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Health -E- News

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SECTION NEWS

Upcoming CLEs: Regarding the one hour CLEs, please note that there have been changes in the date and times (in red) for some of the CLEs. If you placed them on your calendar after receiving the last Health-E-News, please correct your calendar. Here is the new schedule:

March 25th	11:30 AM	Fraud & Abuse: State laws and Enforcement Policy
April 22nd	7:30 AM	Fraud & Abuse: Federal Laws - Civil Enforcement Policy
May 27th	11:30 AM	Fraud & Abuse: HMO and DOI Enforcement Activities
June 24th	7:30 AM	Fraud & Abuse: Stark I & II and Anti-Kickback

Board Meetings: The Board will meet on the following dates at the State Bar office, and any member of the Section is welcome to attend these meetings:

March 18 th	7:30 AM
April 15 th	11:30 AM
May 20 th	7:30 AM
June 17 th	11:30 AM

NEW DEVELOPMENTS IN HEALTH LAW

BILL LIST WAITING FOR THE GOVERNOR'S SIGNATURE

- HB2 General Appropriation Act of 2004; see www.governor.state.nm.us, "Legislative Action" section for message #185 on line item vetoes for this bill
- HB254 Immunization Registry Act; signed
- HB271 Behavioral Health Planning Council; signed
- HB322 Secretary of Health Hospital Oversight; signed

HB468 Medicaid False Claims Act; signed
HB581 New Mexico Telehealth Act; signed
HB625 Food & Medical Services Gross Receipts; signed
SB34 Develop Comprehensive Strategic Health Plan; signed
SB73 Cancer Clinical Trial Patient Coverage; signed
SB113 Brain Injury Medicaid Waiver Program; *pocket veto*
SB203 Immunization Registry Act; pocket veto (Note: this bill a duplicate of HB254)
SB315 Secretary of Health Hospital Oversight; signed
SB436 Nursing Home & Care Facility Tax Credits; signed
SB502 Health Insurance Coverage Requirements; signed

Health Care Employees to Have Whistle Blower Protection.

One of the Bills the Governor has signed is the **Medicaid False Claims Act** (“MFCA”), HJC/HB 468, which will be the one of the subjects discussed at the March 25th CLE (11:30 am at the State Bar Offices) by John Bannerman and Francis Barikor, attorneys with Bannerman & Williams, P.A..

Section 12 of the MFCA contains a whistleblower provision that is rather broad. It protects an “... *employee who is discharged, demoted, suspended, threatened, harassed or otherwise discriminated against in the terms and conditions of employment by the employer because of lawful acts done by the employee on behalf of the employee or others in disclosing information to the department or in furthering a false claims action.*” (Emphasis added). It doesn’t protect independent contractors.

There is a question regarding what is meant by “lawful acts.” For example, if the employee was responsible for a violation of the MFCA, is reporting it a “lawful act?” A qui tam plaintiff (called a relator under the federal False Claims Act) may have knowledge of the violation and be the “original source” of the information because he or she planned or initiated the violation. In other provisions of the MFCA the court may reduce a qui tam relator’s recovery if the relator planned or initiated the violation on which the action was brought; and if the relator is convicted of criminal conduct arising from the relator’s role in the violation, the court is required to dismiss the person from the action and the relator gets nothing. (§9.C),

An employee protected by this provision “...shall be entitled to all relief necessary to make the employee whole,”... including but not limited to reinstatement with the same seniority status, *two times the amount of back pay*, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and *reasonable attorney fees*. The statute provides for a cause of action in state court.

Regarding attorney fee awards, Section 12 is silent regarding the employer’s right to recover fees, if the employee does not prevail. This is not the case under §9.C, which permits the defendant to recover fees in the qui tam action if HSD does not proceed with the action, the defendant prevails, and the court finds that the action was (i) filed for an improper purpose, (ii) not warranted by existing law or by a non-frivolous argument for an extension of the law, modification, or reversal of the law, (iii) or was based upon unsupported allegations or factual contentions.

Any healthcare provider who bills the Medicaid program needs to carefully consider any personnel action that might result in the employee asserting a claim under Section 12 of the MFCA. Experienced employment lawyers can recommend a number of policies and procedures which can reduce the risk of whistleblower claims succeeding.

[Contributed by John Bannerman or Bannerman & Williams, P.A.]

CMS Will Match State Costs For Running Disease Management Programs

The Centers for Medicare and Medicaid Services (CMS) urged states to adopt programs to help chronically ill individuals better manage their diseases. In a letter to state Medicaid officials, Acting CMS Administrator Dennis G. Smith said that the agency would match state costs in running such programs. According to CMS, studies have shown that those with chronic illnesses, such as diabetes, asthma, congestive heart failure, and hypertension use a disproportionate share of medical services and often receive uncoordinated services. Disease management programs are designed to work directly with the individuals and their physicians on their treatment, including diet, adherence to medicine schedules, and other self-management techniques. In his letter, Smith says that state plans that provide direct service may qualify for federal matching funds.

[Editor's Comment: Two years ago at the AHLA Annual Meeting Disease Management was the topic of a Special Interest lunch I attended. It was in its infancy, and there were serious questions being raised concerning its effectiveness and whether it would be reimbursed. As is the case, with much of health care, the trends change. Remember the adage – Where Medicare (CMS) goes, the rest will follow.]

To read CMS' press release, go to
<http://www.cms.hhs.gov/media/press/release.asp?Counter=967>

Non-consensual Medical Treatment: The Line Between Battery And Malpractice

Sherry F. Colb

FindLaw columnist and Rutgers law professor Sherry Colb discusses a Florida case of a man who alleges that he was given a blood transfusion without his consent, and despite the fact that as a Jehovah's Witness, he would have refused the transfusion. The issue the case raises is whether the man's allegation is fundamentally one of medical malpractice, or of battery -- defined in the law as a "trespass against the body," or, in other words, an unconsented touching. The distinction is crucial because Florida imposes a cap on the non-economic damages a plaintiff in a medical malpractice case may receive, but there is no such limit for battery.

<http://writ.news.findlaw.com/colb/20040310.html>

Can Doctors Resort to Self Help to Screen Out the Litigious?

Why Websites Offering Exactly This Service Are Entirely Legal By PAUL SCOTT :

Recently, a Texas business captured the attention of the national media. The business is Doctor-know.us -- a web service created by physicians. The site acts as a central repository of medical malpractice plaintiffs and the attorneys and expert witnesses that act on their behalf.

Does this prospect sound interesting or scary? Read more at

http://writ.news.findlaw.com/commentary/20040311_scott.html

DHHS Proposes Rule To Allow Religiously Affiliated Organizations To Compete Equally For Funding

The Department of Health and Human Services (DHHS) March 9 issued a proposed rule and request for comments in the *Federal Register* (69 Fed. Reg. 10951) implementing a policy that "religiously affiliated (or 'faith-based') organizations should be able to compete on an equal footing with other organizations for the Department's funding without impairing the religious character of such organizations."

The rule proposes to remove barriers to the participation of such organizations in DHHS programs by ensuring that DHHS' discretionary grants and other financial assistance are open to all qualified organizations, regardless of their religious character or affiliation, and to establish the proper uses for

such funds and the conditions for receipt of funding.

Comments on the rule are due by May 10, 2004. To read the proposed rule in the *Federal Register*, [click here](#)

HIMSS/Phoenix Health Systems Release New Survey Finding Industry Still Not HIPAA Compliant

Less than half of healthcare industry respondents to a recent survey said they were ready to comply with all aspects of the Health Insurance Portability and Accountability Act (HIPAA) transactions and code sets rule, according to the Healthcare Information and Management Systems Society (HIMSS) and Phoenix Health Systems. Only 50% of respondents reported they had completed external testing, the survey found.

The compliance deadline for the transactions and code sets rule was October 16, 2003, but CMS invoked a contingency plan to accept and process transactions that are submitted in legacy formats so that trading partners would have time to work through issues related to implementing the HIPAA standards. "Technical obstacles and poor communication among healthcare trading partners remained severe ongoing impediments to [transactions and code sets] compliance success," the survey said.

Six hundred and thirty-one providers, payors, clearinghouses, and vendors responded to the survey, which was conducted from January 5 through January 20, 2004.

To read the survey results, go to <http://www.hipaadvisory.com/action/surveynew/winter2004.htm>

Health Law Cases

CATHOLIC CHARITIES OF SACRAMENTO, INC. v. SUPERIOR COURT OF SACRAMENTO COUNTY (DEP'T OF MANAGED HEALTH CARE), No. S099822 (Supreme Court of California, March 01, 2004)

The Women's Contraception Equity Act (WCEA), which requires employers who provide health insurance prescription coverage to include coverage for prescription contraceptives, does not violate provisions of the state and federal constitutions guaranteeing the free exercise of religion. Even if the WCEA substantially burdens a religious belief or practice, it serves the compelling state interest of eliminating gender discrimination. Plaintiff does not qualify for the Act's "religious employer" exemption because, as it concedes, its purpose is not the inculcation of religious values, it does not primarily hire and serve Catholics, and it does not qualify for federal tax exemption as a church, an integrated auxiliary of a church, a convention or association of churches, or a religious order.

To read the full text of this opinion, go to:

<http://login.findlaw.com/scripts/callaw?dest=ca/cal4th/slip/2004/s099822.html>

MCCARTHY v. OZARK SCH. DIST., No. 02-3035, 02-3094, 02-3104, 02-3195 (8th Circuit, March 08, 2004)

Appeal from an order preserving the statutory requirement that Arkansas schoolchildren be immunized was rendered moot when the legislature broadened the statute's exemption to encompass philosophical as well as religious objections; newly raised challenges to the revised statute were unripe for review.

To read the full text of this opinion, go to:

<http://caselaw.lp.findlaw.com/data2/circs/8th/023035p.pdf>

AM. HOME ASSURANCE CO. v. POPE, No. 03-2815 (8th Circuit, March 11, 2004)

While insured psychologist's failure to report child abuse to government officials was criminal conduct and thus satisfied the policy exclusion for criminal misconduct, that provision did not preclude coverage on a claim that the insured breached his common law duty to notify the child's caregivers that the child's father posed a future risk of sexual abuse to her. Remanded for further proceedings.

To read the full text of this opinion, go to:

<http://caselaw.lp.findlaw.com/data2/circs/8th/032815p.pdf>



HAPPY St. Patrick's Day

This Email Newsletter is a publication for the members of the Health Law Section of the New Mexico State Bar Association. Its contents may be time dated, and references to Internet sites may change. The Content of this Newsletter does not reflect the opinions of the Members of the Board of Directors of the Health Law Section of the State Bar. This Newsletter is informational only, does not constitute legal advice. Members of the Health Law Section may submit topics for the newsletter by emailing them, or the internet site at which they can be located, to JAB@NMCounsel.com