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REPORTING REQUIREMENTS FOR HAIs

By: TANYA DANIELS HARRIS, ESQ.

Beginning in June of this year, the Health Care-Associated Infection Prevention and Control Act ("Act 52") will require nursing homes to report health care-associated infections ("HAIs") to the Patient Safety Authority ("PSA") and the Department of Health via a web-based reporting system, the Pennsylvania Patient Safety Reporting System ("PA-PSRS"). Mandatory reporting for nursing homes will be phased in by geographic area as follows: Eastern PA – June 1st; Central PA – June 15th; and Western PA – June 22nd.

The occurrence of an HAI is a "serious event," which is defined as an "event, occurrence or situation involving the clinical care of a patient in a medical facility that results in death or compromises patient safety and results in an unanticipated injury requiring the delivery of additional health care services to the patient." A nursing home must submit a report of an HAI to the PSA within 24 hours of confirming an HAI. Nursing homes will also be required to notify the resident or their legal representative in writing that a serious event has occurred within 7 calendar days of confirming an HAI.

Non-compliance with Act 52's reporting requirements can result in the imposition of an administrative penalty of \$1,000 per day. Providers will need to ensure compliance with these reporting requirements, as well as ensure the timely identification of HAIs based on the criteria specified in Act 52. The failure to identify or report an HAI not only potentially subjects a provider to sanctions, but also raises the risk of liability exposure, particularly where failure to adequately document and identify an HAI results in harm to a resident. Compliance with Act 52 will mitigate the risk of administrative sanctions and liability exposure.

If you have any questions regarding the reporting requirements under Act 52, please do not hesitate to contact Kimber L. Latsha or Tanya Daniels Harris. ■

ARE YOU RED FLAG READY?

By: DAVID C. MARSHALL, ESQ.

On November 9, 2007, the Federal Trade Commission ("FTC") issued its "Red Flag Rules." These regulations require financial institutions and creditors with covered accounts to take steps to prevent identity theft. The FTC will begin enforcing the Red Flag Rules on August 1, 2009.

All creditors must comply with the Red Flag Rules. The term "creditor" includes any entity that extends, renews, continues or arranges for credit. Creditors also include any entities that provide services before receipt of payment, deferring payment until a later date. Entities maintaining covered accounts must also comply with the rules. A "covered account" is an account (meaning a continuing relationship established by a person with a creditor to obtain a product or service) used mostly for personal, family, or household purposes, and involves multiple payments or transactions.

(See *FLAG READY*, page 2)

HARD TIMES: CCRC COMPLIANCE WITH FINANCIAL COVENANTS

By: DOUGLAS C. YOHE, ESQ.

Due to the current economic conditions, the value of endowment funds for many Continuing Care Retirement Communities (“CCRCs”) has dropped and the occupancy of residential units has fallen. If a CCRC has had to sell investments and as a result recognized losses, the CCRC may not be able to meet its debt service coverage ratio covenant, especially if its entrance fees have decreased during the same time period. Further complicating matters, a CCRC may have multiple financial covenants with different standards in its loan or bond documents. Typically, financial covenants include a debt service coverage ratio which must be met on a periodic basis (annually, semi-annually or quarterly), a liquidity covenant, and a day’s cash on hand covenant. The failure to meet a financial covenant may be an event of default under the loan or bond documents.

In most situations, the loan or bond documents specify the action that the CCRC must undertake when it does not meet its financial covenants. Some loan and bond documents require the CCRC to hire a consultant to review the CCRC’s activities and follow the consultant’s advice. Regardless of the reason for not meeting financial covenants, a CCRC should communicate with the lender or bond trustee regarding its inability to meet the financial covenant and ascertain whether it can obtain a waiver.

When a CCRC communicates its inability to meet financial covenants, the lender may attempt to change the economic terms of the CCRC’s debt. Thus, the CCRC should be prepared to explain the reasons for its inability to meet the financial covenants. In cases where a covenant was not met because of unrealized losses from the sale of investments, the CCRC should be prepared to explain the reasons for the sale, especially if it was for the purpose of repositioning the CCRC’s investments based on guidance from its investment advisors.

Douglas C. Yohe is available to discuss any issues you may have with regard to meeting financial covenants under lending arrangements. ■

(FLAG READY, continued from page 1)

Based on these definitions, a health care provider that provides services in advance of the receipt of payment (for example, through billing in arrears, or by accepting Medicare or Medicaid payments which are received after services are provided) would be considered a “creditor.” If that health care provider also maintains covered accounts for any of its residents or patients, then the health care provider would be subject to the Red Flag Rules.

The Red Flag Rules require a covered financial institution or creditor to do the following by August 1, 2009:

- Identify the red flags (a pattern, practice or activity that indicates the possible existence of identity theft) applicable to each covered account;
- Develop written policies designed to detect the identified red flags and investigate instances of suspected identity theft;
- Ensure that the Board of Directors or senior management approve and oversee the development and implementation of an Identity Theft Prevention Program; and

- Conduct appropriate workforce training on the Red Flag Rules and the organization’s Identity Theft Prevention Program.

In some respects, the Identity Theft Prevention Program can be viewed as a subset of a health care provider’s HIPAA Privacy and Security Policies. HIPAA requires a covered health care provider to prevent the unauthorized disclosure of protected health information. Covered accounts may contain both protected health information, which is required to be protected by HIPAA, and identifying information, which is subject to the Red Flag Rules. The HIPAA rules and the Red Flag Rules are both designed to protect components of the information entrusted to health care providers by their residents or patients.

If you would like assistance in determining whether your organization is subject to the Red Flag Rules, or would like assistance in developing the required Identity Theft Prevention Program and related policies, please do not hesitate to contact David C. Marshall. ■



EMPLOYMENT AUDITS: NECESSITY IS THE MOTHER OF PREVENTION

By: *GLENN R. DAVIS, ESQ.*

Our business can't keep up with all the new employment legislation being passed." "It's too costly to implement new procedures and policies." "Employees are becoming increasingly hostile." "Claims are made by disgruntled former employees to get back at us." "Society is much more litigious these days."

These are examples of comments that we frequently hear from businesses. The fact is that the quantity of recent and pending employment legislation is enormous. Although the employment relationship is one of the most highly regulated relationships in the United States, many employers overlook compliance in the employment function while auditing their businesses for regulatory or financial compliance. The prudent employer has its employment practices regularly reviewed because of the changing laws and associated risks of regulatory and civil actions.

Experience shows that many organizations follow employment policies and practices that were developed in the distant past or were borrowed from another company and then made their own. As a result, employment policies and practices may not reflect the organization's philosophy, may not be applied consistently, and likely, do not meet the employer's current needs. Most importantly, however, the employment policies and practices may not be compliant with state or federal law.


With many businesses facing an unusually tough economic year, it is all the more important to take proactive steps to reduce costs and minimize risks. Taking a proactive approach before a government agency investigates your company should be a necessity rather than a long-term goal.

An objective assessment, or an audit, of an employer's employment policies and practices can prevent future legal problems by ensuring that employment policies and practices are legally sound, meet the employer's needs and are consistently and fairly applied to the workforce. An audit generally includes review of hiring procedures, employment policies, employment postings and forms, compensation policies, personnel files, employee benefits, safety programs, anti-discrimination and anti-harassment prevention methods, termination practices and procedures, and employee training practices. While every audit will vary based on the specific needs of a business, the underlying component is a comprehensive review of employment practices.

Employers should not overlook the need for a labor audit, especially in light of both the potential passage of the Employee Free Choice Act and increased union activity in Pennsylvania. The purpose of a labor audit is to determine employee attitudes toward the employer, supervisors and the job, and to identify possible areas of vulnerability to organizational drives by unions.

Labor audits usually involve several steps, including review of policies such as union-free, non-solicitation/non-distribution, bulletin board and visitor access to see if they convey the message that employee needs are a matter of concern to the company. The audit may also include face-to-face interviews with a representative sample of employees, as well as interviews with managers and supervisors. Finally, the audit may include training sessions for supervisors as to why it is critical for the employer to maintain non-union status.

The importance of conducting periodic and systematic employment/labor audits cannot be over-emphasized. They allow employers to proactively identify and correct problems, avoiding the more costly alternative of resolving problems through litigation. Thus, these audits should be treated just as seriously as financial or other regulatory compliance audits.

If you would like to discuss conducting an employment/labor audit for your organization, please contact either Glenn R. Davis or Angela L. Thomas. 

INSIDE THE FIRM



KIMBER L. LATSHA

We are happy to announce that Kimber L. Latsha was named as one of Central Pennsylvania's Best Lawyers in 2009 in the Central Pennsylvania Business Journal. Lawyers are selected for this honor based on the vote of their peers.



ANGELA L. THOMAS

On April 27, 2009, the Pennsylvania Tourism & Lodging Association presented Angela L. Thomas with its Associate Member of the Year Award. Nominees are judged on their commitment to the industry through their participation in activities and programs designed to benefit PTLA membership. Angela serves as a member of the PTLA Human Resources Committee, and takes a proactive approach in educating fellow members about changes to the law, upcoming legislation and general best practices.



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SEMINARS

PANPHA Webinar	June 19, 2009	"Prohibition of Excessive Overtime in Health Care Act"	Angela L. Thomas, Esq. & Glenn R. Davis, Esq.
PANPHA Annual Conference	June 24, 2009	"Assisted Living Forum"	Kimber L. Latsha, Esq.
PANPHA Annual Conference	June 25, 2009	"Managing the Risk of Aging in Place in CCRCs"	Kimber L. Latsha, Esq.
PANPHA Annual Conference	June 26, 2009	"Human Resources Development Forum"	Angela L. Thomas, Esq. & Glenn R. Davis, Esq.
PANPHA Annual Conference	June 26, 2009	"Legal Issues Update"	Kimber L. Latsha, Esq. & David C. Marshall, Esq.
AHLA Annual Conference	July 1, 2009	"Arbitration Clauses in LTC Facility Contracts and Beyond"	Kimber L. Latsha, Esq.
PBI 12 th Annual Elder Law Institute	July 23, 2009	"PA's New Assisted Living Regulations"	Kimber L. Latsha, Esq.
Pennsylvania Veterinary Medical Association	August 13, 2009	"Witness for the Prosecution: Disciplinary Action Before the State Board," "Ready, Aim, Fire: Disciplines and Discharges," and "Your Time or My Time?: Compensation under the FLSA"	Angela L. Thomas, Esq. & Glenn R. Davis, Esq.
55 th Annual Education Law Association Conference	October 22, 2009	"Fourth Amendment Update"	Kevin M. McKenna, Esq.
AAHSA Annual Meeting	November 9, 2009	"Legal Update/Culture Change"	Kimber L. Latsha, Esq.
AAHSA Annual Meeting	November 9, 2009	"FMLA, ADA and Workers' Compensation: Today's Legal Challenge"	Angela L. Thomas, Esq. & Glenn R. Davis, Esq.