A warning for foreign hospitals

Wholly foreign-owned hospitals have been given the green light in certain parts of China. But many legal uncertainties remain, such as rules regarding acquisition and type of hospitals, foreign doctor licences, local doctor transfers and pricing

>> For full translation See p. 88

On August 27 2014, the National Health and Family Planning Commission and the Ministry of Commerce jointly published the *Circular on the Launching of a Pilot Project for the Establishment of Wholly Foreign-owned Hospitals* (关于开展设立外资独资医院试点工作的通知) (Circular). Before this release, wholly foreign-invested hospitals could only be set up in the China (Shanghai) Pilot Free Trade Zone. However, the Circular enlarges the pilot area for wholly foreign-invested hospitals to seven provinces and municipalities, which include Beijing, Tianjin, Shanghai, Jiangsu province, Fujian province, Guangdong province and Hainan province.

The Circular also allows for the establishment of wholly foreign-invested hospitals through acquisition. This means that foreign investors are now able to acquire the shares of existing Chinese, non-government funded hospitals in these regions and convert them into wholly foreign-invested hospitals.

However, there are a number of areas of uncertainty surrounding the implementation of the Circular:

Lack of provincial regulations

The Circular states that each provincial health authority and bureau of commerce must provide detailed measures for the establishment of wholly foreign-invested hospitals and submit them to the National Health and Family Planning Commission and the Ministry of Commerce for approval before implementation. It is difficult to see how these hospitals will actually be set up, however, before these measures are released and put in place.

Related rules unclear

The following matters also need to be clarified in order to provide direct guidelines and procedures to set up a wholly foreign-owned hospital:

Establishment conflicts

Article 35 of the *Tentative Regulation on the Administration of Sino-Foreign Equity and Contractual Joint Venture Hospitals* prohibits the establishment of a wholly foreign-owned enterprise. This conflicting provision will need to be modified after the issue of the Circular.

Acquisition of existing hospitals

For the time being, there is no regulation governing the procedure for the acquisition of existing hospitals. The only regulation which may be applicable is the *Provisions for the Acquisition of Domestic Enterprises by Foreign Investors (Revised)*. These only apply to the acquisition of Chinese domestic companies and it is unclear how they would be applied if a foreign hospital was to acquire a Chinese government-funded hospital, which is unlikely to be registered as a company.

Type of hospitals to be set up

The Circular does not set out clear guidelines on the types of hospitals which are to be set up by foreign investors.

Constraints on foreign doctors

At present, foreign doctors can only be granted practicing licences in China for one year after obtaining the approval of the health authority. After this one-year licence expires, foreign doctors then have to re-register for a further one-year licence. Although it is not explicitly clear whether this policy will also apply to foreign doctors in a wholly foreign-owned hospital, the current regime requires modification in order to encourage more foreign doctors to work in China.

Freedom to transfer doctors

It also remains unclear how the transfer of Chinese doctors working in government-funded hospitals to wholly foreign-owned hospitals is to be dealt with. For doctors, whether a transfer may affect their ability to earn qualifications and promotions after transferring is a crucial factor for consideration. Without explicit regulations in this regard, Chinese doctors may be unwilling to move from government-funded hospitals to wholly foreign-owned hospitals.

Pricing

The National Development and Reform Commission, the National Health and Family Planning Commission and the Ministry of Human Resources and Social Security jointly issued the *Circular related to the Implementation of Market Price for Medical Services of Non Government-funded Hospitals* on March 25 2014. The Circular emphasises that non-government-funded hospitals may apply market prices and that local authorities may not interfere in the pricing of non-government-funded hospitals. Each province will now need to formulate their respective pricing rules to prevent interference in non-government-funded enterprises.

Proceed with caution

The uncertainties in PRC laws and regulation make it difficult for foreign investors to smoothly enter into this market. Although foreign investors are now able to set up wholly foreign-invested hospitals across the seven provinces and municipalities, they should carefully consider the different legal environments of each local area when selecting the place for incorporation.

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