

Health Law ADVISORY

Current legal insights for health care executives

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Julie A. Knutson, Editor

Good Governance and the Exempt Organization

“The Internal Revenue Service believes that a well-governed charity is more likely to obey the tax laws, safeguard charitable assets, and serve charitable interests than one with poor or lax governance. A charity that has clearly articulated purposes that describe its mission, a knowledgeable and committed governing body and management team, and sound management practices is more likely to operate effectively and consistent with tax law requirements. And while the tax law generally does not mandate particular management structures, operational policies, or administrative practices, it is important that each charity be thoughtful about the governance practices that are most appropriate for that charity in assuring sound operations and compliance with the tax law.”

The above is a recent statement by the IRS about the importance of good governance for charities. Based on this statement, the IRS stated: “As a measure of our interest in this area, we ask about an organization’s governance, both when it applies for tax-exempt status and then annually as part of the information return that many charities are required to file with the Internal Revenue Service.”

As revised for tax year 2008, the IRS Form 990, *Return of Organization Exempt From Income Tax*, now requires exempt organizations to answer several questions about governance, management, and disclosure. These “Good Governance” questions are viewed as indicators of tax compliance by the IRS. In many cases, the questions also ask for narrative responses and descriptions of policies on Schedule O. The Good Governance questions include subject areas such as:

- Conflict of interest. In addition to questions about the existence of a conflict of interest policy, organizations are to provide a narrative of how they regularly and consistently monitor and enforce such policy.
- Independence of directors. The instructions now define what qualifies a director as “independent.” Previous IRS announcements express a desire that the majority of the board be independent.
- Audit committee. Questions ask about the existence of such a committee with responsibilities for both overseeing the

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audit and the selection of the auditor.

- Executive compensation. Questions ask whether the organization has a process for setting compensation of CEO (and of other officers/key employees) that includes review and approval by independent persons, comparability data and contemporaneous substantiation.
- Policy regarding payment or reimbursement or provision of certain expenses. Questions ask about written policies regarding reimbursement for first-class or charter travel, travel for companions, tax indemnification and gross-up payments, discretionary spending account, housing allowance or residence for personal use, payments for business use of personal residence, health or social club dues or initiation fees, and personal services (e.g., maid, chauffeur, chef).
- Whistleblower policy. Questions inquire about a whistleblower policy (that extends to tax and exemption related issues) and that encourages staff and volunteers to come forward with illegal practices or violations of policy, protects the individual from retaliation, and identifies to whom reports are to be made.
- Documentation retention and destruction policy. Questions ask about the existence of such a policy, the responsibilities of persons under such policy, and the protections against destruction while under investigation.
- Investment policy. Questions inquire whether there is a written policy regarding review of investments.
- Contemporary documentation of meetings. Questions inquire about documentation of both board and

board-delegated committee meetings.

- Public access to documents. Questions ask about public access to the organization's governing documents, conflict of interest policy, and financial statements, and how such documents are made available.
- Joint venture policy. Questions ask whether there is a policy to evaluate participation in joint ventures under tax law and to take steps to safeguard exempt status with respect to such arrangements.
- Governing body review of 990. Questions ask whether a copy of the 990 was provided to the governing body before filing, and request a narrative of the nature and extent of the board review.

The position of the IRS is that the policies in place on the last day of the fiscal year dictate how these good governance questions are to be answered. For those organizations with a 12/31/2008 FYE, that means that policies must be in place by then.

John R. Holdenried

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New HIPAA Guidance for Providers Regarding Disclosures to Family and Friends – Exercise Caution

The Department of Health and Human Services (HHS) Office for Civil Rights (OCR) has issued two new HIPAA Privacy Rule documents that are intended to assist providers and consumers in situations when a patient's family, friends or others involved in the patient's care request a patient's protected health information. These guides attempt to answer common questions providers frequently face in these situations which are often not directly addressed by providers' own HIPAA policies and procedures. They also attempt to provide answers to questions that, even though addressed in policy and procedure manuals, are often misinterpreted.

Following is a summary of some of the guidance to given by the OCR to health care providers:

- **If the patient has the capacity to make health care decisions, when may a health care provider discuss the patient's PHI with the patient's family and friends?**

In this situation, a provider may disclose PHI if the patient agrees or, when given the opportunity, does not object. The health care provider may share or discuss only the information that the person involved needs to know about the patient's care or payment for care.

- **If the patient is not present or is incapacitated, may a health care provider share the patient's PHI with family or friends?**

In this situation, a health care provider may share the patient's information with family or friends as long as the health care provider determines, based on professional judgment, that it is in the best interest of the patient. The health care provider may discuss only the information that the person involved needs to know about the patient's care or payment.

- **If a patient's family or friends calls a health care provider and inquires about the patient's condition, does the provider have to confirm the identity of the person to whom they are speaking prior to releasing any information about the patient?**

HIPAA does not require a provider to obtain proof of identity prior to releasing PHI over the phone. However, the provider may choose to establish rules for verifying who is on the phone prior to releasing PHI.

We caution against too much reliance on this guide, as it gives some general rules without full explanation of the boundaries and limitations contained in the text of the Privacy Rule. For example, the Rule limits disclosure to "family members, other relatives, or a close personal friend" of the individual who are involved in the

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patient's care, and only such information as is "directly relevant to such person's involvement with the individual's care or payment related to the individual's health care." This guidance does not expand the requirements of the Rule.

Many of you ask the patient at the time of registration to list which family members and friends may receive information about the patient. If you undertake to ask the patient to specifically list family and friends, you must be diligent in only disclosing information to those listed.

And while we agree that "proof of identity" is not required by the Privacy Rule before releasing information over the phone, there are very good reasons to continue your practice of taking reasonable precautions to determine the identity of the person to whom you are speaking and his or her authority to receive the information. With the new "Red Flag" Identity Theft rules around the corner, there are even more regulatory reasons to continue to verify the identity of a caller to the extent possible before releasing information over the phone.

These are just some examples of the scenarios discussed by the OCR in the guide. For more information, the guide is available online at: http://www.hhs.gov/ocr/hipaa/provider_ffg.pdf. While this guide can be useful, we do not recommend that you read it as an invitation to relax your current good risk management practices on disclosures to family and friends.

Andrew D. Kloeckner

Editors' Note: The following article appeared in the Labor & Employment Law Update published on October 30, 2008. Due to the impending January 1, 2009 deadline for plan compliance, we are cross-publishing the article in the Health Law Advisory for your information.

IRS Makes Sweeping Changes to 403(b) Plans

On July 26, 2007, the Internal Revenue Service published final regulations applicable to 403(b) Plans available to employees of public schools and Code Section 501(c)(3) tax exempt organizations. These regulations become effective January 1, 2009. The regulations finalize proposed regulations from 2004 and represent the first comprehensive guidance issued under Code Section 403(b) since 1964.

The new rules will require examination of 403(b) programs maintained for employees to determine changes needed to comply with the final regulations and to assure the continued tax-qualification of the 403(b) annuities or custodial accounts that have been purchased for employees under the program. The following is a summary of the significant changes made by the new rules that will have to be addressed for section 403(b) retirement plans.

Written Plan Document Requirement.

The final regulations impose, for the first time, a requirement that there be a written plan document containing all terms and conditions for eligibility, benefits, applicable limitations, the contracts available under the plan, and the time and form under which benefit distributions are made. In

Where the new rules have its most negative impact, however, is on what you must do to fix your relationship prospectively.

addition, any optional provisions (such as loans, hardship distributions, contract transfers, and exchanges and rollovers) must be set forth in the plan document.

Contract Exchanges and Transfers.

The final regulations permit non-taxable transfers from one 403(b) Plan to a 403(b) Plan of a different employer, provided that certain requirements are met. The 403(b) Plans must each permit the transfer, the individual's benefit after the transfer must be at least as great as before the transfer, and the new 403(b) Plan must contain distribution restrictions that are not less stringent than the former 403(b) Plan. Contract exchanges within the same 403(b) Plan are also permitted under the final regulations, provided that requirements similar to those for plan-to-plan transfers are met. In addition, contract exchanges require that the employer must enter into an agreement with the issuer of the new contract to ensure the exchange of certain information related to tax compliance requirements.

Universal Availability and

Nondiscrimination Rules. 403(b)

Plans are generally subject to a "universal availability" requirement. This requirement, with a few exceptions, provides that all employees must be permitted to make salary deferral elections into a 403(b) Plan if any employee of the employer is permitted to do so.

Controlled Group Rules. The final 403(b)

regulations also impose new controlled group rules on tax-exempt entities (other than churches and governmental agencies). In general, control by one organization of 80 percent or more of the board members of another organization will cause the organizations to be treated as a single employer for benefit plan purposes. This means that nondiscrimination tests and other code-imposed limits will have to be applied across both organizations as if the two organizations were a single employer. Additionally, vesting service and plan eligibility may need to be tracked across multiple organizations.

As mentioned above, these final regulations go into effect January 1, 2009, and will require 403(b) programs and any individual 403(b) annuity contracts and custodial arrangements to be examined in determining what changes, if any, need to be made and how you want to proceed in responding to the new rules under the final 403(b) regulations.

Adam L. Cockerill

Labor & Employment Section

Upcoming Events

The 20th Annual Health Law Forum will be held on Friday, November 21, 2008 at the Marriott Regency in Omaha. Registration is available online at www.bairdholm.com.

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