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CORRIDORS

News for North Carolina Hospitals
from the Health Law Attorneys of Poyner Spruill LLP

IRS REVOKES HOSPITAL'S EXEMPTION UNDER SECTION 501(C)(3) FOR FAILURE TO COMPLY WITH COMMUNITY HEALTH NEEDS ASSESSMENT REQUIREMENTS

by Wilson Hayman

On August 4, 2017, the Internal Revenue Service (IRS) released its first revocation of a hospital's tax exemption under Internal Revenue Code (IRC) Section 501(c)(3) for failure to comply with Section 501(r) of the Affordable Care Act.

Background. Section 501(r) and its regulations imposed new requirements on 501(c)(3) organizations that operate one or more hospital facilities. Among others, the law and regulations require each hospital organization to conduct a community health needs assessment (CHNA) to assess the health needs of the community it serves, including financial and other barriers to care. In that context, each hospital facility is required to meet a variety of requirements, including:

- Conducting a CHNA at least once every three years
- Making the CHNA publicly available on a website
- Adopting an implementation strategy to meet the needs identified in the CHNA

The written implementation strategy must describe how the facility plans to address the health need or, if it does not intend to address the need, explain the facility's decision. Failure to comply with these requirements may result in revocation of the hospital's 501(c)(3) status and a $50,000 excise tax on the hospital. The IRS has indicated that minor errors or omissions that are inadvertent, and even ones that are more than minor but not willful or egregious, will be excused if the hospital corrects them and discloses the errors.

The final rule interpreting these requirements for tax-exempt hospitals was published in the Federal Register on December 31, 2014, and became effective for tax years beginning after December 29, 2015.

Facts. In the recent case, the hospital in question had "dual status." As a formerly private, nonprofit organization, it had received confirmation from the IRS that it was tax-exempt under Section 501(c)(3), but it had later been taken over by a county agency and became a tax-exempt governmental unit. The hospital had a CHNA prepared in order to keep its Medicare designation as a "critical care access facility." The hospital prepared an implementation strategy report but never made it widely available to the public via a website, claiming it had a paper document available to the public upon request. Although the hospital administrators stated that they may have acted on several of the recommendations in the report, no separate implementation strategy was ever developed as the regulations required In their interview with the IRS, administrators said that they did not need or want their tax-exempt status under Section 501(c)(3), and as a small, rural facility, they did not have the financial ability or staffing to devote to the requirements of the CHNA.

Ruling. The IRS concluded that the hospital had failed to comply with the portions of Section 501(r) that required adopting an implementation strategy to meet the community needs identified through its CHNA and making its CHNA report widely available to the public. The IRS considered these failures to be not minor but "egregious." Because the hospital's administrators indicated they had neither the will nor the financial resources to complete the CHNA process, the IRS considered the hospital's actions to be willful. Consequently, the IRS concluded the hospital had failed to comply with the requirements of Section 501(r), and its tax-exempt status should be revoked.

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NEW OSHA REGULATIONS

DOES YOUR DRUG TESTING POLICY COMPLY?

by Tom Davis

At the end of last year, OSHA began enforcing new regulatory rules expanding the requirements for employers reporting and submitting workplace injury and illness records. The new reporting requirements also contain new anti-retaliation regulations. These new provisions include the ability of OSHA compliance officers to issue citations to hospitals and other employers based upon alleged retaliation, even in the absence of any employee complaint. A citation can be issued solely based upon the written requirements of the employer's safety plan.

Unfortunately, the new anti-retaliation provisions may operate to make many current drug testing policies noncompliant and subject to sanction. The new rules prohibit an employer "from using drug testing, or the threat of drug testing, as a form of retaliation against employees who report injuries or illnesses." Specifically, the new regulations prohibit universal drug testing of employees after every work-related incident.

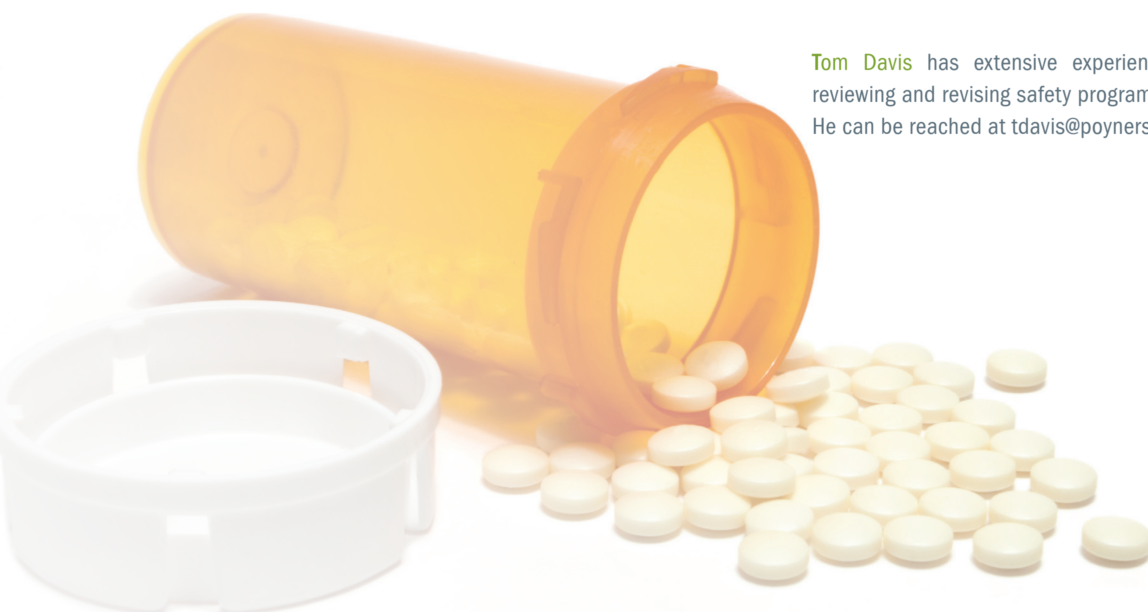
OSHA's new rule does not create a blanket prohibition of a hospital's drug testing of employees. It does, however, place limitations on such testing. OSHA requires that "drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use." A hospital employer seeking to utilize post-incident drug testing of employees must be able to show:

Probable cause that the work-related incident was caused by drug-related impairment (i.e., slurred speech, erratic actions, the smell of alcohol, etc.);

- Probably cause that the work-related incident was caused by drug-related impairment (i.e., slurred speech, erratic actions, the smell of alcohol, etc.);
- The test will actually test for and identify the substance suspected in the impairment;
- The hospital's motivation in giving the test was not retaliation; and
- The test was not given as punishment or to embarrass the employee tested.

Hospital employers are urged to review their current safety policies to determine whether provisions relating to the drug testing of employees after a work-related incident are in conformity with the current OSHA requirements. If they are not, the offending provisions should be revised immediately.

Tom Davis has extensive experience defending OSHA citations, reviewing and revising safety programs, and providing safety training. He can be reached at tdavis@poynerspruill.com or 919.783.2816.



WITH ALL THE ATTENTION ON THE TRAVEL BAN, WHAT COULD A HEALTH SYSTEM AS EMPLOYER BE MISSING?

by Jennifer Parser

Check those Form I-9s! It is a good time for hospitals and health systems to conduct an internal audit of I-9s because inspections and fines have not gone away and a new I-9 edition was published recently. In June 2017, an Administrative Law Judge in the Office of the Chief Administrative Hearing Officer fined a staffing company $276,000, reduced from the $367,000 originally imposed by Immigration and Customs Enforcement (ICE). While this is less than the highest fine of $605,250 imposed in 2015 on an events planning company for *incomplete* I-9s (there were only four missing I-9s out of 339 employees), the reason for the staffing company's fine was a failure to produce the I-9s to ICE within three days of its request. So "Rule No. 1" to be taken from this latest large ICE fine: have complete I-9s ready and available for inspection at all times.

Second, use the latest Form I-9. A new I-9 went into effect on July 17, 2017. The January 1, 2017 version can be used until September 17, 2017. After that, hospitals and health systems as employers must use only the July 17 iteration. "Rule No. 2": never rely upon preprinted I-9s. Always go to the website and download the latest version.

Here is guidance from ICE and the Office of Special Counsel (OSC) at the US Department of Justice on parameters of a permissible internal audit:

- While internal audits are neither required nor specifically recommended by ICE or the OSC, if they are pursued, the scope of the audit must be predetermined. Since an employer can choose to review all of or a sample of I-9s, it is critical that the selection of a sample be based upon neutral criteria.
- An internal audit is not allowed for any discriminatory reason. While an employer must ensure that the audit is not based on citizenship, national origin or other discriminatory reason, the timing of the audit can be inadvertently discriminatory if based upon a tip that could be motivated by discrimination or retaliation and does not appear reliable. The employer should have its internal audit process set up in advance, including how, what and when it will communicate with affected employees.
- If the audit uncovers an error in Section 1 of the I-9, the employee must be contacted to correct the error and draw a line through the incorrect information, enter the correct or missing information, and initial and date the new information.
- An employee with a deficient I-9 should be notified, and provided with a copy of the I-9, any attached documentation, and directions on how to obtain missing or inaccurate information.
- If the audit uncovers photocopies of documentation that do not appear genuine, the employer should address its concern to the employee and provide the employer with the list of acceptable documents that accompanies the I-9 instructions. The employer must never request a specific document and cannot terminate an employee unless the employee cannot prove his or her identity and/or work authorization. In fact, when Catholic Healthcare West allegedly requested certain documents of non-US citizens and naturalized citizens as part of its I-9 process, it agreed to a settlement of $275,000 with the Department of Justice, which investigated its I-9 practices.
- ICE presumes that an employer acted reasonably if, as a result of an internal audit, it provides a reasonable length of time for an employee to supply adequate identity and/or employment authorization documentation. Ten days is binding only upon an employer responding to a Notice of Suspect Documents from ICE. Thus, employees should be given more time, as some documents take longer to obtain. In fact, an employer can allow or disallow additional time based upon objective nondiscriminatory and nonretaliatory criteria, and then document the basis for its decision and efforts of the employee to obtain the acceptable documentation.

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FIVE TAKEAWAYS FROM THE OCR REMINDER ON HIPAA OBLIGATIONS IN RANSOMWARE INCIDENTS

by Saad Gul and Mike Slipsky

Apparently prompted by the recent wave of high-profile ransomware attacks, the Department of Health and Human Services' Office of Civil Rights (OCR) has reminded hospitals, healthcare systems, and other covered entities and business associates of their cybersecurity obligations. The reminder follows a previous warning that unless the affected covered entity or business associate can establish that there is a low probability that personal health information (PHI) has been compromised, a breach is presumed to have occurred.

OCR's reminder first reiterated that the HIPAA Breach Notification Rule defines a breach as the impermissible acquisition of, access to, use of, or disclosure of PHI. Under these criteria, most ransomware incidents would be considered breaches absent an affirmative showing, under a high evidentiary standard, that specific safe harbors apply.

Second, if the ransomware incident implicates the Breach Notification Rule, OCR emphasized that patients, regulators, and in certain instances, the media must be notified within the regulatory guidelines. The guidelines provide for notice "without unreasonable delay." Sixty days is considered the outer limit. Timely reporting helps mitigate damage at the individual level (by preventing identity theft) and at the aggregate level (by enabling detection and suppression of threats).

Third, OCR underscored the necessity of having an incident response policy and different types of contingency plans in place. These policies and plans provide the affected entity with a mechanism to continue services even while the security incident is in progress.

Fourth, these policies and plans should be regularly vetted and tested, under the sponsorship of management. In addition to addressing disaster recovery and emergency contingencies, they should encompass maintenance (such as containment testing and regular updates, including data backups). They should also factor in post-incident reviews and investigations.

Finally, OCR stressed the desirability of information sharing: pooling threat and vulnerability information to enable greater robustness of the healthcare sector as a whole. The Federal Government has encouraged the process via measures such as the Cybersecurity Information Security Act (CISA) and Executive Order 13691.

Hospitals and the healthcare sector in general have been particularly vulnerable to ransomware. Both operational needs and stored PHI are extremely sensitive, while technology infrastructure may be dated, resources are limited, and IT departments and budgets are stretched thin. Nevertheless, HIPAA's stringent penalty regime and OCR's stated intention to expand enforcement mean that HIPAA-compliant plans and processes are more important than ever. In short, hospitals are advised to pay a little for compliance now, rather than a lot – in ransom payments, remediation costs and OCR-imposed penalties – later.

Saad Gul and Mike Slipsky, editors of NC Privacy Law Blog, are partners with Poyner Spruill LLP. They advise clients on a wide range of privacy, data security, and cyber liability issues, including risk management plans, regulatory compliance, cloud computing implications, and breach obligations. Saad (@NC_Cyberlaw) may be reached at 919.783.1170 or sgul@poynerspruill.com. Mike may be reached at 919.783.2851 or mslipsky@poynerspruill.com.

WITH ALL THE ATTENTION ON THE TRAVEL BAN, WHAT COULD A HEALTH SYSTEM AS EMPLOYER BE MISSING?

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- An employee who was not employment authorized, and who subsequently becomes employment authorized, should not be terminated.
- A new I-9 should not be required if an existing I-9 appears deficient: the old form should just be corrected. If a new I-9 must be used because the original I-9 lacks space for corrections or is damaged, it should be stapled to the deficient I-9 if it exists.
- If the employee has left employment when the error is discovered, the employer should attach a signed and dated statement to the I-9 identifying the error and the reason the employee cannot complete or correct the error.
- Does enrollment in E-Verify supplant the need for an internal audit? No. E-Verify provides a defense related to an employer hiring someone who is not employment authorized but does not offer a safe harbor for I-9 violations.

Final thoughts: an employer is considered to "know" an employee is not employment-authorized through actual knowledge and "knowledge which may be fairly inferred through a notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about an individual's unlawful employment status." When doing an internal audit, an employer may become "knowledgeable", applying either of the above definitions, about a legitimate employment eligibility issue. An employer who has actual or constructive knowledge that an employee is not employment authorized, yet continues to employ that individual, can incur heavy fines and even imprisonment for both company owners and managers. Therefore, a carefully conducted internal audit may require appropriate follow-up as itemized above.

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IRS Revokes Hospital's Exemption Under Section 501(c)(3) for Failure to Comply with Community Health Needs Assessment Requirements

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Although this ruling was based on a unique set of facts, it indicates that the IRS considers a hospital's failure to complete and adopt an implementation strategy and to post the CHNA on a website to be egregious failures, which are sufficient grounds for revocation of the hospital's Section 501(c)(3) exemption.

The law requires the IRS to review the community benefit activities of each Section 501(c)(3) hospital every three years, which includes a review of the hospital's Form 990, its website and other publicly available information. If the IRS finds evidence of noncompliance, this will likely cause the hospital to be referred for examination. In light of this ruling, hospitals should carefully review their own compliance with the requirements of Section 501(r), including implementation strategy and posting of the CHNA to a website.

Wilson Hayman's practice focuses on healthcare law, civil law, administrative law, and compliance with the Stark Law, Anti-Kickback statute, and other federal and state laws. He may be reached at whayman@poynerspruill.com or 919.783.1140.

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