GASSMAN CROTTY & DENICOLO,

ATTORNEYS AT LAW

THE THURSDAY REPORT

Issue #246 Thursday, June 28, 2018

Re: The Summersday Report

In This Issue:

[1] The authors thank Florida Bar Journal Tax Section Editor Michael D. Miller, JD, LL.M., and our law clerk Scotty Schenck for their extensive work on this outline.

Quote of the week

Don't Believe Everything You Read On The Internet just because there is a picture with a quote by it.

-Abraham Lincoln on D-Day (the internet told us this is true)

Celebrate June 28 like you have never celebrated before.

Never before on June 28 has a newsletter like the Thursday Report been unleashed throughout the free world.

Please let us know how your June 28, 2018 has been impacted by this Thursday Report.

30% of any population taking a placebo notes a significant improvement to their condition. Let us capsulize the latest legal, tax, and mediocre humor for your enjoyment or at least thanks for not sending us to junk.

Avoid Catastrophe with Knowledge: Recent Compliance Issues that Medical Practices Need to Know About

by Alan Gassman

The following was presented to a group of physicians in Tampa on June 17, 2018

Although this past Florida legislative session was thankfully not very active when it comes to health care, there are still a few noteworthy legislative changes that pertain to physician practices. The following discussion pertains to legislative changes made this last session that have been signed by the Governor or became law without his signature, therefore they are final. Please note that there were other relevant bills during this past session that were not included in this article.

The primary legislative topics relevant to physicians that will be discussed today include: (1) direct primary care agreements; (2) changes in controlled substance regulations; (4) new public record exemptions; (6) new health care facility regulations; (6) the Targeted Probe and Education (TPE) process; (7) HIPAA; (8) digital security; (9) Medicare registration and revalidation; (10) compliance and Medicare regulations; (11) and nurse practitioners and supervisory physicians.

I. Direct Primary Care Agreements

House Bill 37, effective July 1, 2018, will allow primary care physician and group practices to enter into private contracts with patients, legal representatives, and their employers to provide primary care for direct "capitated" or other non-insurance related payment without violating the insurance laws which prevented physicians from charging fixed annual or monthly amounts for "whatever the patient needs" for primary care, which is defined as described below.

Primary care providers include Medical Doctors, Doctors of Osteopathic Medicine, Chiropractors, Nurse Practitioners, and Physician Assistants licensed under Fla. St. §§ 458 and 459. The bill also allows group practice entities employing these providers to enter into such agreements.

The agreement can include all of the screening, assessment, diagnosis and treatment of a patient that are conducted within the competency and training of a primary care provider. The law is designed to encompass anything that the typical primary care provider learns in residency and is therefore competent to perform. The law prevents a primary care doctor from including services in the agreement that are not within the competency of a normally trained primary care physician, even if a primary care physician is competent in the area and routinely provides these services.

Specifically, the statute on this reads as follows:

624.27 Direct primary care agreements; exemption from code.—
(1) As used in this section, the term:
(a) "Direct primary care agreement" means a contract between a primary care provider and a patient, a patient's legal representative, or a patient's employer, which meets the requirements of subsection (4) and does not indemnify for services provided by a third party.
(b) "Primary care provider" means a health care provider licensed under chapter 458, chapter 459, chapter 460, or chapter 464, or a primary care group practice, who provides primary care services to patients.
(c) "Primary care services" means the screening, assessment, diagnosis, and treatment of a patient conducted within the competency and training of the primary care provider for the purpose of promoting health or detecting and managing disease or injury.
(2) A direct primary care agreement does not constitute insurance and is not subject to the Florida Insurance Code. The act of entering into a direct primary care agreement does not constitute the business of insurance and is not subject to the Florida Insurance Code.
(3) A primary care provider or an agent of a primary care provider is not required to obtain a certificate of authority or license under the Florida Insurance Code to market, sell, or offer to sell a direct primary care agreement.
(4) For purposes of this section, a direct primary care agreement must:
(a) Be in writing.
(b) Be signed by the primary care provider or an agent of the primary care provider and the patient, the patient's legal representative, or the patient's employer.
(c) Allow a party to terminate the agreement by giving the other party at least 30 days' advance written notice. The agreement may provide for immediate termination due to a violation of the physician-patient relationship or a breach of the terms of the agreement.

(d) Describe the scope of primary care services that are covered by the monthly fee.
(e) Specify the monthly fee and any fees for primary care services not covered by the monthly fee.
(f) Specify the duration of the agreement and any automatic renewal provisions.
(g) Offer a refund to the patient, the patient's legal representative, or the patient's employer of monthly fees paid in advance if the primary care provider ceases to offer primary care services for any reason.
(h) Contain, in contrasting color and in at least 12-point type, the following statement on the signature page: "This agreement is not health insurance and the primary care provider will not file any claims against the patient's health insurance policy or plan for reimbursement of any primary care services covered by the agreement. This agreement does not qualify as minimum essential coverage to satisfy the individual shared responsibility provision of the Patient Protection and Affordable Care Act, 26 U.S.C. s. 5000A. This agreement is not workers' compensation insurance and does not replace an employer's obligations under chapter 440."

A. Eligibility

In order to qualify, the agreement between the primary care provider and the patient must be in writing and signed by both parties. Specifically, there must be one signature by the patient, the patient's legal representative, or an employer and a second signature by the practitioner or agent. The term "agent" refers to an administrator or someone who is authorized by the practitioner to sign on his or her behalf.

B. Specific Employer-Employee Requirements

As previously stated, an employer may be the signor on behalf of a patient for one of these prepaid agreements. This means, an employer could essentially provide this as a benefit to its employees. Under this set up, an employer could enter into an agreement with a primary care group at a fixed annual fee to provide these services directly to its employees, rather than going through the employer's health insurance. However with the benefits of the employer-employee prepaid agreements, comes additional formalistic and substantive requirements. Additional substantive requirements include a termination provision, specification of monthly and add on fees, as well as restrictions on defining the scope of primary care services. Formalistic requirements that must also be considered include formatting preferences, standard legal agreement clauses, and clear patient-friendly drafting.

C. Potential Application Problems

Physicians must be very careful to understand the rules and grey areas that apply with respect to coordination of these arrangements with health insurance plans and Medicare or other governmental program (like Medicaid, Tri-Care, and VA program recipients). For example, a provider enrolled in Medicare cannot provide any services that Medicare pays for compensation, so serious concierge providers withdraw from Medicare or provide very limited services to Medicare recipients.

Providers who have signed managed care plans with health insurance carriers or employer organizations will find that the terms of such agreements preclude charging plan members for any services provided under the plan, or from treating any patients of the practice better than plan members.

Some practices keep managed care plans under one company and put the concierge practice into a separate company, but catastrophic issues can arise in the health care law when one provider is working for two separate practice companies. These separate entity structures can cause loss of the legal right to have a medical practice or to bill Medicare, so these arrangements need to be carefully considered with competent health law counsel.

Also, while these agreements would be a great benefit to patients who are uninsured or have potentially high deductibles, it is important to be legally protected from any patient who might sue a doctor for abandonment, failure to provide necessary services or deceptive trade practices if a patient may be without treatment when needing services and facility access that is beyond the scope of the primary care doctor's permitted scope of services.

II. Public Record Exemptions

House Bill 1005, effective July 1, 2018, will provide new exemptions from the public record requirements for certain identifying and location related information for current or former directors, managers, supervisors, nurses, and clinical employees of addiction treatment facilities. Florida has a strong public records law in Chapter 119 of the Florida Statutes which allows any person to obtain information held by public agencies. Public agencies under this chapter include public entities that are health care providers. For example, many hospitals are owned and operated by health care districts, so in the past certain items like schematics and blue prints of the facility could be accessed by the general public.

III. Changes in Health Care Facility Regulations

Senate Bill 622, effective July 1, 2018, is a very comprehensive bill covering many areas relating to people and facilities regulated by the Agency for Health Care Administration such as nursing homes, assisted living facilities, birthing centers, and hospitals. However there are a few changes this bill makes that are especially important for physicians including: licensure requirements.

A. New Licensure Requirements

The first major change is the elimination of state licensure requirements for clinical laboratories. Clinical laboratories are regulated at the federal level by the Clinical Laboratory Improvement Act (CLIA). Before the recent changes, Florida was one of the few states that still independently licensed clinical labs. Now CLIA certified labs will no longer have to be licensed by the State of Florida. One legislative glitch that will doubtlessly be repaired is that technically clinics may not be excluded from the anti-kickback prohibitions under Chapter 456 of the Florida Statutes.

This does not preclude providers from sanction if they receive compensation or financial remuneration in a clinic that he or she refers to. Criminal Patient brokering sanctions can still be

enforced by the state attorney's office, and the Medicare anti-kickback and the stark laws still apply when Medicare or other federal money is involved.

B. Changes to Licensing Exemptions

Health care clinics have to be licensed in Florida unless they are exempt. A number of these exemptions apply to health care clinics wholly owned by licensed practitioners or immediate family. There are no requirements to get a certificate of exemption although many payers require it so clinics can prove they are operating lawfully, but the state doesn't specifically require that an exempt clinic get a certificate of exemption. In the past, if a clinic applied for a certificate, the certificate was valid indefinitely. Now, these certificates must be renewed every two years. The purpose of this new renewal requirement is to ensure certificates are current (i.e. change of ownership).

C. Background Screening

Any type of licensed facility regulated by the Agency for Health Care Administration (ACA) is required to perform background screening. Now, background screening is expanded to controlling interests, which include officers, directors, and 5% or more owners. Previously, these individuals did not have undergo background screening unless the ACA had reason to believe that they had some criminal history. This is concerning when you consider there may be controlling interests that may now not be eligible because they are unable to pass a background screening, but in past years screening was never required.

IV. The New Targeted Probe and Education (TPE) Process

Under the new Administration, CMS has made it a priority to take steps towards a more provider friendly structure. Since October 1, 2017, First Coast Service Options (FCSO) has begun implementation of the New Targeted Probe and Education (TPE) process which is much more favorable to providers.

A. The Education Based Approach

In the past, CMS has taken a more penalty-based approach to auditing. If a physician appeared to be billing outside the norm for a particular code he or she would immediately go into overpayment. Now, CMS is taking a more education-based approach to auditing—and this is something that physicians should take full advantage of. Part of the reason CMS has proposed this new process, is to help providers become a more integral part of auditing determinations. In doing so, CMS will be able to limit the number of cases and provide relief for the backlogged appeals system.

B. The New Three Step Process.

Under the new TPR process, providers will have the opportunity to correct billing issues through a three-round process. For the first round, approximately 30 charts are requested and evaluated to

determine if there are any instances of overpayment. If overpayment is determined on any of the line items a demand is made for overpayment only for those line items in the audit as the overpayment is not extrapolated. If there is a low error rate, the audit will end there. If there is a significant error rate, another round will be initiated. Prior to the next round being initiated, there will be an educational process and then round two will start in approximately 45 days with another request for approximately 30 charts to evaluate for overpayment. If the results are similar to round one, another round will be initiated. If there are unfavorable results in round three then the overpayment may be extrapolated over the universe which could lead to significant overpayment and/or possible prepayment review.

V. How to Avoid HIPAA Violations

Although there have been no recent legislative changes to HIPAA regulations, physicians should always proactive when considering ways to avoid protect patients from HIPAA violations. Especially since the Office of Civil Rights (OCR) is taking action now more than ever to crack down on providers. Many of the issues that lead to HIPAA violations can be reasonably avoided by practitioners, and ultimately stem from improperly trained medical staff and unsecure technology.

A. Training and Education for Medical Staff

There are myriad of unfortunate circumstances where healthcare providers have been held liable for the actions of uninformed medical staff, when violations could have been easily avoided by implementing and maintaining basic training and education standards. All staff and personnel should be trained upon hire and receive annual training. It is recommended that written confirmation of the training be kept on file.

One fundamental standard that should be emphasized in training is the "Minimum Necessary" standard. Meaning, confidential patient information should only be utilize and disclosed minimally, and to the extent necessary, to complete the task at hand. Although straight forward, this standard applies across all forms of patient communication and can lead to serious violations of patient confidentiality if not upheld in all forms of communication.

Example 1 –In one instance a hospital employee left a telephone message with a patient's daughter, and provided confidential information relating to the patient's medical condition and treatment plan. This event lead to a full OCR investigation into the hospitals training requirements for confidential communications and the OCR determined that the hospital was lacking sufficient training and education procedures. To resolve this issue, the hospital developed and implemented several new procedures that specifically trained all medical staff on the minimum necessary standard for confidential patient communications, as well as, how to properly review registration information for patient contact directives.

VI. The Need for Enhanced Digital Security

In addition to properly training medical staff, there is a significant correlation between patient confidentiality violations and inadequate electronic security protection. To avoid these issues,

physicians need to ensure all confidential information stored on laptops and cellular devises is properly secured and all medical staff with access to digital information understand the proper protocol for utilizing these sources.

Example 2—Technology related HIPAA violations may occur in the event that devises are stolen or removed from a medical facility. If a health care provider fails to implement adequate security measures (i.e. password protection) on its devises, doctor-patient confidentiality may be breached, and the provider will be held liable.

Example 3— Recently, federal officials began investigation on what is reported to be the "third-largest data breach" recorded by the US Department of Health and Human Services. The responsible party is a San Francisco-based healthcare provider that failed to properly check the formatting of an email list provided by one of its vendors. This oversight resulted in a sorting error that inadvertently sent misaddressed emails to 55, 947 patients. These emails included detailed confidential patient information. To avoid this issue, physicians must make sure that their systems are frequently updated and screened to avoid unintentional errors.

Example 4—Training for medical staff is also essential when it comes to portal access and usage. In most cases, improper usage is due to a lack of training and/or procedural guidance. A common example of these violations, is seen when medical staff receives oral communication to access health records but fails to obtain written authorization to utilize portal access on behalf of the practice. To avoid disclosure violations, providers need to ensure that employees have had appropriate training on proper portal usage and receive oral and written confirmation that they are properly utilizing access privileges.

VII. Medicare Registration and Revalidation Issues

Another important tip for providers—especially those with licensing in multiple states— is to always voluntarily relinquish licensing they do not intend to renew. Failure to relinquish medical licensing is a common occurrence for providers that may result in suspension of their licensing. To avoid this issue, physicians must always voluntarily relinquish their licensing and never let them lapse

In the event that adverse actions occur, providers and suppliers are required to disclose reportable final adverse legal actions to the Medicare Administration and attach all documentation concerning the type of final adverse action being reported, the date that the final adverse action occurred, and what court or governing/administrative body imposed the action. The documentation must be furnished regardless of whether the adverse action occurred in a state different from that in which the provider seeks enrollment or is enrolled. Failure to comply with these reporting requirements may result in the revocation of the physicians Medicare billing privileges.

Example 5— If a provider moves to FL and lets their Medical License lapse in another state—because they are not planning on returning—this may lead to an adverse action on their Medicare provider number and must be reported to FSCO the Medicare Contractor for Florida or their Medicare provider number in FL will be suspended.

XIII. The Gap in Compliance Plans and Medicare Rules and Regulations

It is also vital to consider Medicare Rules and Regulations when constructing compliance plans. Failure to do so can lead to substantial financial repercussions.

Example 6 – If you have a clinical lab that recently signed a Corporate Integrity Agreement (CIA) with the Department of Justice (DOJ) it appears it will cost in excess of $200,000 a year to comply with the CIA. In addition to cost of complying with the CIA, the provider has to deal with the other issues of overpayment, penalties and lost income due to the reasons they got into trouble in the first place.

IX. Nurse Practitioners and Related Disciplinary Actions

Under Florida Law, nurse practitioners are not to perform acts of medical diagnosis and treatment without physician supervision. Pursuant to Fla. St. § 458.348, it is the responsibility of supervisory physicians to formally establish the protocol between himself or herself and the nurse practitioner. Failure on the part of the supervising physicians to ether establish reasonable protocol or failure to properly uphold the standards set, may put the supervisory physician at risk for serous liability. To avoid this issue, the following elements must be considered by physicians when establishing a supervisory relationship with nurse practitioners.

A. Notice of Relationship – When a physician enters into a formal supervisory relationship with a nurse practitioner the physician shall submit notice to the board within 30 days of entering into the relationship, notice must also be provided within 30 days after the termination of the supervisor relationship.

B. Limitation on the Amount of Supervisor Locations –A physician engaged in providing primary health care services may not supervise more than four offices in addition to the physician's primary practice location. A physician engaged in providing specialty health care services may not supervise more than two offices in addition to the physician's primary practice location. In either case, the physician must provide the board with the addresses of all offices where he or she is supervising which are not the physician's primary practice location.

C. Certification – The supervisor physician must be board certified.

D. Distance – All offices that are not the physician's primary place of practice must be within 25 miles of the physician's primary place of practice or in the same county. However, the distance between any offices may not exceed 75 miles.

E. Schedule Notice – A supervisor physician supervising an office in addition to his or her primary office must post in each office a current schedule of the regular hours when the physician will be present in that office and the hours when the office is open while the physician is not present.

X. Licensing under The Agency for Health Care Administration (AHCA)

It is important for solo practitioners to plan and secure their assets in order to avoid the repercussions of lost business and contracts in the event of an emergency. One of the best ways to ensure this is to register the practice with the AHCA, rather than solely relying on the licensing of a sole practitioner for an exemption from obtaining an AHCA Health Care Clinic License.

In the event that the practitioner's license is terminated unexpectedly (i.e. death), and the practice is legally operating under the practitioner's license, the practice will not be eligible to bill for services rendered for 90 days until it can be registered through the AHCA. In the meantime, not only is the practice forced to close its doors and lose business, the practice also runs the risk of losing its managed care contracts if the contracts are in the name of the individual provider.

When a practice is contracting with managed care, whether as a solo practice or a group practice, all contracts should be through the corporate entity not the individual provider. It is understandable that each individual practitioner must be credentialed with the payer as part of the process; however, the individual practitioner should ensure they reassign their benefits to the corporate entity and that all payments are made to the corporate entity.

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Our friends at EasyLivingFL.com had this to say about the new pain medication laws:

How Will Florida's New Law on Prescribing Pain Medications Effect You?

Typically if you have surgery, dental work, or happen to slip and fall and wake up later with pain your doctor may prescribe a pain reliever that often contains an opioid. It is not unusual to receive a prescription with 15-30 pain tablets, prescribed every four hours as needed. That will all be changing soon.

Beginning July 1, 2018 a prescription for a Schedule II opioid for the treatment of "acute pain" may not exceed a three-day supply. The three day limit may be increased to seven days if determined to be medically necessary with proper documentation and "Acute Pain Exception" written on the face of the prescription. The prescriber must document in the patient's medical record the acute medical condition and lack of alternative treatment options that justify deviation from the three day supply limit.

Acute pain is statutorily defined as "the normal, predicted, physiological, and time-limited response to an adverse chemical, thermal, or mechanical stimulus associated with surgery, trauma, or acute illness." It's almost easier to understand what is defined as non-acute pain. Acute pain ***does not*** include pain related to cancer, terminal conditions (death to occur within one year), pain treated with palliative care (incurable, progressive illness or injury), or traumatic injuries with an Injury Severity Score of 9 or greater (an internationally recognized

scoring system). Schedule II opioids you may recognize include: codeine, hydrocodone, morphine, oxycodone, and amphetamines. A complete list of Schedule II medications is listed in Chapter 893.03 of the Florida Statutes.

If you are prescribed a medication that includes a controlled substance your prescription is entered into a statewide database. The Department of Health is required to maintain this electronic system to collect and store controlled substance dispensing information in Florida. The Prescription Drug Monitoring Program (PDMP) known as E-FORCSE, Electronic-Florida Online Reporting of Controlled Substances Evaluation Program maintains patient's controlled substance dispensing history. The dispensing of a controlled substance must be reported to the database no later than the next business day. The new law requires health care practitioners to consult the database to review the patient's controlled substance history before prescribing or dispensing a controlled substance for a patient who is 16 years of age or older. This requirement is for almost any controlled substance, for any reason, not just acute pain or chronic nonmalignant pain.

One of the goals of the PDMP is to help prevent drug abuse, however for the prescribing practitioner there are not specific guidelines of how they should respond or prescribe after reviewing the patient's controlled substance dispensing history. This may need to be tackled by the State Medical Boards.

The Center for Disease Control states Opioids are the main driver of drug overdose deaths. Florida had over 4,500 deaths related to overdose in 2016. In 2017 Governor Scott declared Florida's Opioid epidemic a Public Health Emergency. Finding the balance between treating patients with pain and discovering who may be an addict is challenging.

Medical providers registered with the Drug Enforcement Agency (DEA) and authorized to prescribe controlled substances must take a board-approved two hour continuing education course on prescribing controlled substances by January 31, 2019. (4) While this course may be helpful for understanding the new law I have to wonder how much education will be made available or required to recognize, diagnose and treat addiction.

More information and FAQ's are available at Florida Take Control, a website describing the new law is available at http://www.flhealthsource.gov/FloridaTakeControl/.

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One Law Student's Efforts to Change the Lives of Many

By: Sandy Czarnecki and Yasmin Bakhtyari

Stetson Law Students Sandy Czarnecki and Yasmin Bakhtyari established BY GRACE in 2017 as a 501(c)(3) organization after serving the Haitian community for two summers, and have impressed us with their dedication and efforts.

Our founder, Sandy Czarnecki, established BY GRACE in 2017 after serving the Haitian community for two summers. She sought a way to help impoverished children cycle out of poverty through the power of education.

BY GRACE, Corporation, is a 501(c)3 nonprofit organization operating out of Tampa, Florida. Our mission is to improve the quality of life for children in developing nations through education and community development. We envision a world where each person has the opportunity to reach his or her full potential and experience life in all its fullness.

BY GRACE currently addresses the educational needs of students in Mare-Rouge, Haiti through The Haiti Education Fund program. The program provides funding for tuition, uniforms, learning materials and a hot lunch each day for sponsored students.

The company's board is conscious of the effects poverty has on education in Haiti and are committed to growing and adapting The Haiti Education Fund to meet Mare-Rouge's emerging educational needs. Being the poorest country in the western hemisphere, many families in Haiti are unable to support the education of their children, which puts a generation of Haitian youth at risk of lacking the knowledge and basic skills to either succeed in the basic labor force or proceed to higher education. Primary school enrollment is roughly 85%, where less than 22% of children move on from primary to secondary education. Furthermore, one-third of girls over the age of six in Haiti do not attend school.

The cost of sponsoring a child through the Haiti Education Fund is $175 USD. Furthermore, we look to expand our work into other developing nations in the near future and hope you will join us on our journey to make a difference!

Contact information:
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What are you doing to help the universe? Reading the Thursday Report may be enough, but there is always more.

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Florida Doctor's Guide to Section 199A: Tax and Business Planning Consideration *Part 1 of 3.*

By Alan Gassman and Brandon Ketron

The 1,097-page Tax Cuts and Jobs Act (the "Act")[2] was enacted on December 22, 2017. The IRS may issue guidance on some key aspects of the Act in the summer of 2018, but it will take many years to sort out a number of the issues discussed in this article.

This article is written to enable readers with little or no tax background (our non "code head" colleagues and friends) to understand the income tax planning that may take place for Florida physicians and medical practices in 2018. The new laws will benefit thousands of Florida physicians who may need some degree of restructuring as soon as possible during 2018 to maximize tax benefits. Readers who want to understand how the tax law works in this area, or who need a refresher should also benefit from reading this article and its sometimes-repetitive examples.[3]

Important Definitions and Terminology:

The authors recommend skimming the first two sentences of each definition and returning as needed.

[2] The Act is officially titled "An Act to provide for reconciliation pursuant to Titles II and V of the concurrent resolution on the budget for fiscal year 2018."

[3] Thanks to Professor Jerry Hesch for pointing out that repetition and examples, preferably without citing very many Tax Code Sections, are often the primary stepping stones to understanding tax law.

1. **W-2 Wages** – Compensation paid to employees of a flow-through entity, including S-Corporation owners[4] and non-owner employees of all flow-through entities, that must be reported to the IRS within 60 days of payment to qualify as W-2 wages for the Wage and Qualified Property Test as described below. Wages, themselves, will never qualify for the 20% deduction. High-income taxpayers cannot qualify for the 20% deduction if the entity that provides the flow-through income does not have sufficient W-2 Wages or "Qualified Property" as described below. Wages do not include amounts paid to independent contractors. It is noteworthy that the IRS may re-characterize wages as being dividends from a company to its shareholders, or dividends as being wages.

Which employees, below, can be paid W-2 wages by the business structures listed on the right?	**Sole Proprietorship**	**Partnership**	**S Corporation**
Owners/employees with ownership interest	No	No	Yes
Non-owning employees	Yes	Yes	Yes
Spouses (with no ownership interest)	Yes	Yes	Yes
Independent contractors	No	No	No

2. **Guaranteed Payments** – Payments made by the partnership to a partner that would otherwise be considered as "wages" are called "Guaranteed Payments" under Internal Revenue Code Section 707(c) and are not considered to be wages for purposes of the Section 199A wage measurement

[4] Wages paid to a partner are considered guaranteed payments and are not W-2 wages. Owners of Sole Proprietorships, Schedule C, and E entities may also not pay themselves W-2 wages.

rules. This can cause confusion, and loss of the 20% deduction.[5]

3. **Qualified Property** – Physical depreciable assets, including real estate, furniture, and equipment of a flow-through entity or an individual taxpayer that has not yet exceeded the longer of its depreciable life or 10 years. For example, non-residential real property placed in service after 1986 has a depreciable life of 39 years, while equipment normally will have a 5 or 7 year life depending upon its nature. As a result, non-residential real property may be used for the Wage and Qualified Property Test for 39 years, and equipment for 10 years.

Below is a chart that shows examples of some depreciable periods for property:

Type of Property	Depreciable Period	Depreciable Period For 199A Purposes
Non-residential Real Property (post-1986)	39 Years	39 Years
Office Furniture (Desks, files, safes, etc.)	7 Years	10 Years
Automobiles and Taxis	5 Years	10 Years
Light General Purpose Trucks	5 Years	10 Years
Information Systems (computers, card readers, printers, etc.)	5 Years	10 Years

4. **Effectively Connected Income** – Income that is derived from assets used in or held for use in the U.S., and the activities of the U.S. business were a material factor in the realization of such income. The 20% deduction does not apply for non-U.S. trade and business income with the exception of Puerto Rico.[6]

5. **Taxable Income** – An individual's or married couple's Taxable Income consists of all income,

[5] Payments from a partnership do not have to be "guaranteed" from a state contract law standpoint in order to be characterized as a Guaranteed Payment. This causes a lot of confusion, even for experienced tax lawyers.
[6] IRC § 199A(f)(1)(C).

minus deductions for permitted business expenses and certain above-the-line deductions, minus the greater of (1) a standard deduction of $12,000 for a single taxpayer, or $24,000 for a married couple filing jointly, or (2) the amount of the taxpayer's itemized deductions.[7]

Additionally, for the purposes of this article:

[7] Itemized deductions consist of permitted mortgage interest deductions (on up on $750,000 of interest or up to $1,000,000 of debt incurred prior to Dec. 15, 2017), up to $10,000 of state and local taxes (including real estate taxes), charitable donations, and medical expenses exceeding 7.5% of gross income. *See* IRS Form 1040, Schedule A.

1. We refer to the trade or business entity as being the "flow-through entity." This includes only entities treated for income tax purposes as S corporations, partnerships, and individually-owned trades and businesses. C corporations and other taxable entities do not qualify.

2. We refer to the person, married couple, trust, or estate that owns the flow-through entity interest, actually pays taxes, and can qualify for the 199A deduction as the "taxpayer."

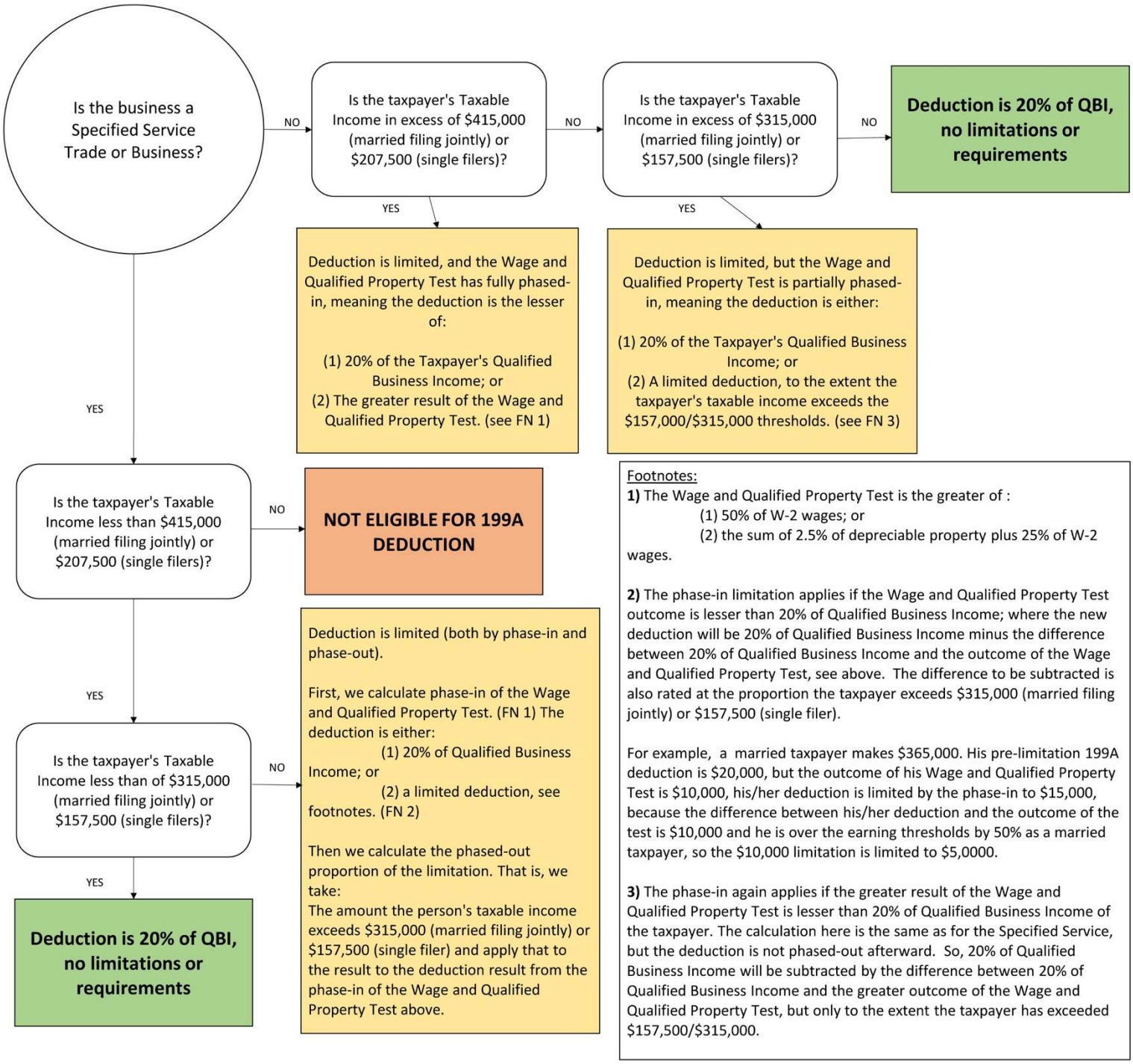
SECTION 1. C Corporation Discussion.

The Act provides that all C corporations are taxed at a flat 21% of taxable income. In addition, Florida imposes a 5.5% income tax on C corporation income; however, the Florida income tax is deductible by the C corporation against the federal income tax, bringing the effective combined state and federal tax rate to 25.345%. C corporation shareholders also pay income tax on dividends and liquidation proceeds, bringing the highest combined C corporation state, federal and Medicare tax rate to 43.11%.

Income Bracket	2017 C Corporation Rates	New, 2018 C Corporation Rate
$0-$50,000	15%	21%
$50,001-$75,000	25%	
$75,001-$100,000	34%	
$100,001-$335,000	39%	
$335,001-$10,000,000	34%	
$10,000,001-$15,000,000	35%	
$15,000,001-$18,333,333	38%	
$18,333,334+	35%	

Therefore, many C corporations will convert to S corporation status for the new 199A deduction. Although the "unrecognized built-in gain rules" and a "sting tax" can apply to S corporations that converted from C corporations, these can often be avoided with proper planning.[8]

[8] *See* BNA Portfolio 731-3rd: S Corporations: Corporate Tax Issues, Detailed Analysis, I, C, 7 and Detailed Analysis, I, B, 5; Traum, Taking the "Sting" Out of S Corporations' Earnings and Profit.



Be sure to check back for part 2 in the next issue

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Richard Connolly's World

Insurance advisor Richard Connolly of Ward & Connolly in Columbus, Ohio often shares pertinent articles found in well-known publications such as *The Wall Street Journal*, *Barron's*, and *The New York Times*. Each issue, we feature some of Richard's recommendations with links to the articles.

The attached article from Leimberg Information Services says:

"Folks, it's over. Risk-pooled 831(b) and 501(c)(15) captives are* no mas**. *The Fat Lady has sung, and now it* ***is just a matter of getting out of the theater alive.

With both **Avrahami** *and* ***Reserve Mechanical*** *in their back pocket,* ***IRS*** *representatives now* ***have little incentive to take a settlement*** *where less than the full amount of the taxes owed are paid. Probably now the only thing that one will be able to negotiate with the IRS about is* ***whether there will be penalties and if so how much."***

To view the full article, click HERE

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Calling All Beta (Fish) Testers!

Our office has been working on a calculator to estimate Section 199A deductions for practitioners as part of a new e-book we have been working on. It has three parts: a general deduction calculator based on flow-through income, total taxable income, etc., and two calculators for the Wage and Qualified Property Tests that determine if a taxpayer's deductions will be limited.

We are looking for individuals to test the limits of our calculator, and are willing to dig around for bugs and other errors (sorry, no fish here). Ideally, this person would:

- have a working knowledge of taxes, or be a CPA, tax lawyer, etc.
- have a grasp of Section 199A basics or be willing to learn
- have gills, or be able to breathe underwater

If you are interested, please email scotty@gassmanpa.com or alan@gassmanpa.com for more details! The first 5 people to complete a testing of the calculator and send a report back will earn a bucket from Kentucky Fried Chicken.

Humor

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Upcoming Seminars and Webinars

Speaking of Hot Topics - Please Put Wednesday, August 29 from noon to 1:30 p.m. (EST) on your calendar for this free webinar, and thanks so much to Jonathan Blattmachr, Marty Shenkman and Jerry Hesch for their participation.

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— Travis Arango, Stetson Law Graduate 2015

FRIDAY, APRIL 6, 2018
11:00 A.M. TO 5:00 P.M.
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This workshop will include the following sessions:

Session 1: Goals and How to Reach Them
Session 2: Eliminating Frustrations and Obstacles
Session 3: Solving Problems & Developing Strategies
Session 4: How to Effectively Attract, Serve, and Retain Clients
Session 5: How to Develop a Great Team
Session 6: Putting it All Together!
***Optional* Session 7:** Special hour for estate planners

Alan S. Gassman is a practicing lawyer and author based in Clearwater, Florida. Mr. Gassman is the founder of the firm Gassman Law Associates, P.A., which focuses on the representation of physicians, high net worth individuals, and business owners in estate planning, taxation, and business and personal asset structuring.

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For more information email
agassman@gassmanpa.com

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All others - $125

Stetson Law School—Gulfport Campus 1401 61st Street South St. Petersburg, FL 33707

Estate Planning Retainer Agreements and Engagement Letters
Thurs. July 12th, 12pm EST - Free Webinar

Sponsored By:

InterActive Legal and Peak Trust Company

<u>Speakers:</u> Martin Shenkman, Esq. and Sandra Glazier, Esq.

<u>Course Description</u>:

Retainer agreements (engagement letters) are critical to establish and document the understanding the practitioner has with the client. They are an important step that practitioners can take to identify expected actions and protect practitioners from a myriad of potential issues, or worse ethical problems or suits. What should practitioners consider including in a retainer agreement? How has technology changed the issues that might be addressed? Are text messages an issue? Why is it important to communicate billing practices? What options are available in doing so? What special precautions might be considered and addressed when representing married couples? Should practitioners consider warning clients about

their obligations to the estate planning process? What caveats might practitioners consider inserting into the agreement? When should agreements be revisited? What are the logistics of retention and conflict waiver agreements? Are there benefits to addressing the practitioner's obligations?

REGISTER HERE

Calendar of Events

Newly announced events in RED

EVENT	DATE/TIME	LOCATION	DESCRIPTION	REGISTRATION	FLYER
MER Primary Care Conference	Thursday, July 5-7, 2018	Yellowstone, Wyoming	Alan will be speaking at the Medical Education Resources (MER) event	Contact: Agassman@gassmanpa.com	Click Here
Maui Mastermind Business Law Webinar	Wednesday, July 11, 1:00PM-2:00PM	Gotowebinar.com	Corporate and LLC Structuring - Business, Creditor, Tax and Family Planning Considerations	Contact: Agassman@gassmanpa.com	
All Children's Webinar	Wednesday, August 29, 2018	Gotowebinar.com	"Hot Topics for a Hot Summer" With Jonathan Blattmachr, Martin Shekman & Jerome Hesch	Contact: Agassman@gassmanpa.com	
Professional Acceleration Workshop	Friday, September 7, 2018. 11AM-5PM	Stetson Law School—Gulfport Campus 1401 61st Street South St. Petersburg, FL 33707	Reach Your Personal Goals, Increase Productivity and Accelerate Your Career.	Contact: Agassman@gassmanpa.com	Click Here
Florida Osteopathic Medical Association Conference	September 14-16, 2018, 7:30 am – 8:30 am	2900 Bayport Drive Tampa, Florida 33607	Mid-Year Seminar	Contact: Agassman@gassmanpa.com	
University of Florida Advisers Network	September 14, 2018	University of Florida	Dynamic Planning Strategies for the Well Informed Advisor	Contact: Agassman@gassmanpa.com	
Leimberg Webinar	Thursday, September 20, 2018, 3:00 PM – 4:30 PM	Leimbergservices.com	Bankruptcy	Contact: Agassman@gassmanpa.com	
FBA Trust & Wealth Management Conference	Thursday, September 28, 2018	Ritz Carlton, Sarasota	Creditor Protection and Planning for Addicted Individuals	Contact: Agassman@gassmanpa.com	
Notre Dame Tax Institute	October 11-12, 2018	South Bend Indiana	Planning Under Section 199A and Associated Tax and Practical Considerations	Contact: Agassman@gassmanpa.com	
Las Vegas Life Insurance Conference	October 25, 2018	Las Vegas, Nevada	Dynamic Planning techniques for Cautious Advisors Note-this is a private event	Contact: Agassman@gassmanpa.com	

AAA-CPA Conference	November 5, 2018	Miami, FL	Topics to be Announced	Contact: Agassman@gassmanpa.com	
MER Primary Care Conference	November 8-11, 2018	JW Marriott Los Cabos Beach Resort & Spa	1. Lawsuits 101 2. Ten Biggest Mistakes That Physicians Make in Their Investment and Business Planning 3. Essential Creditor Protection & Retirement Planning Considerations. 4. 50 Ways to Leave Your Overhead & Increase Personal Productivity.	Contact: Agassman@gassmanpa.com	
Mote Vascular Foundation Symposium	November 30 – December 2, 2018	The Westin-Sarasota, 1175 N. Gulfstream Ave, Sarasota, FL 34236		Contact: Agassman@gassmanpa.com	

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