

SENATE NO. 609

AN ACT AUTHORIZING HEALTH CARE PROFESSIONALS TO NEGOTIATE WITH HEALTH CARE INSURERS AND PROVIDING FOR THE POWERS AND DUTIES OF THE ATTORNEY GENERAL

*Be it enacted by the Senate and House of Representatives in General Court assembled,
And by the authority of the same, as follows:*

1 SECTION 1. The General Laws are hereby amended by inserting after chapter 93G the following
2 chapter:

CHAPTER 93H

PROVIDER JOINT NEGOTIATIONS

5 Section 1. As used in this chapter, the following words shall have the following meanings:

6 “Attorney General,” the attorney general of the commonwealth and individuals designated
7 by him to act on his behalf in carrying out the purposes of this chapter.

8 “Carrier,” an insurer licensed or otherwise authorized to transact accident or health
9 insurance under chapter 175; a nonprofit hospital service corporation organized under chapter
10 176A; a nonprofit medical service corporation organized under chapter 176B; a health maintenance
11 organization organized under chapter 176G; and an organization entering into a preferred provider
12 arrangement under chapter 176I. A third party administrator shall be considered a carrier when
13 interacting with health care professionals.

14 “Carrier affiliate,” a carrier that is affiliated with another entity by either the insurer or entity
15 having a five percent or greater, direct or indirect, ownership or investment interest in the other
16 through equity, debt or other means.

17 “Covered lives,” the total number of individuals who are entitled to benefits under a health
18 care insurance plan, including, but not limited to, beneficiaries, subscribers and members of the
19 plan.

20 “Health care professional,” a physician or other health care practitioner licensed, accredited
21 or certified to perform specific health services consistent with law, person, acting alone or acting
22 with other persons through a partnership, professional corporation, organization or association.

23 “Health care provider” or “provider,” a health care professional or a facility.

24 “Health care services,” services for the diagnosis, prevention, treatment, cure or relief of a
25 health condition, illness, injury or disease provided by a health care professional and performed
26 within the lawful scope of practice.

27 “HMO,” a health maintenance organization organized under chapter 176G. The term
28 includes any carrier product that requires enrollees to use health care professionals in a designated
29 provider network to obtain covered services except in limited circumstances such as emergencies.

30 “Incentive plan,” any compensation arrangement between a carrier and a health care
31 professional or health care provider group or organization that employs or utilizes services of one or
32 more health care professionals that may directly or indirectly have the effect of reducing or limiting
33 services furnished to insureds, including but not limited to withholds and risk sharing arrangements.

34 “Joint negotiation,” negotiation with a carrier by two or more health care professionals
35 acting together as part of a formal entity or group or otherwise.

36 “Joint negotiation representative,” a representative selected by a group of health care
37 professionals to be the group’s representative in joint negotiations with a carrier under this act.

38 “Office of Attorney General,” the office of attorney general of the commonwealth.

39 “POS,” a point-of-service plan, a variation of an HMO that provides insureds with the
40 choice of obtaining diagnostic and treatment services from a provider of health care services who is
41 not under contract with or is otherwise a participating provider in a carrier’s network.

42 “PPO,” a preferred provider organization organized under chapter 176I. The term includes
43 any carrier product, other than an HMO or POS product, that provides financial incentives for
44 enrollees to use health care professionals in a designated provider network for covered services.

45 “Provider contract,” an agreement between a health care professional and a carrier which
46 sets forth the terms and conditions under which the provider is to deliver health care services to
47 enrollees of the carrier. The term does not include employment contracts between a carrier and a
48 health care professional.

49 “Provider network,” a grouping of health care providers who contract with a carrier to
50 provide services to insureds covered by any or all of the carrier’s plans, policies, contracts or other
51 arrangements.

52 “Self-funded health benefit plan,” a plan that provides for the assumption of the cost of or
53 spreading the risk of loss resulting from health care services of covered lives by an employer, union

54 or other sponsor, substantially out of the current revenues, assets or any other funds of the
55 employer, union or other sponsor.

56 “Third party administrator,” an entity that provides utilization review, provider network
57 credentialing or other administrative services for a carrier or a self-funded health benefit plan.

58 Section 2. Purpose.

59 (1) Active, robust and fully competitive markets for health care services provide the best
60 opportunity for residents of this commonwealth to receive high-quality health care services at an
61 appropriate cost.

62 (2) A substantial amount of health care services in this commonwealth is purchased for the
63 benefit of patients by carriers engaged in the provision of health care financing services or is
64 otherwise delivered subject to the terms of agreements between carriers and health care
65 professionals.

66 (3) Carriers are able to control the flow of patients to health care professionals through
67 compelling financial incentives for patients plans to utilize only the services of health care
68 professionals with whom the carriers have contracted.

69 (4) Carriers also control the health care services rendered to patients through utilization
70 review programs and other managed care tools and associated coverage and payment policies.

71 (5) The power of carriers in markets of this commonwealth for health care services has
72 become great enough to create a competitive imbalance, reducing levels of competition and
73 threatening the availability of high-quality, cost-effective health care.

74 (6) Carriers often are able to virtually dictate the terms of the contracts that they offer health
75 care professionals and commonly offer provider contracts on a take-it-or-leave-it basis.

76 (7) The power of carriers to unilaterally impose contract terms jeopardizes the ability of
77 physicians and other health care professionals to deliver the superior quality health care services
78 that have been traditionally available in this commonwealth.

79 (8) Physicians and other health care professionals do not have sufficient market power to
80 reject unfair provider contract terms that impede their ability to deliver medically appropriate care
81 without undue delay or hassle.

82 (9) Inequitable reimbursement and other unfair payment terms adversely affect quality
83 patient care and access by reducing the resources that health care professionals can devote to patient
84 care and decreasing the time that physicians are able to spend with their patients.

85 (10) Empowering health care professionals to jointly negotiate with carriers as provided in
86 this act will help restore the competitive balance and improve competition in the markets for health
87 care services in this commonwealth, thereby providing benefits for consumers, health care
88 professionals and less dominant carriers.

89 (11) Allowing health care professionals to jointly negotiate with carriers through a common
90 joint negotiation representative will improve the efficiency and effectiveness of communications
91 between the parties and result in provider contracts that better reflect the mutual areas of agreement.

92 (12) This chapter is necessary, proper and constitutes an appropriate exercise of the
93 authority of this commonwealth to regulate the business of insurance and the delivery of health care
94 services.

95 (13) It is the intention of the General Court to authorize health care professionals to jointly
96 negotiate with carriers and to qualify such joint negotiations and related joint activities for the State-
97 action exemption to the Federal antitrust laws through the articulated State policy and active
98 supervision provided in this act, under section 7 of chapter 93 of the General Laws.

99 Section 3. Health care professionals may jointly negotiate with a carrier and engage in
100 related joint activity, as provided in sections 6 and 7, regarding nonfee-related matters which can
101 affect patient care, including, but not limited to any of the following:

102 (1) The definition of medical necessity and other conditions of coverage.

103 (2) Utilization review criteria and procedures.

104 (3) Clinical practice guidelines.

105 (4) Preventive care and other medical management policies.

106 (5) Patient referral standards and procedures, including, but not limited to, those applicable
107 to out-of-network referrals.

108 (6) Drug formularies and standards and procedures for prescribing off-formulary drugs.

109 (7) Quality assurance programs.

110 (8) Respective health care professional and carrier liability for the treatment or lack of
111 treatment of plan enrollees.

112 (9) The methods and timing of payments, including, but not limited to, interest and penalties
113 for late payments.

114 (10) The terms and conditions for amending any agreement between health care
115 professionals and a health insurer, including the amendment of payment methodologies, fee
116 schedules, and payment and claims policies and procedures.

117 (11) The terms and conditions for the reconciliation process under incentive plans, including
118 but not limited to risk sharing and withhold arrangements.

119 (12) The terms and conditions for retroactive termination of covered lives, including but not
120 limited to beneficiaries, subscribers and members of the plan.

121 (13) Other administrative procedures, including, but not limited to, enrollee eligibility
122 verification systems and claim documentation requirements.

123 (14) Credentialing standards and procedures for the selection, retention and termination of
124 participating health care professionals.

125 (15) Mechanisms for resolving disputes between the carrier and health care professionals,
126 including, but not limited to, claims payment, and the appeals process for utilization review and
127 credentialing determination.

128 (16) The carrier plans sold or administered by the insurer in which the health care
129 professionals are required to participate.

130 Section 4. When a carrier has substantial market power over health care professionals, the
131 professionals may jointly negotiate with carrier and engage in related joint activity, as provided in
132 sections 6 and 7 regarding fees and fee-related matters, including, but not limited to, any of the
133 following:

134 (1) The amount of payment or the methodology for determining the payment for a health
135 care service.

136 (2) The conversion factor for a resource-based relative value scale or similar reimbursement
137 methodology for health care services.

138 (3) The amount of any discount on the price of a health care service.

139 (4) The procedure code or other description of the health care service or services covered by
140 a payment.

141 (5) The amount of a bonus related to the provision of health care services or a withhold from
142 the payment due for a health care service.

143 (6) The amount of any other component of the reimbursement methodology for a health care
144 service.

145 Section 5. (a) A carrier has substantial market power over health care professionals when
146 either (1) the carrier's market share in the comprehensive health care financing market or a relevant
147 segment of that market, alone or in combination with the market shares of its carrier affiliates,
148 exceeds either twenty-five percent of the covered lives in the geographic service area of the
149 professionals seeking to jointly negotiate; or (2) the Attorney General determines that the market

150 power of the insurer in the relevant service and geographic markets for the services of the
151 professionals seeking to jointly negotiate significantly exceeds the countervailing market power of
152 the professionals acting individually.

153 (b) The comprehensive health care financing market includes (1) all carrier products which
154 provide comprehensive coverage, alone or in combination with other products sold together as a
155 package, including, but not limited to, indemnity, HMO, PPO and POS products and packages; and
156 (2) self-funded health benefit plans which provide comprehensive coverage.

157 (c) Relevant market segments in the comprehensive health care financing market shall
158 include the following: (1) carrier products and self-funded health benefit plans; (2) within the
159 carrier product category, private health insurance, Medicare HMO, PPO and POS and Medicaid
160 HMO; (3) within the private health insurance category, indemnity, HMO, PPO and POS products;
161 and (4) such other segments as the Attorney General determines are appropriate for purposes of
162 determining whether a carrier has substantial market power.

163 Section 6. The following requirements shall apply to the exercise of joint negotiation rights
164 and related activity under this act:

165 (1) Health care professionals shall select the members of their joint negotiation group by
166 mutual agreement.

167 (2) Health care professionals shall designate a joint negotiation representative as the sole
168 party authorized to negotiate with the carrier on behalf of the health care professionals as a group.

169 (3) Health care professionals may communicate with each other and their joint negotiation
170 representative with respect to the matters to be negotiated with the carrier.

171 (4) Health care professionals may agree upon a proposal to be presented by their joint
172 negotiation representative to the carrier.

173 (5) Health care professionals may agree to be bound by the terms and conditions negotiated
174 by their joint negotiation representative.

175 (6) The health care professionals' joint negotiation representative may provide the health
176 care professionals with the results of negotiations with the carrier and an evaluation of any offer
177 made by the carrier.

178 (7) The health care professionals' joint negotiation representative may reject a contract
179 proposal by a carrier on behalf of the health care professionals as long as the health care
180 professionals remain free to individually contract with the carrier.

181 (8) The health care professionals' joint negotiation representative shall advise the health
182 care professionals of the provisions of this act and shall inform the health care professionals of the
183 potential for legal action against health care professionals who violate the federal antitrust laws.

184 Section 7. (a) Before engaging in any joint negotiation with a carrier, health care
185 professionals shall obtain the Attorney General's approval to proceed with the negotiations. The
186 petition seeking approval shall include the following: (1) the name and business address of the
187 health care professionals' joint negotiation representative; (2) the names and business addresses of
188 the health care professionals petitioning to jointly negotiate; (3) the name and business address of
189 the carrier or insurers with which the petitioning providers seek to jointly negotiate; (4) the
190 proposed subject matter of the negotiations or discussions with the carrier or insurers; (5) the
191 proportionate relationship of the health care professionals to the total population of health care

192 professionals in the relevant geographic service area of the providers by providers by provider type
193 and specialty; (6) in the case of a petition seeking approval of joint negotiations regarding one or
194 more fee or fee-related terms, a statement of the reasons why the carrier has substantial market
195 power over the health care professionals; and (7) such other data, information and documents that
196 the petitioners desire to submit in support of their petition.

197 (b) The petition seeking approval shall include the following: (1) the Attorney General's file
198 reference for the original petition for approval of joint negotiations; (2) the proposed new subject
199 matter; (3) the information required by subsection (a)(6) with respect to the proposed new subject
200 matter; and (4) such other data, information and documents that the health care professionals or
201 carrier desire to submit in support of their petition.

202 (c) No provider contract terms negotiated under this act shall be effective until the terms are
203 approved by the Attorney General. The petition seeking approval shall be jointly submitted by the
204 health care professionals and the carrier who are parties to the contract. The petition shall include:
205 (1) the Attorney General's file reference for the original petition for approval of joint negotiations;
206 (2) the negotiated provider contract terms; and (3) such other data, information and documents that
207 the health care professionals or carrier desire to submit in support of their petition.

208 Section 8. (a) The Office of Attorney General shall either approve or disapprove a petition
209 under section(s) 7(a), (b) or (c) within 30 days after such petition is filed. If any petition is
210 disapproved, the Attorney General shall furnish a written explanation of any deficiencies with such
211 petition along with a statement of specific remedial measures as to how such deficiencies may be
212 corrected.

213 (b) (1) The Office of Attorney General shall approve a petition under section 7(a) and
214 (b) if (i) the pro-competitive and other benefits of the joint negotiations outweigh its anti-
215 competitive effects, and (ii) in the case of a petition seeking approval to jointly negotiate one or
216 more fee or fee-related terms, the carrier has substantial market power over the health care
217 professionals.

218 (2) The pro-competitive and other benefits of joint negotiations or negotiated
219 provider contract terms may include, but shall not be limited to (i) restoration of the competitive
220 balance in the market for health care services, (ii) protections for access to quality patient care, and
221 (iii) improved communications between health care professionals and carriers.

222 (c) For the purpose of enabling the Attorney General to make the findings and
223 determinations required by this section, the Attorney General may require the submission of such
224 supplemental information as it may deem necessary or proper to enable him to reach a
225 determination.

226 Section 9. In the case of a petition under section 7(a) or (b), the Attorney General shall
227 notify the health insurer of the petition and provide the insurer with the opportunity to submit
228 written comments within a specified time frame that does not extend beyond the date on which the
229 Attorney General is required to act on the petition.

230 Section 10. Within 180 days from the mailing of a notice of disapproval of a petition under
231 section 8, the petitioners may commence a claim in superior court seeking approval of such petition.
232 The matter shall be tried by the court without a jury. The court shall enter its findings as a
233 judgment of the court and the judgment shall have the same effect and be enforceable as any other
234 judgment of the court in civil cases, subject to the provisions of this chapter. Appeals may be taken

235 to the supreme judicial court under the same conditions and under the same practice as appeals are
236 taken from judgments in civil cases rendered by the superior court.

237 Section 11. Any petition submitted under section 7 herein and any supplemental submission
238 made under section 8 herein shall be considered confidential, not a public record under the section 7
239 of chapter 4, and not subject to public disclosure under section 10 of chapter 66.

240 Section 12. The Attorney General may, in effectuating the purposes of this chapter, engage
241 experts or consultants to assist with the review of the petition. All copies of reports prepared by
242 experts and consultants shall be made available to the petitioners. All costs incurred under this
243 chapter shall be the responsibility of the petitioners in an amount to be determined by the Attorney
244 General. No petition for approval of joint negotiations, petition for approval of modification of
245 joint negotiations, or petition for approval of provider contracts shall be considered complete,
246 unless an agreement has been executed with the Attorney General for the payment of costs incurred
247 pursuant to this chapter.

248 Section 13. Nothing contained in this act shall be construed (1) to prohibit or restrict
249 activity by health care professionals that is sanctioned under the federal or state laws; (2) to prohibit
250 or require governmental approval of or otherwise restrict activity by health care professionals that is
251 not prohibited under the federal antitrust laws; (3) to require approval of provider contracts terms to
252 the extent that the terms are exempt from state regulation under section 514 of the Employee
253 Retirement Income Security Act of 1974 (Public Law 93-406, 88 Stat. 829); or, (4) to expand a
254 health care professional's scope of practice or to require a carrier to contract with any type or
255 specialty of health care professionals.

256 Section 14. If any provision of this chapter or the application thereof to any person or
257 circumstances is held invalid, such invalidity shall not affect other provisions or applications of the
258 chapter, which can be given effect without the invalid provision or application, and to this end the
259 provisions of this chapter are declared to be severable.

260 SECTION 2. This act shall take effect on January 1, 2008.