ENDNOTES
News for North Carolina's Hospice and Palliative Care Community

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It Could Happen to Anybody, and It Did: Office of Civil Rights Slams Provider For Employee's HIPAA Violation

Have you ever decided to catch up on a little paperwork after hours or on a weekend, shoved a few resident medical or billing records into your briefcase or downloaded them onto your iPad or laptop? Sure you have. But you might want to think twice about that for yourself and your employees, or at least tread carefully.

In February 2016, the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services slapped Lincare, a national provider of respiratory care, infusion therapy and medical equipment for in-home patients, with a $239,800 fine for an employee who took patient charts containing protected health information home, then changed residences and just left the records behind. The records were discovered by an unauthorized individual. OCR charged Lincare with violations of the Health Insurance Portability and Accountability Act (HIPAA) and, for only the second time in history, used civil fines, not education or other sanctions, to make its point.

Lincare defended the allegations before a federal administrative law judge, arguing the employee stole patient records. Lincare lost. The ALJ upheld OCR's allegations on all counts, finding that Lincare knew employees routinely took patient records home, had an unwritten policy requiring employees to store patient records in their vehicles for extended periods of time and, as to the theft defense, even if true, then Lincare had inadequate policies and procedures governing employee removal and storage of patient charts and against theft of them. The OCR also alleged, and the ALJ agreed, that even after learning of the complaint about the abandoned records, Lincare took only minimal efforts to correct its policies and strengthen procedures to ensure HIPAA compliance.

To be sure, providers of in-home goods and services face a tougher time ensuring HIPAA-compliant protection of patients' Protected Health Information (PHI). But the issue isn't limited to home care providers or vendors. We handled a case last year involving the storage of resident PHI on an employee's personal, unencrypted cell phone, and the Centers for Medicare and Medicaid Services jumped all over it, requiring a multi-layered Directed Plan of Correction.

So what to do? Ensure that you have robust policies and procedures governing when employees may remove charts or copies of charts from the facility or business premises; how those must be stored, whether in hard-copy format or electronically; how they can be used and return protocols. Also ensure that all employees transmit and/or store PHI only on work-approved or -issued, encrypted electronic devices. Your policies and procedures have to address these and other issues where work practices potentially permit the unauthorized disclosure of residents' confidential health or financial information.

The OCR, in its press release, served notice that it's more than willing to prosecute complaints of unauthorized disclosure of PHI, and to use civil money fines to enforce the law.

KEN BURGESS' *practice has focused heavily, but not exclusively, on issues affecting long term care providers. He has advised them on a wide variety of legal planning issues arising in the skilled nursing facility setting, assisted living setting, hospice, home health and other spheres of long term care. He may be reached at kburgess@poynerspruill.com or 919.783.2917.*

Hospice Providers – Step Up to the "MIC"

by Iain Stauffer

After a period of relative calm on the audit front, many signs point to an increase in audit activity. According to the Program Integrity Section of the Division of Medical Assistance, a Medicaid Integrity Contractor (MIC) will begin audits of North Carolina Medicaid hospice providers soon. Is your agency ready for this increased audit environment?

What is a Medicaid Integrity Contractor?
The Deficit Reduction Act of 2005 established the Medicaid Integrity Program under Section 1936 of the Social Security Act. It required the Centers for Medicare and Medicaid Services (CMS) to contract with entities to: conduct reviews of Medicaid provider actions; audit claims; identify overpayments; and educate providers and others on payment integrity and quality of care. A Medicaid Integrity Contractor (MIC) is the name for the private entity that contracts with CMS to perform these functions. There are three types of MICs: Review MICs; Audit MICs; and Education MICs. Review MICs conduct data mining analysis and risk assessments of Medicaid claims data. Audit MICs conduct post-payment audits of Medicaid providers and identify overpayments. The audit ensures that claims are paid in compliance with Medicaid rules and regulations and that claims paid are medically necessary. Education MICs educate providers and others on matters regarding payment integrity and quality of care issues.

What is the likely MIC audit process?
A provider can be selected for a MIC audit based on either data analysis performed by a Review MIC or by referral from a state agency. After a provider is selected, the Audit MIC will send a Notification Letter. Audit MICs conduct both desk audits and field audits. During a desk audit, the provider sends its documentation to the Audit MIC who reviews the records at its office. A field audit occurs when the audit is performed at the provider's location. For a field audit, there will most likely be an entrance conference for the MIC to explain the objectives of the audit and to also attempt to answer questions from the provider. At the conclusion of the on-site field audit work, the MIC may conduct an exit conference with the provider to offer general observations about any audit findings. The most recent version of the CMS Medicaid Program Integrity Manual provides for a five year look back period which begins from the start of the audit, which is the date the engagement letter is sent. If after a review of the records, the MIC finds a potential overpayment, it will prepare a draft report shared with both the State Medicaid Agency and the provider for comment. After the report is finalized, the Audit MIC will send it to the State Medicaid Agency which will pursue the collection of any overpayment and adjudicate any appeals based on state law.

continued on page 3

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Ask and They Shall Receive: Implications of EEOC's New Procedure for Position Statements

By Caitlin Goforth

If you were not closely watching the Equal Employment Opportunity Commission's (EEOC) website, you may have missed its subtle announcement changing how Respondent position statements are handled. The EEOC rolled out nationwide procedures that apply to all EEOC requests for position statements made to employers on or after January 1, 2016.

After an employee files a Charge of Discrimination, the EEOC requires an employer to either submit to mediation or provide a position statement. The position statement is the employer's first chance to give its version of events regarding the alleged violation. After reviewing the Charge and the employer's position statement, the EEOC determines whether, in its view, harassment, discrimination, or retaliation occurred.

Under the revised policy, an employee can now ask for the employer's position statement and any non-confidential attachments while the Charge is pending. Prior to the revision, an employee would have to wait until he or she filed a lawsuit against the employer to request a copy of the employer's position statement. Unfortunately for employers, the revised policy is not a two-way street because the EEOC will still only provide employers with the Notice of Charge and the Charge of Discrimination itself.

The show and tell revisions apply to non-confidential attachments accompanying a position statement. Remember, the EEOC may redact confidential information before providing the position statement to the employee. Therefore, employers should clearly label confidential information. EEOC advises employers to separately label attachments containing confidential information and include an explanation of the confidential nature. The specific categories for confidential information may be found on the EEOC's website.

Employers should, as always, thoughtfully draft position statements being careful to accurately articulate the reasons for the adverse action under investigation. Shifting rationales could be enough to establish pretext and expose the employer to liability. It is necessary for employers to fully understand the facts surrounding the Charge before responding. Considering that the position statement may be used by the employee in any future litigation, employers should retain experienced employment law counsel to assist in any EEOC investigation.

Caitlin Goforth *represents employers in litigation under all federal and state employment laws, including cases involving harassment, discrimination, retaliation, and wage and hour issues. She may be reached at 919.783.2987 or cgoforth@poynerspruill.com.*

> "Life isn't about waiting for the storm to pass. Its about learning to dance in the rain"
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> *~ unknown*

Step up to the MIC... continued from page 1

What will be the focus of the audit?
The specific areas of focus for the hospice audits have not yet been disclosed. However, hospice audit topics in other states have recently included length of stay and compliance with state and federal Medicaid policy and regulations. Here in North Carolina, the Medicaid hospice benefit is governed by Clinical Coverage Policy No.: 3D which incorporates many of the federal regulations that govern the Medicare hospice benefit (42 C.F.R. Part 418). We would be more specific with potential topics if we could, however, that is the information available at this time.

Besides the potential audit topics already mentioned, a recent CMS publication from the Hospice Toolkit, Program Integrity-An Overview for Medicaid Hospice Providers, addressed several overpayment trends from various state and federal audits. These include a lack of documentation to support a terminal illness with a life expectancy of six months or less, failing to certify in a timely manner, hospice employees not properly vetted or licensed, documentation that supported long-term or custodial care rather than hospice care, and issues with the principal hospice diagnoses on claims.

Increased awareness and understanding of previous audit topics can help to prepare for an upcoming audit, and conducting your agency's own internal compliance program.

Can the results be appealed?
An appeal of an overpayment from a MIC audit is governed by state law. In North Carolina, a provider that receives a notice of overpayment should have the opportunity to request a reconsideration review with DMA and file an appeal with the Office of Administrative Hearings. Even though DMA will not have conducted the MIC audit, it will be responsible for defending the audits during an appeal.

Are you ready?
So, what does this mean for North Carolina hospice providers? The Audit MIC for North Carolina is Health Integrity, LLC. According to DMA, the MIC audits will commence in the next four to six weeks. If you are contacted regarding an audit, review the letter carefully. If you have questions, contact the auditor to clarify.

If the letter instructs you to provide or produce records, review the request closely. Identify all relevant records being requested for the beneficiary and the date of service. Before providing documents to the auditor, either by mail or on-site, verify the records are complete and are organized so the auditor can easily locate the information. Don't forget to make copies of any records you send to the auditor. Documentation is crucial for a post-payment audit, and a MIC audit is no different.

Also, make sure that you know and monitor the applicable timeframes for the production of records and for an appeal. A missed deadline can lead to adverse audit findings, create additional issues, and cause your agency to spend more time and effort than is necessary while distracting from patient care.

The impending MIC audits and recent updates to the CMS Program Integrity website regarding the hospice program are clear signs audit activity will increase. Providers should be on notice and plan ahead.

Iain Stauffer's *practice focuses on advising and representing health care providers in Medicare and Medicaid reimbursement, enrollment, compliance, litigation, and regulatory issues. He may be reached at 919.783.2982 or istauffer@poynerspruill.com.*