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Letters to the Editor

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Sticking points remain for providers trying to comply with HIPAA

by Catherine Hubbard, MA, Contributing Editor

Although HIPAA has been with us for a while now, many health care organizations still face doubts—and difficulties—regarding certain implementation requirements, such as how to account for disclosures of personal health information (PHI) and how to determine which providers should be treated as business associates, according to Rebecca Williams, a partner with Davis Wright Tremaine, San Francisco. "A lot of people have been working on this very diligently for a long time and there's still numerous questions out there," she said during a September 2 interview.

Under HIPAA, patients can ask their providers for a list of the instances where they have shared the patients' personal health information. In many cases, organizations have set up complicated infrastructures to account for each disclosure. Yet as it turns out, few patients are asking for the information, Williams said. "Accounting for disclosures can be very frustrating," she said. "Many providers have spent significant time and resources creating an infrastructure to track disclosure, such as recording every disclosure into a log. Then, they only receive a couple requests for accountings each year," she said. In some cases, it might be more efficient for the organizations to compile an accounting as the requests come in, rather than tracking disclosures on a continuous basis, she said.

It's not only the providers that are frustrated. Many patients are disappointed to find out that very little information makes it into the accounting. There's a laundry list of the information that is absent, including information shared for treatment, payment and health care operations and disclosures prior to April 14, 2003, Williams said. Often patients are not satisfied with the scant list of disclosures they are provided. "There are just too many exceptions to please a lot of consumers," Williams said. For instance, a discussion between two doctors about a patient's care would fall under the exception for treatment and would not be included in the list, she said. Also, information about who accessed the patient's record within the organization is not subject to the accounting. However, she noted, "That may be exactly the information the patient wants."

Since the information patients want is not always included in the accounting for disclosures, Williams recommends her clients talk with patients up front. The patient may be better served if the provider understands the reason behind the request and what the patient is looking for. For example, she said, one hospital contacted

a patient after receiving a request for an accounting. It turned out the patient wanted to know whether a particular hospital employee had improperly looked at her PHI. The hospital performed an audit, discovered the employee had improperly accessed the patient's record and sanctioned the employee immediately. A list of disclosures would not have helped in this case, Williams noted. "That was not a disclosure," she said. "The accounting would have been an absolute waste of time."

Business associate rules. Another area that continues to plague providers is the business associate rules under HIPAA, Williams said. Even though all the grandfather provisions for ongoing business associate requirements have expired, and all covered entities must comply, many people are still struggling to figure out whether a third party is a business associate in certain situations, she said.

In some cases, the covered entity and third party disagree on the third party's status, Williams said. If there is such a disagreement, the covered entity should ask the entity why it thinks it is not a business associate, Williams said. But ultimately, the risk of an incorrect interpretation lies with the covered entity. One situation in which this question often arises is a disclosure to a durable medical equipment (DME) provider. "Often DME companies are fellow providers, even though they may not be covered entities under HIPAA. HIPAA allows a covered entity to share information with providers for treatment purposes," she said, noting that no business associate contract would be necessary in such cases.

At times, the DME provider might also handle some administrative tasks for the covered entity, in which case it probably would be a business associate for those purposes, Williams said.

"It's a good idea to have some kind of document tracking so that you know what kind of contracts, you know when they are going to terminate, and consolidate contracts if necessary."

Williams recommends health care organizations establish a person or team of people who can understand the rules and set up a system to verify that the appropriate contracts are in place. "It's a good idea to have some kind of document tracking so that you know what kind of contracts, you know when they are going to terminate, and consolidate contracts if necessary," she said. "There's always relationships that are real stumpers," she said, adding that counsel, either in-house or outside, can help puzzle through the problems and prove good faith if there ever is a challenge.

Any contracts with current business associates that get PHI in electronic form will need to be renegotiated in order to comply with the HIPAA security provisions, effective mid-April 2005. "If they get anything electronically, then they have to make sure they've got all the security requirements plugged in," she said.

Noting that there's only about six months left before the effective date, Williams said covered entities should begin renegotiating their contracts immediately if they haven't already. "Start now," she said. ■

CCH Washington Bureau, September 10, 2004

Electronic tools will enhance CMS fraud initiative

by Suzanne Szymonik, JD, Contributing Editor

Now that CMS must expand its fraud-control efforts beyond fee-for-service Medicare and Medicaid oversight to encompass review of the prescription drug benefit, the new drug card program, and the Medicare Advantage organizations, the agency plans to use new electronic tools to attack fraud. On August 27, 2004, CMS Administrator McClellan announced a new fraud control initiative that coincides with the publication of a proposed rule that would require state agencies to estimate improper payments in Medicaid and state children's health insurance programs (SCHIP) so that CMS can then calculate a national error rate.

Five-part initiative. The initiative is prompted by CMS' increased responsibilities to review the new programs mandated by the Medicare Modernization Act of 2003 (PubLNo 108-173). The initiative will focus on five broad goals: (1) a program safeguard contractor will monitor drug card activities; (2) a satellite office will be opened by CMS in the Los Angeles area, identified as a fraud" hot spot"; (3) the Medicare-Medicaid (Medi-Medi) data match program will be expanded; (4) a pilot program to assess the effectiveness of hospital compliance programs will be followed by CMS best practices guidance on good compliance practices; and (5) the use of electronic data tracking will be increased by CMS.

Drug card "bait and switch" schemes. CMS has contracted with Integriguard, a program safeguard contractor, to monitor sponsors of drug cards on a weekly basis. CMS is particularly concerned about "bait and switch" schemes to lure potential customers, and Integriguard will identify potential schemes by looking at pricing information. CMS is also concerned about identity theft, counterfeit cards, and phony drug card sponsors. The agency continues to work with law enforcement agencies on these matters.

A new Los Angeles CMS office should reduce the unusually high rates of improper payments identified in that area, according to CMS. A similar satellite office set up in Miami has been successful in identifying fraudulent activities.

"A pilot project to assess the effectiveness of hospital compliance programs will endeavor to show whether aggressive auditing and monitoring have an impact on billing, especially claim denial rates."

Electronic programs. Medi-Medi electronically matches Medicare with Medicaid claims to detect patterns that may not be evident when billings for either program are viewed in isolation. Patterns reveal dishonest providers such as "time bandits" who bill for more than 24 hours in one day. The Medi-Medi program began in 2001 in California, and by 2003 it operated in six more states, saving $75 million. It will be expanded to Ohio and Washington under the new initiative.

A pilot project to assess the effectiveness of hospital compliance programs will endeavor to show whether aggressive auditing and monitoring have an impact on billing, especially claim denial rates. CMS will issue best practices guidance detailing the pilot's findings. In addition, CMS will build upon the Comprehensive Error Rate Testing program to determine error rates in Medicaid and SCHIP, as well as Medicare, programs.

Finally, the agency will track Medicare and Medicaid claims data on a national level to identify program vulnerabilities, improper payments, and potential fraud areas. Problematic utilization spikes can now be identified and underlying causes studied. ■

CCH Chicago Bureau, August 27, 2004

Final OSHA rule establishes procedures for SOX whistleblower complaints

by Cynthia L. Hackerott, JD

The Occupational Safety and Health Administration (OSHA) has published in the Federal Register *a final rule establishing procedures for handling whistleblower complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, also known as the Sarbanes-Oxley Act (SOX). SOX is one of 14 laws with whistleblower protections administered by OSHA. The rule was published on August 24, 2004 (69 FR 52103-52117) and became effective on that date.*

Background

SOX was enacted on July 30, 2002, to protect employees in publicly traded companies and their contractors, subcontractors or agents from retaliation for providing information that an employee believes is a violation of a Securities and Exchange Commission rule or other federal law relating to fraud against shareholders. OSHA has received a total of 307 employee complaints filed under the provisions of SOX since its inception.

The rule establishes procedures and time frames for the handling of discrimination complaints made by employees or by persons acting on their behalf. Included in the rule are procedures for submitting complaints under SOX, investigations and issuing findings and preliminary orders. A major part of the rule details litigation procedures and how one can object to the findings and request a hearing. The final section of the rule discusses miscellaneous provisions including withdrawals of complaints and settlements and judicial review and judicial enforcement.

Statutory Procedural Requirements

SOX whistleblower provisions provide that a covered employee may file, within 90 days of the alleged discrimination, a complaint with the Secretary of Labor ("the Secretary"). The statute requires the Secretary to notify the person named in the complaint and the employer of the filing of the complaint. The statute further provides that proceedings under SOX will be governed by the rules and procedures and burdens of proof of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. §42121(b).

Responsibility for receiving and investigating these complaints has been delegated to the Assistant Secretary for OSHA. Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by administrative law judges are decided by the Administrative Review Board.

SOX authorizes an award to a prevailing employee of make-whole relief, including reinstatement with the same seniority status that the employee would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained, including litigation costs, expert witness fees and reasonable attorney's fees. *See* 18 U.S.C. 1514A(c)(2). If the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that there has been delay due to the bad faith of the claimant, the claimant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States, which will have jurisdiction over such action without regard to the amount in controversy.

Interim Final Rule

On May 28, 2003, OSHA published in the *Federal Register* an interim final rule promulgating rules that implemented section 806 of SOX (68 FR 31860-31868). In addition to promulgating the interim final rule, OSHA's notice included a request for public comment on the interim rules by July 28, 2003. In response, seven organizations and one individual filed comments with the agency within the public comment period. These comments are discussed in detail in the preamble to the final rule.

Filing of Discrimination Complaint

Section 1980.103 of the final rule provides that, to be timely, a complaint must be filed within 90 days of when the alleged violation occurs; the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision. Complaints filed under the Act must be made in writing, but do not need to be made in any particular form. With the consent of the employee, complaints may be made by any person on the employee's behalf.

The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone

numbers for these officials are set forth in local directories and at the following Internet address: http://www.osha.gov.

Investigations

Section 1980.104 details the SOX investigation procedures. Upon receipt of a complaint in the investigating office, the Assistant Secretary notifies the named person of these requirements and the right of each named person to seek attorney's fees from an administrative law judge (ALJ) or the Board if the named person alleges that the complaint was frivolous or brought in bad faith. The named person has the opportunity within 20 days of receipt of the complaint to meet with representatives of OSHA and present evidence in support of its position.

SOX follows the AIR21 requirement that a complaint will be dismissed if it fails to make a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Also included is the AIR21 requirement that an investigation of the complaint will not be conducted if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct, notwithstanding the prima facie showing of the complainant.

If, upon investigation, OSHA has reasonable cause to believe that the named person has violated the Act and therefore that preliminary relief for the complainant is warranted, OSHA again contacts the named person with notice of this determination and provides the substance of the relevant evidence upon which that determination is based, consistent with the requirements of confidentiality of informants. The named person is afforded the opportunity, within 10 business days, to provide written evidence in response to the allegation of the violation, meet with the investigators, and present legal and factual arguments why preliminary relief is not warranted.

Issuance of Findings and Preliminary Orders

Pursuant to Section 1980.105 of the final rule, the Assistant Secretary will issue, on the basis of information obtained in the investigation and within 60 days of the filing of a complaint, a finding regarding whether or not there is reasonable cause to believe that the complaint has merit. If the finding is that there is reasonable cause to believe that the complaint has merit, the Assistant Secretary will order appropriate preliminary relief. The letter accompanying the findings and order advises the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing, and of the right of the named person to request attorney's fees from the ALJ, regardless of whether the named person has filed objections, if the named person alleges that the complaint was frivolous or brought in bad faith.

If no objections are filed within 30 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final findings and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed.

In the preamble to the final rule, OSHA explains that where the named person establishes that the complainant would have been discharged even absent the protected activity, a preliminary reinstatement order would not be issued because there would be no reasonable cause to believe that a violation has occurred. Furthermore, as under AIR21, a preliminary order of reinstatement would not be an appropriate remedy where, for example, the named person establishes that the complainant is, or has become, a security risk based upon information obtained after the complainant's discharge in violation of SOX. Finally, in appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he received prior to his termination, but not actually return to work.

Objections to the Findings and the Preliminary Order

Section 1980.106 provides that objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC, within 30 days of receipt of the findings. The date of the postmark, facsimile transmittal or e-mail communication is considered the date of the filing; if the filing of objections is made in person, by hand delivery or other means, the date of receipt is considered the date of the filing. The filing of objections is also considered a request for a hearing before an ALJ.

The portion of the preliminary order requiring reinstatement will be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections to the order. The named person may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement.

If no timely objection is filed with respect to either the findings or the preliminary order, the findings or preliminary order, as the case may be, shall become the final decision of the Secretary, not subject to judicial review.

Hearings

For hearings, Section 1980.107 adopts the rules of practice of the Office of Administrative Law Judges at 29 CFR part 18,

subpart A. Formal rules of evidence do not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious. Hearings will be conducted *de novo,* on the record. ALJs have broad discretion to limit discovery in order to expedite the hearing. If both the complainant and the named person object to the findings and/or order of the Assistant Secretary, the objections will be consolidated and a single hearing will be conducted.

If the Secretary has not issued a final decision within 180 days of the filing of the complaint, the ALJ has broad authority to limit discovery. For example, an ALJ may limit the number of interrogatories, requests for production of documents, or depositions allowed. An ALJ also may exercise discretion to limit discovery unless the complainant agrees to delay filing a complaint in federal court for some definite period of time beyond the 180-day point. If a complainant seeks excessive or burdensome discovery or fails to adhere to an agreement to delay filing a complaint in federal court, a district court considering a request for *de novo* review might conclude that such conduct resulted in delay due to the claimant's bad faith.

Role of Federal Agencies

Pursuant to Section 1980.108, the Assistant Secretary, at his or her discretion, may participate as a party or *amicus curiae* at any time in the administrative proceedings. Although OSHA anticipates that ordinarily the Assistant Secretary will not participate in SOX proceedings, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, large numbers of employees, alleged violations which appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Securities and Exchange Commission, at that agency's discretion, also may participate as *amicus curiae* at any time in the proceedings.

Decision of the ALJ

Section 1980.109 sets forth the content of the decision and order of the ALJ, and includes the statutory standard for finding a violation. The ALJ's decision will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (b) of this section, as appropriate. A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior.

The Assistant Secretary's determination as to whether to dismiss the complaint without an investigation or conduct an investigation pursuant to Section 1980.104 is not subject to review by the ALJ, who hears the case on the merits.

If the ALJ concludes that the party charged has violated the law, the order will provide all relief necessary to make the employee whole, including reinstatement of the complainant to that person's former position with the seniority status that the complainant would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees. If, upon the request of the named person, the ALJ determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding $1,000.

Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the named person, and will not be stayed. All other portions of the judge's order will be effective 10 business days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board.

Decision of the Administrative Review Board

Section 1980.110 provides that the decision of the ALJ is the final decision of the Secretary unless a timely petition for review is filed with the Administrative Review Board. Appeals to the Board are not a matter of right, but rather petitions for review are accepted at the discretion of the Board. Upon the issuance of the ALJ's decision, the parties have 10 business days within which to petition the Board for review of that decision. The parties must specifically identify the findings and conclusions to which they take exception, or the exceptions are deemed waived by the parties.

The Board has 30 days to decide whether to grant the petition for review. If the Board does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. If the Board grants the petition, the Act requires the Board to issue a decision not later than 120 days after the date of the conclusion of the hearing before the ALJ. The conclusion of the hearing is deemed to be the conclusion of all proceedings before the ALJ—i.e., 10 days after the date of the decision of the ALJ unless a motion for reconsideration has been filed in the interim. If a timely petition for review is filed with the Board, any relief ordered by the ALJ, except for a preliminary order of reinstatement, is inoperative while the matter is pending before the Board.

When the Board accepts a petition for review, its review of factual determinations will be conducted under the substantial evidence standard. In the exceptional case, the Board may grant a motion to stay a preliminary order of reinstatement that otherwise will be effective while review is conducted by the Board.

In the preamble to the final rule, OSHA states that it believes that a stay of a preliminary reinstatement order would only be appropriate where the named person can establish the necessary

criteria for equitable injunctive relief, i.e., irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public.

If the Board concludes that the party charged has violated the law, the final order will order the party charged to provide all relief necessary to make the employee whole, including reinstatement of the complainant to that person's former position with the seniority status that the complainant would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

If the Board determines that the named person has not violated the law, an order will be issued denying the complaint. If, upon the request of the named person, the Board determines that a complaint was frivolous or was brought in bad faith, the Board may award to the named person a reasonable attorney's fee, not exceeding $1,000.

Withdrawal of Complaints, Objections, and Findings

Section 1980.111 provides for the procedures and time periods for withdrawal of complaints, the withdrawal of findings by the Assistant Secretary, and the withdrawal of objections to findings. At any time prior to the filing of objections to the findings or preliminary order, a complainant may withdraw his or her complaint under the Act by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary will then determine whether to approve the withdrawal.

The Assistant Secretary may withdraw his or her findings or a preliminary order at any time before the expiration of the 30-day objection period described in Section 1980.106, provided that no objection has yet been filed, and substitute new findings or preliminary order. The date of the receipt of the substituted findings or order will begin a new 30-day objection period.

At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the ALJ or, if the case is on review, with the Board. The judge or the Board, as the case may be, will determine whether to approve the withdrawal.

Settlements

At any time after the filing of a complaint, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant and the named person agree to a settlement. Moreover, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the judge, or by the Board if a timely petition for review has been filed with the Board. Any settlement approved by the Assistant Secretary, the ALJ, or the Board, will constitute the final order of the Secretary.

Judicial Review

Section 1980.112 describes the statutory provisions for judicial review of decisions of the Secretary. Within 60 days after the issuance of a final order by the Board (Secretary), any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation. A final order of the Board is not subject to judicial review in any criminal or other civil proceeding. If a timely petition for review is filed, the record of a case, including the record of proceedings before the ALJ, will be transmitted by the Board to the appropriate court pursuant to the rules of the court.

Judicial Enforcement

Pursuant to Section 1980.113, whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

District Court Jurisdiction of Discrimination Complaints

Section 1980.114 sets forth the SOX provision allowing complainants to bring an action in district court for *de novo* review if there has been no final decision of the Secretary within 180 days of the filing of the complaint and there is no delay due to the complainant's bad faith. It provides that complainants will provide notice 15 days in advance of their intent to file a Federal court complaint.

In the preamble to the final rule, OSHA explains that this provision authorizing a federal court complaint is unique among the whistleblower statutes administered by the Secretary. This statutory structure creates the possibility that a complainant will have litigated a claim before the agency, will receive a decision from an ALJ, and will then file a complaint in Federal court while the case is pending on review by the Board.

Special Circumstances and Waiver of Rules

Section 1980.115 provides that in circumstances not contemplated by these rules or for good cause the Secretary may, upon application and notice to the parties, waive any rule as justice or the administration of the Act requires.

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False Claims

Independent contractors and whistleblower claims

by Gené Stephens Connolly, JD, Contributing Editor

A trial court properly denied a physician-plaintiff's "whistleblower" and retaliatory discharge claims because the plaintiff's employment had not been terminated by the defendant-medical center, but rather ended upon the expiration of the physician's written contractual employment agreement. During his one-year term of employment, the physician alleged that the medical center engaged in questionable Medicare billing practices and provided costly therapy sessions to elderly patients without medical justification for the services. Shortly after the physician informed the Office of the Inspector General about the medical center's alleged fraudulent practices, the medical center informed the physician that his contract would not be renewed. The Texas state "whistleblower" statute provides that "no employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities." The statute further requires a plaintiff to establish a prima facie case for violations of the whistleblower statute by showing:

1. that the plaintiff was an employee;
2. that the plaintiff refused to participate in, or to remain silent about, illegal activities;
3. that the employer discharged the plaintiff-employee; and
4. that there was an exclusive causal relationship between the plaintiff's refusal to participate in or remain silent about illegal activities and the employer's termination of the employee.

While the language of the plaintiff's employment contract unambiguously provided that he was an independent contractor rather than an employee of the medical center, a genuine issue of material fact existed regarding whether the defendant so thoroughly controlled the physician's conduct as to render him an "employee" of the medical center under the purview of the state's employment statutes. The plaintiff's employment contract did provide, however, for a one-year term that effectively expired. The employer's refusal to renew the contract did not give the physician an individual right to sue for failure to renew the employment contract. Accordingly, the decision of the trial court was affirmed (Howard v. Life Care Centers of America). ■

CCH Chicago Bureau, August 31, 2004

OSHA

OSHA lifts temporary suspension of respiratory rule

by CCH Editorial Staff

OSHA delayed until July 1, 2004, enforcing several provisions of the respiratory protection standard for establishments required to provide respirators for protection from potential exposure to tuberculosis. The six-month period was provided to allow affected employers to come into compliance with the additional requirements, and follows OSHA's withdrawal last month of its 1997 proposal on tuberculosis and the revocation of a separate respiratory protection standard for workers exposed to TB.

"Requirements such as annual fit testing and medical evaluations for covered employees may be new for some employers," said OSHA Administrator John Henshaw. "We want to make sure they are aware of these new requirements and give them every opportunity to be able to successfully come into compliance."

With the withdrawal of the TB rule, OSHA announced it would begin applying the general industry respiratory protection standard for protection against the disease. This rule includes several requirements that were not as detailed in the revoked rule, such as updating the facility's respirator program, medical evaluation requirements, annual fit testing of respirators, and some training and recordkeeping provisions. During this six-month period, OSHA will not cite these new requirements for establishments with workers exposed only to tuberculosis. All elements of the revoked rule continue to be enforced under the corresponding elements of the current respiratory protection standard.

To meet the requirements of the agency's respiratory protection standard, employers had to revise their respiratory protection program, conduct annual respiratory fit testing, and perform a medical evaluation and annual training for employees using respirators. ■

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