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THE MAMMOTH IMPACT OF THE HIPAA PRIVACY RULE

By: Barbara G. Graybill, Esq.

On December 28, 2000, the Department of Health and Human Services ("HHS") published the final version of the privacy regulations mandated by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). These much-anticipated regulations and their preamble are hundreds of pages long and have elicited both praise and condemnation from the public and the health care industry. Consumers appear to support the protections afforded by HIPAA. However, certain health care analysts predict that the cost of implementation will far outweigh the benefit gained, arguing that there are simpler methods for protecting privacy without the burdensome problems and processes associated with compliance. Against this backdrop, legal scholars are now predicting numerous challenges. The Bush administration has promised to review this package as part of the "look back" at all last-minute activity of the Clinton administration. HHS has re-opened the comment period and delayed the effective date until April 14, 2001.

One of the protections HIPAA mandated was to ensure the security of electronically transmitted information. HHS published its proposed regulations on November 3, 1999. In theory, the primary purpose was to guard against the erosion of privacy of identifiable health information so readily transmittable in this electronic age. As originally published, the regulations were limited to the protection of information transmitted at any time in electronic form. This would have included items such as handwritten notes faxed between providers, and transcribed information transmitted through local provider networks. However, the final rule has been expanded to include written and even oral communications, if those communications affect an individual's physical or mental condition, health care treatment, or payment for such treatment.

At the time the regulations were originally proposed, many health care organizations were concerned that the definition of covered information included demographic data, including names and addresses. Providers argued that requiring specific consent to release information as basic as names and addresses to divisions within their corporation would impede support services (such as mailing support group information to persons suffering certain illnesses) and fundraising efforts aimed at individuals who received services from an organization. The final rules arguably address these concerns by providing that a covered entity may raise funds on its own behalf using demographic information about the individual (the name and address) and the dates of health care provided. However, specific consent must be given before the diagnosis can be communicated, and the patient must have the opportunity to prohibit further fundraising solicitation.

The final regulations apply to health care providers, plans and clearing houses. In the initial draft, health care providers specifically included hospitals, nursing facilities, physicians and suppliers. In the final version, this definition was expanded to include providers who do not participate in Medicare and Medicaid. Providers, even those with a direct treatment relationship to an individual, must obtain written consent before use or disclosure of protected health information for treatment, payment, and health care operations. Verbal consent must be obtained prior to use or disclosure to persons assisting in the provision of care, in certain emergency circumstances, and for facility directories. All providers must develop policies to assure that uses and disclosures of information are limited to the minimum necessary to accomplish the intended use and purpose of the information. The final rule contains a list of public policy exceptions, the most notable of which are those relating to tissue or organ procure

(See *HIPAA*, p.3)

ACT 39 CHANGES PENNSYLVANIA'S POWER OF ATTORNEY LAW

By: Duane P. Stone, Esq.

With Governor Ridge signing Act 39 into law, Pennsylvania's existing law governing powers of attorney was revised and enhanced. Effective April 12, 2000, any new power of attorney must conform to the Act's requirements.

The new law requires powers of attorney to be accompanied by a Notice and Acknowledgement. A specific format for each is set forth in the Act. The Notice, which explains that the power of attorney grants the agent power over the principal's property and assets, must be executed by the principal. The Notice also advises that the agent may conduct business on behalf of the principal without prior discussion with the principal, and that no duty is imposed on the agent to exercise granted powers. The Notice sets forth that the grant of powers will last throughout the principal's lifetime, even if incapacitated, unless otherwise limited.

Prior to the exercise of any authority granted by the power of attorney, the agent must sign the Acknowledgment. The Acknowledgment specifies the duties of the agent, which include exercising the powers for the benefits of the principal; keeping separate the assets of the principal from those of an agent; exercising reasonable caution and prudence; and keeping a full and accurate record of all actions, receipts, and disbursements on behalf of the principal.

The Act also revised the rules governing gifting. Two categories of gifting are established: limited gifts and unlimited gifts. The power to make limited gifts means that the agent may only make gifts to the principal's spouse, issue, and a spouse of the principal's issue in such a manner that it qualifies for exclusion from the federal Estate and Gift Tax. An agent may make an unlimited gift only when such gift is specifically provided for in the power of attorney. The agent and the donee may be liable in equity when a gift is inconsistent with prudent estate planning or financial management for the principal, or inconsistent with the known or probable intent of the principal.

Good draftsmanship requires grants of authority to be addressed with as much specificity as possible. For instance, the parties may wish to include specific grants of authority for a real estate transaction by describing the property and the power the agent has concerning the property. A power of attorney should also address the agent's authority over financial accounts, stocks, mutual funds, bonds, or tax-related issues; specific provisions concerning the power to make anatomical gifts; specific authority to act on behalf and make medical decisions when principal is incapacitated; and the power to pursue litigation on behalf of the principal. The Act has more clearly defined the scope and limits of an agent's authority. Due to these changes, legal counsel should be involved in the preparation and explanation of powers of attorney. —

EXPANSION OF THE WEINGARTEN RIGHTS

By: Chadwick O. Bogar, Esq.

A recent decision issued by the National Labor Relations Board (the "Board") has greatly expanded the representation rights of nonunion employees. In the past, pursuant to the Board's own precedent and the United States Supreme Court's holding in NLRB v. Weingarten, Inc., only employees in unionized work forces were entitled to representation during investigatory interviews when the employee reasonably believed disciplinary action might result. However, in Epilepsy Foundation, the Board reversed its well-established precedent. Consequently, a non-union employer now confronted with a request from an employee for representation at an investigatory interview, which the employee reasonably believes may result in disciplinary action, must either allow the employee to be represented during the meeting or cancel the meeting altogether, regardless of whether the employer is union or non-union.

The facts of Epilepsy Foundation provide a very clear example of what constitutes an "investigatory interview" and the reasonableness of an "employee's belief." Two co-workers prepared a memo to their immediate supervisor, stating that his supervision of them was no longer necessary. They also sent a memo stating the same to their executive director. Subsequently, the executive director approached one of the employees and asked that the employee attend a meeting with both the supervisor and executive director for the purpose of ascertaining whether the employees should be disciplined. The employee immediately requested that his co-worker be allowed to attend the meeting. When this request was denied, the employee refused to attend. As a result of his refusal, the employee was terminated for insubordination. Based upon the executive director's denial of the employee's request for representation at the investigatory meeting, the Board concluded that the employer had violated Section 7 of the Taft-Hartley Act and ordered the employee reinstated with full back pay and benefits.

Application of this rule may prove to be extremely difficult for employers. Unlike in Epilepsy Foundation, where the facts were remarkably unambiguous, most employers are confronted with facts which make it nearly impossible to identify whether a meeting with an employee constitutes an investigatory interview and whether an employee has a reasonable belief that the interview may result in disciplinary action. If an employer is faced with a situation which could be controlled by the Epilepsy Foundation rule and is unsure how to proceed, the best approach would be to postpone the meeting and seek the advice of counsel. —

REVIEW OF BIPA PROVISIONS

By: Steven M. Montresor, Esq.

President Clinton signed into law the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 ("BIPA") on December 21, 2000. The Congressional Budget Office estimates that the implementation of BIPA will increase funding to nursing homes by about \$2 billion over the next five years.

Many BIPA provisions are designed to provide relief from the unintended impact of the Balanced Budget Act of 1997 ("BBA"). Several of the key BIPA provisions affecting nursing homes are:

- From April 1, 2001 to September 30, 2002, the nursing component of the PPS federal rate will be increased by 16.66%. Congress has tasked the General Accounting Office ("GAO") with conducting an audit of nursing staff ratios and reporting back to Congress on the impact of the rate enhancements. Presumably, the GAO's report will be used to determine whether the resultant increase in reimbursement will be used to enhance existing nursing staff levels.
- Effective April 1, 2002, all 14 rehabilitation categories will receive a 6.7% add-on. This provision would replace the 20% add-on to the three rehabilitation RUG categories receiving add-ons under the Balanced Budget Relief Act ("BBRA"). The 12 non-rehabilitation RUG categories receiving add-ons under BBRA will continue to receive the 20% add-on. Both sets of enhancements will continue until HCFA implements a revised RUG system.
- Using a phase-in methodology, the effective update rate from October 1, 2000 through September 30, 2001 will be the full market basket index. In fiscal years 2002 and 2003, the update rate will be the market basket index minus 0.5%.
- Effective January 1, 2001, BIPA repealed consolidated billing for Part B services, except for physical, occupational, and speech therapies.
- BIPA extends the moratorium on the \$1,500 cap on physical, occupational, and speech therapies provided to nursing home residents through December 31, 2002. This is the second moratorium on the therapy caps.

BIPA's changes to the administrative appeal process are less heralded than the rate enhancement legislation, but just as signifi-

cant. BIPA's primary impact will be to shorten the length of time it takes to complete the appeal process. The new law also expands the time a beneficiary or his or her representative may request review of a particular level of determination.

Generally, under BIPA, intermediaries and carriers must complete initial determinations within 45 days of the receipt of a claim for benefits. Any request from a beneficiary for a redetermination must be filed within 120 days of the beneficiary's receipt of the initial determination. The intermediary or carrier must conclude its redetermination within 30 days.

If dissatisfied with the redetermination, a beneficiary may request reconsideration of the initial determination. This new step in the review process will be conducted by a Qualified Independent Contractor ("QIC"). QICs are to be independent of any organization under contract with HCFA. The QIC must render a decision on the request for reconsideration within 30 days. Reconsideration is a prerequisite for an appeal to an administrative law judge ("ALJ"). Any such appeal to an ALJ must be filed within 180 days from the date the beneficiary receives notice of the decision on reconsideration. The ALJ must conclude a hearing and render a decision within 90 days of the date of filing the request for a hearing. The same time limits apply to an appeal to the Departmental Appeals Board ("DAB").

A beneficiary acting as quickly as possible could therefore reasonably expect to conclude the administrative appeals process within one year from the date of the intermediary's or carrier's initial receipt of the claim. This is a substantial improvement over the current system, where backlogs at the DAB level alone are currently in excess of one year.

Providers or suppliers may represent individuals, so long as they waive any rights for payment from the beneficiary with respect to the services or items involved in the appeal. The Secretary of the Department of Health and Human Services has been tasked with designing a standardized written form for the assignment of appeal rights. This should bring some uniformity to what is currently an inconsistent practice among intermediaries and carriers. The changes to the appeals process will affect initial determinations made on or after October 1, 2002. ■

(HIPAA, continued from p. 1)

ment organizations and to those circumstances where there is a serious threat to health or safety.

One area of concern remains the relationship between health care providers and business associates. A business association occurs when the right to use or disclose the protected health information belongs to the covered entity, and another person is using or disclosing the protected health information to perform a function or activity on behalf of the covered entity. Providers and their business associates must address how they will safeguard protected medical information in their contacts with each other. Thus, all contracts with business associates must be reviewed and revised to address the many requirements imposed by the HIPAA privacy regulations.

Health care providers and other covered entities should begin reviewing the final rule and working with their trade associations to prepare for implementation, which for most providers is currently slated for February of 2003. At the same time, however, attention should be given to the challenges promised by providers, the pending review by the Bush administration, and the potential review by Congress pursuant to the Congressional Review Act. Notably, Congress has voted to kill OSHA's ergonomics regulation issued by the Clinton administration last November. Generally, Congress cited the high degree of complexity, the overly-burdensome nature, and the high cost of compliance with the ergonomics standards. Thus, it is entirely conceivable that Congress will utilize the Congressional Review Act to review the HIPAA privacy regulations. In the meantime, affected entities would do well to prepare for implementation while monitoring executive and legislative developments concerning the fate of the final rule. ■

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Latsha Davis & Yohe's Spring 2001 Long Term
Care Compliance Compendium, being held on
April 3, 5 & 6, has been approved for 5.5 NHA credit hours.

Call Patty McMullen at (717) 761-1880 for registration information.

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AHLA	March 30, 2001	"Reimbursement for Long Term Care Facilities"	Kimber L. Latsha, Esq., co-presenting with Lawrence Wilson of HCFA
Pennsylvania Director of Nurses Association (PADONA)	April 4, 2001	"Update of the Federal Certification & State Licensure Survey Process"	Kimber L. Latsha, Esq.
Association of Anabaptist Caring Communities	April 10, 2001	"After the Plan – Implementing Corporate Compliance"	Kimber L. Latsha, Esq.
PA Turnpike Commission, Valley Forge	April 26, 2001	Pre-Retirement Seminar	Jonathan M. Crist, Esq.
PA Turnpike Commission, Harrisburg	April 30, 2001	Pre-Retirement Seminar	Jonathan M. Crist, Esq.
PAHHA	May 2, 2001	"Legal Issues in Home Care"	Kimber L. Latsha, Esq. & Steven M. Montresor, Esq.
OHCA	May 9, 2001	"Responding to Negative Surveys" and "Accident or Abuse? Guidelines for Investigating Suspected Resident Abuse"	Kimber L. Latsha, Esq. & Barbara G. Graybill, Esq.
NJANPHA	May 31, 2001	"E-Mail, V-Mail and Employee Privacy"	Glenn R. Davis, Esq.
NJANPHA	May 31, 2001	"Create Staff, Not Problems"	Glenn R. Davis, Esq.
NJANPHA	June 1, 2001	"Dealing with Denials: Medicare Part A Claims & Medical Review"	Kimber L. Latsha, Esq.
National Business Institute	June 14, 2001	"Exempt Organizations and Charitable Activities in Pennsylvania"	Douglas C. Yohe, Esq.
PANPHA	June 27, 2001	"Create Staff, Not Problems"	Glenn R. Davis, Esq.
PANPHA	June 27, 2001	"Internet Issues for Tax-Exempt Healthcare Providers"	Douglas C. Yohe, Esq.
PANPHA	June 28, 2001	"How to Manage Informal Dispute Resolution"	Kimber L. Latsha, Esq.