

CHAPTER 27

MEDICAL MALPRACTICE LIABILITY INSURANCE

Authority

N.J.S.A. 17:1-8.1, 17:1-15e, and 17:30D-28 et seq.

Source and Effective Date

R.2005 d.167, effective June 6, 2005.
See: 36 N.J.R. 4875(a), 37 N.J.R. 2036(a).

Chapter Expiration Date

Chapter 27, Medical Malpractice Liability Insurance, expires on June 6, 2010.

Chapter Historical Note

Chapter 27, Medical Malpractice Liability Insurance, Subchapter 7. Medical Malpractice Liability Insurance Premium Assistance Fund—Premium Subsidy, was adopted as concurrent new rules by R.2005 d.186, effective May 16, 2005. See: 36 N.J.R. 5970(a), 37 N.J.R. 2207(a).

Subchapter 3, Mandatory Deductibles, Subchapter 5, Prohibited Premium Increase, Subchapter 6, Renewal and Nonrenewal Notices, Subchapter 8, Officers, Directors and Board Members of Medical Malpractice Insurers were adopted as new rules by R.2005 d.167, operative October 18, 2005; d.168, d.169 and d.170 respectively, effective June 6, 2005. See: 36 N.J.R. 4875(a), 37 N.J.R. 2036(a); 36 N.J.R. 4878(a), 37 N.J.R. 2038(a); 36 N.J.R. 4871(a), 37 N.J.R. 2040(a); 37 N.J.R. 205(a), 37 N.J.R. 2041(a), respectively. See: Source and Effective Date.

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SUBCHAPTERS 1 THROUGH 4. (RESERVED)

SUBCHAPTER 5. PROHIBITED PREMIUM INCREASE

11:27-5.1 Purpose and scope

(a) The purpose of this subchapter is to prohibit increases in premiums for New Jersey medical malpractice insurance policy renewals based upon claims filed against insureds where the insured is dismissed from a civil action based upon that claim at an early stage of the civil proceeding.

(b) This subchapter shall apply to any New Jersey medical malpractice insurance policy renewal issued by an insurer authorized to transact medical malpractice liability insurance in this State.

11:27-5.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

“Action” means a civil action commenced in a court of any State or a Federal court.

“Responsive pleading” means any pleading other than a complaint recognized by the rules governing a civil action alleging medical malpractice commenced in any state or by the Federal Rules of Civil Procedure, as applicable, wherein statements in the nature of answers or replies to allegations made against the party filing the pleading are contained.

11:27-5.3 Prohibited premium increase

(a) An insurer authorized to transact medical malpractice liability insurance in this State shall not increase the premium of any medical malpractice liability insurance policy upon the renewal of that policy on the basis of a claim of medical negligence or malpractice against the insured if the insured is dismissed from a lawsuit alleging medical negligence or malpractice based upon that claim, with no indemnity payment by the insurer, prior to or within 180 days after the filing of the last responsive pleading in the action.

(b) An insurer authorized as set forth in (a) above may increase the premium of any medical malpractice liability

insurance policy upon renewal on the basis of a claim of medical negligence or malpractice against the insured which is pending at the time of renewal. In the event, however, that a lawsuit based upon that claim is subsequently dismissed as to the insured during the term of the renewed policy or a subsequent renewal and within 180 days after the filing of the last responsive pleading in the action, with no indemnity payment by the insurer attributable to that claim, the insurer shall, upon the renewal next succeeding such a dismissal, reflect the elimination of this claim in the calculation of the renewal premium.

(c) Where required by N.J.S.A. 17:29AA-5 and N.J.A.C. 11:1-2, an insurer authorized to transact medical malpractice liability insurance in this State shall file a manual rule as to this provision with the Department of Banking and Insurance for inclusion in the company's manual.

SUBCHAPTER 6. RENEWAL AND NONRENEWAL NOTICES

11:27-6.1 Renewal and nonrenewal notices

Medical malpractice liability insurers shall comply with N.J.A.C. 11:1-20 with regard to notices of renewal and nonrenewal of medical malpractice liability insurance policies.

SUBCHAPTER 7. MEDICAL MALPRACTICE LIABILITY INSURANCE PREMIUM ASSISTANCE FUND—PREMIUM SUBSIDY

11:27-7.1 Purpose and scope

(a) The purpose of this subchapter is to set forth procedures for the assessment of certain practitioners and employers for the Fund, and the procedures and methodology for determining eligibility for, making application for, and determining the amount of disbursements from the Fund of medical malpractice liability insurance premium subsidies pursuant to N.J.S.A. 17:30D-28 through 17:30D-30.

(b) This subchapter shall apply with respect to assessments of certain practitioners and employers for the Fund pursuant to N.J.S.A. 17:30D-29, and to any person seeking a disbursement from the Fund of a premium subsidy pursuant to N.J.S.A. 17:30D-28 through 17:30D-30.

11:27-7.2 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

“Board” or “Boards” means the New Jersey State Board of Medical Examiners, New Jersey State Board of Chiropractic Examiners, New Jersey State Board of Dentistry, and New Jersey State Board of Optometrists.

“Bona fide office” means a practice location at which a licensee engages in any activity or provides any service for which possession of a license is statutorily required or otherwise mandated by virtue of the job description, specification or qualifications. A “bona fide office” shall include a private practice setting, at a hospital, educational institution, research facility, governmental agency or a business. The accessibility of a licensee at the practice location to members of the public in person or by telephone shall not be a determinative factor.

“Commissioner” means the Commissioner of the New Jersey Department of Banking and Insurance.

“Completely retired” means a licensure status established by a licensee's affirmative election of an inactive status at renewal pursuant to N.J.S.A. 45:1-7.3, or through a submission of other written notice, where authorized by the professional practice act to obtain a certificate of retirement. During the time that a licensee is “completely retired,” no practice of the profession, within the meaning of this definition, is authorized, including, but not limited to, the prescribing of medications, if authorized within the scope of practice. Physicians, 65 years or older, without hospital or health maintenance organization affiliation, holding a reduced fee license, issued pursuant to N.J.S.A. 45:9-19.16, shall be deemed active licensees and shall not be deemed “completely retired.”

“Department” means the New Jersey Department of Banking and Insurance.

“Fund” means the Medical Malpractice Liability Insurance Premium Assistance Fund established pursuant to N.J.S.A. 17:30D-29.

“Health care provider” is as defined at N.J.S.A. 17:30D-28.

“Joint insurance fund” means a fund formed by two or more entities to provide liability insurance coverage pursuant to N.J.S.A. 17:49A-1 et seq., 18A:18B-1 et seq., 18A:18B-25.33 et seq., or 40A:10-36 et seq.

“Licensee” means an individual licensed by a Board.

“Practitioner” is as defined at N.J.S.A. 17:30D-28.

“Qualifying increase” means an increase in medical malpractice liability insurance premiums paid by a practitioner or the self-insured funding obligation of a health care provider eligible to receive a subsidy from the Fund determined by the Commissioner pursuant to N.J.A.C. 11:27-7.5.

“Risk retention group” is as defined at N.J.S.A. 17:47A-2.

“Statutorily or constitutionally barred from practice” means a licensure status, including those whose licenses have been revoked or actively suspended by a disciplinary order of the Board or suspended by operation of N.J.S.A. 45:1-7.1, for failing to timely renew a license after its expiration.

Adopted changes, R.2005 d.186, effective June 20, 2005.

See: 36 N.J.R. 5970(a), 37 N.J.R. 2207(a)

In “Board’ or ‘Boards”” substituted “Optometrists” for “Optometry”.

11:27-7.3 Assessments of employers and certain practitioners

(a) In accordance with N.J.S.A. 17:30D-29, notices imposing an annual charge in the sum of \$75.00 shall be issued on behalf of the Boards to every physician, podiatrist, chiropractor, dentist and optometrist:

1. Who holds an active license granted on a date one year or more before the date on which the notices are sent;
2. Whose practice is not currently barred or prohibited by statute as unlicensed practice:
 - i. As a result of the entry of a disciplinary order of the Board revoking or suspending full licensure privileges; or
 - ii. As a result of the failure to timely renew an expired license, pursuant to N.J.S.A. 45:1-7.1; and

3. Who is not completely retired from the practice of the profession.

(b) A notice recipient may claim an exemption from the requirement to pay the annual charge upon an attestation that he or she:

1. Is currently on full-time duty with any branch of the armed services, VISTA or the Peace Corps and not required to maintain a New Jersey license to perform duties, if assigned to such duties in New Jersey; or
2. Does not maintain a bona fide office for the practice of the profession in New Jersey.

(c) Each physician, podiatrist, chiropractor, dentist, and optometrist receiving a notice, who does not claim an exemption, shall remit the annual charge, as directed, within 30 days of the receipt of the notice.

(d) Any physician, podiatrist, chiropractor, dentist, or optometrist receiving a notice, who seeks to claim an exemption, shall return the notice, as directed, along with an attestation as to the facts upon which the claim is based, within 30 days of the receipt of the notice.

(e) Any exempt licensee who, as a result of changed circumstances, is no longer entitled to that exemption shall provide notice to his or her respective Board of the change and the date on which the change occurred and remit the full annual charge, within 30 days of the date of the change. The obligation to remit the charge shall accrue on the date of the change in circumstance.

(f) Any licensee who did not hold an active license at the time that the notices were issued and who seeks restoration of an active license during the calendar year following the issuance of the notices, shall be required to remit the annual charge prior to the restoration of the license.

(g) The Boards shall maintain a list of all of their respective licensees who have not paid the annual charge, so that appropriate enforcement action may be pursued against licensees who have failed to either remit payment or claim an exemption.

(h) The Department of Labor and Workforce Development (LWD) shall annually assess all employers who are subject to the Unemployment Compensation Law, N.J.S.A. 43:21-1 et seq., the surcharge prescribed in N.J.S.A. 17:30D-29. Such surcharge may be combined with other assessment or revenue collection activities of the LWD and sent to subject employers. Employers may elect to recover the assessment from their employees by a payroll deduction in an amount not to exceed \$3.00 annually from each covered employee as long as the prescribed surcharge continues in legislative effect.

(i) The surcharge collected by LWD shall be based on the number of discrete social security numbers reported on form WR-30 by each employer subject to N.J.S.A. 17:30D-29 for the immediately preceding calendar year. Thus, the surcharge for calendar years 2004, 2005 and 2006 shall be based on employment reported for calendar years 2003, 2004 and 2005, respectively. An employer who believes it is not subject to this surcharge or who believes the surcharge has been calculated incorrectly may submit a written request for reconsideration thereof to the Director, Division of Accounting, New Jersey Department of Labor and Workforce Development, PO Box 955, Trenton, New Jersey 08625, within 30 days of receipt of the surcharge. Such request must stipulate the legal bases upon which the claim of nonapplicability is based. For the assessment applicable to fiscal year 2004, an employer who has experienced employee turnover, in accordance with the Job Opening and Labor Turnover Survey definition of turnover as described by the United States Bureau of Labor Statistics, in excess of 150 percent for the period January 1, 2004 through June 30, 2004 may recalculate the assessment using the number of employees reported on form WR-30 for the quarter ending September 30, 2004 plus the number of new employees reported on form WR-30 for the quarter ended December 30, 2004. Any such employer who submits such a recalculation shall provide documentation acceptable to LWD supporting the turnover experienced.

Adopted changes, R.2005 d.186, effective June 20, 2005.
See: 36 N.J.R. 5970(a), 37 N.J.R. 2207(a)
Rewrote (i).

11:27-7.4 Data requests

(a) The Department shall request that insurers and other entities providing medical malpractice liability insurance in this State provide the following information with respect to data as of December 31, 2004, 2005 and 2006:

1. The company's base rates (based on \$1 million/\$3 million limits). The rates should be provided for each rating tier (for example, preferred, standard, etc.), each policy form (occurrence, claims-made), and by each specialty and subspecialty;
2. The company's in-force exposures, by policy form, by rating tier, and by specialty and subspecialty, for all limits combined;
3. The company's average written premiums, including all factors, surcharges, discounts, etc., per exposure by policy form, by rating tier, by specialty and subspecialty; and
4. Such other data from an insurer or other entity as the Commissioner may conclude is necessary in order to determine the class or classes of specialties or subspecialties which will be eligible for a subsidy and the amount of any qualifying premium and professional liability funding obligation increase or increases as referenced in N.J.A.C. 11:27-7.5(a) and (b).

(b) For purposes of complying with the data request, the following instructions shall apply. For base rates, the claims-made rates are for mature claims-made only. For claims-made exposures and average premiums, companies should show the exposures and average premiums for all claims-made steps combined. For all base rates, exposures, and average premiums, companies should provide the specialties and subspecialties by name, company class code, and Insurance Services Office (ISO) class code.

(c) The requested information should be provided electronically on Excel spreadsheets in a form provided by the Department and available on the Department's website at www.state.nj.us/dobi/data/njmedmal_survey.xls no later than 30 days after the Department's request for the data or the end of the relevant reporting period, whichever is later, and sent to MMLIPA@dobi.state.nj.us.

11:27-7.5 Determination of eligibility

(a) The Commissioner shall determine the class or classes of practitioners eligible for the subsidy, by specialty or subspecialty, for each type of practitioner whose average medical malpractice liability insurance premium, as a class, on or after December 31, 2002, is in excess of an amount determined by the Commissioner based upon a review of the information filed pursuant to N.J.A.C. 11:27-7.4 and in accordance with N.J.S.A. 17:30D-30. In determining the relevant premium amounts, the Commissioner shall review and consider, without limitation, the premiums paid or charged by insurers transacting business in this State for medical malpractice liability insurance in this State. In certifying the class or classes of practitioners eligible to receive the subsidy, the Commissioner may, in consultation with the Commissioner of the Department of Health and Senior Services, also consider whether access to care is threatened by the inability of a significant number of practitioners in a particular specialty or subspecialty to continue practicing in a geographic area of the State.

(b) Practitioners in a class certified by the Commissioner in accordance with (a) above, including those whose medical malpractice liability insurance coverage is supplied by health care providers who provide professional liability insurance through self-insured hospital funding supplemented with purchased commercial insurance coverage, shall be eligible for a subsidy if:

1. The practitioner received an increase in medical malpractice liability insurance premiums in excess of an amount determined by the Commissioner based on a review of the information filed pursuant to N.J.A.C. 11:27-7.4 for one or more of the following: upon policy inception or renewal on or after January 1, 2004, January 1, 2005, and January 1, 2006, from the amount paid in the immediately preceding calendar year(s); or

2. In the case of practitioners whose medical malpractice liability coverage is supplied by health care providers in the manner set forth in (b) above, the Commissioner determines that the health care provider increased its total professional liability funding obligation in excess of an amount determined by the Commissioner based on a review of the information filed pursuant to N.J.A.C. 11:27-7.4 for one or more of the three year periods set forth in (b)1 above.

(c) Pursuant to N.J.S.A. 17:30D-30, the Commissioner may waive the criteria for eligibility if he or she determines that access to care for a particular specialty or subspecialty is threatened because of an inability of a sufficient number of practitioners in that specialty or subspecialty to practice in a geographic area of the State.

(d) For purposes of determining the qualifying increases incurred by practitioners in the class or classes of specialties or subspecialties set forth in (b) above, the Commissioner shall consider the increases in the base rate for medical malpractice liability insurance for such practitioners imposed by each medical malpractice liability insurer, reciprocal insurance exchange, risk retention group and joint insurance fund providing such coverage in this State and the increase in the self-insured funding obligation of the health care providers referenced in (b) above, and such other information as the Commissioner may conclude is relevant to that determination, including information received in accordance with the procedure set forth in (f) below.

(e) In considering the extent to which access to care is threatened as referenced in (a) and (c) above, the Commissioner shall consider information from relevant studies, reports, practitioners, practitioner trade associations, the Department of Health and Senior Services, the Department's internal analysis, and any other relevant data the Commissioner deems appropriate.

(f) The certification of eligible classes and determination of practitioner and health care provider eligibility shall be made annually as set forth below.

1. The Department shall issue a public notice on or about January 31 of each year setting forth those classes of specialties and subspecialties proposed to be eligible to apply to receive a subsidy from the Fund, the amount available for distribution or projected to be available, and, if applicable, the proposed amounts of the increases in premium and funding obligations referenced, respectively, in (b)1 and 2 above. The public notice shall be disseminated to those interested parties on the Department's distribution list utilized pursuant to N.J.A.C. 1:30-5.2(a)6, and shall also be posted on the Department's website: www.njdobi.org. In addition, the public notice shall be published in the New Jersey Register. The public notice shall also provide that interested parties shall have 30 days from the date of posting on the Department's web-

site to provide written comments on the Department's determinations.

2. After giving due consideration to any comments received, the Commissioner shall thereafter issue an Order establishing the classes eligible, and, if applicable, the amounts of the qualifying increases and funding obligations to be utilized as set forth in (b)1 and 2 above. The Order shall be disseminated to those interested parties on the Department's distribution list utilized pursuant to N.J.A.C. 1:30-5.2(a)6, and to all persons who submitted written comments on the public notice referenced in (f)1 above, and shall also be posted on the Department's website: www.njdobi.org. In addition, the Order shall be published in the New Jersey Register. The Order shall constitute a final agency decision.

(g) Notwithstanding (a) through (f) above, pursuant to N.J.S.A. 17:30D-30c, a practitioner who has been subject to disciplinary action or civil penalty by the practitioner's respective Board pursuant to N.J.S.A. 45:1-21, 45:1-22 or 45:1-25, when that action or penalty relates to the practitioner's provision of, or failure to provide, treatment or care to a patient, shall not be eligible to receive a subsidy from the Fund.

Public Notice: Medical Malpractice Liability Insurance Premium Assistance Fund--Premium Subsidy.

See: 37 N.J.R. 678(a).

Adopted changes, R.2005 d.186, effective June 20, 2005.

See: 36 N.J.R. 5970(a), 37 N.J.R. 2207(a)

In (f)1, substituted "on or about" for "no later than".

11:27-7.6 Application process

(a) Practitioners and healthcare providers deemed eligible to apply for a subsidy from the Fund as provided in N.J.A.C. 11:27-7.5 shall file an application in a form to be prescribed by the Department and posted on the Department's website at www.njdobi.org. The information provided in the application shall include, but not be limited to, the following:

1. Applicant's name, address, daytime telephone number and business address;
2. Applicant's e-mail address;
3. Applicant's type of licensure and license number;
4. Information related to the type of practice; and
5. Information related to the applicant's medical malpractice liability insurer, including insurer name, policy dates and limits of liability.

(b) Applications shall be filed electronically in accordance with the instructions set forth on the application.

(c) Applications shall be filed no later than 30 days after the issuance by the Commissioner of the Order referenced in N.J.A.C. 11:27-7.5(f) specifying the eligible classes of practitioners and healthcare providers and the qualifying

increases in medical malpractice liability insurance premiums and self-funded obligations from the immediately preceding year.

(d) No application shall be accepted if the licensee is required to pay the annual assessment referenced in N.J.A.C. 11:27-7.3 but has not paid the assessment by the due date on the notice.

11:27-7.7 Distribution of funds

(a) The amount of the subsidy to be distributed for a relevant period shall be in the proportion that the qualifying increases in premiums and funding obligations for all eligible classes relate to the total amount of monies collected and allocated for distribution pursuant to N.J.S.A. 17:30D-29e(1), less administrative costs incurred in administering the Fund.

(b) Payments pursuant to (a) above shall be disbursed to each eligible applicant or to the applicant's designee as soon as practicable after the termination of the application period as set forth in N.J.A.C. 11:27-7.6(c).

11:27-7.8 Practice requirement and penalties

(a) Pursuant to N.J.S.A. 17:30D-30d(1), a practitioner who receives a premium subsidy pursuant to N.J.S.A. 17:30D-30 shall thereafter be required to continue to practice at least to the same extent (for example, full-time or part-time, and no restriction in specialty or subspecialty) in that practitioner's specialty or subspecialty in this state for a period of at least two years from the issue date of the subsidy. A practitioner may seek a waiver of the two-year practice continuation requirement by filing a certification with the Commissioner that sets forth the reason(s) the practitioner is or will be unable to fulfill the minimum two-year practice requirement. The Commissioner shall grant the waiver of completion of the minimum two-year practice requirement only for the following reasons:

1. Disabled and therefore unable to practice in the specialty or subspecialty prior to the end of the service period;
2. Death;
3. Extended maternity leave beyond the period of disability;
4. Full-time duty with the armed forces, VISTA or the Peace Corps; or
5. Leave taken in accordance with the New Jersey Family Leave Act, N.J.S.A. 34:11B-1 et seq., or the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq.

(b) In the event it is determined that the practitioner filed a certification which contained false or inaccurate information, the Department shall refer the matter to the appropriate Board for disciplinary action.

(c) If a practitioner who received a premium subsidy fails to satisfy the minimum two-year practice requirement set forth in (a) above, fails to obtain a waiver of such requirement, falsified data on his or her application, or otherwise is found not to have been or continue to be entitled to receive the subsidy, the practitioner shall be required to repay the amount of the subsidy, in whole or in part.

(d) In addition to (c) above, any person who violates the provisions of this subchapter may be subject to the imposition of any other penalties as authorized by law.

SUBCHAPTER 8. OFFICERS, DIRECTORS AND BOARD MEMBERS OF MEDICAL MALPRACTICE INSURERS

11:27-8.1 Prohibition upon concurrently serving in dual capacity

(a) No person who is an officer, director or board member of a professional association for health care providers shall serve concurrently as an officer, director or board member of a State-domiciled medical malpractice liability insurer that is licensed in New Jersey and offering medical malpractice liability insurance policies. For the purposes of this section, a professional association shall not include a professional association formed in accordance with N.J.S.A. 14A:17-1 et seq. and N.J.A.C. 13:35-6.16(f)2.

(b) For the purposes of this section only, a health care provider means an individual or entity which, acting within the scope of its licensure or certification, provides health care services, and includes, but is not limited to, a physician, dentist, nurse or other health care professional whose professional practice is regulated pursuant to Title 45 of the Revised Statutes and a health care facility licensed pursuant to N.J.S.A. 26:2H-1 et seq.

(c) A person or professional association who violates the provisions of this section and/or N.J.S.A. 17:30D-18 shall be liable for a civil penalty of \$10,000 for each violation.