Center for Health and Wellness Law, LLC

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May/June 2017 Newsletter

EEOC Settles Lawsuit Against Orion Energy

According to a May 5, 2017 press release by the Equal Employment Opportunity Commission (EEOC), the EEOC resolved the lawsuit against Orion Energy Systems, a Wisconsin-based company who was sued by the EEOC in 2014. The lawsuit challenged Orion's workplace wellness program under the Americans with Disabilities Act (ADA). The wellness program asked employees to participate in a screening program and those employees who refused to participate were responsible for 100% of their health insurance premium through Orion's group health plan.

Last fall, the Eastern District of Wisconsin court ruled in favor of the EEOC on a number of grounds, but also found Orion's wellness program to be voluntary under the ADA under the law that existed before the EEOC issued its final rules in May 2016. Orion settled with the EEOC by agreeing to pay $100,000 to the employee who alerted EEOC to the possible ADA violation. Orion also agreed not to maintain a wellness program in the future that poses disability-related inquiries or seeks medical examination that is not voluntary within the May 2016 regulations. Orion agreed not to engage in any form of retaliation, including interference or threats against any employee because he or she has raised objections or concerns as to whether the wellness program complies with the ADA. Orion will also tell its employees that any concerns about its wellness program should be sent to its human resources department.

The settlement agreement also requires Orion to train its management and employees on the law against retaliation and interference under the ADA. Orion will provide additional training to its CEO, COO, CFO, human resources director and all employees responsible for negotiating or obtaining heath benefit coverage or selecting a wellness program. This additional training will cover the settlement agreement requirements and ADA requirements as they pertain to wellness programs.

An EEOC attorney states that "The EEOC has always maintained that wellness programs, done right, are a good thing. But they have to be voluntary. Through this settlement, Orion Energy agrees that its future wellness programs will be done right."

What Does This Settlement Mean For Wellness Programs?

With the settlement of Orion Energy, all three cases brought by the EEOC in 2014, Honeywell, Flambeau and now Orion, have reached the end of their legal journey. As noted in earlier blog posts, the Seventh Circuit found the Flambeau case to be moot, the Honeywell case settled and now the Orion Energy case settled rather than being appealed to the Seventh Circuit. By bringing the three cases, the EEOC tried to send a message to the wellness community that

compliance with the ADA and GINA requirements matter. Until Congress declares otherwise, wellness programs must make sure their wellness programs adhere to ADA and GINA requirements, as well as the numerous other laws that impact workplace wellness program design and implementation.

Can I impose a higher fee to an attorney's request for patient medical records? Wisconsin Supreme Court Says "No."

Healthcare providers who maintain patient medical records may on occasion receive a request for copies of those records. Sometimes those requests come from attorneys representing the patient in a lawsuit, such as a personal injury lawsuit. A recent Wisconsin Supreme Court decision has raised questions about charging fees to attorneys who request medical records on behalf of their clients.

In *Moya v. Aurora Healthcare Inc*. (May 4, 2017), the court held "that an attorney authorized by his or her client in writing via a HIPAA release form to obtain the client's health care records" are not required to pay an $8 charge for "certification of copies" or a $20 "retrieval fee."

In other words, the court interpreted the term "person authorized by the patient," defined at Wis. Stat. § 146.81(5), to include attorneys with written authorization. And persons authorized by the patient are exempt from those fees.

But this interpretation conflicts with rules regarding fees under the Health Insurance Portability and Accountability Act (HIPAA).

What are the Fee Limitations under HIPAA?

HIPAA permits a covered entity to impose a reasonable, cost-based fee if the individual (or the individual's attorney) requests a copy of the individual's protected health information. Fees are limited to the actual cost of the following:

1. labor for copying the protected health information requested, whether in paper or electronic form[i];

2. supplies for creating the paper copy or electronic media if the individual requests that the electronic copy be provided on portable media and the covered entity maintains the records electronically;

3. postage, when the individual requests that the copy, or the summary or explanation, be mailed; and

4. preparation of an explanation or summary of the PHI, if the individual in advance both chooses to receive an explanation or summary and agrees to the fee that may be charged.

Under HIPAA, a covered entity may charge individuals actual or average labor costs to fulfill a request for electronic (or paper) copies of protected health information that the covered entity maintains electronically. The labor cost must only relate to the cost of making copies, or creating a summary or explanation, if the individual has requested a summary and explanation.

For example, practitioners can charge the actual or average costs for photocopying paper, scanning paper into electronic format, converting electronic information into the format requested, transferring files (such as uploading or downloading) to a web-based portal, or creating or executing an email that is responsive to the request.

If a covered entity does not wish to calculate actual or average labor costs associated with a request for health information in electronic format, the covered entity may charge a flat fee of $6.50 for each request for electronic records.

If the HIPAA rate applies, covered entities should charge the lesser of: the charges applicable under state law or the charges applicable under the HIPAA rate.

Obviously, attorneys want to take advantage of the lesser rates applicable to requests for a client-patient's health information. But the HIPAA rate will not apply to the attorney's request for a client-patient's records unless it is clear that the individual initiated the request.

When Does the HIPAA Rate Apply to an Attorney's Request for a Client-Patient's Records?

The HIPAA rate applies when an individual (the patient) makes a written request for a copy of his or her protected health information. A covered entity may also choose to accept an individual's oral request for an electronic copy of their protected health information without written signature or documentation.[ii] The HIPAA rate also applies when:

- an individual directs a covered entity to send protected health information to a third party, such as an attorney that is representing the patient. To direct a copy to a third party, the individual's access request must be in writing, signed by the individual, and clearly identify the designated person (lawyer) or entity, and where to send it.[iii] This written request for protected health information to be sent to a designated person is distinct from a HIPAA authorization form, which contains many additional required statements and elements.[iv]

- The fee limitations also apply if the third-party (lawyer) is forwarding, on behalf and at the direction of the individual, the individual's access request for a covered entity to

direct a copy of the individual's protected health information to the third party (lawyer).[v] Forwarded access requests must meet the same requirements just noted above.

Under HIPAA, the HIPAA rate does not apply if the third party (lawyer) is initiating the request on his or her own behalf, even with a HIPAA-compliant authorization from the client.[vi]

For the HIPAA rate to apply, it must be clear that the patient-client is the party initiating the request for his or her own health records to be sent to the patient-client's lawyer.

If a lawyer initiates a health records request on his or her own behalf, the HIPAA rate does not apply unless the attorney is a "personal representative" of a deceased patient or has authority to act on behalf of the patient-client in making decisions related to health care.[vii]

This makes sense because one of HIPAA's primary goals is to protect the privacy and security of an individual's protected health information, and allowing attorney access without proper authority, such as through a healthcare power of attorney, provides less protection from the unauthorized disclosure of the patient's health information.

A HIPAA release form alone, with nothing more, may indicate that a patient has authorized the release of his or her protected health information. But it must be clear that the patient-client has initiated the particular request for records to be sent to the patient's lawyer, otherwise the HIPAA rate does not apply.

Any argument that the *Moya* decision changes this conclusion is misguided, in counsel's opinion, because HIPAA controls when state law is contrary to HIPAA. Any state law that allows a third party to obtain a patient's health records without conforming to the requirements of HIPAA conflicts with HIPAA.

As a practical matter, however, a covered entity should make efforts to determine whether a patient has initiated a request for electronic records through an attorney, if the request is not clear. If it is clear that a patient initiated the request, the covered entity should apply the lesser of the HIPAA rate or state-authorized fees.

If a covered entity receives a call from attorney requesting health information of a patient-client in electronic format, the covered entity should inform the attorney that such oral requests must come from the patient-client, if the covered entity allows oral requests, or that the patient-client must initiate the request in a writing separate from the HIPAA release form.

Please contact the Center for Health and Wellness Law, LLC if you require further assistance.

New HIPAA Security Resources for Health and Wellness Providers from the Federal Office for Civil Rights

The federal Office for Civil Rights (OCR) within the Department of Health and Human Services recently added some resources that should be of interest to health and wellness providers. The first resource addresses the increasing frequency of cyber threats to the health industry. The fact sheet informs health care providers (i.e., HIPAA "covered entities") and those who support them (i.e., HIPAA "business associates") about the United States Computer Emergency Readiness Team (US-CERT) housed within the federal Department of Homeland Security. Health care providers and business associates can subscribe to US-CERT mailing lists and bulletins to get updates on new security vulnerabilities and risks and how to mitigate those risks. OCR points out that HIPAA covered entities and business associates can leverage the US-CERT information as part of their Security Management Process under HIPAA (see 45 CFR § 164.308(a)(1)) to help ensure the confidentiality, integrity and availability of electronic protected health information.

The second resource is for application developers who may have questions about whether and when HIPAA privacy and security rules apply to them. To help these "app" developers, OCR developed a portal with frequently asked questions about health app use scenarios, questions regarding the use of cloud computing and a method to submit your own questions to OCR.

An example of a currently popular question on the portal is as follows:

"There is currently a lack of clarity about whether patient consent to communicate via (unencrypted) SMS is adequate to protect covered entities from HIPAA concerns. HHS (and medical research) has released data supported use of non-encrypted SMS, given its high accessibility to patients and its efficacy in achieving behavior change (e.g. medication compliance, smoking cessation).

Many covered entities feel that this use of unencrypted SMS is okay - as long as sensitive information is not communicated, and as long as it is in agreement with patients' preferences, and as long as consent is obtained. Other covered entities disagree.

What is your perspective?"

Community members have weighed in on the question. To see the various answers, click here.

Frequently Asked Question: We provide our own health screening and submit the data to an outside vendor. Can we send out an invitation to our newly developed Diabetes Prevention Program to those employees who are identified to be at risk through the Health Risk Assessment?

Response: The HIPAA/ACA regulations permit "benign discrimination," which is discrimination in favor of an individual based on a health factor. See 29 CFR s. 2590.702(g). Example: A plan grants participants who have diabetes a waiver of the plan's annual deductible if they enroll in a disease management program that consists of attending educational classes and following their doctor's recommendations regarding exercise and medication. This is benign discrimination because the program is offering a reward to individuals based on an adverse heath factor. This exception is not available if the plan asks diabetics to meet a standard related to a heath factor (such as maintaining a certain BMI in order to get a reward). In this case, an intervening discrimination is introduced and the plan cannot rely solely on the benign discrimination exception. So, depending on what your communication says to the at risk individuals, it may or may not qualify as benign discrimination.

Hurry!! There is Still Room for the One-Day Workplace Wellness Compliance Intensive Training on Monday, August 28, 2017!

Barbara J. Zabawa and JoAnn Eickhoff-Shemek, authors of the book Rule the Rules on Workplace Wellness Programs, will be leading a one-day training on workplace wellness compliance. The learning objectives are:

Objective 1: Attendees will understand basic legal principles and the relationship of law to workplace wellness program compliance. These laws include certification and licensing requirements, mental health laws, particularly as applied to EAP activities, and the need for codes of conduct and standards of practice.

Objective 2: Attendees will be able to identify compliance red flags and requirements when employing incentives in workplace wellness programs. Legal requirements covered include HIPAA, ADA, GINA and tax laws. Attendees will apply concepts in group discussions and problem solving.

Objective 3: Attendees will be able to address data privacy and other compliance concerns when implementing wellness programs that collect health information. Health data collection laws include HIPAA privacy & security, FTC Act, CLIA, and FDA. Attendees will apply concepts through problem solving and group discussion.

To register for the one-day intensive and the WELCOA 2017 Summit, click here.

Have you ordered Rule the Rules of Workplace Wellness Programs yet?

The first comprehensive book regarding workplace wellness program compliance is now available for purchase. Please fill out the order form and get yours today! Discount is available until the end of July!

[i] Id. "Labor for copying includes only labor for creating and delivering the electronic or paper copy in the form and format requested or agreed upon by the individual, once the PHI that is responsive to the request has been identified, retrieved or collected, compiled and/or collated, and is ready to be copied. Labor for copying does not include costs associated with reviewing the request for access; or searching for and retrieving the PHI, which includes locating and reviewing the PHI in the medical or other record, and segregating or otherwise preparing the PHI that is responsive to the request for copying."

[ii] 75 Fed. Reg. 5565, 5633 (Jan 25, 2013).

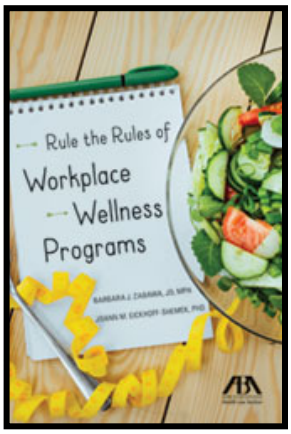
[iii] 45 C.F.R. § 164.524(c)(3)(ii).

[iv] 78 Fed. Reg. 5566, 5635

[v] See Individuals' Rights under HIPAA to access their Health Information, 45 CFR § 164.524. "[W]ritten access requests by individuals to have a copy of their PHI sent to a third party that include these minimal elements are subject to the same fee limitations in the Privacy Rule that apply to requests by individuals to have a copy of their PHI sent to themselves. This is true regardless of whether the access request was submitted to the covered entity by the individual directly or forwarded to the covered entity by a third party on behalf and at the direction of the individual (such as by an app being used by the individual)."

[vi] Id. "Third parties often will directly request PHI from a covered entity and submit a written HIPAA authorization from the individual (or rely on another permission in the Privacy Rule) for that disclosure. Where the third party is initiating a request for PHI on its own behalf, with the individual's HIPAA authorization (or pursuant to another permissible disclosure provision in the Privacy Rule), the access fee limitations do not apply."

[vii] 45 C.F.R § 164.502(g)(1)-(2).



NEW from the ABA Health Law Section

AMERICAN BAR ASSOCIATION
Health Law Section

Rule the Rules of Workplace Wellness Programs

By Barbara J. Zabawa, JD, MPH and
JoAnn Eickhoff-Shemek, PhD

This unique book introduces each chapter with a new learning objective. These objectives focus on the legal as well as the logistic aspects of developing legally healthy wellness programs in the workplace.

In this book you will learn important aspects such as the: "*what*," "*why*" and "*how*" of workplace wellness program laws such as:

1. ***What*** laws are important for workplace wellness program compliance;
2. ***Why*** do those laws exist and why are they important for workplace wellness program design and implementation; and
3. ***How*** can workplace wellness professionals and organizations apply workplace wellness laws effectively?

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Product Code: 5630141 at the special price of **$97.46 per copy**. ~~*(Regular price: $129.95)*~~.

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