

JUNE 2016

In this issue:

Healthcare Lessons Learned
From Reality TV

CMS Finally Publishes The
Final Rule On Returning
Medicare Overpayments

NJ Project Medicine Drop

Free Transportation Gets
Another Nod From OIG

Spotlight on Cyberinsurance

Useful links:

OIG Enforcement Cases:
<https://goo.gl/A8PKAS>

Fair Health Consumer Cost
Look UP:
<https://goo.gl/nWn3iq>

New Jersey Doctor Profiles:
<https://goo.gl/kEk8x0>

HEALTHCARE LESSONS LEARNED FROM REALITY TV

By: Alyson Leone, Esq.

On March 31, 2016, a New York court determined that a lawsuit may proceed against a physician and hospital for breach of physician-patient confidentiality arising from a documentary series about medical trauma, NY Med. The claim arose out of the filming and then broadcasting on television of a patient's medical treatment and death in a hospital emergency room. Even though the network had the hospital's permission to film on its premises and blurred the patient's identity, the hospital never obtained the consent of the patient, or his heirs, to make the recording. The Court, however, did dismiss a claim against the network for intentional infliction of emotional distress, stating that the conduct did not meet the standard that it was extreme and outrageous.

Although the merits of the breach of physician-patient confidentiality claim remain undecided, the case sends a warning that healthcare facilities should carefully review their policies regarding patient confidentiality, and in particular, filming on their property. In response to this case, the members of the Greater New York Hospital Association agreed to voluntarily ban filming in its hospitals without patients' prior consent.

On April 21, 2016, the Department of Health and Human Services, Office for Civil Rights (OCR) announced that it reached a \$2.2 million settlement with the hospital in the case for the "egregious disclosure of two patients' protected health information to film crews and staff during the filming of NY Med, an ABC television series, without first obtaining authorization from the patients". In addition to the fine, OCR will monitor the hospital for two years to ensure it remains compliant with its HIPAA obligations. The significant settlement makes clear that healthcare facilities must make patient privacy an utmost priority.

CMS *FINALLY* PUBLISHES THE FINAL RULE ON RETURNING MEDICARE OVERPAYMENTS

By: Grace Mack, Esq.

On February 12, 2016, six years after the passage of the Affordable Care Act (ACA), CMS published the final rule with respect to returning self-identified overpayments.

The ACA established a requirement that any person who receives an overpayment from Medicare must report and return the overpayment by the later of: (A) the date which is 60 days after the date on which the overpayment was identified; or (B) the date any corresponding cost report is due, if applicable.



Major Provisions

The major provisions of the final rule clarify:

- the meaning of overpayment identification;
- the required lookback period for overpayment identification; and
- the methods available for reporting and returning identified overpayments to CMS.

The Meaning of “Identification”

The final rule states that a person has identified an overpayment when the person has or should have, through the exercise of reasonable diligence, determined that the person has received an overpayment and quantified the amount of the overpayment. For example, if you discover that you have upcoded, you need to identify the extent of the upcoding and quantify the amount of the overpayment. The new standard for identification provides some clarity and consistency for health care providers regarding the actions they need to take to self-identify overpayments.

Lookback Period - 6 years from Identification

Under the final rule, providers must report and return overpayments which are identified within six years of the date the overpayment was received. Specifying the length of the look back period provides additional clarity for providers and suppliers who have identified an overpayment.

How to Report and Return Overpayments

The final rule provides that providers must use an applicable claims adjustment, credit balance, self-reported refund, or another appropriate process to satisfy the obligation to report and return overpayments. As a result, the methods for returning overpayments includes various options from which providers may select based on individuals circumstances.

Penalties for Reverse False Claims

If you receive a Medicare overpayment, and do not return it within 60 days of identifying that overpayment, you may be liable for False Claims Act penalties. The Fraud Enforcement and Recovery Act of 2009 (FERA) amended the False Claims Act to formally adopt the concept of “reverse false claims,” which includes knowingly retaining an overpayment.

The final rule states that a person has identified an overpayment when the person has or should have, through the exercise of reasonable diligence, determined that the person has received an overpayment and quantified the amount of the overpayment.

NJ PROJECT MEDICINE DROP

By: Grace Mack, Esq.

DCA Notice Regarding Drug Take Back Programs Must be Given When Dispensing CDS Prescriptions in NJ

New Jersey P.L. 2015, c.66, which became effective on January 1, 2016, requires



prescribers and pharmacies to provide a notice about drug take back programs to each patient upon dispensing a controlled dangerous substance (CDS) prescription medication. Under the new law:

- If a prescriber dispenses any CDS prescription drug or medicine, the prescribers must provide the patient with a notice prepared by the Division of Consumer Affairs (the DCA) , and
- Pharmacies that dispense prescription drugs (other than long-term care pharmacies) must distribute the DCA notice with any CDS prescription medication that is dispensed to an individual located in New Jersey.

A copy of the DCA notice is available for download on the DCA's website at:<http://www.njconsumeraffairs.gov/meddrop/Documents/Unused-medications.pdf> or<http://www.njconsumeraffairs.gov/meddrop/Documents/Unused-Medications-Spanish.pdf> (En Español).

In order to comply with the requirements of Project Medicine Drop, prescribers and pharmacies must do one of the following:

1. Download the notice from the DCA's website and provide a hard copy to the patient;
2. Download the notice from the DCA's website and email an electronic copy to the patient; or
3. Post a copy of the DCA notice in a conspicuous location and insert the following text in another document (for example, the prescription drug monograph) that is provided to the patient:

The following is the DCA Notice:

SAFE and SECURE MEDICINE DISPOSAL

Unused medications that remain in your medicine cabinet are susceptible to theft and misuse. To prevent medications from getting into the wrong hands, New Jersey's Office of the Attorney General and Division of Consumer Affairs urge you to properly dispose of your expired and unwanted prescription medicine at a nearby Project Medicine Drop location. DROP OFF IS SIMPLE, ANONYMOUS AND AVAILABLE 24 HOURS A DAY – 365 DAYS A YEAR, NO QUESTIONS ASKED. Simply bring in your prescription and over-the-counter medications and discard them in an environmentally safe manner. Always scratch out the identifying information on any medicine container you are discarding. For a list of Project Medicine Drop locations, please visit<http://www.njconsumeraffairs.gov/meddrop>.

Unused medications that remain in your medicine cabinet are susceptible to theft and misuse. To prevent medications from getting into the wrong hands, New Jersey's Office of the Attorney General and Division of Consumer Affairs urge you to properly dispose of your expired and unwanted prescription medicine at a nearby Project Medicine Drop location.

FREE TRANSPORTATION GETS ANOTHER NOD FROM OIG

By: Alyson Leone, Esq.

On March 1, 2016, the Department of Health and Human Services Office of Inspector General once again issued a favorable advisory opinion for the provision of free transportation by a healthcare facility. In this instance, an academic



medical center offered transportation assistance such as mileage reimbursement or fare reimbursement to pregnant patients who were receiving pre-natal care at their 12 clinics throughout the state. The OIG noted that the following factors reduced the risks that this arrangement would violate the law:

- It is beneficial to clinic patients who lack financial means to deliver their baby at the hospital;
- The aid is modest in nature and available only in limited circumstances;
- The program is not advertised and is offered only to existing clinic patients;
- The medical center does not consider whether the patient is a Federal health care program beneficiary or the source of payments for services when giving aid;
- The costs will not be shifted to the Medicare or Medicaid program;
- The arrangement is part of a program of care established and operated by a State academic medical center for the benefit of a specific patient population served by Federal health care programs operated and partially funded by the State.

SPOTLIGHT ON CYBERINSURANCE: IS CYBER LIABILITY INSURANCE WORTH IT?

By: Lisa Gora, Esq.

Medical practices, hospitals and other healthcare entities have become more reliant on electronic communication versus paper communication. But with the demand to convert from paper records to electronic record systems, the opportunity for bad actors to breach these electronic data bases and cause disruptions or system shut-downs of such systems is also incrementally increasing at a surprising rate. Therefore, medical practices and hospitals are looking for ways to protect the personal health information of their patients; mitigate and manage the risks associated with storing patient data in electronic record systems; and avoid breaches of HIPAA overall. To this end, some healthcare entities are securing cyber liability insurance policies.

Due to the burgeoning area of electronic storage for patient health information, cyber liability insurance products have been developed to provide coverage for the unique cyber risks that exist in today's electronically influenced era. Most businesses are generally familiar with commercial insurance policies which provide general liability coverage to protect the business from injury or property damage. However, these standard policies typically do not include coverage for liability for security or privacy breaches such as loss of confidential information by allowing, or failing to prevent, unauthorized access to computer systems. Cyber liability insurance products provide this type of coverage for security or privacy breaches, and may also cover costs associated with patient notification, cost of providing credit monitoring services for those patients affected by the breach, costs associated with restoring, updating or replacing business assets stored electronically, or costs related to legal claims accruing from such breaches. Therefore, it would be worthwhile for your medical practice or

Due to the burgeoning area of electronic storage for patient health information, cyber liability insurance products have been developed to provide coverage for the unique cyber risks that exist in today's electronically influenced era.



hospital administrators to research cyber liability coverage and understand its responsibilities under HIPAA. Taking proactive measures may help prevent your medical practice and/or hospital from incurring potentially significant costs of a breach to your electronic records system which can be costly.

The cost of cyber-liability insurance may be costly and depends on various factors attributable to your medical practice and/or hospital. Health care providers will need to weigh the cost of a cyber-insurance policy versus the overall costs associated with a breach of patient health information and the negative effects stemming from the media attention of such a breach at a medical practice and/or hospital.

EDITOR



Grace D. Mack | Shareholder
Business and Healthcare Law Teams
732.855.6025
gmack@wilentz.com

HEALTHCARE TEAM MEMBERS

Michael F. Schaff | Shareholder
732.855.6047
mschaff@wilentz.com

Brett R. Harris | Shareholder
732.855.6122
bharris@wilentz.com

Peter A. Greenbaum | Shareholder
732.855.6426
pgreenbaum@wilentz.com

Alyson M. Leone | Shareholder
732.726.7474
aleone@wilentz.com

Jason J. Krisza | Associate
732.855.6452
jkrisza@wilentz.com

Lisa Gora | Associate
732.855.6124
lisagora@wilentz.com

The information contained in this newsletter is for discussion purposes only and cannot be construed as legal advice. Recipients of content from this newsletter, clients or otherwise, should not act or refrain from acting on the basis of any content included in the newsletter without seeking appropriate legal or other professional advice and consider all applicable state and federal law. If you have any questions, contact Grace D. Mack, Esq. of the law firm of Wilentz, Goldman & Spitzer, P.A. at gmack@wilentz.com or 732-855-6025.