

**Memo**

**To:** Senior Executives of Ontario's Public Hospitals

**From:** Dyckman Dewhirst O'Brien LLP

**Date:** October 19, 2010

**Re: Potential New Rules for Hospitals:  
Regulations for the *Excellent Care for All Act*, 2010**

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*The Excellent Care for All Act, 2010* (the "ECFAA") came into effect on June 8, 2010 and imposes several new obligations on Ontario's public hospitals related to quality of care. It also expands the mandate of the Ontario Health Quality Council to promote evidence-based care in the health care system. Proposed regulations to the ECFAA were released on October 14, 2010 and are open for public consultation up until November 12, 2010.

This communiqué provides an overview of the ECFAA and other relevant information to assist hospitals comply with the ECFAA.

Hospitals within the meaning of the *Public Hospitals Act* are the only health care organizations to which the ECFAA applies. Future regulations may expand the scope to apply to other publicly funded health care organizations.

In the meantime, the ECFAA imposes the following six (6) obligations on hospitals:

1. Establish a Quality Committee ("QC")
2. Conduct satisfaction surveys of:
  - patients and patients' caregivers
  - employees and those providing services within the hospital
3. Establish a patient relations process
4. Prepare a Quality Improvement Plan ("QIP") which sets out performance improvement targets
5. Ensure executive compensation is tied to the performance improvement targets set out in the QIP
6. Publish a patient declaration of values after seeking public consultation

Summary tables highlighting the *ECFAA* and its regulations (subject to change pending the public consultation) are found below.

For further detail of the proposed regulations, please see:  
[www.health.gov.on.ca/en/ms/ecfa/pro/docs/ecfa\\_notice.pdf](http://www.health.gov.on.ca/en/ms/ecfa/pro/docs/ecfa_notice.pdf)

### **DDO Health Law Services**

Now is a good time to provide your hospital board members with an update on their legal obligations. We have extensive experience advising hospitals boards and can help you to:

- Create a new QC board committee (if you do not have one already),
- Review your existing QC board committee and quality reporting processes, and
- Differentiate the terms of reference for your QC and your Quality of Care Committee (created under the *Quality of Care Information Protection Act, 2004*).

We can provide you with board orientation sessions, training and evaluation services.

If you have questions about executive compensation rules, we can help you find solutions and better understand the impact of the *Public Sector Compensation Restraint to Protect Public Services Act, 2010*.

We also have experience creating and facilitating patient/family satisfaction and employee feedback surveys. We provide regular advice to Patient Relations Offices and can assist hospitals that have yet to develop a formal process for patient engagement and feedback. We have sample Patient Bills of Rights and can assist you to draft one (if you do not already have one) or to review your existing or proposed patient declaration of values. We routinely facilitate public consultation sessions for hospitals on a variety of topics and can assist you if you need to engage your local community on your existing or new patient declaration of values.

We would be happy to assist you in your compliance with the 6 *ECFAA* requirements. For more information, please contact any one of the lawyers listed below:

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**SUMMARY OF EXCELLENT CARE FOR ALL ACT (“ECFAA”) REQUIREMENTS – October 2010**

NEW DUTIES	TIMELINE (IF ANY)	DETAIL
<p>1. Establish a Quality Committee (“QC”), which will report to the hospital board</p>	<p>Although the <i>ECFAA</i> came into force on June 8, 2010, the sections with respect to duties and reporting structure of the QC are not yet in force. They will come into force on a day yet to be proclaimed by the government. We anticipate that this section will come into force at the same time that the proposed regulation dealing with QCs is finalized and comes into force (anticipated January 1, 2011).</p>	<p>In addition to overseeing the preparation of the QIP on an annual basis (described below), QCs will also be responsible for:</p> <ul style="list-style-type: none"> <li>• Monitoring and reporting on quality issues and overall quality of services provided in the hospital,</li> <li>• Making recommendations regarding quality improvement initiatives and policies, and</li> <li>• Ensuring that best practices information supported by available scientific evidence is translated into materials that are distributed to employees and persons providing services within the health care organization, and to subsequently monitor the use of these materials by these people.</li> </ul> <p>Pursuant to the proposed regulations, the QC will be made up of board members and other individuals:</p> <ul style="list-style-type: none"> <li>• A majority of the members of the QC will be voting members of the hospital’s board.</li> <li>• Other mandatory positions on the QC include: <ul style="list-style-type: none"> <li>○ The administrator</li> <li>○ One member of the medical advisory committee</li> <li>○ The hospital’s chief nursing executive</li> <li>○ One member of a health profession within the meaning of the <i>Regulated Health Professions Act, 1991</i> who is not a physician or nurse and who provides health care in the hospital (such as, but not limited to, a dentist, physiotherapist, dietitian, midwife, medical laboratory technician, pharmacist, psychologist )</li> <li>○ Any other person as selected by the board.</li> </ul> </li> </ul>

**SUMMARY OF EXCELLENT CARE FOR ALL ACT (“ECFAA”) REQUIREMENTS – October 2010**

	<p>The MOHLTC Update provides that further information on the QC requirements will be made available Fall 2010.</p>	<p>The proposed regulation also provides that:</p> <ul style="list-style-type: none"> <li>• The hospital board will appoint a voting member of the hospital’s board to be the chair of the QC, and</li> <li>• Subject to Board approval, QC members may designate substitutes to be members of the committee in their place.</li> </ul>
<p>2. Conduct satisfaction surveys of:</p> <ul style="list-style-type: none"> <li>• patients and patients’ caregivers</li> <li>• employees and those providing services within the hospital</li> </ul>	<p><b>Prior to April 1, 2011 -</b> Surveys should be completed prior to April 1, 2011 as the QIP must be in place for the fiscal year commencing April 1, 2011 and the QIP must be based in part on the results of these surveys.</p> <p>The MOHLTC is promising to provide further updates in Fall 2010.</p>	<p><i>Patient/Caregivers</i> The ECFAA provides that at least once every fiscal year, hospitals must survey:</p> <ul style="list-style-type: none"> <li>• Patients who have received care at the hospital in the previous 12 months, and</li> <li>• Caregivers of those patients if the caregivers had contact with the hospital in connection with the services provided by the hospital.</li> </ul> <p>The purpose of this survey is to gauge the satisfaction with the services provided by the hospital.</p> <p><i>Employees and Service Provider Surveys</i> The ECFAA provides that at least once every two fiscal years, hospitals must survey:</p> <ul style="list-style-type: none"> <li>• Employees, and</li> <li>• Persons providing services within the hospital.</li> </ul> <p>The subject matters of these surveys are:</p> <ul style="list-style-type: none"> <li>• Satisfaction working for the hospital,</li> <li>• Satisfaction providing services within the hospital, and</li> <li>• Views regarding the quality of hospital care.</li> </ul>

## SUMMARY OF *EXCELLENT CARE FOR ALL ACT* (“*ECFAA*”) REQUIREMENTS – October 2010

		<p>The <i>ECFAA</i> does not contain any guidance on the specific form or requirements of any of the surveys, such as specific patient or employee groups or sample sizes. The proposed regulations introduced by the MOHLTC do not address any issues relating to surveys and there is no indication such a regulation will be passed in the near future.</p> <p>The MOHLTC’S latest update and a September 15, 2010 OHA Webcast suggest the following:</p> <ul style="list-style-type: none"> <li>• Hospitals that already conduct surveys using an existing tool (e.g., NRC Picker) should continue to do so.</li> <li>• No specific survey is being recommended at this time.</li> <li>• With respect to the failure of the <i>ECFAA</i> to define specific patient groups or sample sizes for the surveys, hospitals should work with the survey vendor to ensure the appropriate patients are surveyed to ensure valid data while minimizing patient burden.</li> <li>• Physicians should be included in the surveys.</li> <li>• Volunteers can but do not have to be included in the surveys.</li> <li>• A working group established by the MOHLTC (“Working Group”) is currently exploring how best to support hospitals not currently surveying their patient population. The Working Group is collecting and carefully reviewing a variety of tools and processes that are already in use throughout the sector with an eye for identifying leading practices.</li> <li>• The Ontario Health Quality Council and Accreditation Canada are working toward alignment/consistency.</li> </ul>
3. Establish a patient relations process	It is expected that MOHLTC guidelines will be made available shortly.	Hospitals must have a patient relations process in place that reflects the content of its patient declaration of values (described below). Information about the process must be made available to the public. No detail is provided in the proposed regulations as to what this should look like.

## SUMMARY OF EXCELLENT CARE FOR ALL ACT (“ECFAA”) REQUIREMENTS – October 2010

<p>4. Prepare a Quality Improvement Plan (“QIP”) which sets out performance improvement targets</p>	<p><b>April 1, 2011</b> – Hospitals must have a QIP in place for the 2011/2012 fiscal year.</p> <p>Further directions regarding QIP expectations are expected to be released shortly.</p> <p>A QIP prototype, guidance document, and further communications are expected to follow in January 2011.</p>	<p>The <i>ECFAA</i> provides that QIPs must be prepared by the QC for every fiscal year and made available to the public. The QIP must also be provided to the Ontario Health Quality Council and it will be subject to province-wide comparison. The <i>ECFAA</i> allows LHINs in the geographic location of the hospital to receive upon request to the hospital, a copy of the draft QIP before it is made available to the public.</p> <p>The <i>ECFAA</i> also provides that the annual QIP must be developed having regard to the following:</p> <ol style="list-style-type: none"> <li>1. The results of the surveys.</li> <li>2. Data relating to the patient relations process.</li> <li>3. The hospital’s aggregated critical incident data as compiled based on disclosures of critical incidents pursuant to regulations made under the <i>Public Hospitals Act</i> and information concerning indicators of the quality of health care provided by the hospital disclosed pursuant to regulations made under the <i>Public Hospitals Act</i>.</li> <li>4. Anything else provided for in the regulations.</li> </ol> <p>The annual QIP must contain, at a minimum:</p> <ol style="list-style-type: none"> <li>1. Annual performance improvement targets and the justification for those targets,</li> <li>2. Information concerning the manner in and extent to which executive compensation is linked to achievement of those targets, and</li> <li>3. Anything else provided for in the regulation.</li> </ol> <p>The QC is responsible for overseeing the preparation of the QIP; accordingly the QC must be established prior to April 1, 2011.</p>
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## SUMMARY OF EXCELLENT CARE FOR ALL ACT (“ECFAA”) REQUIREMENTS – October 2010

		<p>The QIP must contain information “concerning the manner in and extent to which hospital’s executive compensation is linked to achievement” of the performance improvement targets in the QIP. Accordingly, negotiation and finalization of any necessary amendments to executive compensation plans to reflect an attainment of performance improvement targets must also be completed prior to April 1, 2011.</p> <p>The proposed regulations do not address any issues relating to the QIP and there is no indication such a regulation will be passed in the near future.</p> <p>The MOHLTC latest update and the September 15, 2010 OHA Webcast suggest:</p> <ul style="list-style-type: none"> <li>• Hospitals are required to prepare a QIP for April 1, 2011, and</li> <li>• Hospitals will be allowed flexibility in the development of their QIPs so that additional elements (for example, financial, HR management, etc.) can be included if desired. However, at this point it is expected that the QIPs will require data that focuses only on quality of care (i.e., safety, effectiveness, and patient experience).</li> </ul>
<p>5. Ensure executive compensation is tied to the performance improvement targets set out in the QIP</p>	<p><b>Prior to April 2011 –</b> The QIP, which must be in place for the fiscal year commencing April 1, 2011 must contain information concerning the manner in and extent to which executive</p>	<p>The ECFAA requires that the compensation of the chief executive officer be linked to the achievement of performance improvement targets provided for in the QIP. One of the proposed regulations extends the scope of executives covered by this section of the ECFAA to include:</p> <ul style="list-style-type: none"> <li>• Members of the senior management group who report directly to the chief executive officer or person who holds a position equivalent to chief executive officer where there is no chief executive officer.</li> <li>• The chief of staff, where there is a chief of staff.</li> <li>• The chief nursing executive.</li> </ul>

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	<p>compensation is linked to achievement of those targets.</p> <p>Further directions from the MOHLTC on this obligation are expected in the Fall.</p>	<p>The <i>ECFAA</i> specifically addresses executive compensation plans which are subject to the <i>Public Sector Compensation Restraint to Protect Public Services Act, 2010</i> (“<i>Restraint Act</i>”). The <i>Restraint Act</i> prohibits public hospitals from increasing wages for non-unionized staff outside the current pay grid during the period March 24, 2010 to April 1, 2012. Increases may be permissible within the scope of an existing grid based on a number of factors including an “assessment of performance”:</p> <ul style="list-style-type: none"> <li>• Where an executive’s compensation plan already provides for a payment based on performance, there must be some assessment of whether the performance targets were actually met (presumably in order to justify the payment to the executive of that portion of his/her pay which is based on performance).</li> <li>• Where an executive’s compensation plan <u>does not</u> provide for any payments based on an assessment of performance, hospitals are required to modify the compensation plan so that payment of a portion of the executive’s compensation is based on achievement of performance targets. The modification cannot result in the executive earning more than what the compensation plan provided for on March 24, 2010.</li> </ul> <p>Generally, affected employees can claim constructive dismissal where an employer unilaterally modifies his/her compensation plan in a substantial (and negative) manner. Section 9(2) of the <i>ECFAA</i> may be a possible defence to such claims against hospitals. This section provides that the <i>ECFAA</i> prevails over the provisions of a compensation plan and, if there is a conflict between this <i>ECFAA</i> and a compensation plan, the compensation plan is inoperative to the extent of the conflict.</p>
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		<p>Neither the ECFAA nor the proposed regulations provide any direction or guidance on:</p> <ul style="list-style-type: none"> <li>• What if any criteria the performance targets must measure,</li> <li>• How hospitals must assess whether an executive met the performance targets, or</li> <li>• What percentage of an executive’s compensation must be tied to performance improvement targets.</li> </ul>
<p>6. Publish a patient declaration of values after seeking public consultation</p>	<p><b>December 8, 2010</b> – Hospitals must have consulted with the public about their patient declaration of values.</p> <p><b>June 8, 2011</b> – Finalize the patient declaration of values and make it available to the public</p> <p>The MOHLTC has indicated that further direction will be provided prior to December 8, 2010 regarding an acceptable consultation process</p>	<p>Hospitals that <u>do not</u> have a patient declaration of values must:</p> <ul style="list-style-type: none"> <li>• Consult with the public about a draft declaration of values by December 8, 2010, and</li> <li>• Finalize the patient declaration of values and make it available to the public by June 8, 2011.</li> </ul> <p>The proposed regulations do not address any issues relating to the patient declaration of values.</p> <p>The MOHLTC Update and the OHA Webcast Q&amp;A suggest that hospitals that have a declaration of values that was developed without public consultation will be required to meet the consultation requirements of the ECFAA.</p>

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	<p>and an appropriate declaration of values.</p> <p>In addition, the MOHLTC has stated that tools will be made available later this fiscal year to help hospitals ensure that their patient relations process reflects the patient declaration of values.</p>	
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**ONTARIO HEALTH QUALITY COUNCIL**

<b>PRIOR MANDATE</b>	<b>EXPANDED MANDATE</b>
<ul style="list-style-type: none"> <li>• Monitor and report to Ontarians on access to publicly funded health services, health human resources in publicly funded health services, consumer and population health status, and health system outcomes</li> <li>• Support continuous quality improvement</li> </ul>	<ul style="list-style-type: none"> <li>• Provide recommendations to the health system on clinical practice guidelines and protocols</li> <li>• Provide recommendations, in consultation with the public, to the MOHLTC concerning the Government of Ontario's provision of funding for health care services and medical devices</li> </ul>