HEALTHCARE**LEGAL**NEWS

September 28, 2012 • Volume 2, Number 8

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DW HEALTH CARE TEAM - NEWS & SUCCESS STORIES

Tatiana Melnik & **Ralph Z. Levy Jr.**, "HIPAA: Privacy, Security & the Consequences of a Breach for Dialysis Providers," *Nephrology News & Issues*, Vol. 26, No. 10, September 2012

Tatiana Melnik & **Ralph Z. Levy Jr.**, *Recommendations for Dialysis Providers and Nephrologists to Minimize Their Exposure to Data Breach Related Liabilities, Nephrology News & Issues*, Publication pending.

On September 14, **Tatiana Melnik** spoke at the Online Tech Fall Into IT event on *The Impact of Compliance*.

On September 25, **Brian Balow** and **Tatiana Melnik** are speaking at the Michigan HIMSS HITECH Status in Michigan Conference, on *To Be BYOD or Not to Be BYOD: Is a Bring Your Own Device Policy Right for Your Organization?*

On October 3, **Brian Balow** and **Tatiana Melnik** are speaking at the SecureWorld Expo Detroit on *Drafting Bring Your Own Device Policies*.

THE DW HEALTHCARE TEAM IS GROWING

With the addition of six new healthcare attorneys, the DW Healthcare Team has expanded its expertise and its depth.

Mark E. Wilson - joins as a Member in the Firm's Troy office. He regularly assists healthcare clients in securing quality control and streams of income from a variety of sources including an array of compliant joint ventures and medical "super groups". He is also known for facilitating the implementation of My Doctor's Inn, the UnaSource Health "megamedaplex" medical buildings in Troy, Michigan, as well as the WellPointe multi-specialty medical complex in Rochester Hills, Michigan. **Mark can be reached at 248-433-7581 or MWilson@dickinsonwright.com.**

James C. Foresman – joins as a Member in the Firm's Saginaw office. Jim focuses his practice on providing regulatory and transaction services for hospitals, group practices, and professional healthcare providers. **Jim can be reached at 989-791-4644 or JForesman@dickinsonwright.com.**

Carolyn Pollock Cary - joins as Of Counsel in the Firm's Saginaw office. Carolyn focuses her practice on healthcare, employment and labor, and commercial litigation. Her commercial litigation practice includes arbitration and civil litigation of contract disputes, business torts, non-compete agreements and conflicts among departing members/shareholders in a variety of businesses. **Carolyn can be reached at 989-791-4645 or CCary@dickinsonwright.com.**

Rosanna J. Willis – joins as Of Counsel in the Firm's Troy office. Rose focuses her practice on assisting healthcare providers and suppliers with various corporate matters and advises health industry clients on the structure of financial arrangements under the Stark Law and Anti-Kickback Law. She has significant experience with the Michigan Certificate of Need Program and the corporate practice of medicine doctrine in several states. **Rose can be reached at 248-433-7584 or RWillis@dickinsonwright.com.**

Brian S. Fleetham – joins as a Member in the Firm's Grand Rapids office. Brian has extensive experience representing physicians and other healthcare providers on business transactions, contracts, corporate governance, arrangements with hospital and other facilities, and regulatory matters such as Stark, HIPAA, fraud and abuse and compliance matters. **Brian can be reached at 616-336-1016 or bfleetham@dickinsonwright.com.**

Keith Dennen - joins as a Member in the Firm's Nashville office. Keith focuses his practice in the areas of health care law, intellectual property law, estate and probate, employment law, corporate and transactional law and litigation. He has represented clients in a range of matters including in administrative, regulatory, corporate governance, contract disputes, and patent infringement. **Keith can be reached at 615-780-1106 or kdennen@dickinsonwright.com.**

EMPLOYMENT LAW NEWS

RECOVERY OF LOST PROFESSIONAL FEES BY TERMINATED PHYSICIAN

By: Ralph Levy, Jr., who is Of Counsel in Dickinson Wright's Nashville office, can be reached at 615.620.1733 or rlevy@dickinsonwright.com

In a recent decision of the United States Court of Appeals for the Seventh Circuit, *Assaf v. Trinity Med. Ctr.*, the Court upheld the ability of a physician whose employment agreement was improperly terminated by a hospital to recover lost professional fees as part of the damages for the hospital's breach. The case dealt with an unusual fact situation, one in which an employer-hospital reneged on an agreement with a formerly employed physician to settle a previously filed action seeking damages for the hospital's breach of the physician's employment agreement. Despite its atypical nature, this case serves as a reminder to hospitals that wish to terminate an agreement to employ a physician that they may incur damages in excess of the compensation payable to the formerly employed physician for the remaining term of the employment agreement.

The Court upheld the physician's right to seek damages for breach of the settlement agreement of the breach of contract action. Under the terms of the settlement agreement, which Dr. Assaf negotiated directly with the CEO of Trinity Medical Center without the knowledge of or input from either party's legal counsel, the hospital was required to reemploy the terminated physician for a two-year time period at a specified salary. By failing to reemploy the physician for the full time period specified in the settlement agreement, the hospital breached the settlement agreement, which breach itself created a right in favor of the physician to seek damages. The Court found that damages for this breach should include lost professional fees not received by Dr. Assaf during the period of time that the hospital should have employed the physician but did not do so.

This case serves as a reminder that damages recoverable by a physician whose employment agreement is terminated improperly by an employer-hospital may exceed the amounts otherwise payable to the terminated physician for the remaining period of the terminated employment agreement. As a result, employer-hospitals should consider including liquidated damages clauses in employment agreements with physicians to eliminate damages of this type. For employment agreements that do not have clauses of this type, hospitals that employ physicians should discuss with counsel what their potential exposure is for improper termination of any employment agreement prior to terminating the physician-employee.

HEALTHCARE IT NEWS

STAGE 2 MEANINGFUL USE FINAL RULE IS HERE!

By: Tatiana Melnik, who is an Associate in Dickinson Wright's Ann Arbor office, can be reached at 734.623.1713 or tmelnik@dickinsonwright.com

On August 23, 2012, CMS announced the release of the Final Rule for Stage 2 requirements for Meaningful Use, which eligible professionals, eligible hospitals, and critical access hospitals (CAHs) must meet to continue to participate in the Medicare and Medicaid Electronic Health Record Incentive Programs. The Final Rule is generally effective on November 5, 2012; some provisions became effective on September 4, 2012, the date the Final Rule was published in the Federal Register.

In November of last year, HHS announced that it would delay the start date for Stage 2 requirements, due to significant implementation and compliance obstacles experienced by the vendor and provider communities for Stage 1 requirements. As a result, the earliest that the now final Stage 2 criteria will be effective is in fiscal year 2014 for eligible hospitals and CAHs or calendar year 2014 for eligible professionals.

To be eligible for reimbursement, providers must demonstrate meaningful use for a consecutive 90-day EHR reporting period in the first year they participate and then for a full year EHR reporting period for subsequent years. Under the Stage 2 Final Rule, CMS requires that for 2014, providers, regardless of their meaningful use stage, demonstrate meaningful use for only a three-month EHR reporting period. This will permit providers upgrading to 2014 Certified EHR Technology to have adequate time to implement the system.

Stage 1 established a core and menu structure for objectives that providers had to achieve to demonstrate meaningful use. Stage 2 requirements maintain this structure for meaningful use objectives.

While some Stage 1 objectives were either combined or eliminated, most of the Stage 1 objectives are now core objectives under the Stage 2 requirements and the thresholds have been raised. To demonstrate meaningful use for Stage 2, eligible professionals must meet all 17 core objectives and 3 (out of 6) menu objectives; and eligible hospitals and CAHs must meet all 16 core objectives and 3 (out of 6) menu objectives.

Stage 2 includes two new core objectives: (1) eligible professionals must use secure electronic messaging to communicate with patients on relevant health information; and (2) eligible hospitals and CAHs must automatically track medications from order to administration using assistive technologies in conjunction with an electronic medication administration record. Stage 2 also replaces the prior Stage 1 objectives requiring that patients be provided electronic copies of health information or discharge instructions and timely access to health information, and instead requires that patients be allowed to access their health information online (within 4 business days of the information being available to the eligible professionals, and within 36 hours after discharge from the hospital for eligible hospitals and CAHs).

The Stage 2 requirements also place an emphasis on health information exchange between providers in an effort to improve care coordination. One of the core objectives for eligible professionals, eligible hospitals and CAHs requires providers who transition or refer a patient to another provider to provide a summary of care record for more than 50% of those transitions of care and referrals.

PROVIDERS MUST ENTER INTO BA AGREEMENTS WITH VENDORS WHO TRANSMIT, MAINTAIN, USE OR HAVE ACCESS TO PHI

By: Tatiana Melnik • tmelnik@dickinsonwright.com

The Stage 2 Meaningful Use requirements make clear that the federal government is continuing its push to require healthcare providers to use information technology. The requirements also make clear, however, that patient privacy and security has not been sidelined.

With this emphasis on making information available to patients online, providers must remember the need to enter into business associate agreements with vendors who transmit, maintain, use or have access to protected health information. The recent action against Phoenix Cardiac Surgery, P.C. by the Office of Civil Rights (OCR) is instructive on this front. In that case, Phoenix used a publicly accessible, Internet-based calendar to post patient appointment dates and an Internet-based email account to e-mail PHI to workforce members' personal Internet-based e-mail accounts. In both instances, OCR faulted Phoenix for not entering into business associate agreements with the providers of these services. Phoenix agreed to pay HHS $100,000 and enter into a 1-year corrective action plan.

In general, providers should enter into business associate agreements with vendors who "touch" PHI in any manner. This would generally include hosting providers, computer repair services and even copy machine repair services. The only exception to this requirement to enter into business associate agreements is for vendors who are conduits, with the US Postal Service serving as the typical example. Based on the HHS definition of "conduit," and the OCR's interpretation (as explained by Leon Rodriguez, Director of OCR, at a recent presentation) of that term, that exception is very narrow and is not likely to apply to, for example, a hosting vendor that provides managed cloud servers. As David Holtzman noted at the Health Care Compliance Association's 16th Annual Compliance Institute in April 2012, "If you use a cloud service, it should be your business associate. If they refuse to sign a business associate agreement, don't use the cloud service."

Dickinson Wright Offices

Detroit
500 Woodward Ave.
Suite 4000
Detroit, MI 48226
Phone: 313.223.3500

Lansing
215 S. Washington Square
Suite 200
Lansing, MI 48933
Phone: 517.371.1730

Ann Arbor
350 S. Main St.
Suite 300
Ann Arbor, MI 48104
Phone: 734-623-7075

Troy
2600 W. Big Beaver Rd.
Suite 300
Troy, MI 48084
Phone: 248.433.7200

Grand Rapids
200 Ottawa Ave., NW
Suite 1000
Grand Rapids, MI 49503
Phone: 616.458.1300

Saginaw
4800 Fashion Square Blvd.
Suite 300
Saginaw, MI 48604
Phone: 989-791-4646

Columbus
15 N. 4th St.
Columbus, OH 43215
Phone: 614.744.2570

Washington, D.C.
1875 Eye St., NW
Suite 1200
Washington, DC 20006
Phone: 202.457.0160

Toronto
222 Bay St., 18th Floor
PO Box 124
Toronto, ON, Canada M5K 1H1
Phone: 416.777.0101

Nashville
424 Church St.
Suite 1401
Nashville, TN 37219
Phone: 615.244.6538

Phoenix
5009 East Washington St.
Suite 125
Phoenix, AZ 85034
Phone: 602.244.1400

Las Vegas
7201 West Lake Mead Blvd.
Suite 503
Las Vegas, NV 89128
Phone: 702.541.7888