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**Letters to the Editor**

The CCH Healthcare Compliance team welcomes comments or questions regarding articles published in the CCH Healthcare Compliance Letter. Send comments to Sharon Sofinski, Coordinating Editor, at sofinsks@cch.com. For more information about the CCH Healthcare Compliance Portfolio visit our online store at http://health.cch.com.

# Criteria for compliance, ethics programs toughened

## by Angela Fanelli, JD, Coordinating Editor

The United States Sentencing Commission (USSC) has issued amendments to the Sentencing Guidelines that make the standards for compliance and ethics programs more rigorous. The amendments, expected to take effect November 1, 2004, place greater responsibility on boards of directors and upper management for the oversight of hospital compliance and ethics programs.

The amendments will impact compliance officers and upper management in several ways:

- Directors and executives must now take an active leadership role for the content and operation of compliance and ethics programs.
- New responsibilities placed on executives and directors include (1) the identification of risk areas, (2) training of high-level officials, and (3) providing compliance officers with sufficient authority to carry out their responsibilities.
- An organization will be precluded from mitigation of its sentence if it fails to self-report criminal misconduct in a timely fashion and if executive or management-level officials tolerated or were involved in illegal activities.
- Failure to follow applicable regulations and industry standards undermines a hospital's eligibility for compliance credit under the federal sentencing scheme.
- The Guidelines mandate high fines for hospitals that have no meaningful programs to prevent and detect criminal conduct.

Calling its focus on ethical corporate behavior "a unique development in the 13-year history of the organizational sentencing guidelines," the USSC's press release on the amendments goes on to state that "[t]hese amendments represent the first time the organizational sentencing guidelines have been modified in their history. Some of these modifications are the result of recommendations of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines or the result of the recent enactment of the Sarbanes-Oxley Act."

For the full USSC press release, see http://www.ussc.gov/PRESS/rel0404.htm. For the text of the amendments, see http://www.ussc.gov/2004guid/2004cong.pdf. ■

*CCH Chicago Bureau, May 4, 2004*

## Exempt status of hospitals under increasing scrutiny at state, local level

**by Catherine Hubbard, MA, Contributing Editor**

Current challenges to hospital's exempt status under state law center on use of facilities, amount of charity care provided, and billing and collection practices. In some cases, hospitals are losing their exemption because they are using too much of their facility for non-exempt purposes, are providing little charity care or are using abusive collection practices by outside agencies.

As more attention is being drawn to the tax-exempt status of these hospitals, health care executives need to prove to local officials and community groups they provide a substantial amount of charitable care, according to experts who spoke during a recent teleconference. "There's clearly a need for hospitals and their board members to educate city and county officials about the nature of hospitals' business," James Unland, president of The Health Capital Group, Chicago, said during a recent telephone briefing held by the American Bar Association. "The last thing community hospitals needs is a bunch of tax revocations and, even more ominously, a bunch of class action lawsuits," he cautioned.

The industry needs to proactively deal with the issue of charity care, Unland said. "That will require process reengineering," he said, advising hospitals to establish communication and liaison with community groups interested in access to health care by patients.

**State v. federal law.** Many organizations assume that if they are exempt under Internal Revenue Code Sec. 501(c)(3), they will be exempt under state law, said Stephen Weyl, a partner with Sheehan Phinney Bass and Green, Boston. However, any relationship between Code Sec. 501(c)(3) status and a state law exemption is the result of the state electing to follow or incorporate federal standards, he added.

For instance, Utah and Pennsylvania have their own standards for charitable status, noted Nancy Kane, professor of health policy and management at the Harvard School of Public Health, Boston. To qualify in those states, a hospital must provide a significant service to others without expecting a material reward, a profit or payment from the patients. "These types of issues increasingly are coming into the language of state and local tax exemptions reviewers and are being implemented and upheld by state supreme courts," she cautioned.

**"There's clearly a need for hospitals and their board members to educate city and county officials about the nature of hospitals' business."**

Since 1990, Kane said, at least seven states have passed laws requiring hospitals to assess community health needs and to document community benefits, including California, Indiana, Massachusetts, Minnesota, Missouri, New York and Texas. Some states, including Nebraska, have considered legislation that would have required a certain level of charity care as a percent of revenue. "This is not a local phenomenon. Hospitals should carefully consider what they look like and how they will appear in the media, she advised."

**Use of facilities questioned.** Hospitals also need to limit services primarily to health care, Kane said. In one case, a hospital lost its exemption in part because it owned a large number of non-hospital facilities.

This question about use of the facilities is part of what tripped up Provena Covenant Medical Center, which could lose its tax-exempt status soon. Weyl noted that states generally require that the property in question be used exclusively for carrying out the entity's charitable purpose. Any non-charitable use must be no more than incidental.

In Provena, Champaign County, Illinois has recommended the Illinois Department of Revenue deny property tax-exemption of Provena, holding that much of the property is used by outside, for-profit entities. It also said removing the exemption would be consistent with Illinois property tax law and case law and said Provena did not provide a substantial community benefit. The matter is now before the Illinois Depart-

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## Tax (cont'd)

ment of Revenue and a hearing before an administrative judge is expected in the near future, Weyl said. If Provena should lose, it would have to pay about $1.1 million in taxes for the year in question, he said.

**Revenues examined.** In another case (*Utah County v. Intermountain Health Care, Inc.*, 702 P.2d 265 (1985)), the exemption was challenged on the basis of the hospital charging competitive rates, supported almost entirely by patient charges. Also, the donations didn't appear to reduce charges to below market rates, the value of services given as charity were less than one percent of gross revenue and free care was not deliberately advertised.

Kane warned that most exempt hospitals' charity care amounts to less than one percent of gross revenue. So far, she said, most states have not set a percent of gross revenue that should be charity. However, she warned, "A lot of hospitals would be extremely vulnerable if states were to do that."

**Billing and collection.** As more and more hospitals use outside collection agencies to collect debt, charitable organizations need to make sure their practices are not abusive, and don't interfere with the provision of charity care. "There is an increasing process of turning debt over to collection agencies," Kane said, advising hospitals "to watch state laws to make sure it is permitted to use collection agencies."

Provena, which is challenged in part based on its billing and collection practices, used collection agencies to collect debts. During interviews with Champaign County board members, Unland found they were concerned about alleged billing and collections abuses. A local patient advocacy group also drew attention to the problem, he noted. Due to the increased attention and confusion surrounding the issue, hospitals need to assess their practices. "There is a clear and compelling need for hospitals to, at a minimum, self-assess both their policies and their practices, including practices of agents acting on their behalf," he said. ■

*CCH Chicago Bureau, May 6, 2004*

## Fraud & Abuse

### Fraud charges involve treatments for HIV patients

**by Sharon Sofinski, Coordinating Editor**

A federal grand jury has charged nine people in connection with a multimillion-dollar Medicare fraud scheme involving medical clinics that billed for treatments for HIV patients.

Under the scheme, the conspirators used two medical clinics, Bolanos Institute, Inc. and Lefebvre Institute Corporation, to bill Medicare for treatments with the HIV medications Neupogen and Procrit that were either medically unnecessary or not actually provided. The conspirators allegedly paid kickbacks to Medicare patients to act as patients receiving the treatments. The scheme took place from February 2002 to June 2003, with the clinics receiving approximately $5 million in Medicare reimbursements for the Neupogen and Procrit treatments.

Among those charged are three physicians, who falsified diagnoses and documents to hide the fact that the HIV treatments billed to Medicare were not actually provided. The others charged in the scheme were owners or employees of the clinics.

The conspirators face a maximum five-year prison sentence and a maximum $250,000 fine. Two of the conspirators are also charged with money laundering and face a maximum 20-year prison sentence and a $500,000 maximum fine.

The charges were announced on May 5, 2004, by the United States Attorney for the Southern District of Florida. For more information, see http://www.usdoj.gov/usao/fls/Bolanos.html. ■

*CCH Chicago Bureau, May 6, 2004*

# Hospital "credentialing" of non-physician employees

by Sanford V. Teplitzky, Esq. and Steven R. Smith, Esq.

*It is second nature for hospitals to engage in thorough credentialing functions for physicians. Credentialing is required by the Medicare Conditions of Participation,[1] the Joint Commission on Accreditation of Healthcare Organizations (JCAHO)[2] and many state laws.[3] Even in the absence of legal requirements, hospitals have learned from experience that they are subject to many risks simply because physicians practice medicine within the hospital. Many of these risks could be avoided if the hospital had sufficient information about a physician in advance. As a result, medical staff bylaws require that physicians supply a great amount of information about themselves to hospitals as part of the process of gaining privileges to practice within the hospital. This includes completing a lengthy application form and authorizing the hospital to obtain information about the physician held by others.*

Why is so much information required of physicians? Physicians are responsible for the medical care provided to patients admitted to the hospital. Both the hospital and the law look to physicians to make appropriate medical judgments on behalf of patients. The failure to do so can result in great harm and even death. Hospitals are therefore held to a standard to inquire about the credentials of physicians before they are allowed to practice in the hospital. This includes information regarding licensure, education, specialty certifications, references, and experiences at other hospitals and claims history. By gathering this information, hospitals can make an informed judgment as to whether a physician presents too great a risk to patients or the hospital to be allowed to practice in the hospital.

Beyond physicians, there are many other categories of personnel, both employed and non-employed, working in hospitals. These include nurses and other licensed staff such as respiratory therapists, physician assistants and licensed practical nurses, and numerous categories of unlicensed staff including environmental service personnel, dietary personnel, security personnel, finance personnel, unit clerks/secretaries, human relations personnel and maintenance staff. These staff members provide important services to patients, visitors and other employees in the hospital. They also have relatively free access to various areas of the hospital and to patients, visitors and other employees of the hospital. As a result, hospitals have a responsibility to act prudently in hiring, or otherwise retaining, people to provide services. This includes securing certain information about people before making a decision to hire them. The balance of this article will focus on the importance of credentialing or securing background information on non-physician personnel of a hospital, how this may be accomplished and some practical advice for implementing a program to accomplish this.

## Legal Issues

The primary legal issue for hospitals in this context is the concept of negligent credentialing or hiring. This concept holds that a hospital (or any employer) will be held responsible for harm caused by an employee to others where the hospital or employer knew, or should have known, of certain aspects of an employee's background that made it foreseeable that the employee would engage in certain behavior and that such behavior could cause harm to others.[4] Since the standard of conduct for a hospital is not just what it knew, but also what it *should* have known, hospitals need to conduct certain background investigations of potential employees to determine if they present threats to others in the hospital environment. The scope and nature of these investigations depend upon the position for which an individual is being considered and his or her access to persons or things that may be at risk based upon the results of a background inquiry. If a hospital fails to perform a reasonable investigation into an employee's background and a third party suffers harm that is proximately caused by that failure, then the hospital will be responsible for that harm.

It is important to distinguish between the direct liability imposed on an employer for the failure to perform a reason-

able background inquiry on an employee and the indirect liability imposed on an employer for an employee's actions performed within the scope of his or her employment. The former situation involves the liability of the employer as a result of the breach of a duty owed by the employer. The latter situation involves the vicarious liability of the employer as a result of the breach of a duty owed by the employee. The application of the doctrine of *respondeat superior* results in liability to the employer (as well as the employee) when the employee negligently performs an action within the scope of his duties for the employer.[5]

As an example, assume that a hospital hires a delivery person to drive a hospital-owned ambulance. The driver ends up having an accident that causes an injury to a third party as he is performing his responsibilities for the hospital. If the driver is found to be negligent in the performance of his responsibilities, under the doctrine of *respondeat superior,* the hospital will also be found to be responsible for the damages caused by the accident if it is established that the driver was doing what he was hired to do (i.e., drive). However, if it is established that the driver was drunk while he was driving and that he had a history of several prior offenses of driving while intoxicated but the hospital hired him anyway, then the hospital faces the real possibility of being found to have violated its independent duty to make a reasonable inquiry into the employee's background before hiring him in order to reasonably ensure that the employee is able to safely perform his duties. The hospital's liability in this case rests not on the negligent conduct of the employee, but on the negligent conduct of the hospital in failing to perform a reasonable background investigation of the employee.

**"Hospitals need to conduct certain background investigations of potential employees to determine if they present threats to others in the hospital environment."**

## What Investigation Is Required?

JCAHO's Comprehensive Accreditation Manual for Hospitals provides some guidance regarding this issue. Standard HR 1.20 requires that: "The hospital has a process to ensure that a person's qualifications are consistent with his or her job responsibilities."[6] In order to determine what kind of investigation is required, the hospital first must have a well-defined description of the responsibilities that attach to a given job. This will allow the hospital to set forth the explicit qualifications needed in order to perform those responsibilities. It will also provide the hospital the opportunity to delineate those areas of the hospital to which the employee should have access and what information the employee may have access to in the performance of the position. By considering both the functions of the position and the opportunities for exposure inherent in the position, the hospital can make a knowledgeable decision as to not only the qualifications necessary for the employee to perform the position but also what factors may *disqualify* the employee from being considered for the position.

In addition to the direct relationship between the work to be performed and the exposure of the employee to various areas of the hospital, as a general matter, the greater the level of trust or responsibility placed in an employee the greater the scrutiny of his or her background should be. An excellent example of this is for compliance officers or other persons with substantial responsibility for compliance. Compliance officers are responsible for various aspects of a hospital's compliance program and ensuring that the program is implemented. The primary purpose of a compliance plan is to ensure that an organization has a cohesive and organized plan to address how it will make good faith efforts to stay in compliance with the various laws and regulations that apply to it. For hospitals this includes many serious issues, including the prevention of fraudulent and abusive activities. It is foreseeable that if a hospital's compliance officer has a criminal history of being convicted of embezzlement or other crimes involving dishonesty that such person may also engage in dishonest behavior as a compliance officer.[7] Although there is no guaranty that the individual would engage in dishonest behavior again, if he does, the hospital would be charged with such knowledge because trustworthiness is such an important consideration in filling that position.

What information is relevant for any given position is a factual issue that needs to be determined on a case-by-case basis. What is important for a nurse may not be important for a deliveryman and vice versa. However, it is important for hospitals to have an approach for addressing this issue.

## What You Can Do

One way to approach this issue would be to make an individual decision regarding the background investigation needed for every employee and job classification. However, that would not be a practical solution because of the time involved to make such determinations. Nor would it likely be effective because it would involve different people with different skills and abilities making decisions on an ad hoc basis. The results would inevitably be inconsistent and incomplete.

A better way is to develop a policy that addresses the issue in a comprehensive fashion. A good starting point is to carefully review the existing position descriptions for all jobs in the hospital with the understanding that the ultimate goal is to place groups of jobs into categories that will require the same background investigations. The advantage of this is that once the determination is made that a position falls into a certain category, the scope of the background investigation is defined by the category.

Next, a determination should be made regarding the minimum amount of information that will be required for any employee. Examples of this type of information may include verification of identity, immigration status, criminal background, exclusion from federal or state programs and licensure (where required for the position). This type of information is important for both legal reasons (e.g., not employing a person who has been excluded from participation in the Medicare program) and to guard against hiring persons for any position that have certain background characteristics. Depending upon the number of categories of positions a hospital ends up with, the amount of background information required for each succeeding category can then be increased based upon the perceived relevancy of the information to the position (and the potential for harm to be caused by the employee) and the level of trust reposed in the employee.

**"If a hospital fails to perform a reasonable investigation into an employee's background and a third party suffers harm that is proximately caused by that failure, then the hospital will be responsible for that harm."**

## Conclusion

Hospitals have an obligation to gather a certain quantity and quality of background information on all of their employees. This obligation is reflected in the requirements of the Joint Commission as an accreditation standard. It is also reflected in the common law of negligence. It is foreseeable that patients, visitors or other employees may suffer harm as a result of a hospital's failure to make reasonable efforts to ensure that prospective employees do not possess certain background characteristics. The nature of the background characteristics that should be screened for will vary depending upon the requirements and access of the job in question and the level of trust required by that job. By adopting a systematic policy approach to obtaining background information on prospective employees, hospitals will provide a safer and more effective environment for their patients, employees and visitors, and protect themselves from liability.

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1 42 CFR §482.22.

2 Joint Commission on Accreditation of Healthcare Organizations, *Comprehensive Accreditation Manual for Hospitals: The Official Handbook*, Standards MS.4.10 and 4.20 (2004).

3 *See, e.g.*, MD. CODE ANN., HEALTH GEN. §19-319(e).

4 27 AM. JUR.2d *Employment Relationship* §472 (1996).

5 *See, e.g., Ramsey v. Physicians Memorial Hospital, Inc.*, 36 Md. App. 42, 373 A.2d 26 (1977).

6 Joint Commission on Accreditation of Healthcare Organizations, *Comprehensive Accreditation Manual for Hospitals: The Official Handbook* (2004).

7 See United States Sentencing Commission, *Guidelines Manual*, §8C2.5 (f) and Application Note 3(k)(3) to §8A1.2 (Nov. 2003).

## Bush outlines plan for EHRs

**by Sharon Sofinski, Coordinating Editor**

President George W. Bush recently outlined his Health Information Technology Plan, which is designed to ensure that most Americans have electronic health records (EHRs) within the next ten years. Bush believes the plan will improve health care quality, prevent medical errors, reduce healthcare costs, improve administrative efficiencies and increase access to affordable healthcare.

The use of EHRs will ensure that each American has his or her complete healthcare information available at the time and place he or she receives care, Bush noted. A patient's EHR can be shared among healthcare providers upon the patient's authorization, while the patient's privacy will be protected.

In a conversation on the benefits of healthcare information technology at the Department of Veterans Affairs Medical Center in Baltimore on April 27, Bush said "the health care industry is missing an opportunity, if patients, in order to make sure they get quality care, have to carry files from one specialist to the next. It's like IT, Information Technology, hasn't shown up in health care yet."

**Steps outlined.** To achieve the ten-year goal, the plan includes the following steps:

- The adoption of health information standards, which will allow medical information to be stored and shared electronically assuring privacy and security.
- Doubling the funding for demonstration projects on healthcare technology to $100 million. The demonstration projects will help test the effectiveness of the technology and establish best practices for widespread adoption.
- Use of the federal government to promote the adoption of EHRs by creating incentives for healthcare providers to use them.

The President has also created a new sub-Cabinet level—the National Health Information Technology Coordinator—to lead the project and coordinate efforts to achieve the ten-year goal. On May 6, Department of Health and Human Services (HHS) Secretary Tommy G. Thompson announced the appointment of David J. Brailer, MD, PhD, to the position.

Brailer will head an office whose responsibilities will include (1) guiding ongoing work on health information standards and identifying how to support and encourage technology in healthcare delivery systems, and (2) studying options to create incentives in Medicare and other HHS programs to encourage the private sector to adopt interoperable EHRs.

Currently, Brailer is a senior fellow at Health Technology Center in San Francisco, where he has advised various regional and national efforts on IT and health information exchange. Prior to that, Brailer served for ten years as chairman and CEO of CareScience Inc., where he designed and oversaw the development of the health information exchange technology implemented in Santa Barbara County, California.

Thompson said of the swift appointment: "Health information technology promises huge benefits, and we need to move quickly across many fronts to capture these benefits.".

**Changed system.** The adoption of EHRs would change the healthcare system in several ways. For example:

- When a new patient arrives at a doctor's office, he or she will not have to provide personal information, medical history, allergies, etc., since it will already be available.
- Patients would no longer need to physically carry medical records and x-rays from physician to physician, because physicians will be able to retrieve that information electronically.
- Outbreaks of disease or bioterrorism attacks would be identified quickly and easily, since patients who arrive at different emergency rooms with similar unusual and/or sudden symptoms would be reported instantly to health officials, who would then alert authorities.

**Health IT response.** Healthcare information technology organizations applaud the plan. Linda Kloss, RHIA, CAE, vice president and CEO of the American Health Information Management Association (AHIMA), stated, "AHIMA applauds the Bush Administration. Federal support is key to achieving a fully electronic and interoperable healthcare system." In a recent press release, H. Stephen Lieber, President/CEO of Healthcare Information and Management Systems Society (HIMSS), said, "The Administration listened to the recommendations of Congress and other stakeholders such as HIMSS who knew that if this initiative was not elevated to the Secretariat level, its chances of success were greatly diminished. Now with a national Coordinator who has an open door to the Secretary of HHS, this initiative will take on even greater importance. In national debates, access is the key to success, and this latest action demonstrates the President's commitment to make the NHII a reality."

For more detail on the Health Information Technology Plan, see http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap3.html. To review comments from HIMSS, see http://www.himss.org/ASP/ContentRedirector.asp?ContentID=47547. AHIMA's comments are at: http://www.ahima.org/press/press_releases/04.0427.cfm. ■

*CCH Chicago Bureau, May 6, 2004*

## New overtime rule guarantees overtime pay to LPNs

U.S. Secretary of Labor Elaine L. Chao joined nursing students at Florida Community College at Jacksonville, North Campus, to highlight the benefits of the Department of Labor's new overtime rule for the nursing community. Under the new Overtime Security rule, all Licensed Practical Nurses (LPNs) are now guaranteed overtime pay.

"For the first time in history, the Department of Labor's new Overtime Security rule expressly states that Licensed Practical Nurses are entitled to overtime," said Labor Secretary Elaine L. Chao. "And it makes clear that Registered Nurses (RNs) who currently receive overtime will continue to receive overtime when the new rule takes effect."

Under the new overtime rule, RNs making up to $23,660 annually are guaranteed overtime pay, as are those who are paid on an hourly basis or receive overtime as part of a collective bargaining agreement. For RNs making more than $23,660 there is no change to the current law regarding their overtime pay.

The new rules expand the number of workers eligible for overtime by nearly tripling the salary threshold. Under the 50-year-old regulations, only workers earning less than $8,060 annually were guaranteed overtime. Under the new rules workers earning $23,660 or less are guaranteed overtime. Workers will gain up to $375 million in additional earnings each year.

"The new rule announced last week updates and clarifies the current regulations, so that America's nurses can spend their time healing and not having to hire lawyers to resort to lengthy court battles," said Secretary Chao. "By reducing the number of unnecessary lawsuits, resources that were absorbed by these lawsuits can be better tapped to create more nursing jobs."

The Department's new FairPay rule will take effect on August 23, 2004. It is published in the Federal Register and a text version is available online at www.dol.gov/fairpay. For further information about the Fair Labor Standards Act, visit the Department's Wage and Hour Division web page at www.dol.gov. ■

*CCH Chicago Bureau, May 4, 2004*

## DOJ settles immigration-related charges against healthcare system

**by Deborah Hammonds, Contributing Editor**

The Justice Department (DOJ) announced an agreement that settles immigration-related employment discrimination claims against Rex Healthcare, a private healthcare system with several facilities in Wake County, North Carolina. Under the terms of the agreement, Rex agreed to pay a $3,600 civil penalty, post anti-discrimination notices, educate its personnel, and refrain from discriminating against U.S. citizens and work-authorized immigrants during the employment verification process.

The agreement, announced on April 19, 2004, resolves a complaint filed with the Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices (Office of Special Counsel). The complainant alleged that Rex unlawfully required proof of citizenship from non-U.S. citizens during the employment verification hiring process. Specifically, the complainant alleged that Rex required her to produce immigration-related documents while permitting U.S. citizens to present any acceptable combination of documents, including a Social Security card and driver's license. The complainant also alleged that Rex unlawfully retaliated against her for exercising her rights.

The Immigration and Nationality Act (INA) requires employers to examine documents from new employees in order to verify their work eligibility in the United States. The INA also prohibits employers from treating citizens and non-citizens unequally.

The Office of Special Counsel enforces the INA's anti-discrimination provision, which prohibits employers from discriminating against individuals because of their citizenship or immigration status, as well as national origin, with respect to employees' hiring, firing, and recruitment or referral for a fee. The INA also prohibits employers from engaging in discriminatory practices when verifying employees' work eligibility. It also prohibits retaliation against individuals who assert their rights under the INA, assist with investigations, or file discrimination complaints. ■

*CCH Chicago Bureau, April 22, 2004*