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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 17, 2016

Representative John Davis
900 Court Street NE H483
Salem OR 97301

Re: Applicability of HB 4107-A

Dear Representative Davis:

A-engrossed House Bill 4107 prohibits the Oregon Health Authority from amending a contract with a coordinated care organization (CCO) unless certain conditions are met. You asked whether the provisions of House Bill 4107-A apply to the contracts between CCOs and the Oregon Health Authority that are in effect for 2016 or whether the provisions would also apply to contract amendments made prior to the effective date of the bill.

The answer is that the provisions of HB 4107-A apply only to amendments to the contracts that are in effect on the effective date of the bill[1] and amendments to any future contracts.

Current law requires the authority to compensate CCOs based on a "fixed global budget." ORS 414.625 (1)(c). "Global budget" is defined as:

> . . . a total amount established prospectively by the Oregon Health Authority to be paid to a coordinated care organization for the delivery of, management of, access to and quality of the health care delivered to members of the coordinated care organization. ORS 414.025 (8).

Thus, by definition, a global budget must be "established prospectively" and there is no provision for a retroactive adjustment to a global budget. House Bill 4107-A amends ORS 414.652 to allow a contract to be amended to adjust a global budget retroactively but only if:

> (a) The amendment does not result in a claim by the authority for the recovery of amounts paid by the authority to the coordinated care organization prior to the effective date of the amendment; or
>
> (b) The amendment is necessary to comply with federal law.

Section 2 of HB 4107-A states that the amendments to ORS 414.652 apply "to a contract between the Oregon Health Authority and a coordinated care organization that is in effect on or after the effective date of this 2016 Act." As noted above, you have asked whether this applicability clause limits the provisions of HB 4107-A to the contracts between CCOs and

[1] The effective date of the A-engrossed bill is 91 days after adjournment sine die.

the authority that are in effect for 2016 or whether the provisions would also apply to contract amendments made prior to the effective date of the bill.

As you know, courts interpret laws and discern the legislative intent of a law using the methodology established in *PGE v. BOLI*, 317 Or. 606, 610-611 (1993). Under that methodology, the first level of analysis is a consideration of the text and context of the law. A court may also consider proffered legislative history of a statute, but the court need only give that legislative history the evaluative weight that the court considers appropriate to shed light on legislative intent. *State v. Gaines*, 346 Or. 160, 171-172 (2009). Finally, if the legislative intent remains unclear after examining the text, context and legislative history of a statute, general maxims of statutory construction may be used to resolve remaining uncertainty. *Id.*

Examining the text and context of section 2 of HB 4107-A, we conclude that the Legislative Assembly intends the provisions of HB 4107-A to apply only prospectively.

The five-year contracts between the CCOs and the Oregon Health Authority have been amended and restated several times since 2014. The contract that is currently in effect was amended and restated effective January 1, 2016.

House Bill 4107-A applies to amendments to a contract that is "in effect" on or after the effective date of the bill. Since the CCO contracts that are in effect for 2016 are different in significant respects than the contracts that were in effect prior to 2016, the plain meaning of the text would dictate that the bill applies to current and future contracts and not a contract that was in effect in either 2014 or 2015.

In addition, in the floor debate on HB 4107-A in the House of Representatives on February 15, you carried the bill and stated that:

> This bill applies to future contracts as well as those amended or restated contracts that went into effect on January 1 of this year, 2016, or thereafter, and it effectively would repeal any language within the contracts that are contrary to that intent of the legislature and of this bill.

Therefore, you have provided legislative history that is consistent with the plain meaning of the bill.

In stating that HB 4107-A is intended to "repeal any language within that contracts that are contrary to that intent of the legislature and of this bill," the "language" you appear to be referring to is the amended and restated terms that amended Part I.A. of the 2015 CCO contract, as follows (the new language is shown in boldface):

> This Amended and Restated Contract is effective January 1, **2016** regardless of the date of signature**. This Contract, and the CCO Payment Rates contained herein, is** subject to approval by the US Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS). **In the event CMS fails to approve the proposed 2016 CCO Payment Rates prior to the Effective Date, OHA shall pay Contractor at the proposed CCO Payment Rates, subject to adjustment upon OHA's receipt of CMS approval or modification of the proposed CCO Payment Rates.** Oregon Health Authority, Amended and Restated Health Plan Services Contract, at 7.

Article I, section 21, of the Oregon Constitution, provides, in part, that no law "impairing the obligation of contracts shall ever be passed" and Article I, section 10, of the United States Constitution, provides, in part, that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." Each of these provisions is known as the Contracts Clause of its respective constitution. While it is beyond the scope of your request, it may be useful to very briefly address the analysis a court would employ in assessing the effect of the Contracts Clause on the effective repeal of the term in the 2016 contracts, as amended and restated above.

The Oregon Health Authority could not challenge the effective repeal of the term based on the Contracts Clause because, as an agency of the state, it does not have standing to challenge the constitutionality of a state statute. *Housing Authority of Kaw Tribe of Indians v. Ponca City,* 952 F.2d 1183, 1189 (10th Cir. 1991), *citing South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980).

If a CCO challenged the effective repeal of the above-quoted term, a court would employ a three-level analysis to determine, first, whether the law operates to create a substantial impairment of a contractual relationship. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). Second, if the bill constitutes a substantial impairment, the impairment may be constitutionally justified if the state has a significant and legitimate public purpose behind the law. The final inquiry is whether the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of appropriate character to the public purpose justifying the regulation. *Energy Reserves*, 459 U.S. at 411-412.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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