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HEALTH LAW ALERT

CHAPTER 224 HEALTH CARE COST CONTAINMENT UPDATE #9:

**DIVISION OF INSURANCE RISK-BASED PROVIDER ORGANIZATION
REGULATIONS, BULLETIN, AND CONTINUING GUIDANCE**

The purpose of this client alert is to summarize the key provisions of and deadlines imposed by the Division of Insurance (“DOI”) final regulations issued August 15, 2014 (the “RBPO Regulations”), governing the registration of Risk-Bearing Provider Organizations (“RBPOs”). DOI promulgated the RBPO Regulations (located at [211 CMR 155.00](#)), [Bulletin 2014-05](#), and related guidance pursuant to Massachusetts General Laws Chapter 176T.

Provider organizations must apply for a Risk Certificate if they fall within the definition of an RBPO, meaning (a) they manage the treatment of a group of patients and bear downside risk according to the terms of an alternative payment contract, and (b) they do not qualify for a Risk Certificate Waiver.

A provider organization may qualify for a Risk Certificate Waiver if it can show that its alternative payment contracts do not contain significant downside risk. This involves disclosing the provider organization’s projected proportion of revenue subject to downside risk, the steps it has taken to prepare for such risk, and the reasons it believes such risk should not be considered significant. For the March 1, 2015 through February 29, 2016 term only, any RBPO with an annual net patient service revenue of less than \$15,000,000 may obtain a Risk Certificate Waiver. If a Risk Certificate Waiver is denied, a provider organization must apply for a Risk Certificate in order to enter into alternative payment contracts containing downside risk.

If an RBPO is subject to the full Risk Certificate application process, it must submit information sufficient to demonstrate that its alternative payment contracts are not expected to threaten its financial solvency. An RBPO which is required to obtain a Risk Certificate must also register with the Health Policy Commission (the “HPC”) as a Registered Provider Organization.¹

DOI has released three additional sub-regulatory RBPO guidance documents on its website:

1. [Presentation slides](#) given at DOI’s regional information sessions for providers;

¹ See our [Chapter 224 Health Care Cost Containment Update #7: Registration of Provider Organizations](#) on this topic.

2. [Questions and Answers on Applications for Risk Certificate Waivers and Risk Certificates to Meet the Requirements of 211 CMR 155.00 and Bulletin 2014-05](#) (currently revised as of September 25, 2014); and
3. [Guidelines for Conducting Independent Reviews of Risk-Bearing Provider Organizations in Conjunction with the Application for Risk Certificates for the Term Beginning March 1, 2015.](#)

DOI's Bulletin 2014-05 provides an implementation timetable for the RBPO Regulations. DOI extended the current transition period to March 1, 2015, during which time DOI's original Transition Period Waivers remain in effect. After March 1, 2015, Risk Certificate Waivers and Risk Certificates will be required.

For a seamless conversion from a Transition Period Waiver to a Risk Certificate Waiver or Risk Certificate, RBPOs must have submitted their applications for Risk Certificate Waivers by September 30, 2014 and/or their applications for Risk Certificates by December 15, 2014. It is unclear how DOI will treat missed deadlines. (For example, how should a provider organization who is eligible for a Risk Certificate Waiver but missed the September 30 deadline proceed? Will DOI require the provider organization to go through a full Risk Certificate process, or will there be a second opportunity to obtain a Risk Certificate Waiver?)

In subsequent years, these deadlines will be advanced to August 15 for Risk Certificate Waivers and November 15 for Risk Certificates. All Risk Certificate Waivers and Risk Certificates will have a 1-year term, from March 1 to February 28/29.

The DOI guidance documents and Bulletin 2014-05 include the following additional items of interest:

- A provider organization need not apply for a Risk Certificate Waiver or Risk Certificate if the only health care payers with which it enters into alternative payment contracts involving downside risk are Medicare plans (e.g., Medicare Advantage plan, Medicare Accountable Care Organization). However, if a provider organization enters into any such contracts with a non-Medicare plan (e.g., employer plan, Medicaid), it must submit information on all of its plans, including Medicare plans.
- A provider organization which coordinates its alternative payment contracts with downside risk through another RBPO may or may not need to separately register as an RBPO, depending on the arrangement.
 - If the provider organization does not sign any such contracts directly with a carrier (i.e., it has a subcontracting relationship with the other RBPO), it does not need to separately register as an RBPO.
 - If the provider organization is the signatory on any such contracts, it must apply for either a Risk Certificate Waiver or a Risk Certificate.

- An RBPO applying for a Risk Certificate Waiver or Risk Certificate must list every health care payer with which it contracts, not just those with which it has made downside risk arrangements.
- An RBPO applying for a Risk Certificate Waiver must discuss all of the downside risk it is taking on, including downside risk through both direct contracts and “messenger” or “passthrough” RBPOs.
- For the next RBPO application cycle only (i.e., the December 15, 2014 deadline), an RBPO may have an independent professional conduct the review process set out in the Guidelines for Conducting Independent Reviews (Item 3 above) in lieu of obtaining a formal actuarial certification.

Consistent with the HPC’s Registered Provider Organization regulations, the RBPO Regulations require RBPOs to not only submit information on themselves, but also on other providers or provider organizations with which they have a contracting affiliation. A contracting affiliation is defined as any relationship between a provider organization and another provider or provider organization for the purposes of negotiating, representing, or otherwise acting to establish contracts for the payment of health care services, including for payment rates, incentives, and operating terms, with a carrier or third-party administrator.

Provider organizations must report “material changes” to the information contained in their applications to DOI within 30 days after they take effect, which report must be certified by an officer. DOI has left what constitutes a “material change” somewhat open-ended, stating that no such update is likely to be required where the change does not impact the degree of risk exposure relative to the provider organization’s financial position. The RBPO Regulations also provide the following examples of material changes:

- the addition of new alternative payment contracts;
- amendments to downside risk provisions in existing alternative payment contracts;
- changes to the number or types of patients that are covered under existing alternative payment contracts; or
- changes to the organizational structure of any provider organization (this appears to encompass changes to both the reporting provider organization and other provider organizations with which the reporting provider organization has a contracting affiliation).

DOI will examine an RBPO’s finances every three years. If there is a risk of insolvency, an RBPO’s Risk Certificate may be suspended or canceled after a hearing.

DOI will likely update its Questions and Answers document and other guidance as the application process gets underway. We will continue to monitor developments in this area.

If you have any questions about the RBPO Regulations, Bulletin 2014-05, or related guidance, please contact Attorneys Jennifer Gallop (jgallop@kb-law.com), Robert Griffin (rgriffin@kb-law.com), Emily Kretchmer (ekretchmer@kb-law.com), or Braden Miller (bmiller@kb-law.com).