Hot Topics in Employment Law: Social Media; the Intersection of HIPAA and the NLRB; and Everyday Challenges

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Responsive 24/7

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Social Media

presented by Cynthia L. Effinger

Understanding the major sites:


Facebook: “I love cookies.” (social networking)

YouTube: “Watch me eat these cookies.” (video)


Twitter: “I should make cookies.” (microblog)


LinkedIn: “I own a cookie business.” (professional networking)


Foursquare: “This is where I’m eating cookies.” (check-in)


Pinterest: “Here’s a cookie recipe.” (boards)


Instagram: “Here’s a picture of cookies.” (photos)


Blog: “My personal experience with cookies.” (personal webpage)

Social Media Policies & Freedom of Speech

1)How many of you have a social media policy at your business?

2)How many of you have ever had to discipline an employee regarding social media?

Social Media Policies & Freedom of Speech

PUBLIC EMPLOYERS (Government hospitals or other government programs)	PRIVATE EMPLOYERS (Adult Day Service Providers)
Protected by 1st amendment	No constitutional duty, but subject to NLRB & state law
Right to speak on matters of "public concern & interest", but balanced against employer's right to avoid disruption & efficiency	NLRA allows for employees to communicate in "concerted manner" w/ respect to "terms & conditions" of employment
Speech made pursuant to official duties is not protected; not acting as a citizen	Can have discussions for the employees' "mutual aid"

Social Media Policies & Freedom of Speech

The National Labor Relations Act ("NLRA") protects union activity.

In addition, it also provides protection to "other concerted activities" for purposes of "mutual aid or protection."

Social Media Policies & Freedom of Speech

What is "concerted activity"?

- Engaged in with or on the authority of other employees, not solely by and on behalf of the employee himself (i.e., personal lamenting/griping is not protected).
- Individual action "seeking to initiate or to induce or to prepare for group action."
- Individual action "bringing truly group complaints to the attention of management."

Social Media Policies & Freedom of Speech

How does this NLRB standard apply to social media? Do we even know what "speech" on social media is?

Social Media Policies & Freedom of Speech

The National Labor Relations Board ("NLRB") is heavily scrutinizing employers' social media policies.

- May 30, 2012: NLRB's 3rd operational memorandum on the use of social media in the workplace issued. Report includes details about 6 policies that they considered unlawful because they were overbroad and only 1 that was found to be lawful under the Act.

Social Media Policies & Freedom of Speech

Provisions found to be unlawful in the 3rd memorandum:

"Don't release confidential guest, team member or company information."

"…you must also be sure that your posts are completely accurate and not misleading and that they do no reveal non-public company information on any public site." (financial information of the company, personal information about another employee, such as their performance)

Prohibiting generally the posting of photos, music, videos, quotes, and personal information of others without obtaining the owner's permission, and from using the employer's logo or trademarks even for non-commercial use.

Social Media Policies & Freedom of Speech

"Offensive, demeaning, abusive or inappropriate remarks…"

"Think carefully about 'friending' coworkers…"

"Report any unusual or inappropriate internal social media activity to the system administrator."

"Don't comment on any legal matters, including pending litigation or disputes."

"Don't make any comments about [employer's] customers, suppliers, or competitors that might be considered defamatory."

"…avoid harming the image and integrity of the company."

Social Media Policies & Freedom of Speech

What about if you include a "savings clause" in your contract?

Example:
"National Labor Relations Act. This policy will not be construed or applied in a manner that improperly interferes with employees' rights under the National Labor Relations Act."

Does this remedy any unlawful provisions?
Yes or No (show of hands)

Social Media Policies & Freedom of Speech

No! A savings clause is not enough – "employees would not understand from this disclaimer that protected activities are in fact permitted."

So, what is considered lawful in the memorandum?

Social Media Policies & Freedom of Speech

"…harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online…"

"No unauthorized postings: users may not post anything on the Internet in the name of [employer] or in a manner that could reasonably be attributed to [employer] without prior written authorization from the President or President's designated agent."

"…any opinion or statement as the policy or view of the [employer] or of any individual in their capacity as an employee or otherwise on behalf of [employer]."

"Maintain the confidentiality of [employer] trade secretes and private or confidential information."

Social Media Policies & Freedom of Speech

A few things you (seemingly) can prohibit:

Threats of violence

Unlawful discrimination or harassment

Disclosing trade secrets

Falsely impersonating as someone else in the company

Social Media Policies & Freedom of Speech

Takeaway from the 2012 memorandum:

The opinions of what is lawful and unlawful are not law! It remains to be seen to what extent courts will support NLRB's interpretations on social media policies. However, the NLRB is making this a top enforcement priority and employers should proceed with extreme caution when drafting policies.

Social Media Policies & Freedom of Speech

Best Practices

1) Do not use blanket restrictions in your social media policy (i.e., "Do not discuss company matters online" or "Refrain from talking negatively about coworkers.").

2) Do address specific issues. For example, state that no trade secrets may be posted or ban coworkers from making threats to coworkers on social media.

3) Never ask for an employee's social media passwords!

4) Be consistent in enforcement to avoid a discrimination claim.

Social Media in Health Care

Social media has many important uses in the industry for both providers and patients, but it can be a legal landmine.

"I don't know which doctor to choose. One has more friends on Facebook, but the other one just retweeted my message."

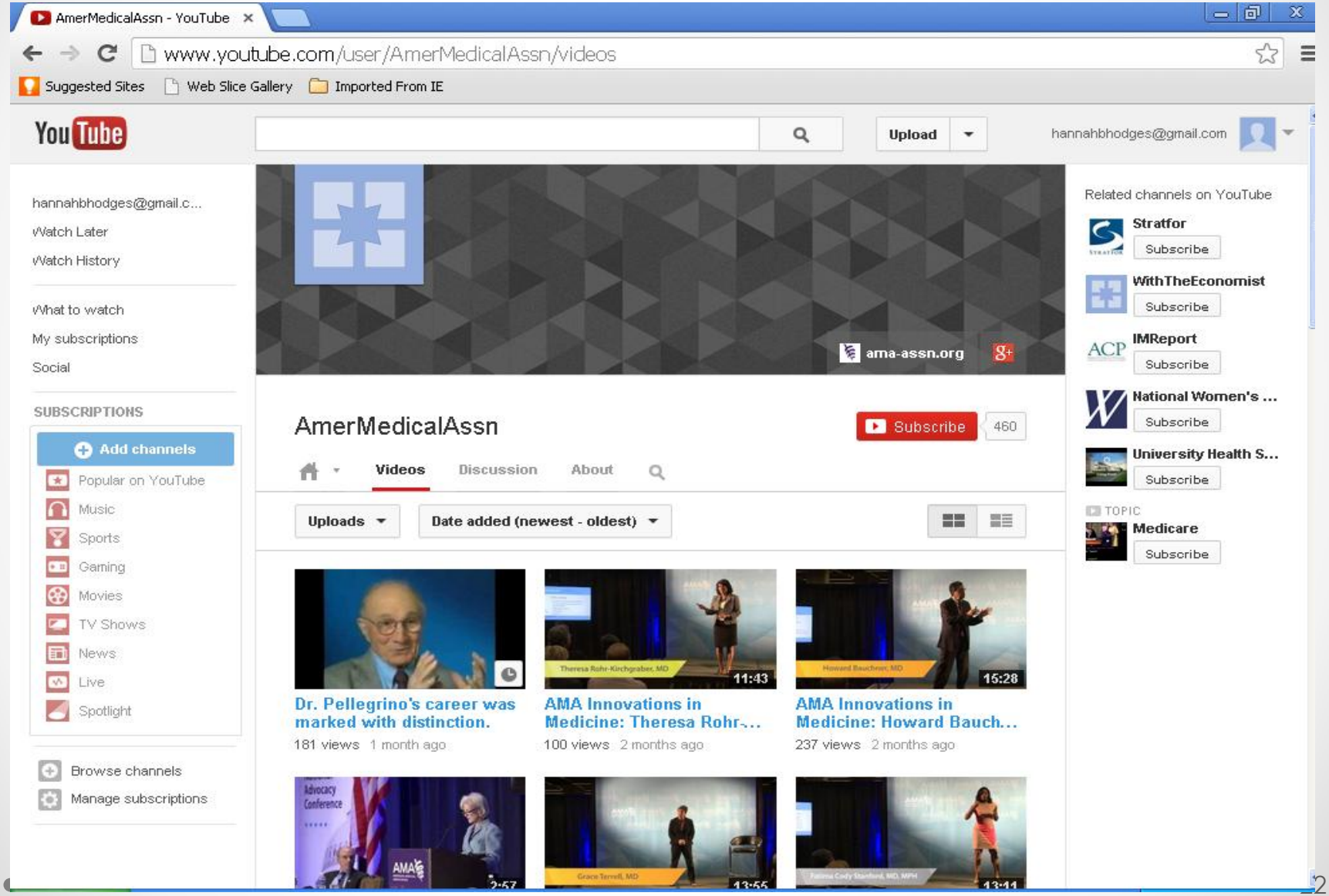
Social Media in Health Care

Uses for PROVIDERS	Uses for PATIENTS
Increase brand awareness • "Sharing Mayo Clinic" blog • LinkedIn • Twitterdoctors.net • Introducing yourself through video	**Health & wellness information , connect with other patients** • WebMD Community • "Sharing Mayo Clinic" blog
Professional training and connecting with other physicians • Sermo, Ozmosis allow physicians to submit cases for community discussion • Doximity—private network for physicians	**Finding a provider or a treatment plan** • FacetoFace Health • Healthgrades.com
Making public announcements/campaigns • CDC uses Facebook and other platforms to inform public of flu outbreaks	**Personal health records** • PatientsLikeMe • MedHelp

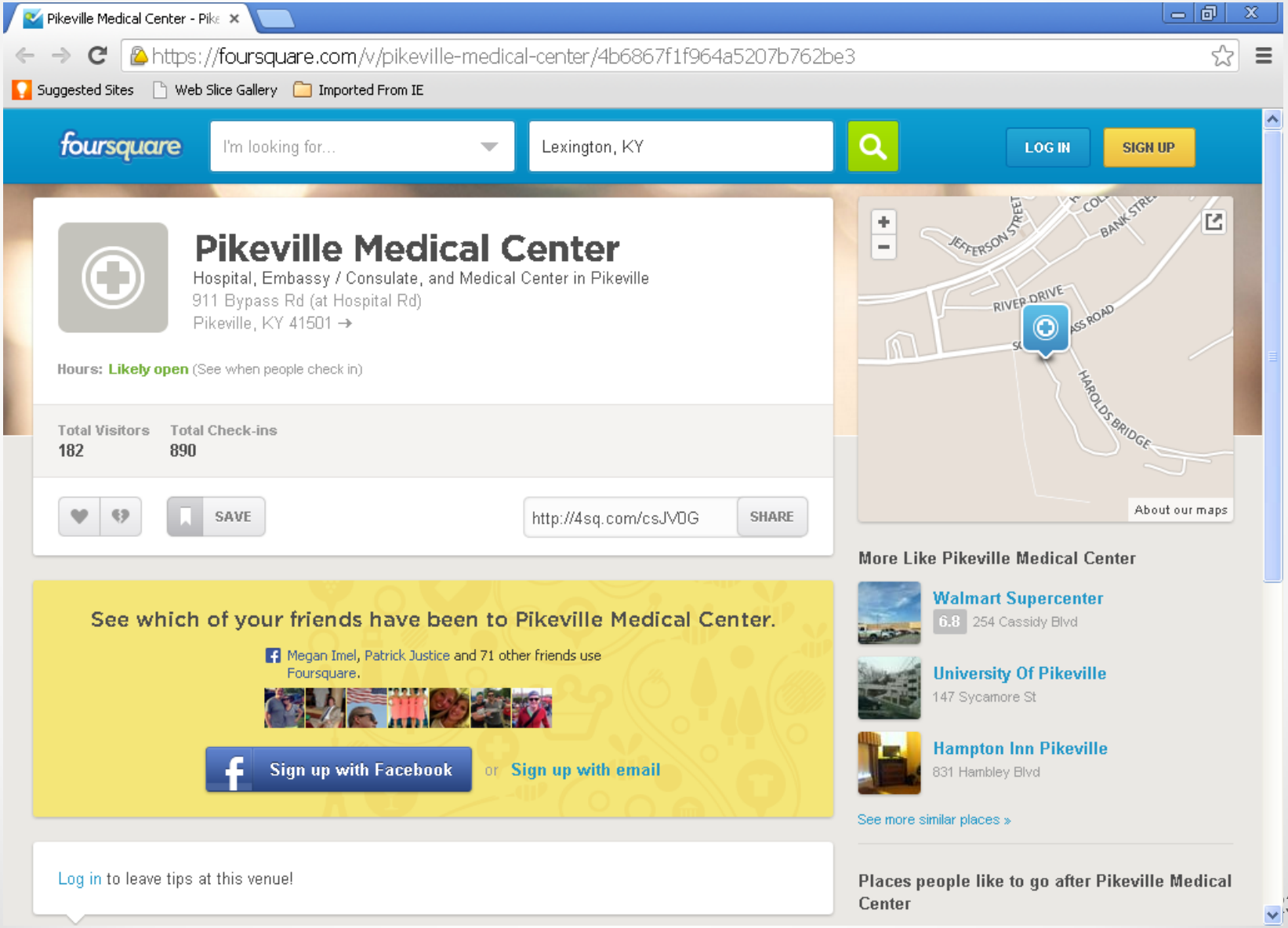
Social Media in Health Care

Social Media in Health Care

Social Media in Health Care



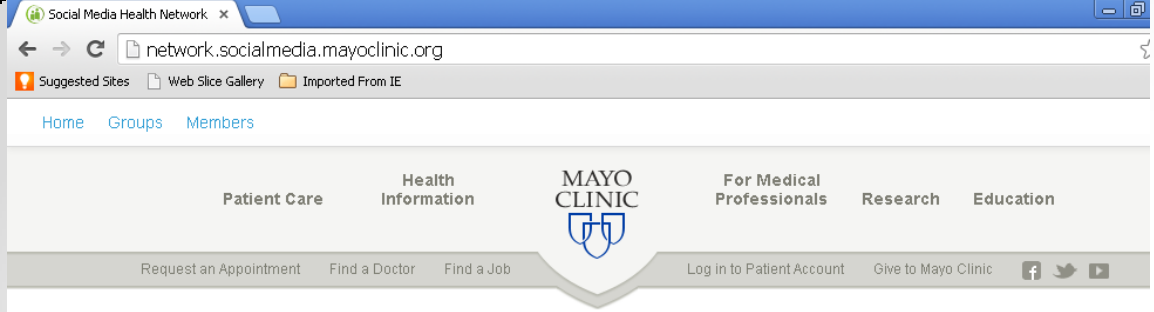
Social Media in Health Care

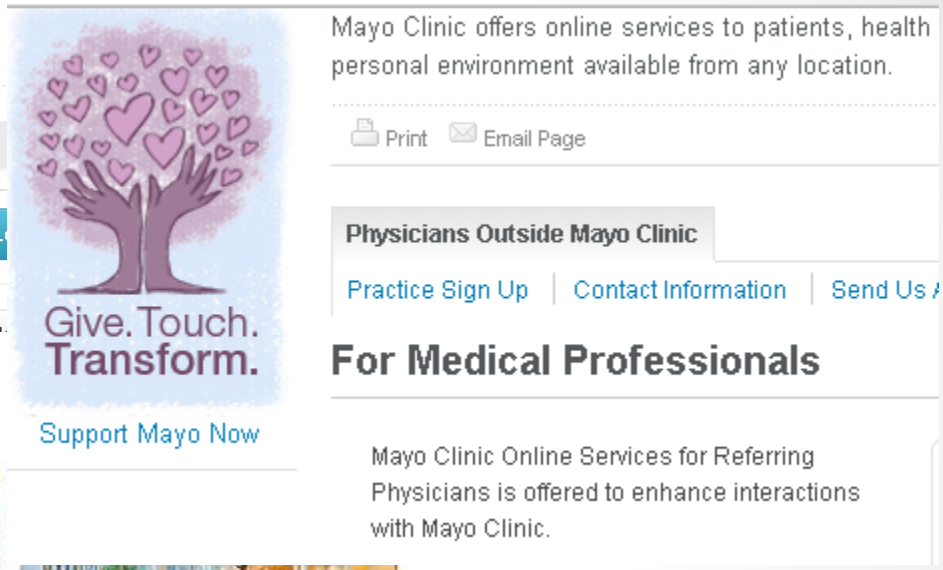


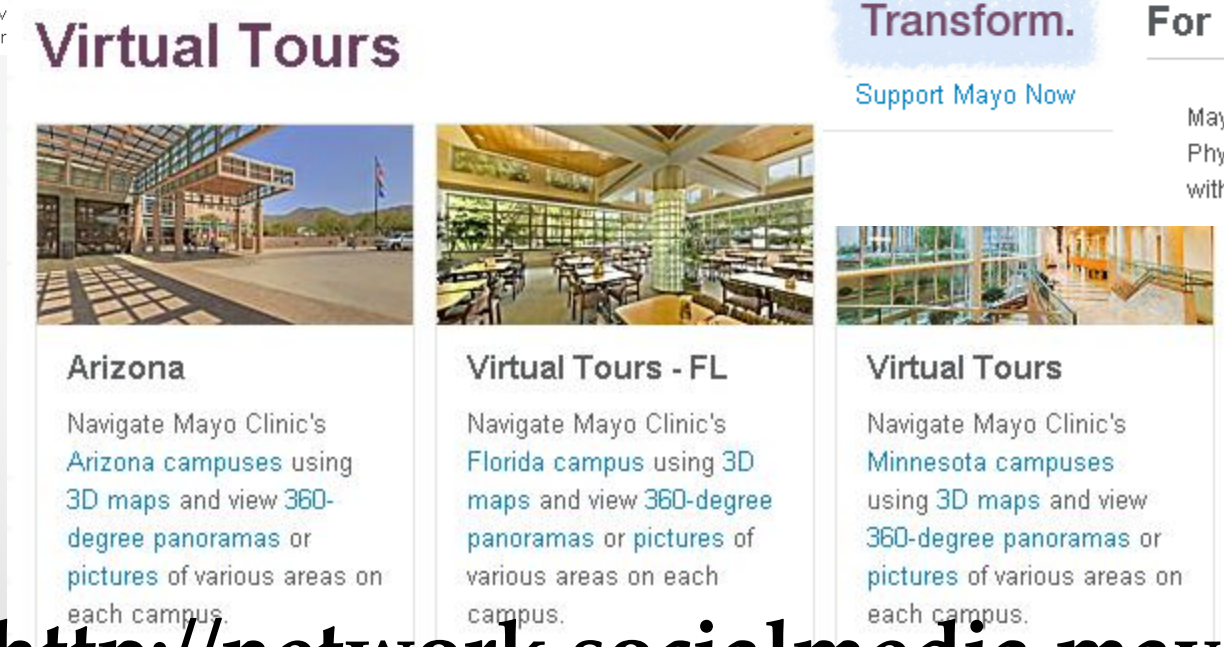
Social Media in Health Care

Getting it right: The Mayo Clinic Center for Social Media

- Gold standard for use of social media by health care organizations.
- Entire center dedicated to social media—facilitating use of SM for other hospitals, professionals, and patients.
- Most popular medical provider channel on YouTube and more than 550,000 “followers” on Twitter, as well as an active Facebook page with over 380,000 connections.
- News Blog, Podcast Blog, and *Sharing Mayo Clinic*, a blog that enables patients and employees to tell their Mayo Clinic stories.
- Mayo has also used social media tools for internal communications, beginning in 2008 with a blog to promote employee conversations relating to the organization's strategic plan, and including innovative use of video and a hybrid "insider" newsletter/blog.







http://network.socialmedia.mayoclinic.org/

Social Media in Health Care

How To Make It Work For You:

Define your goals (more clients, wider understanding of services, name recognition, engage patients on a more personal level).

Determine the time you are willing to dedicate (SM is 24/7). What are your staff's capabilities and how open are they to SM?

Get executive support – everyone has to be on board to make SM successful.

Appoint a SM spokesperson who understands SM outlets and the company's message.

Determine your message and create a unified image across all sites.

Social Media in Health Care

How To Make It Work For You:

Don't expect results overnight…it takes time to establish an online presence. You must post consistently and make posts relevant.

- Measuring progress and results can be achieved through tools. Some are free and some are fee based: HubSpot, Website Grader, Twitter Grader, Facebook Grader, Facebook Insights, Unilyzer, Raven, Hootsuite, SocialOomph, Manage Flitter, Google Alerts, Google Trends, Social Mention.

- Once a SM presence is established, it has to be monitored! Don't underestimate power of one negative post. Must react quickly, but professionally. Have a crisis plan in place!

How to *not* handle a social media crisis:

Amy's Baking Company Bakery Boutique & Bistro · 15,092
like this
21 hours ago ·
Like

This is Samy. I am keeping note of all names here. We will be pursuing action against you legaly, and against reddit and yelp, for this plot you have come together on. you are all just punks.

Like · Comment · Share 56

Amy's Baking Company Bakery Boutique & Bistro · 15,133
like this
21 hours ago ·
Like

WE ARE NOT FREAKING OUT. WE DO NOT CARE ABOUT A "WITCH HUNT" I AM NOT A WITCH. I AM GODS CHILD. PISS OFF ALL OF YOU. FUCK REDDITS, FUCK YELP AND FUCK ALL OF YOU. BRING IT. WE WILL FIGHT BACK.

Like · Comment · Share 117

Amy's Baking Company Bakery Boutique & Bistro · 15,155
like this
19 hours ago ·
Like

You people are all shit. Yelp shit, Reddits shit. Every shit. Come to here, I will fucking show you all.

Like · Comment · Share 245

Amy's Baking Company Bakery Boutique & Bistro · 15,157
like this
19 hours ago ·
Like

You are all little punks. Nothing. you are all nothing. We are laughing at you. All of you, just fools. We have God on our side, you just have your sites.

Like · Comment · Share 395

Courtney Nush Are you taking reservations for lunch tomorrow?
Like · Reply · 2,027 · 20 hours ago via mobile

Hide 116 Replies

Amy's Baking Company Bakery Boutique & Bistro WE DONT LET SLUTTY BITCHES LIKE YOU HERE.
Like · 416 · 20 hours ago

EXPAND

Social Media in Health Care

How To Make It Work For You:

Ownership Concerns:

- Include provision in your social media policy that all accounts are the exclusive property of the company.

- Designate one person in charge of accounts, but have set passwords that are known to the owner or manager of the business.

- Include statement on all social media accounts that the account is the property of the company and does not express the views or opinions of any individual.

- Plan for what will happen to the social media accounts in the event the company breaks up by including provision in the Operating Agreement.

Social Media in Health Care

Getting it wrong…

- A nurse who posted a patient's picture and chart on his Facebook page because he thought it was "funny" and since it was "only Facebook," there was no real harm in it.
- Emergency room personnel who posted pictures on the Internet of a man being treated for fatal knife wounds.
- A doctor who asked a patient on a date after seeing her profile on a dating website.
- A Rhode Island doctor was fired from the hospital and reprimanded by the Medical Board after she posted on her Facebook page about a long day at work. She never referred to the patient's name but gave out enough details about the injuries to allow others to guess who it was.

Social Media in Health Care

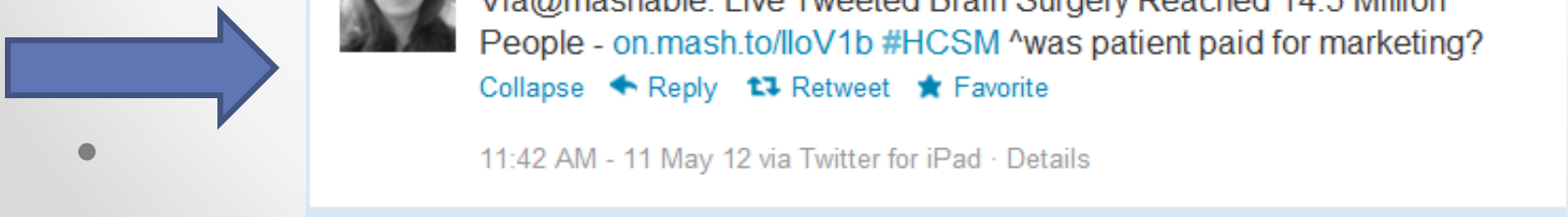
1)How many of you know of an instance when someone has made an inappropriate health-care related post on social media?

2)Did you ask them to remove it? Did you report it?

Social Media in Health Care

Liability & Risks When Using Social Media

- HIPAA Privacy and Security rules
- Professional responsibility codes (professional society codes of ethics)
- State regulations promulgated by boards of registration in medicine
- Malpractice liability for professional advice rendered via social media
- Federal Trade Commission liability under rules for failure to disclose a financial relationship in conjunction with an online rating, review or other commentary



Social Media in Health Care

Use of social networking sites can result in HIPAA violations, even if the user had *no* intention of exposing private information.

- Nurses using Facebook to talk about shift change updates—providing general patient information so that nurses can prepare for the shifts.
- Posting a picture online of an unusual medical condition, even if the person cannot be readily identified from the picture.
- Tweeting about a patient who is a no-show during a certain appointment time.

Social Media in Health Care

State medical boards can discipline physicians for:

- Online misrepresentation of credentials
- Online violations of confidentiality
- Failure to reveal conflicts of interest online
- Depiction of intoxication (ie, pictures)
- Discriminatory language
- Derogatory remarks about a patient

Social Media in Health Care

Social media moves faster than we can prepare for, but some are trying to find ways to make it compliant with existing regulations and standards.

For example, Novarus Healthcare, a mobile solution development company, is developing a confidential and proprietary mobile technology platform that proactively monitors social media sites for HIPAA violations to allow providers to meet the developing challenges presented by the use of SM. ***But until then…***

Social Media in Health Care

You MUST Have a Social Media Policy!

Resources:

Federation of State Medical Boards: Guidelines for Appropriate Use of Social Media (April 2012)

- http://www.fsmb.org/pdf/pub-social-media-guidelines.pdf

AMA Policy: Professionalism in Use of Social Media

- http:www.ama-assn.org/ama/pub/meeting/professionalism-social-media.shtml

A Scenario

Great Care Hospital has its own webpage, www.greatcarehospital.com. They have a Patient Connect page where patients can write about the care they received while at the hospital. One patient doesn't write about her experience, but instead asks, "Is it okay for pregnant women to go swimming? I'm a patient of Dr. Tech-Saavy."

Dr. Tech-Saavy is alerted to the question and responds to the comment on the site by advising, "I would not recommend it since you have low placenta and are so close to your due date. Also, accidental swallowing of chlorine water can be fatal."

A Scenario

Nurse Duh sees Dr. Tech-Saavy's comment on the hospital webpage. She does not suggest he remove the comment, but instead replays the incident on her own Facebook. She writes, "Dr. Tech-Saavy is an idiot! No wonder he has been sued for malpractice three times! As the staff relations advisor, it is my recommendation that Dr. Tech-Saavy be fired. If he's not, I am going to punch him in the face next time I see him making his rounds! Not only is he stupid, he's also horrible to us nurses and never provides the correct information about patients."

Nurse Duh is ***not*** the staff relations advisor and she has no say in who is fired at the hospital.

Nurse Geez sees Nurse Duh's post and writes, "Haha! I agree, he's the worst! What time is your ER shift over? Is Old Wheezy Man still there? I can't handle his whining any more tonight!"

A Scenario

Nurse Duh's Facebook profile picture is a picture that 'Old Wheezy Man' (a 80-year old patient suffering from emphysema) took on his Iphone. Nurse Duh is his favorite nurse and he wanted a picture with her, but there are also other patients in the background who were unknowingly photographed.

Dr. Tech-Saavy gets wind of the Facebook post (even though it's a private account) and fires Nurses Duh and Geez for making negative comments about hospital employees.

Discuss the implications.

- Freedom of speech concerns? "Concerted activity?"
- Privacy concerns? Bad medical advice?
- Photographs by patients? What can you do about them?
- Should Dr. Tech-Saavy have responded at all to the comment? If so, how?

Questions?

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Classifying Workers

presented by Jaron P. Blandford

Classifying Workers

2012:

7,064 FLSA cases filed (record high)

DOL's Wage & Hour Division collected highest level of back wages ever owed to employees ($280 million)

Increasingly more likely to be sued for wage-hour violations than any other employment claim

Classifying Workers

Why these claims are so dangerous:

1)Wage-hour mistakes can be replicated many times over, leading to numerous claims or a potential collective action.

2) Ill intent does not have to be proved by Plaintiff…if you did not comply with the law, you're in trouble.

3) Penalties are steep.

Under federal law, an employer that fails to pay overtime is liable for (1) at least 2 years of back wages, 3 years if the violation is willful (2) liquidated damages that often equal to amount of back pay, and (3)employee's attorney fees & costs.

Classifying Workers

3 Common Misclassification Mistakes:

1) Misclassifying employees as exempt from overtime pay.

2) Misclassifying workers as "independent contractors" rather than employees.

3) Misclassifying workers as unpaid "interns" or "volunteers" rather than paid employees.

Classifying Workers

Is the employee entitled to overtime?

Under the Fair Labor Standards Act ("FLSA") and most state laws, certain employees ***must*** be paid time-and-a half their regular rate of pay for any hours worked over 40 hours per workweek.

Burden on employer to show that exemption applies.

- Title does not matter ("manager" or "supervisor")
- Expected or assumed job duties matter very little

Exemption is determined by (1) which duties the employee *actually* performs; and (2) in many cases, whether employee is paid on a salary basis.

Remember, if the state has its own overtime laws, employer must meet both requirements to avoid overtime liability.

Classifying Workers

Is the employee entitled to overtime?

Common exemptions:

1. **Executive**
   a. employee's primary duty is management of the enterprise in which the employee is employed, or of a customarily recognized department or subdivision thereof; *and*
   b. the employee customarily and regularly directs the work of 2 or more other full-time employees; *and*
   c. The employee has the authority to hire/fire other employees, or the employee's suggestions and recommendations on hiring/firing/promotion/status change are given particular weight.

Classifying Workers

Is the employee entitled to overtime?

Common exemptions:

2. Administrative

a. Employee's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; *and*

b. the employee's primary duty includes the exercise of discretion and independent judgment respecting matters of significance.

Classifying Workers

Is the employee entitled to overtime?

Common exemptions:

3. Professional

a. Employee's primary duty is the performance of work requiring knowledge of an advanced type (defined as predominately intellectual in character & requires the consistent exercise of discretion & judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; *or*

b. Employee's primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Classifying Workers

Is the employee entitled to overtime?

Executive, administrative and professional all require that the employee is paid on a "salary basis."

- Regularly receives each pay period on weekly or less frequent basis;
- Predetermined amount (of at least $455 per week) constituting all or part of employee's compensation;
- Which amount is not subject to reduction because of variations in the quality/quantity of the work performed.

Classifying Workers

Is the employee entitled to overtime?

Very limited number of reasons why employers can deduct a portion of an exempt employee's salary. Some allowable reasons for reduction are:

- Full-day absences for personal reasons, other than sickness or disability;
- Partial and full-day absences taken under the Family Medical Leave Act;
- Good-faith, full-day disciplinary suspensions for violating written workplace conduct rules.

Classifying Workers

Employee versus independent contractor

Most wage-hour laws apply only to "employees." But defining "employee" is not always an easy task and it can be easily confused with contractors.

- FLSA "Economic Reality" test
- IRS Independent Contractor test

Classifying Workers

Employee versus independent contractor

FLSA Economic Reality Test

- Totality of the circumstances.

  - Degree of control;
  - Investment in facilities;
  - Opportunity for profit and loss;
  - Permanency of the relationship; and,
  - Required skill

  - Some courts add 6th factor: whether the services rendered are an integral part of the alleged employer's business.

Classifying Workers

Paid employee versus unpaid intern

Interns = FLSA "trainees"

Limited circumstances where one may work for another, without compensation, solely for his or her own advantage.

Classifying Workers

Paid employee versus unpaid intern

The Six Factor Intern Test (*all* factors must be met, or the intern will be viewed as an employee):

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. The training is for the benefit of the trainee;
3. The trainees do not displace regular employees, but work under close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees; on occasion its operation may actually be impeded;
5. The trainees are not necessarily entitled to a job at the completion of the training period; *and*
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent training.

Classifying Workers

Paid employee versus unpaid intern

Individuals may not "volunteer" services to private sector for-profit employers! Any individual providing voluntary services for such an employer must be recognized as an intern/trainee.

Workplace Investigations

Workplace Investigations

Employee complaints constitute a significant liability risk for employers. A prompt and thorough investigation is not only a business imperative, but also a legal requirement in many instances.

Conducting workplace investigations at the first sign of trouble not only should stop improper behavior, but also serve as a deterrent for future occurrences.

Investigations can provide employers with an effective defense to litigation.

Workplace Investigations

The 7 steps to proper workplace investigations

Step 1: Effective policies in place

- Anti-harassment, anti-retaliation, standards of conduct, equal employment opportunity, reporting and investigation procedures.
- Ensure the policies are understood and used by periodically training managers and employees.

Workplace Investigations

The 7 steps to proper workplace investigations

Step 2: Responding to a complaint

The law does not mandate certain procedures for effective investigation, but they should be conducted in an objectively fair manner. Consider:

- Purpose
- Objective
- Scope

Is immediate action needed or can the status quo remain in place (ie, workplace violence or a lesser issue?)

Workplace Investigations

The 7 steps to proper workplace investigations

Step 3: Determining who should conduct investigation

- ***Must*** be impartial, know company policies, culture, operations, etc., respect privacy of those involved, and be someone who employer would be comfortable with becoming a witness in future litigation
- Manager, human resources specialist, private investigator, outside consultant, legal team
- Consider the nature of the investigation (will a female employee who is alleging sexual harassment feel more comfortable with a female investigator?)
- Team approach is sometimes better than selecting one individual

Workplace Investigations

The 7 steps to proper workplace investigations

Step 4: Evidence gathering

This should start as soon as employer becomes aware of credible allegations.

May need to collect personnel files, electronic files, prior complaints, organizational charts, emails, texts and voicemail messages…even social media messages (but be careful!).

Do you need to issue a litigation hold so as to preserve evidence?

Workplace Investigations

The 7 steps to proper workplace investigations

Step 5: Interviews

Complainant should generally be interviewed first. Alleged bad actor should be interviewed immediately, or soon after, to avoid perception of unfairness.

Consider location. Generally should be at employer's site, but may need to be held off-site to protect confidentiality. But, consider whether you can ask employees to not discuss investigation…

Workplace Investigations

The 7 steps to proper workplace investigations

Banner Estrella Medical Center, 358 NLRB No. 93 (2012):

Human resources consultant routinely asked employees who filed internal, work-related complaints to not discuss complaints with co-workers while investigation was ongoing. An employee who received this request filed an unfair labor charge with NLRB.

NLRB held that the employer violated Section 7 of the NLRA (right of employees to engage in "concerted activity" w/ respect to terms and conditions of their employment).

In order to show a legitimate business justification favoring confidentiality that outweighed employees' Section 7 rights, an employer must identify a specific need to: (1) protect witnesses (2) avoid evidence spoliation (3) avoid fabrication of testimony, or (4) prevent a cover up before instructing employees to maintain confidentiality.

Workplace Investigations

The 7 steps to proper workplace investigations

Step 6: Documentation

- Written notes, audio recordings, or court reporter.
- Notes should contain facts – not impressions or conclusions of the interviewer.
- Assume all documents will be discoverable!

Workplace Investigations

The 7 steps to proper workplace investigations

Step 7: Communicating outcome

- Only complainant and alleged bad actor need to know outcome; detailed information should only be shared on a "need to know" basis.
- Monitoring the work environment and some sort of corrective action (even if complaint is not substantiated) may be needed.
- Be sure to apply uniform & consistent treatment for similar violations. Be prepared to justify any differing treatment.

GINA

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GINA

"Genetic Information Nondisclosure Act"

- Passed by Congress in 2008; took effect in November 2009.
- Enforced by the Equal Employment Opportunity Commission.
- Makes it an unlawful employment practice for employers to "request, require, or purchase" an individual's genetic information. Genetic information is defined broadly and includes the "manifestation of a disease or disorder" in an individual or his or her family members, in addition to more standard concepts like the results of genetic tests.

GINA

On December 17, 2012, the EEOC approved its Strategic Enforcement Plan for Fiscal Years 2012 through 2016. In the Plan, the EEOC identified six national priorities, one of which was targeting genetic discrimination. EEOC has stayed true to its word…

GINA

On May 14, 2013, the EEOC settled its claims against a fabric company, Fabricut, Inc. for $50,000 and injunctive relief. The EEOC had sued Fabricut, Inc. on behalf of a temporary employee who had been denied a permanent position following a post-offer, pre-employment medical examination during which she was asked about her family medical history in a questionnaire.

GINA

One week after settling the Fabricut case, the EEOC filed another GINA suit against Founders Pavilion (a long-term care facility). Again, a potential employer inquired into the family medical history of a prospective employee. This again occurred in the pre-employment physical. In addition, questions were asked of current employees during annual required medical exams.

Allegedly, Founders Pavilion used this information in a way that violated other acts, such as the American with Disabilities Act and Title VII (i.e., refusal to hire a job applicant because she was pregnant and failure to accommodate CNAs with work disabilities).

GINA

Takeaway

It appears that the EEOC believes any inquiry into family medical status or conditions will be a direct GINA violation. Employers should immediately review processes for pre-employment or physical exams to make sure no questions are asked regarding family medical history. Many current forms include sections inquiring about family health ("Do either of your parents have a history of cancer, heart disease, high blood pressure, etc."); these questions should be eliminated.

Supreme Court Decisions

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Supreme Court Decisions

On June 24, 2013, the United States Supreme Court issued a very important ruling that weighs in favor of employers. *Vance v. Ball State University* centered on employers' liability for workplace harassment.

Supreme Court Decisions

Background:

The Supreme Court held many years ago that, under Title VII of the 1964 Civil Rights Act, employers can be held liable for the acts of "supervisors" who harass subordinate employees.

If harassment is by a "supervisor":

Tangible employment action (hiring/firing) = strict liability for employer

No tangible action = still a presumption that the employer is liable for the "supervisor's" harassing actions, which can only be disproved by establishing an affirmative defense that :

(1) the employer exercised reasonable care to prevent and correct any harassing behavior, and

(2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

Supreme Court Decisions

If the harasser is a co-worker:

Employers may only be held liable for the harasser's actions if the plaintiff shows that he/she:

(1) gave the employer notice of the alleged harassment, and

(2) that despite such notice, the employer was negligent in controlling workplace conditions

Supervisor v. Co-worker = big difference for employer liability standards…but what is a "supervisor?"

Supreme Court Decisions

Various definitions of "supervisor" used by courts, until the Supreme Court decided *Vance*.

- Maetta Vance was employed as a catering assistant at Ball State University ("BSU").
- Over the course of two years, Vance submitted several complaints, both to BSU and the EEOC alleging discrimination and racial harassment. The majority of her complaints stemmed from incidents involving BSU employee Saundra Davis, a catering specialist. It was stipulated by both parties that Davis did not have authority to "hire, fire, demote, promote, transfer, or discipline" Vance. But exact nature of work relationship disputed by parties.

Supreme Court Decisions

- The district court held, and the Seventh Circuit affirmed, that BSU could not be held vicariously liable for Davis' alleged harassment because Davis was not a "supervisor" under the Seventh Circuit's "hire, fire, demote, promote, transfer, or discipline" framework.

- Davis was merely a co-worker, so the less stringent negligence standard applied and BSU could only be held liable if Vance could show BSU was negligent in discovering or remedying the harassment.

- Vance could not satisfy this standard, as the evidence showed that BSU had reacted and responded to the complaints in a reasonable manner.

Supreme Court Decisions

Vance (plaintiff): "supervisor" is someone who has authority to control someone else's daily activities and evaluate their performance.

EEOC: "supervisor" is someone who has the ability to exercise significant direction over another's daily work.

BSU (defendant): "supervisor" should only include those individuals who possess more power, such as the ability to hire, fire, or promote.

Supreme Court Decisions

In a 5-4 decision, the United States Supreme Court held that an employee is considered a "supervisor" ***only*** if he or she is empowered by the employer to take "tangible employment actions" against the employee.

"A supervisor must be able to 'effect a significant change in employment status', such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

Supreme Court Decisions

Takeaway

Employers should review their anti-harassment policies and procedures for investigating claims. Job definitions should be clearly defined and employers should definitively decide what employees are empowered to take *"tangible employment actions"* against other employees.

Supreme Court Decisions

On June 25, 2013, the Supreme Court, in the second big win for employers, clarified what standard employees must meet to successfully pursue a retaliation claim under Title VII of the Civil Rights Act of 1964. The case is *University of Texas Southwestern Medical Center v. Nassar.*

Supreme Court Decisions

In the Civil Rights Act of 1991, Congress had amended Title VII to say that an employee could establish a *discrimination* claim by merely demonstrating that race, color, religions, sex or national origin was a "motivating factor" in any adverse employment action. It said nothing about retaliation claims.

Plaintiff, Nassar, was hired by the University of Texas Southwestern Medical Center ("UTSW"), but resigned after one of his supervisors allegedly made remarks about his productivity and national origin. He then sought a job at another hospital, but that hospital withdrew its job offer to Nassar after one of his former UTSW supervisors opposed the hire. Nassar then sued UTSW, alleging discrimination and retaliation.

Supreme Court Decisions

A jury found for Nassar on both claims, but UTSW appealed to the U.S. Court of Appeals for the Fifth Circuit. At the appellate level, it was concluded that the evidence of discrimination was insufficient, but that there was enough evidence to prove retaliation was a "motivating factor" for UTSW's alleged action of discouraging another hospital from hiring Nassar.

UTSW appealed to Supreme Court, asking what standard of proof applies in Title VII retaliation cases?

Supreme Court Decisions

The Supreme Court held that the "motivating factor" standard only applies to claims of discrimination, not retaliation claims. Thus, ***retaliation claims are still subject to the traditional "but for" causation standard, a tougher burden of proof for plaintiffs.*** In other words, a plaintiff must prove that "but for" the fact that he or she alleged harassment/discrimination (by filing a claim, lodging a complaint, etc.), his or her employer would not have taken an adverse employment action.

Supreme Court Decisions

Takeaway

Always document any reasons that certain actions are being taken against employees so that they can be presented in the event a discrimination or retaliation case arises. The 'but for' standard should make it harder for employees to prevail on retaliation claims.

A Scenario

Tina was made an offer to work at an adult day center as a cafeteria worker. Post offer, the employer made her undergo a medical exam. This exam was not done on the employer's premises, but at a medical office. The employer did not know the physician conducting the exam and had only given instructions for the physician's office to conduct a routine medical exam.

The physician's form asked if anyone in Tina's family was obese. She indicated both her mother and father were. While Tina herself was not clinically obese, she was overweight. Tina was subsequently given the job in the cafeteria.

A few months later, after putting on a few pounds because of an unrelated knee injury, the employer expressed his concern with Tina's "health" and said she should get more exercise. The employer demoted her to an activities department position.

Discuss the implications.

Questions?

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HIPAA & HITECH

presented by Lisa English Hinkle

"We all deal with it differently."

HIPAA & HITECH

The HIPAA final omnibus rule, in accordance with the HITECH Act of 2009, was issued on January 17, 2013. It became effective on March 26, 2013.

Provisions are important for entire health care industry, but let's focus on how they impact ***employers.***

HIPAA & HITECH

A group health plan sponsored by an employer is a covered entity under HIPAA. The HIPAA Privacy, Security, Breach Reporting and Enforcement Rules protect personal health information ("PHI") that is received, used, maintained or created by the group health plan as a HIPAA-covered entity. Thus, an employer must comply with HIPAA obligations if he is acting as the sponsor and/or administrator of a group health plan.

PHI = all information, including demographic, used or transmitted by a group health plan or business associate of a group health plan that identifies an individual or could be used to reasonably identify an individual and which relates to:

1) physical / mental condition;
2) health care provision for the individual; or,
3) payment related to health care provision.

HIPAA & HITECH

PHI: employee's enrollment status in a group health plan; information contained on explanation of benefits statements ("EOBs") provided by insurers to plan participants.

NOT PHI: information received because of your role as an employer (not the plan sponsor or administrator) , such as medical information related to an employee's leave of absence.

HIPAA & HITECH

As a plan administrator and / or sponsor, you have to communicate and contract with third parties to provide services to the group health plan. These third parties may be insurance companies, or consultants, or legal counsel. Upon receipt of PHI, these third parties, whether an individual or entity, become a **"business associate"** for HIPAA purposes.

When the HITECH Act passed in 2009, it made business associates of group health plans ***directly subject to several HIPAA requirements*** and required that a HIPAA group plan and other types of covered entities, including business associates, follow certain procedures in the event PHI was disclosed without authorization (a "breach").

HIPAA & HITECH

The Final Rule—Important Changes

1) Expanded definition of a business associate

A **business associate subcontractor** is now explicitly included as a business associate.

BA subcontractor: any person or entity to whom a business associate delegates a function, service, or activity involving PHI; all downstream vendors.

HIPAA & HITECH

The Final Rule—Important Changes

2) The Business Associate Agreement Requirement

Previously, a business associate agreement had to exist between a group health plan and all business associates. Now, there must also be a business associate agreement between a business associate and subcontractor. (Note that a group health plan does *not* have to enter into a contract with the business associate subcontractor).

HIPAA & HITECH

The Final Rule—Important Changes

3) Expansion of BA Liability

Business associates and subcontractors are now obligated to:

- Comply with all of the Security Rule's administrative, physical, and technical safeguards;
- Comply with any request by the HHS Secretary;
- Make reasonable efforts to limit PHI to minimum necessary to accomplish purpose of use or request;
- Comply with all notification requirements of the Breach Notification Rule; and,
- Provide, upon request, an accounting disclosure of PHI in an electronic health record within the prior 3 years and an electronic copy of PHI that is part of an EHR.

HIPAA & HITECH

The Final Rule—Important Changes

4) Breach Notification Requirements

A breach is the "acquisition, access, use or disclosure" of PHI in violation of the Privacy Rule that "compromises the security or privacy of the PHI. The final rule establishes that impermissible use or disclosure of PHI is ***presumed*** to be a breach unless the group health plan or entity can demonstrate there is a "low probability that the PHI has been compromised" based upon a four-part risk assessment detailed in the rule.

HIPAA & HITECH

The Final Rule—Important Changes

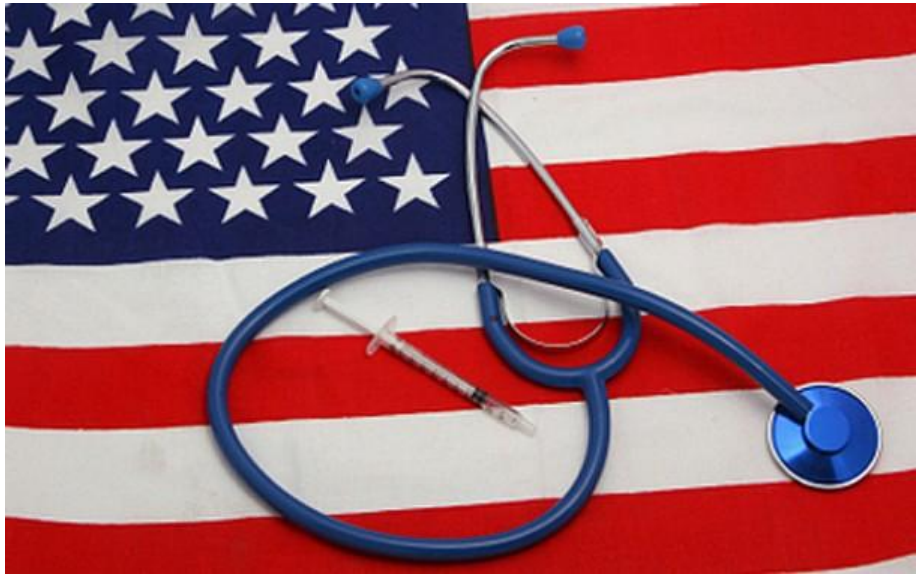
Four Part Test (replacing "risk of harm"):

1) The nature and extent of the PHI involved, including types of identifiers and likelihood of re-identification.
2) The unauthorized person who used the PHI or to whom the disclosure was made;
3) Whether the PHI was actually acquired or viewed; and,
4) The extent to which the risk to the PHI has been mitigated.

*There are still some types of unauthorized disclosures that are not a breach under the final rule.

THE ACA

presented by Lisa English Hinkle



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THE ACA

The current culture of medicine which has been built into our health care systems for decades is experiencing a transformational change. This transformational change will require strong partnerships between payors and providers to meet the new demands of the marketplace.

Historical culture of medicine:
- Competitive
- Volume-based
- Individualistic

Evolving Culture:
Patient centered
Quality
Value-based
Collaborative

THE ACA

GOALS

Affordable Care Act

- Provisions for 2014
- Exchanges
- Miscellaneous
  - Accountable Care Organizations
  - Paying for Quality

THE ACA

Higher Mortality & Inferior Health in the United States

The Institute of Medicine recently reported that there is a "striking persistent and pervasive pattern of higher mortality and inferior health in the United States when compared with other high-income countries. We believe that this poor correlation between spending and outcomes should prompt a reevaluation of current cost-containment efforts."

THE ACA

Expansion of access to health insurance

- Health benefit exchanges

Expansion of Medicaid eligibility

New payment mechanisms

- Quality
- Integration/coordination of care

Fraud and abuse tools

THE ACA

The Watershed Year

January 1, 2014:

- ❑ Expanded Medicaid coverage
- ❑ Presumptive eligibility for Medicaid
- ❑ Individual requirement to have insurance
- ❑ Health insurance exchanges
- ❑ Health insurance premium and cost sharing subsidies
- ❑ Guaranteed availability of insurance
- ❑ No annual limits on coverage
- ❑ Essential health benefits
- ❑ Multi-state health plans
- ❑ Temporary reinsurance program for health plans
- ❑ Basic health plan
- ❑ Medicare advantage plan loss ratios
- ❑ Wellness programs in insurance
- ❑ Fees on health insurance sector
- ❑ Medicare payments for hospital-acquired infection

THE ACA

Employer "Pay or Play"

The employer mandate requires that businesses with 50 or more full-time equivalent employees provide affordable health insurance for those employees or pay penalties. In July 2013, implementation of the mandate was delayed until 2015 (a year after its intended start date of January 2014).

What is a large employer?

- 50 + employees (aggregated)
- Fulltime – 30 hours
  - 30 hours per week
  - 130 hours monthly

THE ACA

No Coverage Penalty

- No minimum essential coverage to 95% of full-time employees and children.
- Any full-time employee receives premium tax credit or cost-sharing reduction for purchasing insurance through state exchange.

THE ACA

No Coverage Penalty

$2000 multiplied by the number of full-time employees ("FTEs") minus 30, divided by 12.

Example:
$2000 x (90-30 FTEs)) / 12
$2000 x 60 / 12
$120,000 / 12
$10,000 per month

THE ACA

Insufficient Coverage Penalty

- Offers health insurance
  - Does not provide minimum value
  - The coverage is not affordable

The lesser of:
$3,000 x # of FTEs receiving subsidy divided by 12; or,
The "no coverage" penalty amount.

THE ACA

Coverage must have **"minimum value."**

- Plan covers at least 60% of total allowed costs of benefits

Coverage must be **"affordable."**

- Coverage must not exceed:
  - 9.5% of W2 wages
  - 9.5% of Federal Poverty Line for a Single Individual

THE ACA

Who is a "full time employee"?

- 30 hours or more weekly
- 130 hours monthly
- Seasonal/variable hourly
  - Test period of 3-12 months
  - Standard measurement period chose by employer

THE ACA

Essential Health Benefits

Health plans offered in individual and small group markets are required to offer comprehensive coverage of Essential Health Benefits

- Ambulatory patient services
- Emergency services
- Hospitalization
- Maternity and newborn care
- Mental health and substance use disorder services, including behavioral health treatment, rehabilitative and habilitative prescription drugs
- Rehabilitative and habilitative services and devices
- Lab services
- Preventive and wellness services and chronic disease management
- Pediatric services including oral an vision care.

A Scenario

A small physician's begins to offer a self-funded group health plan to employees. The physician is the employer and acts as the plan's administrator. The insurance representative asks the physician to email him a list of names of who will be enrolling and whether or not they are currently insured. The representative receives the email, but a few days later his laptop is stolen. His work email is on the laptop and can easily be accessed. However, the laptop is found and returned a few days later.

The physician also sends the same information to his lawyer, to get advice about whether he is in compliance with the ACA. The lawyer prints all client related email, files it, and stores it in boxes in a storage warehouse. The lawyer and the physician have a business associate agreement between them and the lawyer understands that the information is subject to HIPAA.

A Scenario

An employee comes to the employer physician and states that he needs to take 3 weeks of FMLA leave. The physician asks for a doctor's note to verify this need; the employee complies. The note details a mental condition that the patient is suffering from and that she will be seeking inpatient therapy. The physician later loses the doctor's note in the midst of all his other paperwork.

Discuss the implications.

Questions?

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