

**Health Care Law and
Employment Law
Update**

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Presented By:
Laura M. Dinon, Esq
ldinon@plunkettcooney.com
231-348-6417

Today's Presenter



Laura M. Dinon
(231) 348-6417
ldinon@plunkettcooney.com

**Recent Developments in
Health Care Law**

**Highlights of the 2014
Physician Fee Schedule Regs**

- **RVU Recalibration.** CMS adjusted the PE, work and malpractice RVU's assigned to a number of CPT codes which, along with the other changes implemented for 2014, result in projected payment increases/decreases for some specialties of up to 12%

2014 Fee Schedule Rates con

- **Cap at Hospital/ASC Facility Rate.** CMS proposed to cap the PE component of physician services at the rate paid to a hospital or ASC for the same service on the theory that physician offices should never be paid more than a facility for the same service.
- This change has been deferred for now.

2014 Fee Schedule Rates con

- **Misvalued Services.** CMS continues to review and validate the RVU's assigned to "potentially misvalued services," particularly those that have not been recalibrated in a number of years.
- CMS has contracted with outside organizations to develop RVU validation models, one to focus on the accuracy of physician time required to perform each service.

2014 Fee Schedule Rates con

- **New Chronic Care Management Service Payable As of January 1, 2015.** CMS will begin to pay for physician management of certain patients with multiple chronic conditions. The service does not entail a face to face encounter between the physician and patient.

2014 Fee Schedule Rates con

- **New Conditions to Payment for "Incident to" Services.** Medicare's physician payment regulations were amended to require compliance with state law as a condition to Medicare payment for services paid under the MPFS that are "incident to" the services of a physician.

2014 Fee Schedule Rates con

- **Value Based Payment.** CMS is implementing the statutory requirement that it develop a value-based modifier of the rates otherwise payable to physician's starting with a subset of physicians in 2015 and extending to all physicians by 2017.

Michigan Health Law Update

- **Hi-Lex Controls, Inc. v BCBS of Michigan** (ED Mich May 23, 2013). BCBS was ordered to pay \$5.1 million in restitution for hiding fees it collected as a third party administrator of a self insured health plan, in marked up hospital claims.
- **BCBS v Genesee County Road Commission and County of Midland v BCBS**, (Mich App 2013 cases) In both cases, the Michigan Court of Appeals affirmed BCBSM's practice of charging an access fee to self-insured health care customers.

Mich. Health Law Update con.

- **Business Corporation Act amended to Add Professional Services Corporation Act as Chapter 2A.**
- Now that the PSCA is a chapter of the BCA, changes to the BCA will automatically apply to the PSCA.
- Clarifies when a corporation must organize as a professional corporation as opposed to when it may organize as a professional corp.

Mich. Health Law Update con.

- **Mistalski v L & L Assocs., Inc.**(Mich App May 23, 2013) At-will employee who took a medical leave of absence was informed upon her return that her position would be shared with another employee but she would maintain same pay and benefits. She sued claiming Director of Nursing's alleged statement "you will have your job" created a separate contract. Ct held since she was offered a job with same duties and compensation, no new position was offered.

Mich. Health Law Update con.

- **Emergency Response; Do-Not-Resuscitate Orders; Authorize Guardians to Execute and Provide Other General Amendment**
- Amends MCL 333.1052 et seq. and adds Section 3a; MCL 400.704 and MCL 700.1103 et seq
- Amends Michigan's Do-Not-Resuscitate Procedure Act to:

Mich. Health Law Update con.

- Include a declarant's patient advocate among the individuals who must sign a declarant's do-not-resuscitate (DNR) Order;
- Allow a guardian with the power to execute a DNR order under the Estates and Protected Individuals Code to execute a DNR order for a ward
- Require a court to issue an injunction voiding a DNR if it finds it was entered contrary to the wishes of the declarant or the ward

Mich. Health Law Update con.

- Require that a writing prepared by a person who observed a declarant's revocation of a DNR order be delivered to the declarant's attending physician and if a patient of a facility, to the facility's administrator
- Allow a patient advocate or guardian to revoke a DNR order on behalf of a declarant; and
- Require that Void be written on every page of a revoked DNR order instead of destroying it.

Mich. Health Law Update con.

- Requires that a DNR order be accessible in an individual's residence and prohibits a first responder from resuscitating a person who has a DNR order
- Amends the Estates and Protected Individuals Code so that a guardian cannot execute a DNR order unless he or she has done the following:
 - Visited the ward within 14 days before

Mich. Health Law Update con.

- Executing the DNR order and, if meaningful communication was possible, consulted with the ward about executing the DNR order; and
- Consulted directly with the ward's attending physician as to the specific medical indications that warranted the DNR order.

Mich. Health Law Update con.

- **Biris v Ingham County Med Care Facility** – (Mich App May 9, 2013) –Plaintiff claimed the employer acted in retaliation for her support of a patient care investigation, when it required her to be examined by a health care provider prior to allowing her to return to work from a medical leave. Court found for the employer, as she never presented any evidence except the temporal proximity of the events, that the employer was motivated by retaliation.

Mich. Health Law Update con.

- **Falconer v Havenwyck Hospital, Inc.** (Mich App Mar 14, 2013)
Employee alleged that employer's understaffing of adult unit of psychiatric hospital was a dangerous condition sufficient to meet the intentional tort exception to the worker's compensation Act. Court held for the employer.

Mich. Health Law Update con.

- **Irwin v Ciena Health Care Management, Inc.** – (Mich App Oct 3, 2013) Nurse noticed an entry for discontinuing insulin in a patient's medication administration record but no physician's order. She investigated and found a valid order for insulin but no order to discontinue. Her supervisor ordered her to administer the insulin, she refused and came in at night and copied the chart. She was fired for insubordination.

Mich. Health Law Update con.

- She claimed she was terminated for refusing to provide care that potentially placed a patient's health at risk in violation of public policy. The court held that the public policy exception to at-will employment did not apply because administering the insulin was not a violation of the law since there was a prescription order for insulin.

Mich. Health Law Update con.

- **Medical Good Faith Provisions** (Effective September 10, 2013) Amends MCL 333.1101-333.25211 by adding Part 204.
- Amends the Public Health Code to add the "Medical Good-Faith Provisions Act" which requires health facilities or agencies, upon the request of a prospective or current patient or resident, to disclose in writing any policies related to a patient or the services he/she may receive involving life-sustaining or

Mich. Health Law Update con.

- non-beneficial treatment within that facility or agency.
- Requires that the health facility or agency disclose such policies to a parent or legal guardian upon request, for minors or wards.

Mich. Health Law Update con.

- **Amendment to Insurance Code**, 2013 P.A. 30
- Creates a workgroup to establish a uniform procedure for authorization for prescriptions
- Requires enactment of a new procedure by July 2016

HIPAA

- HIPAA covered entities are required to submit reports of certain breaches of unsecured protected health information (PHI) affecting fewer than 500 individuals to the Office for Civil Rights (OCR) on an annual basis no later than 60 days after the end of the calendar year in which the breach occurred.

HIPAA

- According to OCR the most common breaches are:
 - Impermissible uses and disclosures of PHI
 - Lack of safeguards for PHI
 - Lack of patient access to their PHI
 - Uses or disclosures of more than the minimum necessary PHI and
 - Lack of administrative safeguards for electronic PHI

HIPAA

- Covered entities should ensure their HIPAA compliance programs are effective, including:
 - Developing policies and procedures in all areas required by HIPAA/HITC
 - Periodically reviewing and revising policies and procedures to ensure that patient information is safeguarded
 - Developing appropriate training for all levels of employees and ensuring that

HIPAA

- that updated policies and procedures are distributed throughout the workforce
- Ensuring that senior leaders demonstrate a commitment to protecting patient privacy and foster a culture of compliance
- Establishing physical, technical and administrative safeguards to minimize the risk of inappropriate access to ePHI and

HIPAA

- Developing and consistently enforcing internal sanctions for workforce members that violate privacy policies and procedures

HIPAA

- Takeaways from enforcement cases:
 - Encrypt thumb and hard drives containing PHI
 - Erase leased equipment hard drives before turning it back in
 - Secure on-line data bases especially after technology changes/upgrades

HIPAA

- Develop protocols for responding to media inquiries
- Actively monitor systems to ensure that technical safeguards are functioning properly

Recent Developments in Employment Law

Proposed/Pending - Federal

- **Fair Pay Act of 2013** – require equal pay for equivalent jobs without regard to sex, race or national origin
- **Paycheck Fairness Act** – creates defenses to Equal Pay Act claims but make it easier for class actions to proceed
- **Employment Non-Discrimination Act** – would prohibit employment discrimination on the basis of actual or perceived sexual gender identify by employers.

Proposed/Pending - Federal

- **Pregnant Workers Fairness Act** – require employers to make reasonable accommodations for pregnant applicants and employees
- **Equal Employment for All Act** –prohibit use of credit report in employment decisions
- **Protecting Older Workers Against Discrimination Act** – make it easier to bring an age discrimination claim

Proposed/Pending - Federal

- **Family and Medical Leave Inclusion Act** – expand FMLA to domestic partners
- **Military Family Leave Act of 2013** – allow family members of persons called up for military service to take two work weeks per year for each family member called up.
- **Parental Bereavement Act of 2013** – allow 12 weeks FMLA for parents grieving the death of a child

Proposed/Pending - Federal

- **Healthy Families Act** – employers with 15 or more employees would have to give one hour of paid sick leave per 30 hours of work up to 56 hours of sick leave
- **Family and Medical Leave Insurance Act of 2013** – require employers to pay employees on FMLA for caregiving equal to 1/18th of their annual income

Proposed/Pending - Federal

- **Time Off to Vote Act** – require employers to provide up to 2 hours so employees could vote in federal elections
- Obama directive to DOL to revise exempt basis pay to ensure more employees are entitled to overtime
- **Fair Minimum Wage Act** – amend the FLSA to increase minimum wage over three years to \$10.10

Proposed/Pending - Federal

- **Working Families Flexibility Act of 2013** – allow private employers to provide comp time rather than pay overtime
- **Paid Vacation Act** – amend FLSA to require certain employers to provide one week vacation per year
- **Veterans Day Off Act** – require employers to give veterans, Veterans Day off.

Proposed/Pending - Federal

- **The Flexibility for Working Families Act** – essentially allow non union individual employees to negotiate with the employer!
