



1995 SENATE BILL 640

March 21, 1996 - Introduced by Senators BURKE and MOEN, cosponsored by Representatives BOYLE, R. POTTER, L. YOUNG and R. YOUNG. Referred to Committee on Health, Human Services and Aging.

1 **AN ACT** *to renumber and amend* 448.01 (11); *to amend* 449.19; and *to create*
2 subchapter V of chapter 150 [precedes 150.88], 441.07 (1) (f), 446.04 (4m),
3 447.07 (3) (km), 448.01 (11) (c), 448.57 (2) (gm), 448.90 (2) (gm), 449.07 (1) (fc),
4 450.10 (1) (a) 3m., 455.09 (1) (em), 457.26 (2) (gm), 459.34 (2) (fm) and 459.46
5 (5) (b) 6m. of the statutes; **relating to:** prohibiting certain health care providers
6 from referring a patient to a health care entity in which the health care provider
7 has a financial interest, granting rule-making authority and providing a penal-
8 ty.

Analysis by the Legislative Reference Bureau

Under current law, a person licensed by the medical examining board (board) as a physician or podiatrist, or a person certified by the board as an occupational therapist, occupational therapy assistant or respiratory care practitioner, may not directly or indirectly give or receive any fee, commission or other form of compensation in exchange for referring a person to seek professional services from a person licensed by the board. A person licensed as a physical therapist by the physical therapists affiliated credentialing board may not directly or indirectly give or receive any fee, commission or other form of compensation in exchange for referring a person to seek professional services from a person licensed by the affiliated credentialing board. A chiropractor or an optometrist is also prohibited from splitting or dividing any fee for his or her professional services with any person except an associate licensed chiropractor or optometrist. In addition, current law, as contained in the administrative code, regulates fee splitting or referrals by other health care providers as follows: 1) dentists are prohibited from accepting rebates from or splitting fees with another

health care provider unless the action is disclosed to the client; 2) pharmacists are prohibited from accepting rebates or splitting fees with any other health care provider or health care facility; and 3) psychologists, social workers, family therapists and professional counselors are required to inform a client of any financial interest that is not obvious and that may accrue to the psychologist, social worker, family therapist or professional counselor for a referral to or use of a service, product or publication.

This bill explicitly prohibits a health care provider from referring a patient to a health care entity outside the health care provider's office practice or group practice if the health care provider has a financial interest in the health care entity. The bill defines "health care provider" as a nurse, chiropractor, dentist, dental hygienist, physician, podiatrist, physical therapist, occupational therapist, occupational therapy assistant, physician assistant, respiratory care practitioner, dietitian, optometrist, pharmacist, psychologist, social worker, marriage and family therapist, professional counselor, speech-language pathologist or audiologist. The bill defines "financial interest" as an ownership interest in, an equity or debt security from, or a compensation agreement with, a sole proprietorship, partnership, firm, corporation, limited liability company or other business.

The bill also provides for several exceptions to the general prohibition against a health care provider referring a patient to a health care entity in which the health care provider has a financial interest. Specifically, the bill allows such referrals in the following circumstances: 1) in the case of an emergency, when complying with the prohibition presents an immediate danger to the life of the client; 2) in a case for which medicaid or medicare reimbursement is sought and the referral is permitted by federal law governing such cases; 3) in a case in which the health care provider will be providing health care services personally and directly to the patient within the entity to which the patient is referred; 4) in a case in which the health care entity is a publicly traded entity that meets criteria specified in the bill and in which the health care provider's interest is less than 0.5% of the entity's total equity; 5) in a case in which the referral is to a health maintenance organization in which the patient is an enrolled participant and with which the health care provider has a referral agreement; and 6) in a case in which the referral is to certain joint ventures, an ambulatory surgery center or a hospital if the health care provider has an employment or service agreement with the joint venture, ambulatory surgery center or hospital and if the health care provider's compensation is not based on the number of referrals made to the joint venture, ambulatory surgery center or hospital.

The bill also creates an exception for referrals to an entity in which the health care provider has a financial interest if there is a demonstrated need for the entity in the community. Under the bill, there is a demonstrated need for an entity in the community in any one of the following circumstances: 1) there is no other health care entity or facility of reasonable quality that provides medically adequate service; 2) requiring a patient to use another entity or facility creates a hardship for the patient; 3) the entity is formed to own or lease medical equipment that replaces obsolete or inadequate equipment in or under the control of a hospital located in a health manpower shortage area; or 4) the community meets any other demonstrated need established by rule by the cost containment commission. In addition, the structure of the

entity must satisfy the following requirements: 1) a person who is not in a position to refer a patient to the entity is able to invest in the entity on the same terms as a health care provider; 2) a health care provider who invests is not required or encouraged to make referrals to the entity as a condition of becoming or remaining an investor; 3) the entity markets or furnishes its services to referring health care provider investors and other investors on equal terms; 4) the entity does not make loans to or guarantee loans for health care providers who are in a position to make referrals; 5) the income from the health care provider's investment is based on the health care provider's equity, not on the number of referrals; and 6) the entity does not prohibit the health care provider from investing in other entities.

Under the bill, before obtaining a financial interest in an entity, a health care provider may request a determination from the cost containment commission as to whether referrals to that entity will be proper under the community need exception. If a health care provider does not request such a determination before obtaining a financial interest in an entity, he or she must request a determination before making any referral to the entity under the community need exception unless it is not practical to seek a determination for a particular referral. Under the bill, the cost containment commission has 90 days to provide any determination, whether requested before or after the health care provider obtains a financial interest in the entity to which the referral is made. If the cost containment commission does not provide a determination in the 90-day period, the health care provider may make referrals to the entity, if he or she requested the determination before obtaining a financial interest in the entity, or may make the particular referral on which the request was based, if he or she made the request after obtaining a financial interest in the entity.

The bill also provides that a health care provider may seek an advisory opinion from the cost containment commission as to whether a referral violates the bill's provisions. The cost containment commission is required to promulgate rules that are necessary to administer and enforce the provisions of the bill. The bill also allows an examining board that regulates a health care provider to discipline the health care provider for violating the provisions of the bill. Finally, the bill provides that any person who violates the provisions of the bill shall forfeit \$20,000.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** Subchapter V of chapter 150 [precedes 150.88] of the statutes is
2 created to read:

3

CHAPTER 150

1 SUBCHAPTER V

2 REFERRALS BY HEALTH CARE

3 PROVIDERS

4 **150.88 Definitions.** In this subchapter:

5 (1) "Financial interest" means an ownership interest in, an equity or debt secu-
6 rity from, or a compensation agreement with, a sole proprietorship, partnership,
7 firm, corporation, limited liability company or other business. "Financial interest"
8 does not include a directorship that is uncompensated if the director has no owner-
9 ship interest in the entity for which he or she is a director.

10 (2) "Group practice" means 2 or more health care providers organized as a part-
11 nership, professional corporation, limited liability company, foundation, not-for-
12 profit corporation, faculty practice plan, or similar association, in which all of the fol-
13 lowing apply:

14 (a) Each member, employe or independent contractor of the group provides the
15 full range of health care services that the health care provider routinely provides
16 through the use of the office space, facilities, equipment or personnel of the group.

17 (b) The services of the health care provider are provided through the group, and
18 payments received for health care services are treated as receipts of the group.

19 (c) The expenses of, and the income from, the practice are shared or distributed
20 by a method determined by the group either at the time the group is formed or by a
21 later determination revising the method initially determined by the group.

22 (3) "Health care entity" means an individual or a sole proprietorship, partner-
23 ship, firm, corporation, limited liability company or other enterprise that provides
24 health care services.

25 (4) "Health care provider" means any of the following:

- 1 (a) A nurse licensed under ch. 441.
- 2 (b) A chiropractor licensed under ch. 446.
- 3 (c) A dentist or dental hygienist licensed under ch. 447.
- 4 (d) A physician, podiatrist or physical therapist licensed under ch. 448.
- 5 (e) An occupational therapist, occupational therapy assistant, physician assis-
- 6 tant, respiratory care practitioner or dietitian certified under ch. 448.
- 7 (f) An optometrist licensed under ch. 449.
- 8 (g) A pharmacist licensed under ch. 450.
- 9 (h) A psychologist licensed under ch. 455.
- 10 (i) A social worker, marriage and family therapist or professional counselor cer-
- 11 tified under ch. 457.
- 12 (j) A speech-language pathologist or audiologist licensed or registered under
- 13 ch. 459.
- 14 **(5)** "Health care services" means services provided to a person by a health care
- 15 provider.
- 16 **(6)** "Health maintenance organization" has the meaning given in s. 609.01 (2).
- 17 **(7)** "Health manpower shortage area" means an area in this state that is in a
- 18 health manpower shortage area as determined by the federal department of health
- 19 and human services under 42 USC 254e.
- 20 **(8)** "Office practice" means the primary facility at which a health care provider
- 21 provides health care services.
- 22 **(9)** "Publicly traded health care entity" means a health care entity that satisfies
- 23 all of the following requirements:

1 (a) The entity is listed for trading on the New York stock exchange, the Ameri-
2 can stock exchange or the national association of securities dealers automated quota-
3 tion system.

4 (b) The entity had, at the end of its most recent fiscal year, total net assets of
5 \$30,000,000 or more that were related to providing health care services.

6 (c) The entity provides its services, products or facilities on equal terms to
7 health care providers who are investors and health care providers who are not inves-
8 tors.

9 (d) The entity issues one class of common stock only, without preferential treat-
10 ment among shareholders as to status, voting rights or remuneration.

11 (e) The entity does not loan funds to, or guarantee any loans for, health care
12 providers who are able to refer patients to the entity.

13 (f) The income from a health care provider's investment is not related to the
14 volume or type of referrals a health care provider makes to the entity.

15 (10) "Refer" means requesting, suggesting, sending or inducing a person to
16 seek or obtain professional services from a health care entity. "Refer" includes a
17 health care provider requesting or establishing a plan of care that includes the provi-
18 sion of health care services outside the health care provider's practice or group prac-
19 tice.

20 **150.882 Prohibited conduct.** Except as provided in ss. 150.884 and 150.886,
21 no health care provider may refer a patient to a health care entity outside the health
22 care provider's office practice or group practice if the health care provider has a finan-
23 cial interest in that entity.

1 **150.884 Exceptions.** A health care provider may refer a patient to a health
2 care entity that is outside his or her office practice or group practice and in which he
3 or she has a financial interest in any of the following circumstances:

4 **(1)** The referral is made during an emergency and compliance with s. 150.882
5 presents an immediate danger to the life of the patient.

6 **(2)** (a) The referral is one to which 42 USC 1395nn applies and is permitted
7 under 42 USC 1395nn.

8 (b) The referral is one to which 42 USC 1396b (s) applies and is permitted under
9 42 USC 1396b (s).

10 **(3)** The health care provider provides health care services personally and di-
11 rectly to the patient within the entity to which the patient is referred.

12 **(4)** The health care entity to which the patient is referred is a publicly traded
13 health care entity and the health care provider's financial interest does not exceed
14 0.5% of the entity's total equity.

15 **(5)** The health care entity to which the patient is referred is part of a health
16 maintenance organization, if the patient is an enrolled participant of the health
17 maintenance organization and the referral is made under an agreement between the
18 health care provider and the health maintenance organization.

19 **(6)** The health care entity to which the referral is made is a joint venture in
20 which the health care provider's group practice has invested for the purpose of pro-
21 viding health care services, an ambulatory surgery center or a hospital, if all of the
22 following conditions are met:

23 (a) The health care provider has an employment or service agreement with the
24 entity for specified services.

1 (b) The compensation the health care provider receives from the entity is con-
2 sistent with the fair market value of the services provided, is not determined on the
3 basis of the value or volume of referrals, and is reasonable even if no referrals are
4 made to the entity.

5 **150.886 Community need referrals. (1)** A health care provider may refer
6 a patient to a health care entity that is outside his or her office practice or group prac-
7 tice and in which he or she has a financial interest if all of the following conditions
8 are met:

9 (a) The community in which the entity is located has a demonstrated need for
10 the entity. A community has a demonstrated need for an entity in any one of the fol-
11 lowing situations:

12 1. There is no other health care entity or facility of reasonable quality that pro-
13 vides medically appropriate service.

14 2. Requiring a patient to use another entity or facility creates a hardship for
15 the patient.

16 3. The entity has been formed to own or lease medical equipment that replaces
17 obsolete or inadequate equipment in or under the control of a hospital located in a
18 health manpower shortage area.

19 4. The community meets any other demonstrated need established by rule by
20 the commission.

21 (b) The structure of the entity meets all of the following requirements:

22 1. A person who is not in a position to refer a patient to the entity is able to in-
23 vest in the entity on the same terms as those offered to a health care provider.

1 2. No health care provider who invests is required or encouraged to make refer-
2 rals to the entity or otherwise generate business for the entity as a condition of be-
3 coming or remaining an investor.

4 3. The entity markets or furnishes its services on equal terms to referring
5 health care provider investors, other investors and health care providers who are not
6 investors.

7 4. The entity does not loan funds or guarantee any loans for health care provid-
8 ers who are in a position to refer patients to an entity.

9 5. The income on the health care provider's investment is based on the health
10 care provider's equity in the entity rather than on the volume of the referrals the
11 health care provider makes to the entity.

12 6. The investment contract between the entity and the health care provider
13 does not prohibit a health care provider from investing in other entities.

14 **(2)** Before obtaining a financial interest in a health care entity, a health care
15 provider may request the commission to determine whether the entity satisfies the
16 requirements under sub. (1). A request by a health care provider under this subsec-
17 tion shall be in writing and shall contain sufficient information for the commission
18 to make a determination. The commission shall provide the determination in writ-
19 ing, stating the reasons for its determination, no later than 90 days after receiving
20 the health care provider's written request. If the commission does not provide a de-
21 termination in the 90-day period, the entity shall be considered to satisfy the re-
22 quirements under sub. (1) based on the information contained in the health care pro-
23 vider's written request and the health care provider may make referrals to the entity
24 under this section.

1 **(3)** If a health care provider has not received a determination under sub. (2)
2 that permits the health care provider to make referrals to an entity in which the
3 health care provider has a financial interest, the health care provider shall, before
4 making a referral under this section, request the commission to determine whether
5 the entity satisfies the requirements under sub. (1). A request by a health care pro-
6 vider under this subsection shall be in writing and shall contain sufficient informa-
7 tion for the commission to make a determination. The commission shall provide the
8 determination in writing, stating the reasons for its determination, no later than 90
9 days after receiving the health care provider's written request. If the commission
10 does not provide a determination in the 90-day period, the entity shall be considered
11 to satisfy the requirements under sub. (1) based on the information contained in the
12 health care provider's written request and the health care provider may make the
13 referral to the entity under this section.

14 **(4)** When making a referral under this section, a health care provider shall dis-
15 close his or her financial interest in the entity to which the patient is being referred
16 to the patient and, if it requests information regarding the health care provider's fi-
17 nancial interest, to a 3rd-party payor. If alternative facilities are reasonably avail-
18 able, the health care provider shall provide the patient with a list of the alternative
19 facilities and shall inform the patient that he or she may use the alternative facility
20 other than the one in which the health care worker has a financial interest. A health
21 care provider may not treat a patient differently if the patient chooses to use an alter-
22 native facility.

23 **(5)** No entity may receive referrals under this section unless the entity esta-
24 blishes a referral review program to ensure that referrals from health care providers
25 who have a financial interest in the entity are appropriate or necessary referrals.

1 **(6)** If compliance with the provisions of this section are not practical, as defined
2 by rule by the commission, the health care provider may refer the patient to an entity
3 in which he or she has a financial interest without submitting a written request un-
4 der sub. (3). A health care provider making a referral under this subsection shall pro-
5 vide the patient with information concerning all reasonably available alternative fa-
6 cilities.

7 **150.888 Evasion.** No health care provider may enter into an agreement or ar-
8 rangement with another person that provides for the other person to make a referral
9 that the health care provider is prohibited by this subchapter to make directly.

10 **150.89 Advisory opinions.** A health care provider may request in writing
11 that the commission provide an advisory opinion concerning whether a referral to an
12 entity violates this subchapter. The opinion of the commission requested under this
13 section shall be presumptively correct. If the commission does not provide the opin-
14 ion within 90 days after receiving the written request the health care provider may
15 make the referral and the referral shall not be considered to be a violation of this sub-
16 chapter.

17 **150.892 Rule-making authority.** The commission shall promulgate rules
18 that it determines are necessary to administer this subchapter.

19 **150.894 Penalties.** Any person violating this subchapter or a rule promul-
20 gated under this subchapter shall forfeit \$20,000 for each violation.

21 **SECTION 2.** 441.07 (1) (f) of the statutes is created to read:

22 441.07 **(1)** (f) Any act that violates subch. V of ch. 150 or a rule promulgated
23 under subch. V of ch. 150.

24 **SECTION 3.** 446.04 (4m) of the statutes is created to read:

1 446.04 **(4m)** Violating subch. V of ch. 150 or a rule promulgated under subch.
2 V of ch. 150; and

3 **SECTION 4.** 447.07 (3) (km) of the statutes is created to read:

4 447.07 **(3)** (km) Violated subch. V of ch. 150 or a rule promulgated under subch.
5 V of ch. 150.

6 **SECTION 5.** 448.01 (11) of the statutes is renumbered 448.01 (11) (intro.) and
7 amended to read:

8 448.01 **(11)** (intro.) “Unprofessional conduct” means ~~those~~ any of the following:

9 (a) Those acts or attempted acts of commission or omission defined as unprofes-
10 sional conduct by the board under the authority delegated to the board by s. 15.08
11 (5) (b) ~~and any.~~

12 (b) Any act by a physician or podiatrist in violation of ch. 161 or 450.

13 **SECTION 6.** 448.01 (11) (c) of the statutes is created to read:

14 448.01 **(11)** (c) Any act in violation of subch. V of ch. 150 or a rule promulgated
15 under subch. V of ch. 150 by a person holding a license, certificate or limited permit
16 granted by the board.

17 **SECTION 7.** 448.57 (2) (gm) of the statutes is created to read:

18 448.57 **(2)** (gm) Violated subch. V of ch. 150 or a rule promulgated under subch.
19 V of ch. 150.

20 **SECTION 8.** 448.90 (2) (gm) of the statutes is created to read:

21 448.90 **(2)** (gm) Violated subch. V of ch. 150 or a rule promulgated under subch.
22 V of ch. 150.

23 **SECTION 9.** 449.07 (1) (fc) of the statutes is created to read:

24 449.07 **(1)** (fc) Violates subch. V. of ch. 150 or a rule promulgated under subch.
25 V of ch. 150;

1 **SECTION 10.** 449.19 of the statutes is amended to read:

2 **449.19 Referral to other specialists.** If, during the course of examining a
3 person, an optometrist determines the existence of a pathological condition requiring
4 treatment outside the scope of the practice of optometry, the optometrist shall so ad-
5 vise the person and shall refer the person to an appropriate medical specialist for fur-
6 ther evaluation. No referral under this section may violate subch. V of ch. 150 or a
7 rule promulgated under subch. V of ch. 150.

8 **SECTION 11.** 450.10 (1) (a) 3m. of the statutes is created to read:

9 450.10 (1) (a) 3m. Violating subch. V of ch. 150 or a rule promulgated under
10 subch. V of ch. 150.

11 **SECTION 12.** 455.09 (1) (em) of the statutes is created to read:

12 455.09 (1) (em) Violates subch. V of ch. 150 or a rule promulgated under subch.
13 V of ch. 150.

14 **SECTION 13.** 457.26 (2) (gm) of the statutes is created to read:

15 457.26 (2) (gm) Violated subch. V of ch. 150 or a rule promulgated under subch.
16 V of ch. 150.

17 **SECTION 14.** 459.34 (2) (fm) of the statutes is created to read:

18 459.34 (2) (fm) Violated subch. V of ch. 150 or a rule promulgated under subch.
19 V of ch. 150.

20 **SECTION 15.** 459.46 (5) (b) 6m. of the statutes is created to read:

21 459.46 (5) (b) 6m. Violated subch. V of ch. 150 or a rule promulgated under
22 subch. V of ch. 150.

23 **SECTION 16. Initial applicability.**

24 (1) This act first applies to referrals made on the effective date of this subsec-
25 tion.

