding U.S. workers to fill those positions. If you need assistance in qualifying a foreign born physician or other medical professional for employment with your company, or if you have other general questions regarding immigration laws applicable to your company, please contact Carol Enteliano at (205) 633-0268 or [centeliano@tannerguin.com](mailto:centeliano@tannerguin.com).

*“Foreign born physicians and other medical personnel present an attractive pool of human resources for many medical facilities...”*

## Hospital Allowed to Subsidize Surgeons’ Medical Malpractice Insurance

On January 6, 2005, the OIG posted Advisory Opinion 04-19, in which it approved a hospital subsidizing the premiums for medical malpractice insurance for two neurosurgeons. At a time when malpractice insurance premiums for many specialties are skyrocketing, the OIG concluded that even though the arrangement did not qualify for safe harbor protection, it would not impose administrative sanctions on the requestor under the anti-kickback statute.

In the facts presented, two neurosurgeons who practiced together were informed by their insurance carrier that it was terminating their claims-made insurance coverage and that they would need to pay for tail coverage unless they retired, in which case the insurance company would provide the tail coverage at no additional cost. Due to a shortage of available neurosurgeons in the area, the hospital entered into an agreement with the neurosurgeons where they agreed to continue practicing and the hospital agreed to subsidize some of the cost of their malpractice insurance while the

premiums crisis continued. Even with the subsidy, the neurosurgeons’ cost for insurance increased.

The OIG, mindful of the potential adverse impact on patients’ access to medically necessary care, concluded that the facts and circumstances in the case adequately reduced the risk that the subsidy could be an improper payment for referrals or the generation of federal health care program business. If you are interested in reading the details of the facts and circumstances, please e-mail Blake Madison at [bmadison@tannerguin.com](mailto:bmadison@tannerguin.com) for a copy of the advisory opinion.

Although the OIG has ruled on the anti-kickback aspects of this transaction, there is no indication if a ruling has been requested from CMS (Center for Medicare and Medicaid Services) regarding the parties’ compliance with the Stark law.



## President Bush Pushes for Damages Cap

On January 5, 2005, in speeches in Illinois, President Bush renewed his efforts to have Congress pass meaningful medical liability reform. Specifically, President Bush supports a cap on non-economic damages of \$250,000.

Although similar proposals have passed the House of Representatives previously, the Senate has failed to approve them. Based on comments by Senators Kennedy of Massachusetts and Dorgan of North Dakota, the chances of passage of the President's plan in the Senate seem to remain remote. Specifically, the objecting senators contend that the President's

proposal is merely a smoke-screen to shield large drug-producing companies from liability for their own negligence.

Bush has stated that reducing medical malpractice insurance costs are among his priorities in the next four years. While the President's plan would provide for unlimited economic damages, he takes the position that some reason has to be applied in determining the non-economic damages granted. The consumer group Public Citizen has stated that it disagrees that capping non-economic damages will help reduce medical malpractice insurance costs.



*“...chances of passage of the President's plan in the Senate seem to remain remote.”*

## Plaintiffs' Attorneys Fail in Attempted Lawsuit Against Baptist Health System

Plaintiffs' attorneys nationwide have recently attempted to bring lawsuits on behalf of uninsured patients arguing they have been overcharged for their medical care. Such a proposed class action lawsuit filed in federal district court in Alabama against Baptist Health System, Inc. has recently been dismissed.

Primarily, the case was dismissed because the Court found that the majority of the plaintiffs' claims were barred under the legal doctrine of res judicata, meaning the claims could have been addressed by the parties in previous cases involving Baptist and its attempts to collect for medical services provided to the named uninsured patients. Those patients failed to make any claims that the charges were excessive at that time and the Court determined that as a result, the

plaintiffs were barred from bringing those claims in the present case.

The Court also dismissed the plaintiffs' claims that Baptist had violated the Emergency Medical Treatment and Labor Act (EMTALA). The Court found that the plaintiffs did not allege that Baptist failed to provide them with appropriate screening or that they were screened in a manner different from other patients or that Baptist failed to stabilize them. In addition, the Court held that the EMTALA claims were time barred by the applicable statute of limitations.



## Bush Nominates New Head for HHS

On December 13, 2004, President George W. Bush nominated his replacement for departing Secretary of Health and Human Services Tommy Thompson. Michael Leavitt, currently administrator of the Environmental Protection Agency, has also served as

Governor of Utah and is known for his work in the efforts to revamp Medicaid and welfare programs on the state level. Specifically, he is known for cutting costs in those programs to help them run more efficiently.



## Reminder on Disclosures Under HIPAA

A quick reminder to our readers that simply because you receive a request for production of documents from a lawyer does not mean you can release protected health information to that attorney without the appropriate accompanying documentation.

It is important to recall that even if a subpoena for medical records is sent to you, you must also receive the necessary HIPAA compliant documentation before releasing the records. That means that you either must receive a signed authorization for the release of those records to you from

the patient or individual whose records are being requested, or you must receive documentation of the “reasonable assurances” that are required by law to accompany the subpoena, or a copy of a HIPAA protective order from the court.

For more information on the documentation of the “reasonable assurances” required by the applicable regulations or to determine if the subpoena you have received is HIPAA compliant, please contact Blake Madison at (205) 633-0246 or [bmadison@tannerguin.com](mailto:bmadison@tannerguin.com).



## Seminars

If you are interested in having a Tanner & Guin attorney speak to your group or company on health law related issues, please call Blake Madison at (205) 633-0246.



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