

# Health Law ADVISORY

*Current legal insights for health care executives*

October 30, 2009  
Julie A. Knutson, Editor

## *New Standards For Hospital Exemption?*

The Senate Finance Committee's proposed health care reform bill includes important new requirements for hospitals that are tax exempt under Section 501(c)(3). These appear to have broad bipartisan support. Specifically, a hospital organization will need to meet four new community benefit standards in order to continue to be exempt:

1. The hospital must conduct a community health needs assessment at least every three years and must take into account input from persons who represent the broad interests of the community served by the hospital facility, including those with special knowledge of or expertise in public health. The assessment must be made widely available to the public and the hospital must adopt a implementation strategy for meeting such community needs.
2. The hospital must have a written financial assistance policy which includes eligibility criteria for financial assistance, whether such assistance includes free or discounted care, the basis for calculating amounts charged to patients, and the method for applying for financial assistance. The policy must be widely publicized within the community.
3. The hospital must limit the amounts

charged for emergency or other medically necessary care provided to individuals eligible for assistance under the financial assistance policy to not more than the lowest amounts charged to individuals who have insurance covering such care and prohibits the use of gross charges for this purpose.

4. The hospital cannot engage in extraordinary collection actions before the organization has made reasonable efforts to determine whether the individual is eligible for assistance under the financial assistance policy.

There are several other key tax exemption features in the proposed legislation:

- The IRS is specifically required to review at least once every 3 years the community benefit activities of each hospital organization.
- Hospitals must annually report a description of how the organization is addressing the needs identified in each community health needs assessment and a description of any such needs that are not being addressed together with the reasons why such needs are not being addressed.
- Hospitals must make their audited financial statements available to the public.

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- The IRS is charged with gathering data involving levels of charity care, bad debt, and unreimbursed costs of tax exempt hospitals, governmental hospitals, and for-profit hospitals and reporting such information and trends to Congress.

All of this represents a compromise from earlier proposals that imposed specific financial requirements for charity care and community benefits. At this point, it appears that the Senate Finance Committee is willing to delay more significant changes until more data becomes available based on the new Form 990s.

**John R. Holdenried**

criminal prosecution post-HITECH, a physician and two hospital employees were charged with HIPAA violations for accessing a patient's records without any legitimate purpose. The doctor and two employees admitted to looking at the medical records of Anne Pressly, the TV reporter from Little Rock who had been beaten to death in her home and later died at the hospital. Each of the three pleaded guilty to the charges.

On October 26, 2009, a federal judge handed out the sentences. The physician was fined \$5000 and ordered to perform 50 hours of community service educating professionals on the importance of patient privacy under HIPAA. The other two employees, one an account representative and the other an ER unit coordinator, were fined \$2,500 and \$1,500, respectively. Each also received one year of probation, although the maximum possible sentence was one year's jail time.

In the press release from the Department of Justice, the U.S. Attorney stated: "[w]e hope that today's sentencings send the message that the HIPAA protections apply to every person in the community, regardless of their position or stature. Likewise, the penalties for violating HIPAA apply equally to every person with access to protected health information." The government has clearly signaled that it intends to fully prosecute individuals for actions that violate HIPAA.

This prosecution highlights a covered entity's need to have **effective** training that ensures that each and every employee understands that accessing a patient's medical record without a business purpose can subject that employee and the covered entity to criminal penalties. This case also suggests that covered entities should be proactive in their review of audit logs of employee access to records. With the new data breach notification rule in place, the obligation to notify an individual of a breach begins when the covered entity knew or should have known of the breach. If you fail to periodically evaluate access to records, the Office for Civil Rights could make a case that you should have known of a violation much earlier than you might otherwise expect.

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# ***HIPAA Enforcement Update - "Snooping" Leads to HIPAA Conviction; Interim Final Enforcement Rule Just Released***

Both criminal and civil enforcement of HIPAA are making headlines this week. On the criminal side, in the first known

## Civil Enforcement

Civil enforcement of HIPAA is also making headlines as the interim final rule on HIPAA enforcement by the Department of Health and Human Services was released on Thursday, October 29<sup>th</sup>. The interim final rule amends HIPAA's enforcement regulations to incorporate the HITECH Act's new categories of violations and tiered ranges of civil monetary penalties.

Based on the statutory language in the HITECH Act, the interim final rule establishes several categories or "tiers" of violations that reflect increasing levels of culpability, including a new tier for "willful neglect." Each tier corresponds to a minimum penalty amount and then a maximum amount for all such violations of an identical provision in a calendar year. The comments to the rule include the following table, "to ensure that covered entities are fully aware of their potential liability:"

entity liable for the penalty knew, or, by exercising reasonable diligence, would have known that the violation occurred; or such additional period as the Secretary determines to be appropriate based on the nature and extent of the failure to comply. Like the criminal case discussed above, this civil enforcement provision again highlights the need to exercise reasonable diligence to make sure violations in your organization are discovered.

The interim final rule will become effective on November 30, 2009.

**Vickie B. Ahlers**

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Violation Category – Section 1176(a)(1)	Each Violation	All such Violations of an Identical Provision in a Calendar Year
(A) Did Not Know	\$100 - \$50,000	\$1,500,000
(B) Reasonable Cause	\$1,000 - \$50,000	\$1,500,000
(C)(i) Willful Neglect - Corrected	\$10,000 - \$50,000	\$1,500,000
(C)(ii) Willful Neglect –Not Corrected	\$50,000	\$1,500,000

Importantly, the new enforcement rule changes the affirmative defenses to HIPAA violations. Under the prior enforcement rule, the covered entity had the opportunity to try to establish that it did not have knowledge of the violation, and by exercising reasonable diligence, would not have know that the violation occurred.

Under the new enforcement rule, the covered entity can attempt to establish an affirmative defense that the violation was (i) not due to willful neglect; and (ii) corrected during either the 30-day period beginning on the first date the covered

# Preparing For The H1N1 Influx: Options Under EMTALA

In October, the Centers for Disease Control (CDC) reported widespread influenza activity in 41 states. The CDC expects influenza activity, in particular H1N1 influenza, to increase throughout the fall and winter seasons. The Centers for Medicare and Medicaid Services (CMS) recently released guidance on EMTALA and options for hospitals in a disaster. The CMS memorandum discusses requirements and options for hospitals that may experience a surge in demand for emergency department services.

Under EMTALA, Medicare participating hospitals must perform an appropriate medical screening exam (MSE) to determine if an individual has an emergency medical condition. If the individual has an emergency medical condition, the hospital must treat and stabilize the condition within its capability, or transfer the individual to a hospital that has the capability and capacity to stabilize the condition.

To assist in managing a surge in emergency department volume, the guidance provides an overview of three options that do not require a waiver under EMTALA. First, a hospital may set up an alternative screening site on campus to perform the MSE. The CDC recommends the use of separate waiting and examination rooms for individuals with H1N1 influenza symptoms. An individual could be redirected to the alternative site after being logged in, and the log-in process could even take place outside of the emergency department.

The second option for hospitals, without

seeking a waiver, is to establish a screening location off-campus. The hospital could use signage to direct individuals experiencing flu-like symptoms to go to the off-campus location specially set up to handle individuals with flu-like symptoms. In addition, the CDC recommends that hospitals encourage individuals to phone the hospital before visiting the emergency department. Such a phone system could deliver messages to incoming callers directing individuals to visit the off-site screening location if experiencing flu-like symptoms. However, a hospital may **not** tell an individual who has already come to the emergency department to go to the off-site location for the MSE.

Finally, without seeking a waiver, hospital and community officials could work together to set up a screening site that is not under the control of the hospital. Again, hospitals would not be able to tell individuals that have already presented to the emergency department to go to the off-site location. The community and hospital would need to work together to appropriately staff the site with medical personnel trained to evaluate individuals with flu-like symptoms.

Under EMTALA, the Secretary of Health and Human Services may waive certain requirements for hospitals in response to emergencies. For such waivers to be granted, the Secretary must have declared a public health emergency and the President must have declared a national emergency through the Stafford Act or the National Emergencies Act. On October 1, 2009, the Secretary renewed the Public Health Emergency; and on October 24, 2009, President Obama signed an Emergency Declaration for H1N1 influenza.

Under EMTALA, the Secretary may waive the requirement that prohibits certain rapid triage or sorting activities off-site. Hospitals must seek a waiver from the Department of Health and Human Services. If a waiver is granted, the hospital could set up an alternative screening location off-campus and transfer patients from the emergency department to the alternate location. Such a waiver lasts until the termination of the declaration of the public health emergency.

Overall, there is some flexibility under

*The hospital could use signage to direct individuals experiencing flu-like symptoms to go to the off-campus location specially set up to handle individuals with flu-like symptoms.*

EMTALA for hospitals to manage an influx of patients experiencing flu-like symptoms presenting to the emergency department without seeking a waiver. Hospitals and communities should continue to work together to develop preparedness plans to address the influenza activity. Finally, hospital and community officials should continue to monitor the CDC's H1N1 influenza website at [www.cdc.gov/h1n1](http://www.cdc.gov/h1n1) and [www.flu.gov](http://www.flu.gov).

**Michael W. Chase**

## *Upcoming Speaking Engagement:*

November 4: Barbara Person, Iowa  
Hospital Association – EMTALA: From  
All the Angles

### *Save the Date!*

The 21st Annual Health Law Forum will be held on Friday, November 20, 2009 at the Marriott Regency in Omaha, Nebraska. For more information and to register online, please visit - <http://www.bairdholm.com/news-events-25.html>.

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