

NEW HAMPSHIRE LEGISLATURE OVERRIDES VETO OF MEDICAL MALPRACTICE REFORM

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JULY 20, 2012

On June 27, 2012, the New Hampshire Legislature overrode a veto of Senate Bill 406 by Governor John Lynch to pass a first-of-its-kind, early offer medical malpractice reform. What this means – New Hampshire will be the first state in the nation to adopt an “early offer” program aimed at providing speedy resolution to malpractice cases.¹ The law takes effect on January 2013.

IMPORTANT PROVISIONS OF SENATE BILL 406 (RSA 519-C)

Senate Bill 406 establishes a system of early offers for medical injury claims as an alternative to litigation or screening panels under RSA 519-B, amending RSA 519 by inserting a new chapter – RSA 519-C. Generally, under the new bill, New Hampshire physicians and hospitals will be able to make an “early offer” of compensation to injured patients of unintended medical outcomes. The program would enable patients who sustain medical injuries and agree to participate in the process to receive a capped settlement, based largely on lost wages and medical expenses, in a matter of months, as opposed to the years traditional malpractice cases take to reach resolution. If the injured patient accepts the early offer, court action would be avoided and the patient would be compensated. If the injured patient refuses the early offer and takes the health care provider(s) to court, but receives a jury verdict equal to or less than the early offer, the injured patient will have to compensate the defendant health care providers(s) for legal costs. A few provisions in the bill are worth noting:

- **Notice of Injury:** The claimant must provide written notice to the provider of the alleged injury, including how the injury was caused and the severity of the injury, using the National Practitioner Data Bank Scale.² The claimant must provide copies of medical records, medical bills and evidence of lost wages – or provide authorizations to enable the provider to obtain those documents. The notice must include a demand for economic losses and a request for an early offer from the provider.

¹ For full text of Senate Bill 406 (passed under Chapter 288), see <http://www.gencourt.state.nh.us/legislation/2012/SB0406.html>.

² Individuals must register with the National Practitioner Data Bank to access this information. See <http://www.npdb-hipdb.hrsa.gov/>.

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- **Early Offers:** The provider must respond to the claimant's notice within 90 days providing the details of the offer or declining to extend an offer.
- **Independent Medical Examination:** The provider may request that the individual alleging a medical injury submit to an independent medical examination by a qualified board certified physician chosen by the medical care provider and agreed to by the claimant. After such a request is made, the provider's deadline to submit an offer is extended by 30 days. The cost of the examination, including reasonable travel expenses for the claimant, shall be paid by the medical care provider's professional liability insurance company. The claimant will be provided with all reports and documents originating from the examination. See RSA 519-C:2(VII).
- **Accept or Reject Early Offer Within 60 Days:** If the provider extends an early offer, the claimant has 60 days from receipt to accept or reject the provider's offer in writing. A claimant may request a hearing to resolve any dispute with respect to the content of an early offer. If the claimant does so, he or she may accept or reject the early offer within 10 days after the hearing officer issues the decision.
- **Rejection of Early Offer:** If the claimant does not accept the early offer within the time constraints, the early offer is considered to be rejected. A claimant who rejects an early offer may pursue an action for medical injury against the medical care provider pursuant to RSA 507-E and RSA 519-B. See RSA 519-C:2(XI).

A claimant who rejects an early offer and who does not prevail in an action against the provider by being awarded at least 125 percent of the early offer amount, must pay the provider's reasonable attorney's fees and costs. In order to ensure the claimant can provide for such payment, the claimant must certify to the court that a bond or other suitable security has been posted before the court will even consider the case. See RSA 519-C:2 (XII).

- **Acceptance of Early Offer – Payment:** If an early offer is accepted, the provider must pay the claimant's economic losses as a result of the medical injury and the reasonable attorney's fee within 15 days of the claimant accepting an early offer. See RSA 519-C:5(I). The provider must also pay the claimant's future economic losses as such losses accrue (medical bills – 15 days after proof received; lost wages – weekly basis; all other expenses – 30 days after proof received). If any requested payment is denied, the provider must notify the claimant in writing of the denial and its basis for denial. Within 30 days, the claimant can request a hearing regarding the denial. See RSA 519-C:5(II). In cases involving a patient's death, the claimant will also be entitled to future lost earnings reduced by living costs through the decedent's life expectancy. See RSA 519-C:6.

- **Economic Losses:** Economic losses for which the provider would be responsible include: all the monetary expenses incurred related to the medical injury and its consequences, including actual out-of-pocket medical expenses, replacement services, 100 percent of the claimant's lost wages, and a statutory "additional payment" (see below). Economic losses do not include: pain and suffering, punitive damages, enhanced compensatory damages, exemplary damages, damages for loss of enjoyment of life (hedonic damages), inconvenience, physical impairment, mental anguish, emotional pain and suffering, and lost earning capacity, lost consortium, and all other non-economic damages of any kind. See RSA 519-C:1(IV).
- **Additional Payment Recoverable:** As noted, the economic losses included in any early offer must include an additional payment to the claimant, calculated as follows:
 - For a temporary injury involving only emotional harm, without physical injury: \$6,600.
 - For a temporary injury involving insignificant harm: \$2,100.
 - For a temporary injury involving minor harm: \$7,800.
 - For a temporary injury involving major harm: \$31,500.
 - For a permanent injury involving minor harm: \$35,500.
 - For a permanent injury involving significant harm: \$81,500.
 - For a permanent injury involving major harm: \$127,500.
 - For a permanent injury involving grave harm, or an injury resulting in death: \$140,000.

The determination of the claimant's injury classification is done in accordance with the National Practitioner Data Bank severity scale.³ See RSA 519-C:7(II)(a-h).

- **Reasonable Attorney's Fee:** "Reasonable attorney's fee" means 20 percent of the present value of the claimant's economic loss and the reasonable costs incurred in representing the injured person. See RSA 519-C:1(X).
- **Multiple Parties:** Where multiple providers are alleged to have contributed to cause the injury, an early offer is not to be reduced or apportioned based on the comparative fault of the providers. The providers, independently or jointly, may extend an early offer, and the claimant's acceptance bars any suit or claim for compensation against any provider as a result of the same injury. Any provider who extends an early offer may seek contribution from other providers in a separate action. (The claimant will not be a party to that action but is obligated to cooperate with the proceedings and will be reimbursed by the providers for all "reasonable costs.>"). See RSA 519-C:9.
- **Confidentiality:** Proceedings, records, and communications during

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negotiation of an early offer are confidential. The outcome and any other writings, evidence, or statements made or offered by a party or a party's representative during negotiation of an early offer are not admissible in court or in a screening panel hearing under RSA 519-B.

GOVERNOR LYNCH'S VETO

In his veto, Governor Lynch stated that the bill was well-intended, but unfair to victims. Governor Lynch noted that the early offer bill favors physicians and hospitals and would not compensate victims for lost earning capacity or pain and suffering. "I believe that the Legislature's efforts to fashion a balanced, reasonable early offer program should continue," Lynch wrote in his veto message. "It needs more work in order to adequately protect the interests of injured patients." The veto override makes it very unlikely that the Legislature will revisit the bill and improve it, as Lynch suggested.

SUPPORT/OPPOSITION

The New Hampshire Medical Society supported the early offer bill, considering it an effective method of lowering the cost of the state's medical malpractice insurance. Others, including trial lawyers, malpractice insurance companies and patient advocacy groups, opposed the "early offer" bill, warning that it could actually cause medical malpractice insurance premiums increase. Opponents were also adamantly opposed to the provision requiring the injured patient to post a bond before entering the court system, advocating that it favors health care providers and their insurers.

The practical effect of the "early offer" remains to be seen.

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