

MEMORANDUM



September 25, 2020

BY EMAIL

TO: California Association of Nurse Anesthetists
FROM: Mayer Brown LLP
RE: AB 2257/Guidance for CRNAs

Recent legislation (AB 2257) amending AB 5 provides a path forward for CRNAs who do not want to be treated as employees of the hospitals, surgery centers and anesthesia groups for which they provide anesthesia services by expanding a business to business (B2B) exemption that was previously inaccessible to CRNAs.

AB 5 altered the way that many professionals are classified in California by forcing them to be classified as employees, rather than independent contractors, of the facilities at which they perform services. That change likely applied to CRNAs who had been functioning as independent contractors. AB 5 contained no express exemption for CRNAs or nurses generally, as it did for other medical professionals such as physicians. Moreover, CRNAs likely could not claim AB 5's B2B exemption, since that exemption was not available to businesses (called "business service providers") whose workers provide services directly to the customers of another business, as CRNAs do to the patients (i.e., customers) of a hospital or surgery center.

AB 2257 addresses this inequity by allowing business service providers to access the AB 5 B2B exemption as long as their "employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses."

Legislative reports accompanying AB 2257 make clear that this amendment was intended, in part, to help medical groups that include non-exempt medical professionals like CRNAs. Specifically, two Senate reports state that such medical groups can claim the B2B exemption if they "reorganize partnerships and other business structures to make the non-exempt medical professionals employees." Another Senate committee report suggests the same, stating that the amended language "will greatly assist S-Corporations [a corporate structure often utilized by independent CRNAs] in complying with the 'ABC' test."

Some of AB 2257's language is vague and will need to be clarified by subsequent legislation or the courts. In the meantime, it seems clear that in enacting AB 2257, the Legislature intended for the expanded B2B exemption to provide a path forward for non-exempt medical providers such as CRNAs who do not want to be employees of the facilities at which they provide services.

The below provides guidance on how CRNAs can best position their businesses to claim the expanded B2B exemption:

Form or Join a CRNA Business Service Provider – CRNAs should form or join a business which can act as the CRNA business service provider for purposes of the B2B exemption. As noted below, CRNAs must be employees of that business services provider, regardless of its structure.

- The most common business structure for such purposes is a **professional nursing corporation**, which can be designated as an “**S Corporation**” for tax purposes. A nursing corporation can be formed by a single CRNA or multiple CRNAs. CRNAs can be shareholders of and, thus, own the professional nursing corporation. **However, to best position the business for the B2B exemption, CRNAs should also be employees of the nursing corporation.**
- Alternatively, if two or more CRNA nursing corporations enter into a partnership, the partnership can act as the CRNA business service provider. Again, the CRNAs should be employees of their respective nursing corporations.
- A professional medical corporation can also act as the CRNA business service provider, but such corporation must be majority-owned by licensed physicians. Once again, the CRNAs and other non-exempt medical providers should be employees of the medical corporation.

Have the CRNA Business Service Provider Enter Into Contracts and Include Key Provisions in Them—All CRNA anesthesia services should be provided pursuant to contracts entered into between the CRNA business service provider and facilities (e.g., hospitals, surgicenters) or other anesthesia groups that in turn enter into contracts with facilities. All such contracts should be in writing and made in the name of the CRNA business service provider, as opposed to its CRNA employees.

In addition, such contracts should contain the following terms:

- Anesthesia services are to be provided in the name of the CRNA business service provider (as opposed to the hospital, surgery center or other anesthesia group).
- If possible, the name of the CRNA business service provider should be reflected on CRNA identification badges, patient disclosure/consent documents and patient billings.

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CANA

September 25, 2020

Page 3

Have the CRNA Business Service Provider Enter Into Contracts and Include Key Provisions in Them (con't)

- The CRNA business service provider should retain the right to provide anesthesia services to other entities (i.e., the contract should be non-exclusive).
- Contracts should specify the rate of pay for the anesthesia services to be provided and payment due date.
- The CRNA business service provider should be free from the control and direction of the hospital, surgery center or other anesthesia group in connection with the performance of the anesthesia services.

Additional Items to Consider

- Contracts involving non-anesthesia services (such as billing, accounting, payroll, etc.) should also be made in the name of the CRNA business service provider, as opposed to its CRNA employees.
- The CRNA business service provider must possess all required business licenses and tax registrations.
- The CRNA business service provider should maintain a business location that is separate from the other contracting business. A CRNA's residence may suffice.
- The CRNA business service provider should advertise and hold itself out to the public as available to provide anesthesia services (e.g., website, business cards, etc.). To the extent feasible, the CRNA business service provider should have multiple contracts to provide such services.
- CANA is advising CRNAs to consult their own business and tax consultants to determine what arrangement best fits their needs.