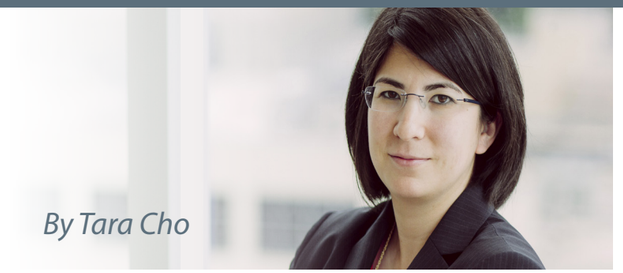
ENDNOTES
News for North Carolina's Hospice and Palliative Care Community

FEBRUARY 2015

How to Mitigate Compliance Risks with BYOD



By Tara Cho

If you have ever left your mobile phone on an airplane, in a restaurant or somewhere other than in your possession, you know it's frightening enough to think of losing the device itself, which costs a premium, as well as your personal photos or information stored on the device. Now imagine if you lost your mobile phone, but it also had protected health information (PHI) associated with your health care work stored on it. The lost device suddenly presents the potential for reputational damage and legal or regulatory obligations, in addition to the inconvenience and cost of replacement.

Mobile phones are lightweight, palm-sized and cordless, which makes them convenient and easily portable. These same features make mobile phones highly susceptible to theft or loss. As such, there are serious compliance risks to consider and mitigate when allowing personal mobile device use for work purposes, or a bring your own device (BYOD) program, especially in a health care setting. Despite the known risks, current research shows that in some industries, up to 90% of employees are using their personal devices for work purposes whether "allowed" or not. For example, a home health or hospice provider using a personal device for work purposes might send a text message to a patient's primary care physician (PCP) to obtain guidance or to provide an update. Since the provider works in the home setting rather than in a facility or office with a computer on which to enter a note in the patient's electronic health record, the correspondence with the PCP may suddenly become the only existing note for that exchange. Furthermore, the communication may include PHI, raising compliance obligations such as state laws or HIPAA security requirements.

There is no quick and easy remedy to completely eliminate all risks associated with the use of mobile phones, particularly employee-owned devices. However, there are steps that can be taken to minimize those risks while allowing the use of mobile technology to provide enhanced and continuous care to patients. One such step is implementing a mobile device management (MDM) solution. An MDM solution allows a secure connection for employees to access work networks and information resources remotely, using an application installed on their personal device. That solution keeps "work applications" such as the employer's email program technically separated from "personal applications" like social media apps. In addition, an MDM solution allows the employer to force technical controls on the device, such as password requirements, encryption or the ability to remotely wipe all data from the device.

Recognizing that employers must relinquish ownership and technical control to make a BYOD program work, employers also must implement robust policies and procedural controls. For example:

- Permissible Uses. Document the permissible uses of personal devices for work purposes, including whether employees are ever permitted to transfer PHI or other types of sensitive personal information on a personal device, and the employment terms associated with such uses.
- Device Security Controls. Document the policies that govern device controls (such as requiring employees to use passwords, up-to-date malware protection, device time-out, authentication or encryption on the device).
- Training and Sanctions. Enforce training requirements and frequency as part of the terms of use and implement clear sanctions policies for unauthorized access or use. Employers may also consider whether the same training and policies/procedures will apply to vendors or contractors.
- HR Policies. Review other important employment law considerations such as employee privacy rights, social media policies and policies for removing applicable data from the devices of terminated or exiting employees.

There are many compliance considerations to keep in mind when deciding whether to implement a BYOD program. A comprehensive security framework, including technical controls, policies, procedures, and training, can reduce the high risks associated with the use of personal mobile devices for work purposes.

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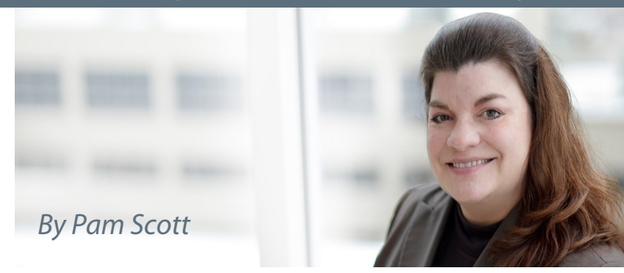
Gear Up for Increased CMS Scrutiny of Hospice Services for Assisted Living Facility Residents



By Pam Scott

A recent study issued by the evaluation and policy division of the U.S. DHHS Office of Inspector General (OIG) indicates that hospices can expect increased scrutiny regarding the services they provide to assisted living facility residents. The study, dated January 13, 2015, was based upon an evaluation of all Medicare hospice claims from 2007 through 2012. Key observations made by OIG included the following:

- Hospices provided care significantly longer for individuals in the assisted living facility setting as compared with other settings such as private homes and skilled nursing facilities.
- For-profit hospices received much higher Medicare reimbursement per beneficiary than did nonprofit hospices.
- Residents of assisted living facilities often had medical diagnoses that required less complex care.
- Hospices often furnished fewer than five hours of visits for routine home care patients in assisted living facilities.

The OIG study does not speak to the important reality that residents of assisted living facilities typically are healthier than residents of skilled nursing facilities, which would tend to support a higher median number of hospice days in the assisted living setting.

OIG recommends to CMS that, as part of its ongoing hospice payment reform efforts, it should reduce incentives for hospices to target assisted living facility residents with certain diagnoses and those likely to have extended periods of care. Of course, this follows a similar recommendation by MedPac. OIG's study recommends that CMS "target certain hospices for review." These include hospices with a high percentage of CMS payments for patients in assisted living facilities, and hospices with a high percentage of patients receiving care over 180 days or patients with certain diagnoses. In the wake of this critical study, hospices, especially for-profit hospices, can expect increased scrutiny of the services they provide to assisted living facility residents.

Hospice providers whose patients include a high number of assisted living facility residents should expect to be subject to increased Medicare review. Hospices should consider taking preemptive defensive steps now, such as:

- Evaluating their data on assisted living facility residents in order to identify any outliers or potentially unsupported distinctions from services provided in other settings; and
- Conducting internal compliance reviews regarding the services provided to assisted living facility residents.

This is especially true of for-profit hospices that fall in or near the category of high service to assisted living facility residents.

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BACK BY POPULAR DEMAND!!

EndNotes is back by popular demand! We'll update you every other month on important state and national regulatory issues that affect you directly as providers. *EndNotes* will be available and provided free of charge to hospice and palliative care providers in North Carolina, and to interested friends of these industries. We welcome your comments and suggestions on topics of interest!!

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Happy New Year from the DC District Court – Companionship Exemption Lives On!!

Home care patients, caregivers and the entire home care community celebrated a huge victory to kick off 2015. The U.S. District Court for the District of Columbia (DC court) vacated the U.S. Department of Labor's (DOL's) revised regulations, pertaining to the companionship exemption, scheduled to go into effect on January 1 of this year. The revised rules would have eliminated the long-standing exemption from the minimum wage and overtime pay requirements under the Fair Labor Standards Act (FLSA) for home care companies employing individuals who provide companionship and live-in domestic services to the elderly or infirm. Under the DOL's revised regulations, only an individual, household or family that directly employs a companion would have qualified for the exemption. In addition, the regulations would have significantly narrowed the definition of companionship services. The revised rules would have essentially eviscerated the companionship exemption.

The DC court issued a series of rulings in late December 2014 and early January 2015 that agreed with the National Association for Home Care & Hospice's (NAHC's) challenge to the new DOL rules, and concluded that the new rules were invalid and violated the FLSA. The court ultimately concluded that the regulatory changes proposed by the DOL, which would change regulations in place under the FLSA since 1975, would destabilize the entire home care industry and adversely affect these services for millions of elderly and infirm Americans.

The DC court first ruled in December 2014 that home care patients are entitled to equal rights, regardless of the payor of their bill, so the proposed exclusion of workers employed by third-party home care companies from the overtime pay exemption violated the plain language of the FLSA. In that ruling, the court pointed out the language in the FLSA that states that any employee providing companionship or live-in domestic services falls within the scope of the exemption. Therefore the focus is the type of service provided, not who pays the check. Following its first ruling in this case, the court held in its January 2015 ruling that DOL's new regulation, which would redefine companionship services and live-in care, was contrary to the plain language of the FLSA that specifically includes personal care in the definition. In making its decision to vacate the proposed regulations, the court took an unusual path, granting the NAHC's request for a temporary restraining order in one aspect of the case and then agreed to block all challenged parts of the proposed regulations without a trial.

In its rulings to protect caregivers and their ability to work full time, the court focused on the strength of these particular exemptions under the FLSA and how they have remained intact for nearly 40 years. The exemptions have survived an unsuccessful challenge before the U.S. Supreme Court and multiple failed efforts by legislators in the majority party to get out of committee with changes to the law. In as arguably as direct a statement as any judge might make about the nature of the DOL's revised regulations, the court stated in its December 22, 2014, opinion, "…the Department of Labor amazingly decided to try to do administratively what others had failed to achieve in either the Judiciary or the Congress."

The DOL filed an appeal on January 23, 2015, in the U.S. Court of Appeals for the District of Columbia to challenge the court's rulings. If the DOL's request to expedite the appeal is granted, briefing could be completed by mid-April 2015 and a decision on the appeal could come as early as June 2015. NAHC has made clear its intention to defend the court's ruling and continue fighting the DOL's revised companionship exemption, so that the exemption lives on and home care providers can continue operating under the well-established rules. However, the DOL's revised regulations at issue in the pending appeal certainly appear to reflect an agency perspective that does not favor the exemption. For this reason, home care providers would be well-advised to examine their policies and procedures related to companionship and live-in domestic services to ensure they are in line with the parameters of the well-established law.

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DEA Rules On Disposal of Controlled Substances – What's Up?

by Pam Scott

Questions remain about the U.S. Drug Enforcement Agency's rules on secure disposal of controlled substances and exactly how they will be implemented with regard to the disposal of controlled substances by hospice personnel. A copy of the final rules as published in the Federal Register is available at http://www.deadiversion.usdoj.gov/fed_regs/rules/2014/2014-20926.pdf.

The rules, which took effect October 9, 2014, and were aimed at expanding options for secure disposal of controlled substances and decreasing improper drug diversion and disposal, pose significant challenges for hospice providers caring for patients in their homes. Hospice staff frequently handle controlled substances as part of patient care, and the DEA rules surprised many by providing that, absent specific authority under state law, home hospice personnel are not authorized to receive controlled substances from a hospice patient or a member of the patient's household for purposes of proper disposal. There is no North Carolina law or rule authorizing hospice personnel to take possession or dispose of unused controlled substances of a hospice patient (either alive or deceased) or a member of the patient's household. The prohibition against hospice staff disposal of unused controlled substances would seem to increase the risk of abuse or diversion in many instances.

National trade associations are in the process of seeking clarification from the DEA regarding the implementation of the new rules for hospice personnel. However, pending further guidance on these issues, now is a good time for hospices to reexamine and tweak their written policies and procedures for management and disposal of controlled substances in a patient's home, to bring them in compliance. Keys to success for hospice providers in this arena include:

- Educating hospice patients and/or their families about disposal options and how to use them;
- Assisting patients and their families in authorized disposal methods; and
- Partnering with authorized collectors of unused controlled substances to facilitate participation in legal disposal methods such as take-back and mail-back programs, and disposal in collectors' authorized receptacles.

Hospice agencies should review their practices and policies governing transport and disposal of controlled substances to incorporate only those options allowed by law.

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"When it rains, look for rainbows. When it's dark, look for stars."
~ Unknown