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## ARE YOU READY FOR HIPAA?

By Daniel J. Pedersen, Esquire

With winter nearly upon us, spring is just around the corner. April 14, 2003 will be here before you know it – are you HIPAA compliant? HIPAA, the acronym that is commonly misspelled and often represented by the icon of a hippopotamus, is the Health Insurance Portability and Accountability Act. This 1996 legislation, initially intended to facilitate the ability for employees to take their existing health insurance with them when changing jobs, also has substantial effects in the Skilled Nursing industry. Congress passed the legislation in 1996, but failed to create any of the laws to effectively implement it. As a result, the Department of Health and Human Services (HHS) has played an influential role in creating the Privacy and Security regulations.

Title II of HIPAA is entitled Administrative Simplification and deals with privacy and security guidelines for medical information. With the privacy regulations, which were made final on August 14, 2002, a plethora of new jargon has been created, including such terms as “individually identifiable health information,” “protected health information,” “business associate contracts,” “chain of trust partner agreements,” “acknowledgment forms,” “consent forms,” “authorization forms,” and “Notice of Privacy Practices.” Fortunately, however, despite these phrases and the threatening size of these regulations, compliance is a rather simple task for nursing facilities. Many of the basic premises and concepts behind HIPAA are already practiced at your facility – HIPAA just modifies things a bit, requiring some additional forms, and a more thorough system of checks and balances. All in all, Administrative Simplification is comprised of several parts – Privacy, Security, Transactions and National Identifiers.

With respect to privacy, HIPAA stresses the importance of maintaining the confidentiality and security of health information. What does this all mean? Basically, a more conscious effort must be made at ensuring that medical charts are not readily accessible to the general public. Information retained on computers and visible on computer screens cannot be easily read by visitors or employees that are not privy to such information. Additionally, when patients are sent out for services, or outside doctors or other professionals provide services, only the medical information pertinent to the treatment is shared. These privacy related practices should be incorporated into a Policy and Procedure Form and compliance with this section is required by April 14, 2003. This means that the policies must be implemented and in practice, and that employees must have received training, and all of the changes to ensure privacy of records have been enacted (ie., use of passwords and screensavers on computers, greater security over the residents' charts). On October 15, 2002,

HHS named the Office of Civil Rights (OCR) to be the agency responsible for enforcing the Privacy Rule.

The security standards are slightly more complex. The government is still in the process of developing these regulations, which involve establishing security standards for the retention of health information and related data that is stored electronically and on paper. The security standards may be introduced by the end of 2002. These security standards function to protect the integrity of data stored electronically, by using various encryption techniques to prevent “hacking” (unauthorized access to computerized information), as well as protect the integrity and confidentiality of tangible paper documents. There are several elements to the security standard, including Administrative (ensuring adequate contracts are in place with outsiders receiving protected health information (PHI), and that employees are trained), physical (use of locks and keys, or other methods of protecting and securing PHI from public view and access), and technical (use of encryption and passwords on computer systems). The elements of these standards are similar to those needed to maintain the privacy of medical information, and are also related to the security mechanisms related to the electronic transactions of PHI.

The transaction section involves regulating and controlling the way in which the transmissions of health information are to occur between your facility and the government and other billing entities. The original compliance date for this section was set for October 16, 2002. However, even the Federal Government failed to have adequate transmission software available for that date. A one-year extension was granted, which required providers to file a compliance report with the Department of Health and Human Services by October 15, 2002. This element is more related to software programmers and your role should be to assure that your software is HIPAA compliant before the October 16, 2003 deadline. As an additional note, the Commonwealth of Pennsylvania was ready for the original October 2002 compliance deadline and will accept any electronic transmissions that you are ready to submit.

The national identifier section involves the establishment and utilization of a national system of claims identifiers. There will be a uniform coding methodology for all insurance, Medicare, and Medicaid procedures. You should be working closely with your Information Technology (IT) Director as well as your software company to ensure that when October 2003 comes, you will be ready to transmit your MDS and other resident data in compliance with the HIPAA regulations. On October 15, 2002, HHS named the Centers for Medicare and Medicaid Services (CMS) to be the agency to enforce the trans-

actions and code setting standards sections of Administrative Simplification. The National Identifier Section strives to create a more uniform system of identifying entities. In the past, entities had separate numbers for tax, Medicare and Medicaid identification purposes. This section proposes to use the federal tax identification number as a single identification number with the goal of simplifying transactions and proper identification. These identification standards will not be in effect until 2004. Likewise, a human identifier standard was proposed whereby every person in the United States would have an identification number. However, there is a current dispute as to whether this idea is actually necessary, and whether it imposes too much "big brother" type control and regulations over Americans.

All in all, these changes are supposed to make the transmission of health-related information easier on providers and the government - hence the title - Administrative Simplification. In the beginning, these provisions will cause many headaches, some confusion, and anything but simplification. However, once these new provisions are in

full effect, life should be truly easier. HIPAA is not optional like a Corporate Compliance Program. HIPAA is the law! It is recommended that serious consideration be taken to implementing HIPAA compliance programs if your facility has not already done so. Government auditors and inspectors may soon be looking for the presence of HIPAA programs during facility investigations and audits. Failure to have an adequate program, and failure to adhere to the guidelines could result in CMP's or being dropped from the Medicare and/or Medicaid Programs.

The HIPAA regulations are confusing to many and misunderstood by some. Just keep in mind that HIPAA is a rather basic concept that can be made easier with the creation of draft Policies and Procedures as well as conducting thorough training sessions. The staff of Capozzi and Associates, P.C., is keeping a close eye on developments and is available to provide the training to assist you in becoming and remaining HIPAA compliant.

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## COMPLIANCE RISK AREA: REPORTING CREDIT BALANCES

*By Michael A. Hynum, Esquire*

Recently the OIG issued a report of their findings that examined whether Medicare and Medicaid credits were recorded properly on hospital accounting records as overpayments that should have been reported back to the programs. The findings revealed that many providers did not fully comply with state 30-day and federal 60 day reporting requirements.

Credit balances result from excessive reimbursement sent to the facility. This may occur when duplicate payments are collected for the same service, or Medicare paid when it turns out that another insurer had primary responsibility for the bill. While the balances found ranged from a few hundred dollars to hundreds of thousands of dollars, the credit balance issue is an important compliance risk area.

Several false claims cases have been settled around unreturned credit balances. To resolve this problem, OIG has recommended recoupment of the overpayments, revisions to policies and procedures, advising staff of reporting requirements, and submitting "adjustive" request forms for unreported Medicaid overpayments.

The OIG noted that the failure to timely report credit balances seemed to be a lack of staff awareness of credit balance reporting requirements. It is important to address this as your personnel are being trained to help insure that your facility does not wind up on the receiving end of a false claims action. Our staff is available to assist you.

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## ADDRESSING WORKPLACE VIOLENCE

*By Doreena Craig Sloan, Esquire*

Very often we read about violence that has erupted in the workplace. Workplace violence seems to come in primarily two forms. The first, and predominant media image, is the armed, disgruntled employee or client who selectively or indiscriminately shoots at employees, supervisors or managers. The second, and less well known but more predominant, involves any act against an employee that creates a hostile work environment and negatively affects the employee, either physically or psychologically. These acts include all types of physical or verbal assaults, threats, coercion, intimidation and all forms of harassment.

As an employer, you have a general duty under Section 5(a)(1) of the Occupational Safety and Health Act to "furnish each employee a place of employment that is free from recognized hazards that are causing or likely to cause death or serious harm to the employee." Additionally, the legal doctrine of respondeat superior provides that an employer can be held vicariously liable for the actions of its employees. Generally, these actions are civil in nature and involve either negligent hiring; negligent retention and negligent supervision of employees as well as the provision of inadequate security are often the legal issues involved.

Here are a few questions to think about in determining your facility's vulnerability to workplace violence. Are your hiring practices specifically designed to get the most accurate information about prospective employees? Are you and your employees trained to notice behaviors that are indicators that an individual may be prone to vio-

lence? Are your termination procedures specifically designed to reduce the possibility of violence? Has workplace violence or harassment been tolerated by any employee? Are your premises physically secure for employees? Do you have a policy in effect regarding weapons on the premises? Are your managers, supervisors and employees aware of the existence of your facility's workplace prevention program? Do they all know who to go to for assistance?

It is important to be proactive and guard against risks faced by employees. If you do not have a Workplace Violence Prevention Program or strategy in place, it is very important that you begin to establish one. Failing to do so can leave you and your employees vulnerable to violence at the workplace, ill-equipped to prevent and/or intervene to diffuse potentially violent situations, financially liable to the almost inevitable civil law suits that follow, and subject to substantially decreased employee morale and productivity after a violent incident that may have been prevented with proper planning. Studies have been done about the annual cost of workplace violence to American businesses. The monetary cost of the loss of employee productivity, death, injuries, counseling, legal fees, court awards, and management time spent in crises resolution as well as other tangential factors was found to exceed \$36 billion dollars in 1995.

While there is no single workplace violence prevention solution to fit all workplaces, appropriate programs can be designed to fit your individual needs. Capozzi and Associates, P.C. stands ready to assist you.

# ARBITRATION AND EMPLOYEES WHO ABUSE ELDERLY RESIDENTS: A CASE STUDY IN MIXED MESSAGES AND CROSSED SIGNALS

By Louis J. Capozzi, Jr., Esquire

Both Federal and State laws provide for the protection of elderly citizens from abuse, including abuse by employees of facilities or programs providing care to those citizens. Elderly citizens are said to have a right to be free from abuse. State laws and regulations concerning protection from abuse have been increasing annually in recent years, including some affecting the employment of persons who are found to have abused others. Where the employees involved are covered by collective bargaining agreements, however, the extent to which the elderly may be free from their abusers can become the subject of arbitration and to the substitution of the arbitrator's determination of appropriate progressive discipline in place of assuring the resident's peace of mind, health and safety. Recent case law narrowing the scope of review of such arbitration decisions may require further regulation to give priority to and promote uniformity in resident protection.

In Eastern Associated Coal Corp. v. United Mine Workers of America, District 17, the Supreme Court of the United States narrowed the scope of review that Federal Courts have under Section 301 of the Labor-Management Relations Act of 1947 in cases seeking to vacate or modify arbitration decisions about employee discipline matters. Nevertheless, courts that have applied that scope of review have determined that it still includes questions of public policy in addition to those contained in positive law; however, they have differed on what kinds of offenses not covered by positive law provide a foundation for application of the public policy exception and on under what specific factual circumstances public policy may be used to preclude reinstatement of an employee. See: Boston Medical Center v. Service Employees International Union, Local 285<sup>1</sup> in which the First Circuit noted: "Even in the absence of specific law or regulation barring reinstatement . . . we acknowledge that there might be conduct so egregious that reinstatement might threaten the general public policy promoting the competence of nurses and patient safety", citing Eastern Associated Coal at 61-62; George Watts & Son Inc. v. Tiffany & Co.<sup>2</sup> in which the Seventh Circuit acknowledged but did not apply the exception; Illinois Nurses Association v. Board of Trustees<sup>3</sup>, in which an Illinois appeals court reached different results based on assessment of likelihood of serious repetition and whether the offense endangered patients' lives; Chicago Fire Fighters Union Local No. 2 v. City of Chicago<sup>4</sup>, in which an Illinois appeals court remanded the public policy issue involving drunk firemen for consideration on the merits by the arbitrator, which citing its prior "zero tolerance" determination in resident abuse cases in County of DeWitt v. AFSCME Council 31<sup>5</sup>; City of Brooklyn Center, MN v. Law Enforcement Labor Services, Inc.<sup>6</sup> in which a Minnesota appeals court applied the public policy exception based on the likelihood of continuing sexual harassment by a police officer.

Resident abuse impacts employee discipline from several directions. An employee discharged because of resident abuse may be ineligible for unemployment compensation without anything more. See: Brandt v. Unemployment Compensation Board of Review<sup>7</sup> in which the Supreme Court of Pennsylvania found that verbal abuse was misconduct disqualifying nursing home employees from unemployment compensation. Employees with prior convictions of crimes involving resident abuse are precluded by Federal law from working in places funded directly or indirectly by Federal health care programs<sup>8</sup> and also may be precluded by State laws from any work involving care of dependent persons even prior to conviction. For example, in Pennsylvania, provisions of the State's Older Adults Protective Services Act<sup>9</sup> permit suspension and removal from the facility in some cases pending the results of a criminal investigation. In addition, employees who have been accused of resident abuse and had a "finding" entered against them after administrative review onto a State Registry may not be employed or retained as a nurse aid at a nursing facility that participates in any Federal health care programs<sup>10</sup>, see also: Hearns v. D.C. Department of Consumer & Regulatory Affairs<sup>11</sup> in which the District of Columbia appeals court upheld Nurse Aid Registry disqualification of an employee for verbal abuse.

Nevertheless, even where resident abuse occurs, is reported to oversight agencies, investigated and confirmed after review, employees may not have a "finding" placed on the State Registry or may not be accused or convicted of any crime. Not all investigations of abuse are done by the State agency that administers the State Registry and investigations by other agencies are often protected by statute from disclosure to other agencies. For example, in Pennsylvania, the investigations and findings of the Pennsylvania Department of Aging under the Older Adults Protective Services Act are confidential<sup>12</sup> and not disclosed to the Pennsylvania Department of Health, which administers the State Registry, with the result that a person found after administrative review by the Department of Aging to have been the perpetrator of resident abuse may not have a "finding" entered on the State Registry precluding that person from further employment. As a result, such substantiated abusers have been seen by some courts as not precluded from continuing employment under the narrow scope of review set in Eastern Associated Coal. See: Northern Health Facilities, Inc. v. District 1199P<sup>13</sup> in which the U.S. District Court found that a final administrative finding of verbal abuse of a resident entered by the Department of Aging but not entered on the State Registry after review and investigation by the Department of Health did not provide a foundation for application of the public policy exception; compare: County of DeWitt v. AFSCME Council 31<sup>14</sup> in which an Illinois appeals court found a public policy of no tolerance for resident abuse; Highlands Hospital and Health Center v. AFSCME District Council 84<sup>15</sup> in which the U.S. District Court applied public policy to a case involving serious physical abuse, Edgewood Convalescent Center v. District 1189<sup>16</sup> in which the U.S. District Court applied public policy to a case involving neglect of nursing home residents by staff found sleeping on the job; but, see also: Illinois Nurses Association v. Board of Trustees<sup>17</sup> in which and Illinois appeals court permitted reinstatement in a case of 20-year employee whose actions did not endanger patients' lives; UPMC Braddock v. Teamsters Local 250<sup>18</sup> the U.S. District Court, while finding relevant public policy, distinguished its prior decision in Highlands Hospital based on ambiguity of facility policies and the lack of evidence of likelihood of repetition.

As a result, public policy in these cases may vary from State to State and issues related to discipline of employees for resident abuse may be taken to arbitration under a collective bargaining agreement, where they are subject to differing perspectives about appropriate progressive discipline that can result in the reinstatement of a person who has abused a resident. While employers may bargain with their employees during contract negotiations to remove some issues relating to discipline for resident abuse from arbitration, it is more likely that consistency and national standards in this area of public policy will be realized only through further government regulation which turns not "positive law" what, prior to Eastern Associated Coal, may have sufficed as public policy.

<sup>1</sup> 531 U.S. 57 (2000).

<sup>2</sup> 260 F.3d 16,23 (1st Cir. 2001)

<sup>3</sup> 248 F.3d 577 (7th Cir. 2001)

<sup>4</sup> 318 Ill. App.3d 519, 741 N.E.2d 1014 (2000)

<sup>5</sup> 323 Ill. App.3d 168, 751 N.E.2d 1169 (2001)

<sup>6</sup> 298 Ill. App.3d 634, 699 N.E.2d 163 (1998)

<sup>7</sup> 635 N.W.2d 236 (Minn. Court of Appeals 2001)

<sup>8</sup> 537 Pa. 267, 643 A.2d 78 (1994)

<sup>9</sup> 42 U.S.C. § 1320a-7(a)(2); 42 CFR § 483.13(c)(1)(ii)

<sup>10</sup> 35 P.S. § 10225.704

<sup>11</sup> 42 CFR § 483.13 (c)(1)(ii)

<sup>12</sup> 704 A.2d 1181 (D.C. App. 1997)

<sup>13</sup> 35 P.S. § 10225.306

<sup>14</sup> Case No. 4:CV-01-0899, U.S. District Court for the Middle District of Pennsylvania, Decision of December 5, 2001, enforcing arbitration award to reinstate employee (Muir, J.)

<sup>15</sup> 298 Ill. App.3d 634, 699 N.E.2d 163 (1998)

<sup>16</sup> 1996 U.S. Dist. LEXIS 22652, 1996 WL 163947 (W.D. Pa. 1996)

<sup>17</sup> 1985 U.S. Dist. LEXIS 23853 (D. Mass. 1985)

<sup>18</sup> 318 Ill. App.3d 519, 741 N.E.2d 1014 (2000)

<sup>19</sup> 32 F.Supp.2d 231 (W.D. Pa. 1998)

# Act 142 of 2002 (Signed December 3, 2002)

## Changes to Board of Claims Jurisdiction Over Medicaid Provider Disputes Effective Date Postponed Until DPW Publishes Procedural Order in Pa Bulletin

The General Assembly of Pennsylvania passed House Bill 2674, as amended at Printer's Number 4710, on November 27, 2002. The Governor signed the Bill on December 3, 2002, as Act 142 of 2002. This new law:

- (1) Will eliminate as of its "effective date" sometime prior to July 1, 2003 Medical Assistance providers' rights to file reimbursement related claims against the Pennsylvania Department of Public Welfare in the Board of Claims;
- (2) Will eliminate the rights of all persons to file claims arising from implied contracts or quasi-contracts against the Commonwealth of Pennsylvania, limiting claims to only those arising out of signed written contracts, rights Pennsylvanians have had since at least 1811;
- (3) Will require MA providers to seek relief before DPW's Bureau of Hearings and Appeals; but also,
- (4) NOW requires DPW to make significant changes in procedures for handling such appeals, including expanding provider rights to obtain information through discovery to support their appeals and establishing time limits for DPW to enter decisions, effective as to all matters currently before DPW's Bureau of Hearings and Appeals.

**The Act, however, DOES NOT eliminate provider rights to Board of Claims determinations for any matters that are pending before the Board of Claims prior to the "effective date" and the Act**

makes that "effective date" the date on which DPW publishes in the *Pennsylvania Bulletin* by July 1, 2003 a notice about the new procedures required by the Act. Prior to publishing that notice, however, DPW must first circulate the notice for comments by interested parties; and, therefore, there will be a delay in the "effective date" for repeal of Board of Claims jurisdiction until that circulation and comment requirement has been met and new claims can be filed during that delay period.

Therefore, any provider claims before the Board of Claims that have already been filed or that providers may still file prior to the "effective date" will continue to have the same rights and remedies under the Board of Claims Act as before. Providers that want to preserve their rights to relief under the Board of Claims Act with respect to any present matter MUST file their claims prior to the "effective date" or they will not be able to obtain relief from the Board of Claims under the terms Act 142 of 2002.

Act 142 of 2002 states at Section 21.2: "Any claim filed and not finally resolved under the Act of May 20, 1937 (P.L. 728, No. 193), referred to as the Board of Claims Act, prior to the effective date of this Act, shall be disposed of in accordance with the Board of Claims Act."

Section 22(1)(IV) of Act 142 of 2002 provides for the repeal of the Board of Claims Act only as of the publication of the DPW notice by July 1, 2003 after circulation for comment.

Address Correction

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