

BUSINESS LAW SECTION

LEGISLATIVE AFFAIRS COMMITTEE UPDATE

Topic: S. 8612/A. 10997 – A Case Study in Legislative Complexity

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January 2019

Committee background

The purposes of this Section’s Legislative Affairs Committee are to strive to improve the laws in New York State that affect business and to work to remove impediments to doing business in New York posed by New York laws. We do this in part by identifying and prioritizing issues of interest to the Section.

This Committee focuses on the laws of primary interest to this Section, including the Business Corporation Law (“BCL”), Limited Liability Company Law, Not-for-Profit Corporation Law (“N-PCL”), General Business Law (securities regulation; franchising), Uniform Commercial Code, Donnelly Act, and Banking Law. Not infrequently, particular bills affect any one of those statutes include issues that affect other statutes and vice versa. Sometimes, particular bills involve a variety of statutes and competing public policy considerations. A recent bill illustrates the complexity that is sometimes involved.

Case in point: N-PCL Section 1412

Current Section 1412 of the N-PCL, enacted in 1993, permits a not-for-profit corporation to be formed to conduct faculty clinical practice plans, which are essentially particular types of medical practices conducted by faculty of medical schools as part of instruction. Prior to the enactment of this section, such plans were housed in professional service corporations (“PCs”) formed under the BCL, which were also structured in such a way as to qualify for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code due to the educational component of the professional practice, under well-established federal tax exemption law, e.g., *University of Maryland Physicians, P.A., v. Commissioner of Internal Revenue*, T.C. Memo 1981-23 (Tax Court, 1981).

Section 1412 is narrowly tailored to medical school clinical practice plans, however. Over the years, similar PCs have been formed to conduct professional practice that is in conjunction with other not-for-profit corporations’ activities but (for various reasons) is outside the scope of the licensure or legal authority of those corporations, such as hospitals and animal shelters. The Certificates of Incorporation of such PCs would provide for the profession to be practiced (medicine or veterinary medicine, in the immediately preceding examples), but would also include provisions to permit the PC to qualify for 501(c)(3) status. Such Certificates of Incorporation had been filed for decades by the Department of State, with the consent of the Office of Professions of the Education Department, as required under the BCL.

Reportedly, in 2017 the Office of Professions began denying consent to such Certificates of Incorporation. In apparent response, Senate bill 8612 (attached) and Assembly bill 10997 were introduced in 2018, but did not pass. The bills would have extended Section 1412 to allow the medical staffs of general hospitals (licensed under Public Health Law Article 28) and certain

developmental-disabilities agencies (licensed under Mental Hygiene Law Section 16.03) to form not-for-profit corporations under Section 1412 to support the mission of the related hospital or agency and to be operated in compliance with Section 501(c)(3) of the Internal Revenue Code.

Related issues

Prohibition of unlicensed practice. Education Law Section 6512 is a general prohibition on the unlicensed practice of the professions and specifically states that:

Anyone not authorized to practice under this title [Title VIII, The Professions] who practices or offers to practice or holds himself out as being able to practice in any profession in which a license is a prerequisite to the practice of the acts shall be guilty of a Class E felony.

Licensed professionals may not split fees with unlicensed persons. See Education Law Section 6509-A, Commissioner of Education Regulation Section 29.1.

Business purposes. Business corporation is a corporation formed “for profit.” BCL Section 102(a)(4). A corporation may be formed under the BCL “for any lawful business purpose.” BCL Section 201(a). A PC may be formed by a licensed professional “for the purpose of rendering such professional services as [the professional] is authorized to practice.” BCL Section 1503(a).

Not-for-profit purposes. Not-for-profit corporation is a corporation formed “not for pecuniary profit or financial gain.” N-PCL Section 102(a)(5). A corporation may be formed under the N-PCL for charitable purposes or non-charitable non-pecuniary purposes. N-PCL Sections 201(b) and 102(3-a), (3-b), and (9-a). A not-for-profit corporation may conduct activities for pecuniary profit or financial gain to support its other lawful activities. N-PCL Section 204.

Other regulated organizations. Hospitals, mental health agencies, and the like that hold operating certificates under the Mental Hygiene Law or the Public Health Law, as well as not-for-profit corporations under Section 1412, are not subject to the prohibition in Education Law Section 6512. See Education Law Section 6503-A(2).

Animal shelters must provide for spaying and neutering of dogs and cats before adoption. Agriculture and Markets Law Section 377-a. Animal shelters may own real property on which veterinary services are delivered. Education Law Section 6706.

Tax exemption. In addition to *Univ. of Maryland Physicians, supra*, the IRS recognizes that private benefit does not preclude exempt status if the private benefit is incidental to the primary public benefit served by the organization’s activities. See, e.g., Rev. Ruls. 70-186, 80-106.

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ON FILE: 05/10/18 Not-for-Profit Corporation Law

TITLE....Relates to university faculty practice corporations

05/10/18 REFERRED TO CORPORATIONS, AUTHORITIES AND COMMISSIONS

HANNON

Amd §1412, N-PC L

Relates to university faculty practice corporations; permits medical staff at certain hospitals to form tax exempt practice corporations.

STATE OF NEW YORK

8612

IN SENATE

May 10, 2018

Introduced by Sen. HANNON -- read twice and ordered printed, and when printed to be committed to the Committee on Corporations, Authorities and Commissions

AN ACT to amend the not-for-profit corporation law, in relation to university faculty practice corporations

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 1412 of the not-for-profit corporation law, as
2 added by and paragraph (f) as amended by chapter 555 of the laws of
3 1993, paragraphs (a), (c) and (e) as amended by chapter 323 of the laws
4 of 2012, paragraph (d) as amended by chapter 549 of the laws of 2013,
5 and subparagraph 2 of paragraph (f) as amended by chapter 172 of the
6 laws of 1999, is amended to read as follows:

7 § 1412. University faculty practice corporations.

8 (a) Organization. Notwithstanding any other provision of law, one or
9 more individuals who are duly authorized by law to render the same
10 professional service, which shall be the practice of medicine, the prac-
11 tice of dentistry, the practice of chiropractics, the practice of phys-
12 ical therapy or the practice of optometry, and who are members of the
13 faculty or medical staff of the same accredited medical school, dental
14 school, chiropractic college, college or university with an accredited
15 doctor of physical therapy program or optometry college, a "general
16 hospital", as defined in section twenty-eight hundred one of the public
17 health law, (provided, however, that individuals on the staff of one or
18 more general hospitals can form a single entity hereunder if such hospi-
19 tals are commonly controlled or one of the hospitals controls the
20 other), or a facility authorized to operate pursuant to section 16.03 of
21 the mental hygiene law, as applicable, in the state of New York may
22 organize, or cause to be organized, a [~~university faculty~~] practice
23 corporation under this article (1) for the purpose of supporting the
24 [~~educational mission of such school by providing~~] mission of such
25 school, hospital or hospitals, or facility, by, (A) in the case of an
26 accredited medical school, dental school, chiropractic college, college
27 or university with an accredited doctor of physical therapy program or

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 optometry college, providing hospital or medical staff clinical instruc-
2 tion and supervision of students of such school, interns and residents
3 and, incident thereto, rendering professional services; (B) in the case
4 of a general hospital or hospitals, or facility, providing care to indi-
5 viduals that the general hospital or hospitals, or facility are author-
6 ized to serve and (2) which shall be operated in compliance with (A)
7 section 501(c)(3) of the United States internal revenue code and (B) the
8 [~~faculty~~] practice plan with which members of the faculty or medical
9 staff of such school, general hospital or hospitals, or facility are
10 required to comply, as applicable, as amended from time to time.

11 (b) Definition. "University faculty practice corporation" means [a]
12 any practice corporation organized or reincorporated under this section.
13 Such corporations shall be referred to herein as "university faculty
14 practice corporations".

15 (c) Certificate of incorporation. The certificate of incorporation of
16 a university faculty practice corporation shall meet the requirements of
17 this chapter and shall have attached thereto a certificate or certifi-
18 cates issued by the licensing authority certifying that each of the
19 proposed members, if any, directors and officers is authorized by law to
20 practice the profession which the corporation is being organized to
21 practice. The certificate shall also state (1) the name of the medical
22 school, dental school, chiropractic college, college or university with
23 an accredited doctor of physical therapy program or optometry college,
24 or the name of the general hospital or hospitals or facility authorized
25 to operate pursuant to section 16.03 of the mental hygiene law, as
26 applicable, in the state of New York of which the proposed members, if
27 any, directors and officers are faculty or members of medical staff, as
28 applicable; and (2) that such corporation shall operate in compliance
29 with (A) section 501(c)(3) of the United States internal revenue code
30 and (B) the [~~faculty~~] practice plan with which members of the faculty of
31 such school or members of the medical staff of such general hospital or
32 hospitals, or facility are required to comply, as amended from time to
33 time.

34 (d) Type. A university faculty practice corporation is a charitable
35 corporation under this chapter.

36 (e) Applicability of laws; members, directors and officers. This chap-
37 ter shall be applicable to a university faculty practice corporation
38 except to the extent that the provisions thereof conflict with this
39 section. A university faculty practice corporation may consolidate or
40 merge only with another university faculty practice corporation. The
41 following provisions of article fifteen of the business corporation law
42 shall be applicable to a university faculty practice corporation except
43 that each reference in such provisions to a "shareholder" shall be
44 deemed to be a reference to a "member" and each reference in such
45 provisions to "shareholders" shall be deemed a reference to "members":
46 paragraphs (a), (b), (c) and (e) of section fifteen hundred one; para-
47 graphs (b), (c) and (d) of section fifteen hundred three; paragraphs
48 (a), (c) and (g) of section fifteen hundred four; section fifteen
49 hundred five; section fifteen hundred nine except to the extent such
50 section refers to section fifteen hundred ten; paragraph (a) of section
51 fifteen hundred twelve; section fifteen hundred fourteen; and section
52 fifteen hundred fifteen. No individual may be a member, director or
53 officer of a university faculty practice corporation unless such indi-
54 vidual is authorized by law to practice in this state the profession
55 which such corporation is authorized to practice and is a member of the
56 faculty or medical staff of the medical school, dental school, chirop-

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1 ractic college, college or university with an accredited doctor of phys-
2 ical therapy program or optometry college, or of the general hospital or
3 hospitals, or of a facility authorized to operate pursuant to section
4 16.03 of the mental hygiene law which such corporation is organized to
5 support.

6 (f) Corporations heretofore incorporated. Any corporation heretofore
7 incorporated under article fifteen of the business corporation law and
8 operated in compliance with the requirements of section 501(c)(3) of the
9 United States internal revenue code may amend its certificate of incor-
10 poration and be reincorporated as a university faculty practice corpo-
11 ration organized under this section by making and filing in the office
12 of the secretary of state a certificate entitled "Certificate of Rein-
13 corporation of...(name of incorporation) under section 1412 of the Not-
14 for-Profit Corporation Law." (1) Such reincorporation certificate shall
15 contain the provisions required, and any other provisions permitted, by
16 section ~~[402]~~ four hundred two of this chapter and shall also set forth
17 (A) a statement that such corporation is filing such reincorporation
18 certificate under this section, (B) if the name of such corporation has
19 been changed, the name under which such corporation was originally
20 incorporated, (C) the date of incorporation of such corporation, (D) the
21 names and post-office addresses of the holders of record of all of the
22 outstanding shares of such corporation entitled to vote, (E) a statement
23 that such corporation has elected to become and be a university faculty
24 practice corporation organized and operated under by virtue of this
25 section and (F) the statements required by paragraph (c) of this
26 section. (2) Such reincorporation certificate shall be either (A)
27 subscribed in person or by proxy by all of the holders of record of all
28 of the outstanding shares of such corporation entitled to vote and shall
29 have annexed an affidavit of the secretary or an assistant secretary
30 that the persons who have executed the certificate, in person or by
31 proxy, constitute all of the holders of record of all of the outstanding
32 shares of the corporation entitled to vote or (B) subscribed by the
33 president or a vice president and the secretary or an assistant secre-
34 tary and shall have annexed an affidavit of such officers stating that
35 they have been authorized to execute and file such reincorporation
36 certificate by the votes, cast in person or by proxy, of all of the
37 holders of record of all of the outstanding shares of such corporation
38 entitled to vote at the meeting at which such votes were cast, and that
39 such votes were cast at a meeting of shareholders held on a date speci-
40 fied, upon notice pursuant to section six hundred five of the business
41 corporation law. (3) A reincorporation pursuant to this paragraph shall
42 not effect a dissolution of such corporation, but shall be deemed a
43 continuation of its corporate existence, without affecting its then-ex-
44 isting property rights or liabilities, or the liabilities of its share-
45 holders, directors or officers as such, but thereafter it shall have
46 only such rights, powers and privileges, and it and such shareholders,
47 directors and officers shall be subject only to such other duties and
48 liabilities, as a university faculty practice corporation and members,
49 directors and officers thereof. (4) Upon the filing of a reincorporation
50 certificate in the office of the secretary of state, (A) any issued and
51 outstanding shares of such corporation shall be purchased by such corpo-
52 ration at a purchase price equal to the price for which such shares were
53 originally issued, or such other price as such corporation shall agree
54 to, such price to be paid out of the surplus of the corporation, where-
55 upon such shares shall be deemed cancelled as of the date of such filing
56 and (B) such reincorporation certificate shall be deemed to replace the

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1 certificate of incorporation of such corporation. The department of
2 state shall not file such certificate of reincorporation unless the
3 consent of the commissioner of taxation and finance is attached thereto.
4 Such certificate of consent shall only be given if the commissioner of
5 taxation and finance ascertains that all taxes imposed under article
6 nine-A of the tax law, as well as penalties and interest charges related
7 thereto, accrued against the corporation have been paid.

8 (g) Effect of section. University faculty practice corporations incor-
9 porated or reincorporated under this section shall be organized and
10 operated exclusively for the purposes set forth in paragraph (a) of this
11 section and shall be subject to the restrictions and limitations imposed
12 by or pursuant to paragraphs (a) and (e) of this section. All universi-
13 ty faculty practice corporations incorporated or reincorporated under
14 this section may operate under the name (or portion thereof) or initials
15 of the affiliated school, hospital or hospitals, or facility, or under
16 the name (or portion thereof) or initials of the system with which such
17 affiliated school, hospital or hospitals, or facility are publicly iden-
18 tified. Notwithstanding anything to the contrary in article twenty-eight
19 of the public health law or the regulations adopted pursuant thereto, no
20 corporation organized under this section shall be deemed to be estab-
21 lishing or operating a hospital, diagnostic center and/or treatment
22 center requiring establishment or construction approval solely by reason
23 of being organized as a not-for-profit corporation. Insofar as the
24 provisions of this section are inconsistent with the provisions of any
25 other law, general or special, the provisions of this section shall be
26 controlling as to the corporations incorporated or reincorporated here-
27 under.

28 § 2. This act shall take effect immediately.

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S8612

SPONSOR: HANNON

TITLE OF BILL: An act to amend the not-for-profit corporation law, in relation to university faculty practice corporations

PURPOSE:

To permit the medical staff of a general hospital as defined by Article 28 of the Public Health Law or a facility authorized by Article 16 of the Mental Hygiene Law to organize practice corporations under the State's Not-for-Profit Corporation Law Section 1412.

SUMMARY OF PROVISIONS:

Section one amends Not-for-Profit Corporation Law § 1412 to permit individuals who are authorized to render the same professional service and who are members of the medical staff of general hospitals as defined by New York Public Health Law Section 2801 or a facility authorized by Article 16 of the Mental Hygiene Law to organize practice corporations in the same manner and form as faculty of an accredited medical school or other enumerated medical education entities are permitted to organize under § 1412. All such practice organizations would be referred to as "university faculty practice corporations" under § 1412, as it would be amended, and qualifying existing corporations would be permitted to reincorporate under § 1412 if desired.

In furtherance of the foregoing, § 1412(a) would be amended to permit members of a medical staff to organize or cause to be organized a practice corporation for the purpose of supporting the mission of the general hospital by providing care to individuals the hospitals are authorized to serve. In addition, such practice corporations would be required to operate in compliance with Section 501(c)(3) of the Internal Revenue Code. Individuals on the staff of one or more general hospitals would be permitted to form a single practice corporation under Section 1412 if such hospitals are commonly controlled or one of the hospitals controls the others. Lastly this section would amend § 1412(g) to specifically permit all "university faculty practice corporations" to operate under the name (or portion thereof) or initials of the affiliated school, education entity, hospital or hospitals or under the name (or portion thereof) or initials of the system with which the affiliated school, education entity, hospital or hospitals is/are publicly identified.

Section two provides that the act shall take effect immediately.

JUSTIFICATION:

Section 1412 of the State's Not-for-Profit Corporation Law currently permits individuals who are authorized by law to practice the same professional service and who are members of the faculty of the same accredited medical school or other medical education entity to form practice corporations known as "university faculty practice corporations." Such corporations are organized for the purpose of supporting the mission of the related medical school or medical education entity and must be operated in compliance with Section 501(c)(3) of the Internal Revenue Code and the practice plan associated with the affiliate medical school or medical education entity.

In contrast, individuals who are similarly authorized by law to practice the same professional service and who are members of the medical staff of a general hospital are not currently permitted to organize a practice corporation under Not-For-Profit Law Section 1412. Instead, they must organize under Section 1503 of New York State's Business Corporation Law. However, most such practice organizations have assumed (or desire to assume) the same roles and attributes of practice organizations organized under Section 1412 of the Not-for-Profit Law: they support the mission of their related not-for-profit hospital; they operate in compliance with Section 501(c)(3) of the Internal Revenue Code (and in many cases actually obtain 501(c)(3) status). Thus these practices have arranged what are commonly referred to as captive PC arrangements with a general hospital or facility authorized under Article 16 of the Mental Hygiene Law.

In reviewing new applicants and renewals, the New York State Education Department (SED) has recently raised questions about the ability of such medical staff practice organizations to assume these not-for-profit attributes, namely, supporting their related hospital and operating in compliance with Section 501(c)(3), given the fact that they are organized under Section 1503 of the Business Corporation Law. In addition, SED has raised questions about the use of all or some portion of the name of the related hospital or system in the name of the medical staff practice organization. In taking these positions, SED indicates it is constrained by State law, and has begun denying renewals for applications that had previously been approved.

To address this situation, this legislation ensures that general hospitals and Article 16 facilities that have a long standing practice of the state approving, and in many cases encouraging, these arrangements, can continue. These proposed amendment will help serve the goals of health reform by eliminating barriers to system development, encouraging clinical integration among affiliated providers, and advancing care coordination and collaboration among providers. The amendment will also provide a vehicle for practice organizations that most closely reflect the actual relationships among members of the medical staff and their affiliated hospitals and facilities, their actual form and not-for-profit status.

LEGISLATIVE HISTORY:

New bill.

FISCAL IMPLICATIONS:

None.

EFFECTIVE DATE:

Immediately

