

# Health Care Compliance LETTER

Volume 12, Issue 4

health.cch.com

February 24, 2009

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by Larry Perlman, CPA, JD, LLM

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## Uncompensated care tops hospitals' community benefit

Uncompensated care accounts for the largest portion of community benefit expenditures among nonprofit hospitals of almost all sizes and demographic groups, according to a report by the Internal Revenue Service (IRS). The report summarizes the findings of an IRS study that began in 2006 when the agency sent questionnaires to more than 500 nonprofit hospitals. The study was aimed at providing the IRS and the public with a more complete understanding of the types and extent of community benefit activities offered by nonprofit facilities.

Hospitals reported that uncompensated care, by a wide margin, makes up the greatest segment of their community benefit expenditures. Among the group as a whole, uncompensated care accounted for 56 percent of the aggregate community benefit expenditures incurred by the hospitals. That figure is slightly skewed, however, by a group of 15 hospitals with large medical research expenditures. The IRS found that when those facilities are excluded from the group, uncompensated care accounts for 71 percent of community benefit expenditures.

**Tax-exempt criteria.** The community benefit standard is the legal standard for determining whether a nonprofit hospital is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. The standard has faced scrutiny from the public and Congress in recent years, as it has become more difficult to draw distinctions between for-profit and nonprofit facilities. Some have suggested a revision of the community benefit standard. To better understand what nonprofit hospitals are doing to benefit their communities, the IRS questionnaires asked hospitals to provide information on their patient mix, emergency room, board of directors, medical staff privileges, and a variety of programs including medical research, professional education and uncompensated care.

The IRS also requested information from 20 nonprofit hospitals about the amounts of compensation paid to officers, directors, trustees and key employees. Organizations that receive exemptions under section 501(c)(3) may pay no more than reasonable compensation to such executives and high-level employees.

**Hospital breakdown.** The IRS report categorized nonprofit hospitals based on their community type, ranging from high-population hospitals located in the country's 26 largest urban areas to critical access hospitals and other rural facilities. The report also broke down its results based on the annual revenue size of each hospital, ranging from more than \$500 million on the high end to under \$25 million on the low end. The report found significant differences in demographics, community benefit activities and financial resources among high-population and high-revenue hospitals, compared to rural and low-revenue facilities.

**Community benefit activities.** Among the group as a whole, the average and median percentages of total revenues reported as spent on community benefit ex-

## Tax Exempt Organizations (cont.)

penditures were 9 percent and 6 percent, respectively. The percentages spent on community benefit expenditures generally increased with revenue size and were highest for high-population hospitals and lowest for rural facilities.

Levels of community benefit expenditures and, specifically, uncompensated care were not distributed evenly and high levels were concentrated in certain hospitals. For example, 9 percent of the hospitals accounted for 60 percent of the reported aggregate community benefit expenditures of the group as a whole. Fourteen percent of the hospitals reported 63 percent of the aggregate uncompensated care expenditures. In addition to uncompensated care, medical education and training accounted for 23 percent of the reported aggregate community benefit expenditures for the group and community programs accounted for 6 percent. Research accounted for 15 percent of the aggregate reported community benefit expenditures, but when the 15 hospitals with extremely large research expenditures were excluded from the group, the figure drops to 1 percent.

Although no link was found between a hospital's community benefit expenditure level and the per capita income levels of its surrounding area, community benefit expenditures generally rose as the uninsured rates of a hospital's surrounding area increased.

**Executive compensation.** The average and median total compensation amounts reported as paid to top

management officials by hospitals that participated in the study were \$490,000 and \$377,000, respectively. Critical access hospitals reported the smallest amounts paid, while high-population hospitals and other urban and suburban facilities reported the highest compensation to executives.

Almost all of the reported executive compensation amounts, while perhaps high in the view of the general public, were found to be within the range of reasonable compensation. IRS rules allow organizations to place the burden of proving excessive compensation on the IRS by using disinterested persons to review comparability data.

**Possible refinement.** The IRS found that any attempt to refine or modify the community benefit standard for federal tax exemption would likely have wide-ranging effects on nonprofit hospitals. "The data suggests that any attempt to refine the standard will seriously impact the existing tax exempt hospital sector because of the hospitals' varying practices and financial capabilities," the report's executive summary stated. "Put another way, any revised standard would affect the different types and sizes of hospitals depending upon the types of activities required to be taken into account as community benefit, the quantitative measure (if any) included in such a standard, and the extent the rule provides for exceptions or special rules."

Ranking Senate Finance Committee member Sen. Charles Grassley (R-Iowa)

said he will ask the IRS to study the level of community benefits and the compensation practices of for-profit hospitals. "That information is necessary to understand how nonprofits are different from for-profits," he added. Grassley also called on the IRS to re-establish charity care requirements for nonprofit hospitals.

The IRS report is available online at: <http://www.irs.gov/charities/charitable/article/0,,id=203109,00.html>. ■

CCH Chicago Bureau, Feb. 13, 2009



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CCH Health Care Compliance Letter is published 24 times a year by CCH, a Wolters Kluwer business, 4025 W. Peterson Avenue, Chicago, IL, 60646. Subscription rate is \$305 per year. First-class postage paid at Chicago, Illinois, and at additional mailing offices. POSTMASTER: SEND ADDRESS CHANGES TO CCH Health Care Compliance Letter, 4025 W. PETERSON AVENUE, CHICAGO, IL 60646. Printed in U.S.A. ©2009 CCH. All rights reserved.

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### New e-book guides providers through RAC review process

The *Recovery Audit Contractor Workbook* is a practical guide to assist all providers participating in Medicare prepare for a potential RAC audit, including:

- preparing for a RAC audit, including establishing the internal structure and authority to manage the RAC audit process;
- what to do during a RAC audit, including proper ways to respond to RAC demands and requests, tracking documentation, and preparing for appeals;
- what to do after a RAC audit, including conducting a risk assessment and developing corrective actions.

The workbook includes several helpful charts explaining the RAC review and Medicare appeals process. It also includes several sample letters and forms that providers can use to prepare their organizations for RACs, communicate with RACs, and establish new internal policies for their organizations. The e-book can be ordered by visiting <http://health.cch.com/Products/ProductID-5510.asp>.

### Health IT funding, HIPAA provision included in stimulus bill

President Obama on February 17 signed the American Recovery and Reinvestment Act of 2009 (HR 1) into law. The President said the \$789 billion economic recovery package is “the first step to get our economy on the road to recovery and pave the way to long-term growth.” Senate negotiators on February 6 had reached an agreement on paring down a massive economic stimulus package after having been deadlocked in negotiations with conservative members from both parties who charged that the initial measure would fail to shore-up the faltering economy. The \$920 billion package was cut down to \$780 including a \$25 billion carve out of the tax package approved by the Senate Finance Committee. The bill includes many of the same provisions that were included in the House version of this legislation (HR 1) on January 28, 2009.

**Health IT funds.** In particular, \$19 billion would be provided for health information technology (HIT), apportioned as \$17 billion for Medicare and Medicaid incentives and \$2 billion for HIT grants. An Office of the National Coordinator for Health Information Technology would be established to create an open and transparent process to develop standards by 2010 and allow for secure nationwide electronic exchange of health information. Current federal privacy and security protections for health information, such as requiring that an individual be notified if there was an unauthorized disclosure or use of their health information, would be expanded. Over \$2 billion in immediate funding for HIT infrastructure, training, inclusion in clinical education, and state grants would be released immediately to promote HIT.

**Medicare and Medicaid HIT provisions.** To achieve the goal of an adoption rate of electronic health records usage for 90 percent of physicians and 70 percent of hospitals, especially by providers who serve Medicare and Medicaid patients, numerous incentives and penalties were drafted into the legislation. Temporary bonus payments ranging from \$44,000 to \$64,000 would be made available to physicians and up to \$11 million for hospitals that meaningfully use

electronic health records. The provisions also would phase-in Medicare payment penalties for physicians and hospitals not using electronic health records starting in 2014. The improvements in quality of care and care coordination and reductions in medical errors with the use of electronic health records would potentially generate savings of over \$12 billion.

**HIPAA provision.** The stimulus bill also authorizes state attorney generals (AGs) to bring lawsuits for statutory damages and attorneys fees on behalf of their respective states for violations of the federal Health Insurance Privacy and

Accountability Act (HIPAA) statute. By amending 42 U.S.C. § 1320d-5 state AGs would be given new enforcement authority and potentially enable them to contract with outside lawyers to file civil lawsuits in federal court with the full authority of the state AG and federal law. Currently, the federal law does not preempt state laws in this area, and a number of states have enacted state HIPAAs with stronger privacy protections than the federal law. The economic stimulus bill would strengthen enforcement of the federal HIPAA in those states without state HIPAA laws. ■

*CCH Chicago Bureau, Feb. 13, 2009*

## Employment Law

### ADA amendments broaden scope of the law

Amendments to the Americans with Disabilities Act (ADA) broaden the intent and number of people covered under the Act, Daniel Samuels, partner at Home Roberts & Owen LLP, explained. Samuels discussed the changes to the law and provided practical advice for employers at an American Bar Association teleconference on January 8, 2009.

**ADA.** The ADA Amendments Act of 2008, which became effective on January 1, 2009, provides broad protections so that a maximum number of employees

are covered, Samuels explained. Under the amended Act, ADA cases are likely to move from “threshold issues” of whether the person has a disability or is a qualified individual with a disability to “liability issues,” whether the employer engaged in an interactive process to reasonably accommodate the individual and whether the person was discriminated against, Samuels noted.

The ADA prohibits an employer from discriminating against a “qualified individual with a disability.” A “disability” is defined as a “physical or mental impairment” that “substantially limits” one or more “major life activities,” a record of

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# Preparing for the revised Form 990: A compliance perspective

by Larry Perlman, CPA, JD, LLM

*Practitioners recently gathered in Orlando to discuss the revised Form 990, Internal Revenue Service (IRS) examinations, and other topics of interest to nonprofit organizations at the Ernst & Young 18th Annual Health Sciences Tax Conference.*

The revised Form 990, Return of Organization Exempt From Income Tax, now requires a substantial increase in the amount of information and disclosures an organization must provide, leading to a much more robust compliance process in the future, according to Scott Donaldson, Ernst & Young, Phoenix. "It really is an increase in the scope of the tax compliance process. Now, more than ever, completing the form is an enterprise-wide function. All segments of the enterprise need to be somewhat involved," Donaldson advises.

**Practical Analysis.** A best practice should include a system-wide education effort, with a four to six hour session focusing on the Form 990 and its required disclosures, he noted. The education should be on an enterprise-wide basis, not just in accounting, finance and tax.

"Recent Congressional and IRS scrutiny that has resulted in significant tax legislative and administrative changes impacting exempt health care organizations is elevating the importance of taxes and related risks within these organizations to the point that it is capturing the attention of upper management, as well as board members, and rightfully so," stated Howard Levenson, Ernst & Young, Washington, D.C., who moderated the overall conference.

In a separate conference session, Andre Ré, Ernst & Young, Atlanta, said, knowing how the IRS works at the national level, he is going to be interested in seeing how ready it is to accept the form on an electronic platform. "To make this shift is a huge programming problem. You need an 18-month lead time to do it. I'll be interested to see what they do with all this data. They may not be able to do much with that information for quite awhile, at least electronically, but there is certainly a lot of potential for future analysis."

### Governance

"There is a huge push by the public to make sure [nonprofits] are transparent," said Andie Ksidakis, Vice President & Deputy General Counsel, Sutter Health, Sacramento. In response, the IRS has expanded the number of questions on the form asking about governance, policies and practices, even though there are no specific laws that require such information.

Donaldson added that even though there are clearer definitions, there "are a lot of judgment calls that have to be made. If you have not yet discussed this topic with senior

management, you are going to need to focus on this sooner rather than later."

One question in the governance section of the core form asks about business and family relationships. Ksidakis said that a nonprofit organization is not required to provide information about a family or business relationship between two officers, directors, trustees, or key employees if it is unable to secure the information after making a reasonable effort to obtain it.

The IRS realized this question was going to be difficult for organizations. Ksidakis thinks what organizations will run into, practically, is an issue of privacy. She recommended asking for this information on the annual conflicts of interest disclosure statement. "If investment issues are delicate, board trustees could be offered an opportunity to sit down with a member of the legal team when they are filling out the statement."

It may be too late to put policies in place, but it is not too late to figure out that there is a policy in place, Ksidakis said. A nonprofit may not have a document labeled "policy," but there may be a relevant policy embedded in a human resources manual.

**Comment.** In terms of how an organization tells its story in the program services accomplishments section, Donaldson thinks the IRS has really improved the form and "made it more significant."

### Form 990, Schedule C

Schedule C, Political Campaign and Lobbying Activities, brings together related questions that were located in different places on the former Form 990.

Jennifer Rhoderick, Ernst & Young, Indianapolis, suggested two places to check if an organization has made an inadvertent political contribution: [opensecrets.org](http://opensecrets.org) and [followthemoney.org](http://followthemoney.org). "If you drop in the name of your organization, [opensecrets.org] will search to see if it has made any contribution to any political organization."

Lucille White, Ernst & Young, Chicago, agreed. "You should look at those Web sites and see if there are any payments with your organization's name on it. I know several institutions that have been surprised when they looked. In many cases, it's just a matter of an individual making a contribution and somehow the employer is confused as being [the actual donor]."

### Form 990, Schedule J

Schedule J, Compensation Information, is used by organizations to report compensation information for certain officers, directors, trustees, key employees and highest paid employees. Even if the Schedule J is not required to be filed for the year, Lydia Lehotsky, Ernst & Young, Chicago, “heartily” recommends a dry run for 2008, so that tax preparers and organizations are aware of the components and from where they will have to pull the information when needed.

The schedule asks whether the organization required substantiation prior to reimbursing or allowing expenses that were incurred by all officers, directors, trustees, and the CEO or executive director. If not, the organization does not have an accountable plan and reimbursements are taxable. “You really do want to have an accountable plan for reimbursement,” said Lehotsky.

The schedule also asks about payments contingent on the revenues or net earnings of any organization or any related organization. Many bonus programs have a revenue component. She predicted that a “yes” answer may be more common than the IRS expects.

### Form 990, Schedule H

The IRS has taken a dollars and cents quantitative approach with Schedule H, Hospitals, so there is little leeway to provide an organization’s data in a qualitative manner. Therefore, it will be a challenge to present the data so that an organization gets full credit for its community benefit.

Amy Dosik, Ernst & Young, Atlanta, said the provision of health care services is not an inherently exempt activity. Something more is needed, which is community benefit. She said that Rev. Rul. 69-545, the community benefit standard, is a good starting point when looking at what the IRS considers community benefit activities.

**Planning Note.** Even though Schedule H is optional for 2008, except for Part V, Listing of Facilities, Steven Rutti, Ernst & Young, Phoenix, recommends a “dry run” for 2008. He said the schedule will require a significant investment of time and personnel to complete it accurately. Tom Neubig, Ernst & Young, Washington, D.C., noted that the American Hospital Association (AHA) is encouraging hospitals to complete a “mock” Schedule H using 2007 data, from which the AHA, working with Ernst & Young, will provide a benchmarking report. Hospitals can then see how their reporting compares to that of similar hospitals (mock Schedule H’s for the AHA project can be completed at <https://survey.ey.com/ScheduleHProject>).

The schedule requires reporting of charity care policies, availability of community benefit reports, and the cost of certain charity care and other community benefit programs. It also requires reporting of seven separate categories of community benefit. In practice, however, Kevin Nowell, Tax Director, Presbyterian Healthcare Services, Albuquerque, said that past data gathering performed by PHS does not match up with proper IRS “buckets.”

The IRS has provided worksheets in the instructions that a hospital may, but is not required to, use to calculate the community

benefit provided at cost, as required in the schedule. Whether using the worksheets or not, Dosik advised that it is important to retain the documentation used for calculating Schedule H figures.

**Comment.** She thinks parts of the community benefit calculation have the potential for “creative” interpretations by hospital systems. For example, if a hospital is part of a larger system and they want to inflate their charity care amount, they may be able to shift non-patient care costs to other parts of the system. “I’m curious to see if there will be cost shifting to make the percentage of [community benefit to] total hospital expense as high as possible.”

What can count as subsidized health services for Schedule H purposes is very limited. They are services provided despite a financial loss. It can be a challenge to figure out which services are being provided at a loss. Nowell said, “When I first saw this I thought ‘Great, why haven’t we captured this all along?’ I’m sure we do a lot of this in the community. But we didn’t have a reporting tool to tell us how much we’re losing on a given program so we had to invent a tool.”

### Valuing a Hospital’s Tax Exemption

Valuing a hospital’s tax exemption is increasingly important as governmental and other interest groups attempt to challenge the right of hospitals to their tax exemption, Dosik said.

The value of a nonprofit hospital’s community benefit and tax-exempt status are subject to much closer scrutiny these days, agreed Tom Neubig. “In the current economic and fiscal environments, knowing the numbers is important, but not just what is on Schedule H.”

The real comparison that many groups are interested in, he said, is the ratio of charity care to the value of the tax exemption. “I think it is important to step back and look at that alternative benchmark. It’s not so much the federal income tax exemption that is at issue here, the real money is at the state and local level, in particular the property and sales tax exemption. I think the exercise oftentimes is worthwhile to go through.”

Economic contribution is important to policymakers. Neubig said that the discussion of community benefits to date has not included the topics of economic and fiscal benefits provided by a local hospital to the local community. These benefits include increased local jobs, increased purchases from local suppliers, and additional sales and property taxes.

**Planning Note.** An additional piece of information that might be helpful, he added, is that although Schedule H asks about economic activities, state and local policymakers are very interested in jobs, especially in this environment. “It is worthwhile to tell [them] that the hospital is providing high paying, white collar, and environmentally friendly jobs. It is useful to have this information in your back pocket.”

### Form 990, Schedule K

Similar to parts of Schedule H, most of Schedule K, Supplemental Information on Tax Exempt Bonds, is optional for

2008. Margaret Purcell, Ernst & Young, Jacksonville, FL, however, encourages organizations “to practice [filling out the schedule] to know where you stand.”

In addition, the IRS has identified hospitals as a “high risk” area. Therefore, the IRS is going to be concentrating on tax-exempt bond examination audits in the hospital area, Andre Ré said.

### Group Returns

Tracy Mahler, Tax Director, BJC HealthCare, St. Louis, noted that as the Form 990 burdens become greater, a number of organizations that have had decentralized tax functions in the past have applied for group rulings. “If the group does not receive an okay by the end of the year, I would seriously consider filing separate returns for the group members.”

In addition, she stated that organizations should complete only one Schedule H using aggregate information for the group.

**Practical Analysis.** One of the biggest benefits to filing a group return, she said, is that filing as a group could reduce the number of individuals who need to be reported on Schedule J.

### Supporting Organizations

Many nonprofit health care systems include one or more supporting organizations. The Pension Protection Act of 2006 (PubLNo. 109-280) created a definition of “supported organization,” three alternative types of supporting organizations, and added new requirements for supporting organizations. Phil Royalty, Ernst & Young, Washington, D.C., said that there are “potential problem areas” in the Act that practitioners need to be aware of and not a whole lot of guidance regarding those areas.

Sue Miencier, Ernst & Young, Detroit, said that the IRS is concerned about how supporting organizations are operated and if they are inappropriately benefiting private interests. “Treasury and the IRS are trying to tighten the nexus relationship between the supporting organization and the organization it supports. Some taxpayers do seek to get private benefit from the supporting organization and this has resulted in increased scrutiny generally, to screen for potential abuse.”

An organization that received an exemption letter that it is a public charity under Code §§509(a)(2) or 170(b)(1)(A)(vi) that does not meet the test, but does meet the requirements for public charity status as a supporting organization under Code §509(a)(3), may complete Schedule A as a supporting organization to most accurately reflect the organization’s status, explained Brenda Griesemer, Ernst & Young, Phoenix.

**Practical Analysis.** “As a best practice you probably would want to get a new determination letter from the IRS to prove what you have filed,” she added.

Royalty suggested that if an organization has a determination letter it may want to consider obtaining an updated ruling to determine what type of supporting organization it is. “It’s probably a good thing to get an updated determination letter if the existing letter doesn’t indicate whether the organization is Type I, Type II, or Type III.”

To get this ruling, he said to submit a letter to the IRS, not a Form 1023, to explain how the organization meets the relevant

tests. “Most pre-2006 determination letters don’t tell you the Type you are. Try to figure out which Type you are. It may make sense to try to qualify under Type I or Type II if possible. This is a complicated area.”

It “behooves” organizations to get the updated letter, Miencier agreed.

### IRS Examinations

IRS examination enforcement has been a continuing concern to the nonprofit community. A session on IRS audits and exams provided many practical suggestions. When an agent shows up, Michael Rachael, Ernst & Young, Atlanta, said, always ask for credentials, which will provide the agent’s jurisdiction. “You should verify that they are an agent and what jurisdiction they have.”

Ré said that organizations should use the opening conference to build a rapport and working relationship with the IRS, and to negotiate materiality thresholds. “Also, get a copy of the IRS audit plan so you can help them find what they are looking for and get them in and out as soon as possible.”

Feel free to “push back” the examination date if it is not good for you or the organization, Rachael said. “Just because you get a letter with a date on it, doesn’t mean you have to meet that particular deadline.”

He reminded attendees that there is no such thing as a “free conversation” and to be mindful of everything said. “If anything the agent says leads you to believe he may be prejudicial, write it down and hold on to it. The agent has to be fair and objective.”

Rachael noted that the organization should arrange for Internet access and make the agents comfortable, but not so comfortable that they want to stay.

**Planning Note.** After the exam, Rachael suggested that the organization have a post-audit critique session to see where the organization could have done better. “You’re going to have to put time into it, but it’s not a cost, it’s an investment. You are setting yourself up so that you can be in a better position for any subsequent examination.”

Nonprofit governance has been a constant theme coming out of the government with the IRS wanting to see how an organization is run. The IRS has developed a checklist for its agents during an examination. Michael Vecchioni, Ernst & Young, Detroit, stated that the checklist is trying to (1) help the agent determine whether or not the governance practices of the organization being examined are helping the organization comply with the tax law and (2) educate the organization about governance considerations they should be thinking about.

If you respond that you do not have a governance policy asked about on the Form 990, it will not necessarily trigger an audit, Vecchioni said, but it will cause the IRS to examine the organization deeper because the Service wants to see how the organization is complying with the tax laws in general.

“Historically, the IRS has looked at an organization’s level of internal control effectiveness as a factor in deciding the reliability of the records audited and the depth of examination,” Rachael said. “This [emphasis on governance] is an outgrowth of that

## On The Front Lines (cont.)

process. It is intriguing to me [that the IRS has] a questionnaire, and I would like [to see how they] developed it.”

### Donation of Partnership Interest

Lucille White mentioned she is seeing a renewed interest in physician integration including practice acquisitions. She has received several inquiries as to whether a deduction for a charitable contribution could be taken if the physician donated his or her practice to a Code §501(c)(3) hospital or health-care organization.

A charitable contribution deduction would be permitted if there is true donative intent and only to the extent of the fair market value of the contributed assets or stock. “A proper valuation is key to this type of transaction as it is almost certain the IRS will challenge the deduction. In any case, the exempt organization donee

is not responsible for establishing the value of the deduction, but merely acknowledging receipt of assets or stock.”

White also mentioned that tax-exempt hospitals that employ physicians should consider the use of a single member LLC to employ the physicians. The single member LLC would be able to obtain a separate provider number to avoid co-mingling of hospital and physician payer reimbursements. There could be state unemployment tax consequences associated with this alternative that should be taken into consideration.

*Reprinted from CCH's Exempt Organizations Reporter, Issue No. 415, Report 415, Feb. 17, 2009.*

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## Employment Law (cont.)

such an impairment; or being regarded as having such an impairment, Samuels explained. To be protected by the ADA, a “qualified individual” must be able to accomplish the “essential functions” of the job with or without reasonable accommodation. If the individual cannot perform the essential functions of the job, he or she is not covered by the Act. If the person is a “qualified individual,” the employer must make reasonable accommodations to the known physical or mental limitations of qualified individuals unless the employer can demonstrate that accommodation would cause an “undue hardship.”

Samuels stressed that in reaching a “reasonable accommodation, the parties must engage in an “interactive process” and jointly come up with a solution. This process involves four steps: (1) identifying and distinguishing essential and nonessential job tasks; (2) consulting with the disabled individual to determine the person’s limitations regarding the essential job functions; (3) assessing the reasonableness of each accommodation identified; and (4) implementing the accommodations that best serve the needs of the employee and the employer.

According to Samuels, an employer may refuse to implement a proposed accommodation if it can show that the accommodation would require significant difficulty or expense to a particular facility or to the employer. He also explained that the law does not require a particular accommodation, only that the accommodation be reasonable.

**ADA litigation.** Congress amended the ADA based on the outcomes of court

cases and administrative hearings. From 1992 - 1997, employers won 92 percent of the ADA cases tried and 86 percent of the administrative complaints ruled on by the Equal Employment Opportunity Commission (EEOC), according to an American Bar Association survey, quoted by Samuels. The majority of the employers successfully argued that the employee was not disabled and, therefore, not covered by the Act.

In *Sutton v. United Air Lines, Inc.*, the Supreme Court concluded that two individuals with 20/200 vision corrected with eyeglasses to 20/20 were not disabled. The Court stated that the employer must mistakenly believe that the individual has a physical impairment that substantially limits one or more major life activities or believe an actual, nonlimiting impairment substantially limits one or more major activities. In *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, the Court interpreted the term “substantially limits major life activities” to mean that the “individual must have an impairment that severely restricts the individual from doing activities that are of central importance to most people’s daily lives,” and, therefore, an employee who had carpal tunnel syndrome, which restricted a limited class of manual tasks, did not meet the requirement of substantially limiting one or more major life activities, Samuels explained.

**ADA amendments.** The ADA amendments specifically reject the holdings in *Sutton* and *Toyota* that Congress found too restrictive. Congress stated that “whether an individual’s impairment

is a disability under the ADA should not demand an extensive analysis.” In addition to amending the definition of “disability” so that it will be construed in favor of broad coverage of individuals to the maximum extent permitted under the ADA, Samuels said that with the exception of eyeglasses, that determination of disability will be made in the “uncorrected” state so that even if the impairment is controlled, in remission, or episodic in nature, if it would substantially limit major life activities if it were active it would be considered a disability. Congress also greatly expanded the list of items identified as major life activities, including the operation of major bodily functions, Samuels noted.

In rejecting the Supreme Court’s interpretation of “substantially limits” in *Toyota*, Congress authorized the EEOC to promulgate regulations so that “substantially limits” is broadly construed. The amendments also provide that an individual is “regarded as disabled” by establishing that he or she has been subject to an action prohibited under the ADA because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”

**Recommendations.** Samuels advised employers to: (1) train human resource staff on the Act and the amendments; (2) assume that more employees are protected by the ADA; (3) engage in and document the interactive process; and (4) ensure that there are legitimate, nondiscriminatory reasons for any adverse employment decision. ■

*CCH Chicago Bureau, Feb. 10, 2009*

## HIPAA

### CVS pays \$2.25 million to settle HIPAA violations

CVS, a retail pharmacy chain, will pay the U.S. government \$2.25 million and take corrective action to ensure it does not violate the privacy of its millions of patients when disposing of patient information such as identifying information on pill bottle labels, HHS reported. The Resolution Agreement and Corrective Action Plan, which applies to all of CVS's more than 6,000 pharmacies, follow an investigation by the HHS Office for Civil Rights (OCR) and the Federal Trade Commission (FTC) for potential violations of the Health Insurance Portability and Accountability Act of 1996 Privacy Rule.

The investigation began after media reports alleged that patient information maintained by the pharmacy chain was being disposed of in industrial trash containers outside selected stores that were not secure and could be accessed by the public. The OCR and the FTC reported that CVS failed to implement adequate policies and procedures to appropriately safeguard patient information during the disposal process and failed to adequately train employees on how to dispose of such information properly.

CVS agreed to implement a Privacy Rule corrective action plan that would (1) revise and distribute its policies and procedures regarding disposal of protected health information; (2) implement employee training on the new requirements; (3) sanction employees for non-compliance; and (4) devise new internal reporting procedures requiring workers to report all violations of these new privacy policies and procedures. HHS and the FTC required CVS to monitor its own compliance and to utilize a qualified independent third party to conduct assessments of CVS' compliance and render reports to the federal agencies. The HHS corrective action plan will be in place for three years; the FTC requires monitoring for 20 years. ■

*HHS Press Release, Feb. 17, 2009; HHS Resolution Agreement and Corrective Action Plan with CVS, January 15, 2009, Health Care Compliance Reporter, ¶1370,030*

## In the News

### Demonstration fosters adoption of EHRs

CMS has developed a new demonstration initiative that aims at rewarding the delivery of high-quality care supported by the adoption and use of electronic health records (EHRs) in physician practices. This initiative expands upon the foundation created by the Medicare Care Management Performance Demonstration. The goal of the five year demonstration is to foster the implementation and adoption of EHRs and health information technology more broadly to improve the quality of care provided. On June 10, 2008, CMS selected 12 community partners in defined sites to help implement this demonstration. The approved community partners represent diverse collaborations of organizations including varied HIT stakeholder collaborations, medical societies, primary care professional organizations, and health departments. The next step in the process will be to randomize all eligible practices into either the treatment or control group. CMS will notify participating practices in March whether they are in the treatment or control group.

*CMS Press Release, Feb. 2, 2009*

### Permanent RAC program roll-out resumes

CMS announced on February 4, 2009, that all parties involved in the protest of the award of the Recovery Audit Contractor (RAC) contracts settled. The settlement means that the stop work order has been lifted and CMS will continue with the implementation of the RAC program. Under the settlement, the four RACs will contract with two subcontractors to supplement their efforts. PRG-Schultz, Inc. will serve as a subcontractor to HealthDataInsights, Inc. of Las Vegas, Nevada, (HDI), Diversified Collection Services, Inc. of Livermore, California (DCS) and CGI Technologies and Solutions, Inc. of Fairfax, Virginia, (CGI) in regions A, B and D. Viant Payment Systems, Inc. will serve as a subcontractor to Connolly Consulting in region C. Each subcontractor has negotiated different responsibilities in each region, including some claim review. PRG-Schultz and Viant had protested CMS' original awarding of the RAC contracts, leading to the delay in the roll-out of the permanent RAC program. The RAC in each jurisdiction is: Region A: DCS; Region B: CGI; Region C: Connolly Consulting, Inc.; Region D: HealthDataInsights, Inc.

*CCH Chicago Bureau, Feb. 9, 2009*

### Hospital's \$50,000 EMTALA penalty upheld

The imposition of a \$50,000 civil monetary penalty against a California hospital that failed to provide required emergency care for an 88-year-old man who died in its emergency room was upheld by an administrative law judge (ALJ). The Office of Inspector General (OIG) imposed the penalty against St. Joseph's Medical Center under the Emergency Medical Treatment and Labor Act. OIG found that St. Joseph's, located in Stockton, California, failed to provide a medical screening examination and stabilizing treatment for the man, who remained in the emergency room for almost three hours without seeing a physician. Although the man's family repeatedly asked the emergency room staff for help, his condition deteriorated and he went into cardiopulmonary arrest and died. The ALJ called the hospital's treatment of the man "shocking" and "a complete collapse of the system of care it purported to offer emergency patients."

*OIG News Release, Feb. 17, 2009*