Firehouse Lawyer

Volume 5, Number 2 *February 15, 2005*

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HIPAA –Criminal Enforcement

Ever since the Privacy Rule was finalized in April of 2003, representatives of "covered entities" have been asking me about the prospects for strict enforcement, and particularly monetary penalties. While some openly wondered if the "HIPAA Police" would be lurking around every corner to assess penalties or worse, others speculated that there might be little, if any, enforcement funds available. In November of 2004, perhaps we began to learn that there can be severe punishment for transgressions. The first actual sentencing for wrongful disclosure of individually identifiable protected health information (PHI) actually occurred in the State of Washington, when Richard Gibson of the City of SeaTac was convicted.

Gibson obtained the name, date of birth, and social security number of a total stranger and obtained four credit cards. Then he proceeded to run up about $9,000 in charges for various items. He had access to PHI, as a technician at the Seattle Cancer Care Alliance, where he had drawn the patient's blood.

A frequently asked question is: "Who enforces the HIPAA Privacy Rule?" Enforcement is the responsibility of the Office of Civil Rights of the U.S. Department of Health and Human Services. They refer criminal prosecutions, of course, to the Department of Justice. Civil penalties include $200 per violation, up to $25,000 per year. Criminal penalties include (1) a fine of up to $50,000 and up to one year in prison for a "knowing violation", (2) a fine of up to $100,000 and up to five years in prison for a violation committed under "false pretenses", and (3) a fine of up to $250,000 and up to 10 years in prison if there was intent to sell, transfer, or use PHI for commercial advantage, personal gain or malicious harm.

The judge sentenced Gibson to 16 months in prison, three years' probation, and repayment of more than $9,000 in restitution to the credit card companies and the patient.

This case is the first known criminal enforcement taken by the DOJ. Although SCCA is of course a covered entity, Gibson himself is not a covered entity. Until now, OCR took the position that the rule's requirements and the enforcement provisions of the Privacy Rule applied only to the covered entity, but not the employees or business associates of the covered entity. In other words, OCR did not think

there was personal liability. The DOJ has historically disagreed and now it looks like the courts may adopt the DOJ interpretation.

The upshot of this case is that, if you are an employee or business associate, confidentiality of PHI must be preserved or you will have personal liability exposure including possible criminal prosecution. If you are a covered entity, because of concepts such as the vicarious liability for employees' actions, and the rule of *respondeat superior* (employer may be liable for employee actions) it would now be even more important to provide training and compliance programs to ensure your employees are not creating potential liability risks for you.

HIPAA-Security Rule

The Privacy Rule may be the big one, when it comes to changing practices and procedures, but do not overlook the Security Rule of HIPAA. If your agency is a health care provider, and you store patient records electronically, be advised that effective April 21, 2005, you also must comply with the Security Rule. This rule pertains to administrative, physical, and technical safeguard measures, to ensure that your data is secure.

Just as under the Privacy Rule, where you had to designate a Privacy Officer, here you need to designate a security official. Perhaps those fire departments with computer or "IT" specialists should simply delegate the "security official" duties to that person. The security official is then responsible for managing and supervising the security measures put in place under the Security Rule.

This rule provides "specifications" to implement the security standards. The ones that are optional or advisory only are called "addressable specifications." There are three types of specifications: administrative, physical, and technical. These must be in place by April 21, 2005. Your administrative specifications should include some for risk analysis, risk management, information system activity review, security incident response and reporting, data backup plans, disaster recovery plans, and emergency mode operation plans. The physical specifications include workstation use, workstation security, disposal of device and media, and media reuse. Finally, the technical specifications include unique user ID, emergency access procedures, audit controls, and person or entity authentication. Thus, you can see why I recommend that you have the IT specialists either managing this whole set of tasks or at least very involved in it. As with the Privacy Rule, obviously a written policy is needed to make this work, followed by training.

NOTE: In 2003, Joseph F. Quinn created a complete HIPAA compliance package, which includes a Policy on Security. Also, his training company, Training Unlimited has done detailed training on compliance with the Privacy Rule.

VETERANS SCORING CRITERIA

With the recent upsurge in deployment of reserve and National Guard forces, all employers, including public employers, need to be mindful of the rights of returning veterans. One of the Washington State statutes that I have been getting questions about again lately has been RCW 41.04.010. This statute requires that municipal fire departments in Washington add certain percentages to the test scores of job applicants, if those applicants are qualified veterans.

This statute used to be referred to as the veterans preference, but some misguided legislators apparently felt that had unintended connotations, so they changed the language of the statute a few years ago to "veterans scoring criteria status", quite a wordy mouthful. But they also made some substantive changes. Formerly, there was language that stated that the "veterans preference" had to be claimed within 15 years of discharge from the military. Now it just says the status should be claimed "upon discharge", but that creates an ambiguity. Just how long can a veteran wait? I am advising employers that they should allow the status one time after discharge, regardless of delay, until a veteran's first appointment to a public post.

Another question has long been which overseas "campaigns" qualify the veteran under the applicable language? For many years, it was true that neither the executive nor legislative branch had declared an end to the Persian Gulf War and therefore vets who served over there had an open-ended entitlement. We have previously noted that such is no longer the case, as the Congress did eventually declare that conflict over. But apparently some major jurisdictions may still not be recognizing that change, which creates some discrepancies in practices, to say the least. The legislation was P.L. 105-85 enacted November 18, 1997, which established January 2, 1992 as the end of that conflict.

More Recent Decisions:

Latest *"Weingarten Doctrine"* Cases:

Many readers know what I mean when the term *"Weingarten Doctrine"* is used, but some don't so a short explanation is in order. In NLRB v. J. Weingarten, Inc. 420 U.S. 252 (1975) it was held that a union employee is entitled to have a union representative present at any meeting held with the employee, if discipline is reasonably foreseeable (investigatory interviews). At times since 1975, the NLRB has held a few times that this rule applied to non-union workers as well, so a few employers without union employees got caught in that trap. Well, the NLRB has flip-flopped again on that issue.

In IBM Corporation, 341 NLRB No. 148 (2004) the Bush Board changed course again, holding that *Weingarten* rights do not extend to non-union workers. Since the Board keeps changing its mind, and since the Washington PERC is not really bound to follow the NLRB, one wonders whether changing established Employer SOPS to the contrary is worth doing. Besides, since many of my Washington employers have both union (mostly IAFF) and non-union employees, I am planning to recommend that they maintain the status quo, not a dual standard. If a non-union employee wants a personal representative (not a union "rep") to attend, what is the harm?

Meanwhile, in Washington a PERC Examiner issued a *Weingarten* decision too. In Methow Valley School District, Decision 8400 (PECB, 2004) an Examiner held that *Weingarten* rights do not extend to the union, but only the employee facing an investigative interview. The Examiner also held there is no right to multiple representatives. Basically, since the right belongs to the individual and not the union, unless

the employee desires union representation at the meeting, there need not be any union rep present. The employee is not *required* to have union representation. When such representation is requested,the union does not control the session in any way.

The union appealed to the full Commission, which affirmed on appeal, emphasizing that employees initiate these rights of representation, not unions.

"VOLUNTEER FIREFIGHTER" MUST HAVE THE DUTIES TO GET THE PENSION, COURT HOLDS.

In November 2004 the Washington State Supreme Court decided an important issue for non-firefighter members of volunteer departments. In *Schrom v. Board of Volunteer Firefighters, #74354-1,* the Court held that two clerical/administrative employees of Washington fire districts did not have the requisite fire fighting duties to be eligible to participate in the RCW 41.24 pension system.

Under that statutory chapter, administered by the State Board for Volunteer Firefighters, relief benefits and pension benefits are made available to eligible "participants". The statute mandates (1) a person must be a "participant"; (2) and also a member of a fire department or law enforcement agency participating in the system; and (3) the person must have served honorably for ten years or more as an active member in any capacity. Essentially, the Court held, in a lengthy 5-4 opinion, that to be a participant one must have firefighting duties. It is not enough to be a member of a department, serving in a clerical or administrative capacity. The upshot of this decision is that any ineligible members who are in fact participating are entitled to recover their contributions together with interest.

The Court said this holding is consistent with their ruling in *City of Kennewick v. Board of Volunteer Firefighters,* 85 Wn. App. 366 (1997) wherein the Court of Appeals held volunteers who had been inactive for 13 years were ineligible. It is also consistent with *Campbell v. Board of Volunteer Firefighters,* 111 Wn. App. 413 (2002) wherein the Court of Appeals held that the firefighter who stopped being a responder and had minimal, primarily social contacts with the department was ineligible after he stopped having firefighter duties. In both of those holdings, it seemed implicit that they had actual firefighting duties when eligible and lost eligibility when they ceased having those duties. These cases seem to vindicate a policy of the Board that has become more and more evident over the last 10-15 years.

DISCLAIMER

CONGRATULATIONS

My concluding remarks this month will be well - deserved "congratulations" to Chief Al Church and the entire Federal Way Fire Department, which has just been re-rated by the Washington Surveying and Rating Bureau. Their new rating is a "2", which I believe is only shared in the whole State of Washington by the Cities of Seattle and Bellevue, so they are the first fire district to be so rated.

There is a success worth emulating for all fire districts or departments in the urban areas of the State. Let's face it—rural departments cannot attain ratings like that due to circumstances beyond their control.

Until next month, I would just say…don't forget to write.

Yours in service…Joe Quinn

P.S. But wait…turn the page for one more ad…