

**WEST VIRGINIA  
SECRETARY OF STATE  
JOE MANCHIN, III  
ADMINISTRATIVE LAW DIVISION**

Form #4 ■

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WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF RULE MODIFICATION OF A PROPOSED RULE**

AGENCY: Tax Division TITLE NUMBER: 110

CITE AUTHORITY: W. Va. Code § 11-13P-8

AMENDMENT TO AN EXISTING RULE: YES  NO

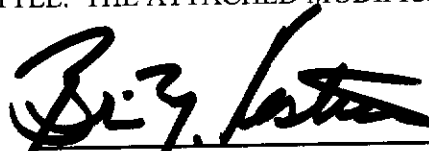
IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 13P

TITLE OF RULE BEING PROPOSED: Tax Credit For Medical Malpractice Liability Insurance  
Premiums

THE ABOVE PROPOSED LEGISLATIVE RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

  
\_\_\_\_\_  
Brian M. Kastick, Secretary of Tax & Revenue

**SCANNED**

MODIFIED  
WEST VIRGINIA  
LEGISLATIVE RULE  
TITLE 110  
SERIES 13P

FILED

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TAX CREDIT FOR MEDICAL LIABILITY INSURANCE PREMIUMS VIRGINIA  
SECRETARY OF STATE

**§ 110-13P-1. General.**

1.1. Scope. – This modified rule explains and clarifies the application of the tax credit for medical malpractice insurance premiums authorized by West Virginia Code § 11-13P-1 et seq. against the Health Care Provider Tax imposed by West Virginia Code § 11-27-1 et seq.

1.2. Authority. – West Virginia Code § 11-13P-8.

1.3. Filing Date. –

1.4. Effective Date. -

**§ 110-13P-2. Definitions.** As used in this rule and unless the context clearly requires a different meaning, the following terms have the meaning ascribed in this section.

2.1. "**Actual annual medical liability insurance premium**" means the actual annual medical liability insurance premium paid by the taxpayer during the taxpayer's taxable year but does not include the premium paid for any other liability insurance.

2.2. "**Adjusted annual medical liability premium**" means the statewide average of medical liability insurance premiums by specialty and subspecialty groups directly paid by eligible taxpayers in those specialty and subspecialty groups during the taxable year to cover physicians' services performed during the year reduced by the sum of \$10,000.

2.3. "**Commissioner**" or "**Tax Commissioner**" means the West Virginia State Tax Commissioner, or his or her delegate.

2.4. "**Contractual allowances**" means the difference between revenue (gross receipts) at established rates and amounts realizable from third-party payors under contractual agreements.

2.5. "**Credit**" or "**Tax Credit**" means the Tax Credit For Medical Liability Insurance Premiums authorized by West Virginia Code § 11-13P-1 et seq.

2.6. "**Eligible taxpayer**" means any person subject to the tax imposed by West Virginia Code § 11-27-16, or a physician who is a partner, member, shareholder or employee of an eligible taxpayer and who is subject to the tax imposed by West Virginia Code § 11-27-16.

2.7. **"Eligible taxpayer organization"** means a partnership, limited liability company, or corporation that is an eligible taxpayer.

2.8. **"Gross receipts"** means the amount received or receivable, whether in cash or in kind, from patients, third-party payors and others for a service subject to the Health Care Provider Tax that is furnished by the eligible taxpayer, including retroactive adjustments under reimbursement agreements with third-party payors, without any deduction for any expenses of any kind: Provided, That accrual basis eligible taxpayers may reduce gross receipts by their contractual allowances, to the extent the allowances are included, and by bad debts, to the extent the amount of the bad debts was previously included in gross receipts upon which the tax imposed by this section was paid.

2.9. **"Health Care Provider Tax" or "Tax"** means the tax imposed by West Virginia Code § 11-27-1 et seq.

2.10. **"Person"** means and includes any natural person, corporation, limited liability company, trust or partnership.

2.11. **"Physician"** means a doctor of medicine or osteopathy.

2.12. **"Physicians' services"** means health care provider services that are performed in this State by physicians licensed by the West Virginia Board of Medicine or the West Virginia Board of Osteopathic Medicine, and that are subject to the Health Care Provider Tax, including those services that are physicians' services for purposes of Section 1903(w) of the Social Security Act, and professional services performed by physicians, including surgery, consultation, and home, office, and institutional calls. However, "physicians services" do not include activities exemplified by the following:

2.12.1. Director fees received by a physician for serving on a board of directors; or

2.12.2. Fees received by a physician for expert testimony

2.13. **"Statewide average medical liability insurance premiums"** means the average of premiums for each specialty and sub-specialty group as determined by the West Virginia Insurance Commission and published in the State Register in November of each year.

### **§ 110-13P-3. Tax Credit Authorized.**

3.1. For taxable years beginning after December 31, 2001, each eligible taxpayer is authorized to annually take a Credit against the Health Care Provider Tax.

3.1.1. No eligible taxpayer may assert the Credit on any tax return due prior to July 1, 2002.

3.1.2. No Credit shall be allowed for any taxable year ending after December 31, 2004.

3.2. The amount of the Credit shall be equal to the lesser of:

3.2.1. Ten percent of the adjusted annual medical liability insurance premium for the taxpayer's specialty or subspecialty group; or

3.2.2. Ten percent of the taxpayer's actual annual medical liability insurance premium.

3.3. No Credit shall be allowed for any medical liability insurance premium paid on behalf of an eligible taxpayer employed by the state, its agencies or subdivisions or an eligible taxpayer organization pursuant to coverage provided under West Virginia Code § 29-12-1 et seq.

3.3.1. To the extent that only a portion of the medical malpractice liability insurance premium is paid on behalf of an eligible taxpayer employed by the state, its agencies or subdivisions and the remainder of the medical malpractice liability insurance premium is paid by the eligible taxpayer, that eligible taxpayer may use the actual amount of medical malpractice liability insurance premium paid by that eligible taxpayer when calculating the amount of Credit available under subsection 3.2 of this section. However, an eligible taxpayer may not use any of the premium paid on its behalf by the state, its agencies or subdivisions or an eligible taxpayer organization when calculating the amount of Credit available under subsection 3.2 of this section.

#### **§ 110-13P-4. Excess Credit Forfeited.**

4.1. If after application of the Credit against the Health Care Provider Tax any Credit remains for the taxable year, the amount remaining and not used is forfeited. Unused Credit may not be carried back to any prior taxable year and shall not carry forward to any subsequent taxable year.

#### **§ 110-13P-5. Determination of tax base for application of the Credit.**

5.1. The Credit shall only be applied against the Health Care Provider Tax payable under West Virginia Code § 11-27-16 and may not be applied against any other gross receipts that may be received by the physician. For purposes of the Credit, the Health Care Provider Tax is imposed on the gross receipts derived by the physician from the provision of physicians' services at the tax rate indicated.

5.2. As indicated in the definition of "gross receipts," the amount subject to the Health Care Provider Tax is the amount received or receivable, whether in cash or in kind. The term "in kind" as used in the definition of "gross proceeds" means the fair market value in money, or of services or property, or the right to receive services, given in lieu of money.

5.2.1. Initially, fair market value is considered to be the amount the Health Care Provider charges for the service rendered. However, the physician may use a lower

amount when that lower amount is an agreed upon amount under a plan negotiated at arm's length with an unrelated party that is acting in its own best interests.

5.2.1.a. A physician may not use the fees paid by Medicare or Medicaid as the lowest price paid by a patient for purposes of measuring the fair market value of services provided free or at a reduced charge because the physician has not negotiated for the fees at arm's length.

5.2.2. When the service is provided at a discount because the patient makes a cash payment, the amount subject to the Health Care Provider Tax is the amount actually received.

5.2.3. Unless the physician is providing a pre-employment physical examination for a person seeking employment with the physician, pre-employment physicals are subject to the Health Care Provider Tax; however, if the physician is providing the examination for a person seeking employment with the physician and there is no charge, the service is not subject to the Health Care Provider Tax.

5.2.4. When a physician furnishes services at a reduced price or free of charge to low-income patients, the tax is imposed on the amount actually received. If the services are provided free of charge, there is no tax due since the physician does not receive any payment or service in return.

5.3. A physician may furnish patient services at no charge or at a reduced charge to patients who pay for the service (or part of it) by performing a service. While these situations typically involve the provision of services to employees as part of the employees' compensation package or services to other patients at a discount based on the patient's obligation to provide goods or services in return, they are not limited to only those types of employees or patients.

5.3.1. When a physician furnishes patient services to its employees at a reduced price or free of charge under a policy of self-insurance, the taxable amount is the lowest price at which the physician furnishes similar patient services to other paying patients. This means that the physician may use the lowest price it charges under a plan negotiated at arm's length with an unrelated party that is acting in its own best interests. The plan used for determining the lowest price must still be open for enrollment.

5.3.1.a. When a physician furnishes patient services to his or her employees and is reimbursed through medical insurance the physician purchased for the employees, the physician is required to pay the Health Care Provider Tax on the total of:

5.3.1.a.1. The amount it receives from the health plan company;

5.3.1.a.2. Any co-payments or deductibles it receives from the employee; and

5.3.1.a.3. Any co-payment or deductible waived by the physician as part of the employees' compensation package.

5.3.2. Free chest X-rays provided annually to employees are subject to the Health Care Provider Tax and the amount subject to the tax is the lowest price at which the physician furnishes similar services to other similarly situated paying patients under a contract negotiated at arm's length.

5.3.3. Patient services provided at a reduced price to employees and their family members are subject to tax at the lowest price at which the physician furnishes similar services to other paying patients under a contract negotiated at arm's length.

5.3.4. Mandated vaccinations, tests, and free vaccinations provided to employees free of charge are subject to the Health Care Provider Tax. The taxable amount is the lowest price at which the physician furnishes similar service to other paying patients under a contract negotiated at arm's length.

5.3.5. Services given by a physician to family members or friends are not subject to the Health Care Provider Tax, but similar services provided to friends are subject to the tax if there is a charge or any form of barter involved in the transaction.

5.3.6. When a physician furnishes patient services to other individuals or groups, such as other Health Care Providers, at a reduced price or free of charge, the gross receipts upon which the Health Care Provider Tax is measured is the fair market value of the goods or services provided. The fair market value of the goods or services provided in return by those individuals or groups shall not be considered.

5.3.6.a. A physician may not use the fees paid to it by other Health Care Providers under professional discount agreements for purposes of measuring the fair market value of the services provided, because those fees do not represent the total amount paid for the services provided.

5.4. The Health Care Provider Tax rate applicable to the provision of physicians' services is as follows:

5.4.1. Effective July 1, 2001, this rate is 1.8%;

5.4.2. Effective July 1, 2002, this rate is 1.6%;

5.4.3. Effective July 1, 2003, this rate is 1.4%;

5.4.4. Effective July 1, 2004, this rate is 1.2%;

5.4.5. Effective July 1, 2005, this rate is 1%;

5.4.6. Effective July 1, 2006, this rate is .8%;

5.4.7. Effective July 1, 2007, this rate is .6%;

5.4.8. Effective July 1, 2008, this rate is .4%;

5.4.9. Effective July 1, 2009, this rate is .2%; and

5.4.10. Effective July 1, 2010, the Health Care Provider Tax imposed on providers of physicians' services is eliminated.

**§ 110-13P-6. Filing of the return and payment of tax.**

6.1. The Health Care Provider Tax return shall be filed annually on or before the last day of January following the end of the eligible taxpayer's calendar year, or, if the eligible taxpayer files on a fiscal year basis, the return shall be filed on or before the last day of the month next following the end of the taxpayer's fiscal year: Provided, That the return for the month of May has an accelerated due date and is due June 15.

6.2. To assert the Credit against the Health Care Provider Tax, the eligible taxpayer shall file with its annual Health Care Provider Tax return the schedule prescribed by the Tax Commissioner. The schedule shall show for the taxpayer's taxable year either the adjusted annual medical liability insurance premium for the taxpayer's specialty or subspecialty group or the taxpayer's actual annual medical liability insurance premium, whichever is appropriate, the amount of Credit allowed, the taxes against which the Credit is being applied and any other information required by the Tax Commissioner.

6.2.1. It is presumed for purposes of using the Credit that the eligible taxpayer will pay the medical liability insurance premium only once per taxable year. Regardless of whether or not the 12 month period for which the Health Care Provider Tax return is filed is the same 12 month period for which the malpractice insurance premium is paid, the eligible taxpayer shall use either the adjusted annual medical liability insurance premium for the taxpayer's specialty or subspecialty group or the taxpayer's actual annual medical liability insurance premium when determining the amount of the Credit under subsection 3.2 of this rule.

6.3. An eligible taxpayer may consider the amount of Credit allowed when determining the eligible taxpayer's liability under the Health Care Provider Tax for periodic payments of estimated tax for the taxable year.

6.3.1. Each eligible taxpayer that expects on average to pay Health Care Provider Tax in excess of \$50.00 per month is required to make estimated monthly payments of 1/12<sup>th</sup> of the total annual amount of Health Care Provider Tax due; the annual return shall be the return filed for the 12<sup>th</sup> month. When calculating each estimated payment, it is anticipated, but not required, that each eligible taxpayer will use 1/12<sup>th</sup> of the Credit authorized for the taxable year.

6.3.2. The annual total tax liability and total Credit are to be adjusted and reconciled on the annual Health Care Provider Tax return.

**§ 110-13P-7. Computation and application of credit.** There are two classifications of eligible taxpayers who may use the Credit.

7.1. Eligible taxpayers, other than payors described in subsection 7.2 of this section, who directly pay medical malpractice insurance premiums and who also pay the Health Care Provider Tax may apply the Credit against the eligible taxpayer's Health Care Provider Tax liability determined under West Virginia Code § 11-27-16. The Credit shall be determined after application of all other allowable credits and exemptions.

7.2. Partners, members or shareholders of partnerships, limited liability companies, or corporations who directly pay medical malpractice insurance premiums for or on behalf of those organizations may apply the Credit against the eligible taxpayer's Health Care Provider Tax liability determined under West Virginia Code § 11-27-16 if the following requirements are satisfied:

7.2.1. The medical liability insurance premiums shall be paid by a payor, as defined in this section, and the payments shall be made to insure against medical liabilities arising out of or resulting from physicians' services provided by a physician while practicing in service to or under the organizational identity of an eligible taxpayer organization or as an employee of the eligible taxpayer organization. The insurance shall cover the medical liability of:

7.2.1.a. the eligible taxpayer organization;

7.2.1.b. one or more physicians practicing in service to or under the organizational identity of the eligible taxpayer organization or as an employee of the eligible taxpayer organization; or

7.2.1.c. any combination thereof.

7.2.2. For purposes of this section:

7.2.2.a. The term "payor" means a natural person who is a partner, member, shareholder or owner, in whole or in part, of an eligible taxpayer organization and who pays medical liability insurance premiums for or on behalf of the eligible taxpayer organization.

7.2.3. The annual Credit allowable shall be applied to reduce the tax liability directly payable under West Virginia Code § 11-27-16 by the payor, as defined in this section, but determined after application of all other allowable credits and exemptions.

7.2.4. After application of the Credit as provided in subdivision 7.2.3 of this subsection, any remaining annual credit shall then be applied to reduce the tax liability

directly payable under West Virginia Code § 11-27-16 by the eligible taxpayer organization but determined after application of all other allowable credits and exemptions.

7.2.5. Where a payor pays medical liability insurance premiums for and provides services to or under the organizational identity of two or more eligible taxpayer organizations or as an employee of two or more eligible taxpayer organizations, the tax credit shall be allocated among the eligible taxpayer organizations in proportion to the medical liability insurance premiums paid directly by the payor during the taxable year to cover physicians' services during such year for, or on behalf of, each eligible taxpayer organization.

7.2.5.a. In no event may the total credit claimed by all eligible taxpayers and eligible taxpayer organizations exceed the credit which would be allowable if the payor had paid all the medical liability insurance premiums for or on behalf of one eligible taxpayer organization, and if all physician's services had been performed for, or under the organizational identity of, or by employees of, one eligible taxpayer organization.

#### **§ 110-13P-8. Burden of proof**

8.1. The burden of proof is on the person claiming the Credit to establish by clear and convincing evidence that the person is entitled to the amount of Credit asserted for the taxable year.