



Where Does The Healthcare Law Now Stand?

By Sandra Feingerts (New Orleans)

The Patient Protection and Affordable Care Act (PPACA) – better known as Healthcare Reform, or even “Obamacare” – continues to make news. The recently-passed act to keep the government open eliminated the free choice voucher – a requirement that would have placed an additional burden on employers in the administration of their health plans by requiring them to give some employees a voucher for the amount the employer pays for an employee’s insurance that could be used by the employee to purchase insurance on the state exchange.

The Republican members of Congress appear committed to dramatic change or repeal of the law. President Obama has said he is open to change, but without specifics. In the other branch of government – the judiciary – the cases that have dealt with the constitutionality of the PPACA are worth noting.

Legality Of The Law Under Fire

Specifically at issue in these legal cases is the so called “individual mandate” which requires almost all individuals who file a federal income tax return to have health coverage that meets the definition of “minimum essential coverage.” Minimum essential coverage is not minimal at all. The definition will be issued through regulations, but it is expected to be broad-based health coverage with few limitations.

Individuals who are required to have health insurance either can obtain coverage through their employers or can purchase it from an insurance company through the state-operated exchange. Those who fail or refuse to purchase health coverage are subject to payment of a tax called the “shared responsibility payment.” This payment is payable for any month a taxpayer does not have health coverage. Generally, the tax is calculated based on the number of individuals claimed as exemptions on the individual’s return.

In 2014, the tax for a single person is the lesser of \$95 per month or 1% of income above the threshold amount that a person has to earn to be required to file a federal income tax return (“filing threshold”). The shared responsibility payment increases both in amount and percentage in 2015, and in 2016 the tax is the lesser of \$695 per month or 2.5% of income above the filing threshold. The rules are a little complicated and there are limits on the tax for taxpayers claiming more than two dependents.

So, is it constitutional for the federal government to require that most of its citizens be covered by health insurance? At the end of 2010, a federal district judge in Florida held that Congress has no authority under the commerce clause of the Constitution to enforce this provision of health reform. The commerce clause allows Congress to regulate economic activity that affects interstate commerce. This holding struck down the health reform act on the grounds that the individual mandate is such an integral part of the whole scheme that PPACA is void.



A Virginia court has taken a more limited approach to the constitutionality of the individual mandate and found it to be unconstitutional, but upheld the other provisions of health reform. Both of these decisions conflict with decisions of other federal district courts which have found the new law to be constitutional. There are dozens of cases like this pending in other jurisdictions.

Appeals of the Virginia case and the Florida case are pending. But the Attorney General of Virginia is advocating that the entire law is unconstitutional and that the Florida court is the one that got it right. He intends to ask the Supreme Court for an expedited direct appeal from the district court – before the court of appeals has heard the case – because the case is of “imperative public importance.” As Congress struggles with legislative change, and while the IRS and the Departments of Labor and Health and Human Services grind away on the list of regulations that have to be issued, the end of this make-or-break drama will ultimately be determined by the U.S. Supreme Court.

Obviously no one can predict the ultimate outcome, and we’re not going to try. But we’ll continue to monitor the situation and keep you apprised of any important developments.

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Dramatic Increases In HIPAA Privacy And Security Enforcement

By Callan Carter (San Francisco)

Health and Human Services' (HHS) Office for Civil Rights (OCR) has sent a strong message about its commitment to enforcement of the HIPAA Privacy and Security Rules by announcing two HIPAA Privacy Rule enforcements within one week, one of which includes the first ever use of civil monetary penalties for a HIPAA Privacy Rule violation.

Cignet Health of Prince George's County

HHS issued a Notice of Final Determination, finding that Cignet Health of Prince George's County, MD violated the Privacy Rule, imposing a civil money penalty of \$4,351,600 for the violations. The penalty was based on the increased penalty amounts authorized by the Health Information Technology for Economic and Clinical Health (HITECH) Act, part of the American Recovery and Reinvestment Act (ARRA), better known as the stimulus package. OCR found that Cignet violated 41 patients' rights by denying them access to their medical records when requested. The patients had individually filed complaints with the OCR, which initiated the investigation.

The HIPAA Privacy Rule requires that a covered entity provide patients with a copy of their medical records within 30 (and no later than 60) days of the patient's request. Under the HIPAA Privacy Rule, each day that a violation continues (i.e., each day that access was not provided) for each individual counts as a separate violation. OCR assessed a penalty of \$100 per day for each day that Cignet failed to timely respond to each individual's request for access (the minimum penalty under the new HITECH penalty structure). The total penalty for these violations was \$1,351,600.

OCR then assessed the maximum penalty of \$50,000 per day for Cignet Health's failure to cooperate with the HHS investigation, which would have resulted in \$242 million in penalties for 2009 and \$130 million for 2010, but because penalties for the same violation are capped at \$1.5 million per year, the penalty for failure to cooperate was limited to \$3 million. The total penalty came to \$4,351,600.

Massachusetts General

The General Hospital Corporation and Massachusetts General Physicians Organization, Inc. (Mass General) agreed to pay \$1,000,000 to settle violations of HIPAA's Privacy Rule. Mass General must also develop and implement a comprehensive set of policies and procedures to safeguard the privacy of its patients. This settlement follows an extensive investigation by the OCR to enforce the HIPAA Privacy and Security Rules.

The incident giving rise to the investigation involved the loss of protected health information (PHI) of 192 patients. These documents were lost on March 9, 2009, when a Mass General employee, while commuting to work, left the documents on the subway train. The documents were never recovered. OCR opened its investigation of Mass General after a complaint was filed by a patient whose PHI was lost. OCR's investigation found that Mass General failed to implement "reasonable, appropriate safeguards" to protect the privacy of PHI when removed from Mass General's premises and impermissibly disclosed PHI, potentially violating provisions of the HIPAA Privacy Rule.

A Marked Increase in HHS Enforcement

The original version of HIPAA had relatively small penalties. Penalties were capped at \$100 per day of violation and at \$25,000 for the same violation in any one year. HHS received much criticism for its informal enforcement of HIPAA; seeking voluntary, confidential

compliance agreements from those who violated the law. Responding to this criticism, HHS finally entered into its first financial settlement in July 2008. Providence Health, which over a seven month period had experienced four separate incidents of lost computers, lost backup tapes and other storage media, agreed to pay a \$100,000 financial settlement and to implement a corrective action plan.

In January of 2009, HHS entered into its second financial settlement. This involved a joint investigation by HHS and the Federal Trade Commission (FTC) over allegations that CVS retail pharmacies were improperly disposing of medical information in unsecured dumpsters. This settlement was \$2.25 million. In July of 2009, HHS and the FTC entered into a settlement with Rite-Aid. As with CVS, the investigation involved allegations that Rite-Aid pharmacies had improperly disposed of medical information. The settlement amount was \$1 million.

Meanwhile, Congress took action to increase the penalties under HIPAA. In February of 2009, Congress passed the HITECH Act to amend HIPAA, dramatically increasing the monetary penalties, which now range from a minimum of \$100 to \$50,000 per day of violation, with an annual cap of \$1.5 million for the same violation in any one year. HITECH also requires HHS to engage in compliance audits and gives states' Attorneys General the right to enforce HIPAA as well. With these two recent enforcements, the message is clear that failure to comply with HIPAA's Privacy and Security Rules and failure to cooperate with an OCR investigation can have severe consequences, particularly now that the penalties have been increased.

Are You In Compliance?

HIPAA's Privacy and Security Rules apply to "covered entities": healthcare providers, insurance companies, healthcare clearinghouses and group health plans, such as employer-sponsored medical, dental, vision, EAP and healthcare flexible spending accounts (FSAs). They also now apply directly to "business associates," which are plan vendors, like insurance brokers, consultants, actuaries and attorneys who have access to PHI. If you are a Covered Entity or Business Associate, you should have already completed your Privacy and Security compliance efforts and should be operating in compliance with the Privacy and Security Rules.

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JUDGE ON VACATION