



# Executive Summary

April 15, 2010

## Listening Session – Impact of H-1B Memo on the Healthcare Industry

### **Background**

On March 26, 2010, the Office of Public Engagement (OPE) hosted a listening session with medical professionals and legal practitioners who represent medical professionals. The purpose of the session was to understand the implications of the January 8, 2010 H-1B memo, which provides guidance on determining if a valid employer-employee relationship exists, on the healthcare industry. The session presented stakeholders with an opportunity to explain the potential effect of the memo on the industry and to inform the Agency of suggestions to revise or clarify existing guidance.

### **Principal Themes**

- **Structure of Physician Employment**

The stakeholder community stressed the necessity of H-1B status for physicians. They explained that many physicians first enter as J-1 visa holders to work in underserved areas and then must convert to H-1B status. Many physicians who are required to work in underserved areas may be the only medical provider in the area. Moreover, some states have laws that prohibit hospitals from being direct employers of the physician. Therefore many physicians may be self-employed and unable to qualify for H-1B status pursuant to the memo. Stakeholders claim that this reliance on the H-1B and the impact of the memo adversely affects U.S. health care.

The stakeholders further explained that the general structure of physician employment is through a physicians group who is the responsible party and who exercise control of the employee/physician. The physicians group operates much the same as a staffing company. However, the stakeholders expressed that physicians work more independently and are often not being supervised by groups that employ them. This scenario is the dominant model. The stakeholders asserted that, under the existing guidance, the physician cannot be supervised by the “end client”. However, in this scenario, the hospital is the “end client” and does exercise some control over the physicians’ employment.

- **Staffing Model**

The stakeholder community expressed concern with the impact that the guidance poses on the staffing model that is used to place health care professionals in the United States. Stakeholders reiterated that several large states, including Texas and California, have laws which prohibit a hospital from being a direct employer. Additionally, the existing staff model also allows the industry to address the challenge of placing physicians and other medical professionals in underserved areas. For example, stakeholders indicated that many emergency rooms outsource to staffing companies who provide physicians and can meet the immediate needs of a hospital.

Many stakeholders also emphasize that, under the current model, staffing companies control the employment of healthcare personnel but do not handle day to day supervision. They argue that the nature

of the business makes on site supervision extremely difficult. Examples of this include: a physician who rotates between several different facilities during his or her residency; a home health care aide where no one is present on site to supervise the clinical duties; and a group practice where the staffing company exercises some level of control but also does not provide on site supervision.

Stakeholders stated that if the “right to control” is required, this contradicts the current regulations. However, if the right to control is not the primary requirement, the memo needs to provide greater specificity that this is only one of the elements considered in determining the employer-employee relationship. Stakeholders proposed that other elements of control be considered including: who pays malpractice insurance; whether or not the IRS legally recognizes the relationship as a valid employer-employee relationship; and who controls hiring/firing. It was also suggested that the memo, as currently written, invites adjudicators to make ad hoc decisions on level of control which leads to inconsistency in adjudications.

- **Individual Professions**

Stakeholders asserted that different professions have different levels of inherent control, such as doctors and lawyers. These individuals are employed within “individual professions” which require that they exercise independent ethical judgment. Stakeholders suggested that perhaps the memo needs to outline additional control factors that define the employer-employee relationship. This clarification would include such elements as whether or not the employee is within a licensed profession that is controlled by certain ethics rules.