

DONOGHUE BARRETT & SINGAL, P.C.
Ten Weybosset Street
Providence, RI 02903
(401) 454-0400 Phone
(401) 454-0400

MEMORANDUM

TO: RIMS Council Members

FROM: Jeffrey F. Chase-Lubitz, Esq.
Richard Goldstein, Esq.

RE: Potential Legal Challenge to the Provider Tax on Imaging and
Ambulatory Surgery Centers

DATE: July 24, 2007

1. **Background:**

As a component of the FY08 State Budget, the Rhode Island Legislature amended the state's tax law to include "surcharges" on providers furnishing imaging services and all entities licensed as freestanding, physician or podiatry ambulatory surgery centers. The provisions are summarized below:

Imaging Services Surcharge (R.I.G.L. § 44-65)

- 2% surcharge on "net patient revenue" resulting from imaging services (despite use of the term "net," the definitions suggest that the 2% will be applied to gross collections on imaging services.)
- "Imaging services" are defined as "all the professional and technical components of x-ray, ultrasound (including echocardiography), computed tomography (CT), magnetic resonance imaging (MRI), positron emission tomography

(PET), positron emission tomography/computed tomography (PET/CT), general nuclear medicine, and bone densitometry procedures.”

- The following providers are excluded:
 - a. licensed hospitals
 - b. licensed rehabilitation hospitals
 - c. non-profit ambulatory care facilities
 - d. facilities performing less than 200 radiological procedures per month
 - e. dentists, veterinarians, podiatrists.

Ambulatory Surgery Center Surcharge (R.I.G.L. § 44-64)

- 2% surcharge on “net patient service revenue” received by every “outpatient health care facility” (“net patient service revenue” is defined as “charges related to patient care less charity care, bad debt and contractual allowances”).
- “Outpatient healthcare facility” is defined as “a person or governmental unit that is licensed to establish, maintain, and operate a freestanding ambulatory surgery center, a physician ambulatory surgery center or a podiatry ambulatory surgery center”.

Provisions Applicable to Both Surcharges

- Effective July 1, 2007.
- Payment of tax, along with a return, is due on the 25th day of the month following receipt of patient revenue.

- The tax administrator is responsible for adopting rules concerning the surcharge return form and data that it must contain.
- Failure to pay within thirty (30) days after due date may result in set-off by other state agencies.
- Provider may file a claim for refund of overpayment within two (2) years after the surcharge is paid.
- If refund claim is denied, provider may appeal denial to tax administrator within thirty (30) days.
- Subsequent appeal is allowed to district court, but total disputed surcharge, penalties and interest must be prepaid.

2. Legal Theories:

- Equal Protection
 - a. United States Constitution, 14th Amendment
 - b. Rhode Island Constitution, Article I § 2 (same)
 - i. discrimination against protected classes' (i.e. race, gender) faces strict scrutiny by courts
 - ii. non-protected classes measured by "Rational Basis Test"
 - iii. courts will uphold statute if it has a rational relation to a state interest; statute will be unconstitutional if a legislative classification is found to be arbitrary.
- Illegal Sales Tax on Professional Services
 - a. Contradictory state laws