



Practical Pediatric Legal Updates

PCC 2016 Users' Conference

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Agenda

- HIPAA Audits Program
- HIPAA Enforcement Update
- Nondiscrimination in Health Programs and Activities
- Employment Law Update
- 60-Day Rule
- Exclusions
- Q and A

HIPAA Audit Program

- HITECH requires HHS to perform periodic audits of covered entities and business associates.
- HHS Office for Civil Rights (OCR) enforces HIPAA and HITECH Rules.
- For audit information, see:

<http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/audit/index.html>



HIPAA Audit Program Phase I

2011 - 2012

Audited controls and processes of 115 covered entities to comply with Privacy, Security and Breach Notification Rules.

HIPAA Audit Program Phase 2

- Launched in 2016.
- Reviews covered entities'/business associates' policies and procedures.
- Desk audit: very little on-site.
- Started with an email asking to verify email address and contact information.
- Followed by pre-audit questionnaire.

osocraudit@hhs

If you did not get an email, check junk and spam folders for OCR emails.

HIPAA Enforcement Actions

Issue: Access

Private practice enforcement actions:

- Improper charges for medical records.
- Providing summary record instead of full record set without consent.
- Refused access to medical exam records when paid for by third party.
- Denial of portion of record created by different provider.
- Denied records to patient with balance due.

Issue: Safeguards; Impermissible Uses and Disclosures

Private practice required to implement safeguards for waiting rooms.



Issue: Conditioning Compliance with the Privacy Rule

Private practice tried conditioning its compliance with the privacy rule on patient's agreement to certain conditions.



Issue: Business Associate Agreements

\$750,000 settlement highlights the need for HIPAA business associate agreements.

Nondiscrimination in Health Programs and Activities

- May 13, 2016: OCR issued the final rule implementing Section 1557.
- Section 1557: nondiscrimination provision of the Affordable Care Act (ACA).
- Rule became effective July 18, 2016 except for requirement to post notices of consumer rights and taglines and accessibility standards for certain buildings.
- Makes it unlawful for any health care provider that receives funding from the Federal government to refuse to treat an individual – or to otherwise discriminate against the individual – based on race, color, national origin, sex, age or disability.

Final Rule Prohibits Sex Discrimination in Health Care

- Women must be treated equally with men in the health care they receive.
- Prohibits denial of health care or health coverage based on an individual's sex, including discrimination based on pregnancy, gender identity, and sex stereotyping.

Final Rule Protects Individuals with Disabilities and with Limited English Proficiency

- Must make electronic information and newly constructed or altered facilities accessible to individuals with disabilities and provide appropriate auxiliary aids and services for individuals with disabilities.
- Must take reasonable steps to provide meaningful access to individuals with limited English proficiency, encouraging providers to develop language access plans.

Final Rule Posting

- Covered entities with 15 or more employees are required to have a civil rights grievance procedure and an employee designated to coordinate compliance.
- Covered entities are required to post information telling consumers about their rights and telling consumers with disabilities and consumers with limited English proficiency (LEP) about the right to receive communication assistance.
- Also must post taglines in the top 15 languages spoken by individuals with LEP in the states in which the covered entity operates, advising consumers of the availability of free language assistance services.

Employment Law Update

- Ban the Box
- Overtime Pay Exemptions
- Telecommuting and Flexible Work Arrangements
- Paid Sick Leave

Ban the Box

- Prohibits employers from asking about criminal history on job applications or early in the application process.
- Aim: give those with criminal records a fair shot.

<http://www.chicagotribune.com/business/ct-ban-the-box-racial-bias-0720-biz-20160719-story.html> (Ban-the-box laws may worsen racial bias . . . July 20, 2016).

Overtime Pay Exemptions

- The United States Department of Labor (DOL) published the final rule on the changes to the Fair Labor Standards Act (FLSA) overtime rules.
- Increases the minimum salary requirement for certain exemptions under the FLSA.
- Will make an estimated 4.2 million more workers eligible for overtime pay effective 12/1/16.
- Raises minimum annual salary for overtime pay exemption to \$50,440 (previously the threshold was \$23,660).



Overtime Pay Exemptions

The FLSA overtime changes will apply to you if you have any employees who meet the job duties and salary basis exemption requirements and their salaries fall between the old and the new threshold for the salary requirements.

Overtime Policies

- Employers need to make sure non-exempt employees are not working unauthorized overtime from home.
- Overtime policy prohibiting working more than 40 hours in a given workweek without advance written authorization.

Telecommuting and Flexible Work Arrangements

- Written policy prohibiting working off the clock, and underreporting or over reporting hours worked.
- Take action if an employee fails to obtain prior approval for any reported overtime hours, but still pay the overtime.



Flexible Work Schedule

Certain states have laws that protect an employee's right to request a flexible work arrangement and impose obligations on employers to consider such requests.

(e.g., Vermont)

Paid Sick Leave

- Passage of paid sick leave laws.
- Generally, require fixed number of days of paid time-off that may be used if employee or a dependent becomes ill.



ACA, Section 6402

Overpayment Requirement

- Section 1128J(d) of Social Security Act.
- Any provider under Medicaid/Medicare must report & return overpayments within 60 days of identification.
- Overpayment defined: any funds received or retained to which provider, after applicable reconciliation, was not entitled.

Retained Overpayment = False Claim

- After 60 days, retained overpayment equals false claim.
- ***Kane v. Healthfirst, Inc.***
(S.D.N.Y.): *qui tam* suit alleging failure to timely repay to Medicaid overpayment due to billing errors from software glitch.

60-Day Rule

- Rule applies to Medicare A & B, likely interpretation for Medicaid.
- Overpayment is “identified,” when a provider has or should have, through “reasonable diligence,” quantified the overpayment.
- Completion of such reasonable diligence should take no more than 6 months from receipt of credible information, absent extraordinary circumstances.
- Reasonable diligence = “credible information” standard (fact specific inquiry).



60-Day Rule Lookback Period

6 years (overpayments identified within 6 years after they were received).

Failure to Comply With 60-Day Rule

- Failure to comply subjects person/entity to liability under the federal False Claims Act (FCA).
- Monetary damages of three times each claim's value, plus penalties of up to \$10,000 per claim.
- Increased risk of qui tam/relator (whistle blower) lawsuits and employee retaliation lawsuits.

Exclusions

- OIG is charged with excluding from participation in Medicare, Medicaid, and other Federal health care programs persons who have engaged in fraud or abuse.
- Anyone who hires or contracts with an “excluded” individual/entity may be subject to:
 - up to \$10,000 civil monetary penalties (CMP) for each item or service furnished by the excluded person for which Federal program payment is sought,
 - assessment of up to three times the amount claimed, and
 - program exclusion.

Exclusions: Best Practices

- Check OIG's List of Excluded Individuals and Entities (LEIE) to ensure that new hires and current employees are not on the excluded list. (The list is updated monthly.)
- There is no federal statutory or regulatory requirement to check the LEIE.
- Some state Medicaid programs require monthly checks.
- Providers must determine how frequently to check LEIE.

Exclusions: What to Do If We Discover an Excluded Employee?

- Consult counsel who should discuss with you:

OIG Provider Self-Disclosure Protocol to disclose and resolve the potential CMP liability.

<http://oig.hhs.gov/compliance/self-disclosure-info/index.asp>



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