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Health -E- News

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SECTION NEWS

2005 Section Election Nominating Committee Report

If you missed the Nominating Committee Report in the Bar Bulletin, the Committee's Report for the 2005 Section Election is as follows:

Position 1: One-Year Term

George F. Koinis

Position 2: Two-Year Term

David M. Kaufman

Position 3: Three-Year Term

Jeffrey C. Gilmore

Position 4: Three-Year Term

Barbara C. Quissel

Position 5: Three-Year Term

Jennifer L. Stone

Katrina-Related Notices

The U.S. Department of Labor and the Internal Revenue Service both announced on October 11 the extension of certain notice periods enforced by the agencies. The DOL announced that COBRA-required notices affecting benefits plans, plan participants, and plan beneficiaries in areas affected by Hurricane Katrina will be extended until February 28, 2006. The extensions apply to the disaster area including the counties and parishes in Alabama, Louisiana, and Mississippi designated as eligible for individual assistance by the Federal Emergency Management Agency because of Hurricane Katrina. The suspended COBRA deadlines for affected employers include:

- COBRA continuation election notices;
- The joint COBRA/HIPAA certificate of creditable coverage issuance deadlines;
- Form 5500/5500 EZ filing deadline.

In addition, the U.S. Equal Employment Opportunity Commission extended the deadline for filing the 2005 EEO-1 survey, (regularly Sept. 30) to March 31, 2006, for employers located in areas affected by Hurricane Katrina. The Internal Revenue Service on Sept. 15, liberalized the substantive and procedural conditions for retirement/401(k) plan loans and hardship distributions for Katrina victims, which include employees or former employees who lived or worked in a federally designated Katrina disaster area as of Aug. 29,

2005. To be covered, a loan or hardship distribution must occur after Aug. 28, 2005, and no later than March 31, 2006. (Announcement 2005-70)

Finally, in the Katrina Emergency Tax Relief Act of 2005 (KETRA), Congress voted to permit penalty-free distributions up to \$100,000 from 401(k) and similar tax-favored retirement plans to people who live in the Katrina disaster area and who suffered economic loss because of the storm. To qualify for the tax-favored treatment, a distribution must occur after Aug. 24, 2005, and before Jan. 1, 2007. The IRS announcement covers a broader class of beneficiaries, but for a shorter period than does KETRA.

AHLA Labor and Employment Practice Group "e-mail alert" Service, October 21, 2005.

NEW DEVELOPMENTS IN HEALTH LAW

E-Prescribing Stark Exception and Fraud and Abuse Safe Harbor Published

The promised Stark exception and Fraud and Abuse Safe Harbor for Certain Electronic Prescribing Arrangements and Electronic Health Records Arrangements have been published in the Federal Register. The Stark exception can be found at:

<http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-20322.pdf>

The proposed Fraud and Abuse Safe Harbor was published at:

<http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-20315.pdf>

Fraud and Abuse Update

- U.S. Attorney for the Central District of California Debra Wong Yang announced October 12 the indictment of two physicians and Bel Air Surgical Institute on charges of healthcare fraud stemming from an alleged "rent-a-patient" scheme that involved billing insurance companies for unnecessary medical procedures. A federal grand jury in Los Angeles indicted William W. Hampton and Mamdouh S. Bahna, the owner of the Bel Air Surgical Institute, for allegedly submitting fraudulent bills to numerous private insurers and for allegedly providing false patient records. According to the press release, Bahna allegedly hired marketers to recruit people willing to undergo unnecessary surgical procedures in exchange for cash or discounted cosmetic surgery procedures. To read Yang's press release, go to <http://www.usdoj.gov/usao/cac/pr2005/143.html>
- Nevada Attorney General Brian Sandoval warned residents October 10 of possible telemarketing fraud schemes in connection with the new Medicare Part D prescription drug program. "We are concerned that some of these programs may try to sell unnecessary products to seniors, or worse, steal seniors' personal information for fraudulent purposes," said Jo Anne Embry, project director of Nevada's Senior Medicare Fraud Patrol Project. "We want to educate consumers to become informed health care consumers before making a decision. That means knowing which programs are legitimate in Nevada and reporting any kind of suspicious activity from groups that aren't approved in our state." To read Sandoval's press release, go to <http://ag.state.nv.us/agpress/2005/Medicare%20Part%20D%20Fraud.pdf>
- New Mexico Attorney General Patricia Madrid announced that Rebecca Aldaba was sentenced to three and one-half years supervised probation and payment of restitution to developmentally disabled clients under her care. Aldaba was a home-based care provider who pled guilty to misappropriating more than \$30,000 from two severely disabled patients under her care, according to Madrid. To read Madrid's press release, go to http://www.ago.state.nm.us/pio/pressrel/2005/html/10-06-05_aldaba.htm

Joint Commission Issues Guide to Ready America's Communities for Natural Disasters and Terror Attacks

The Joint Commission issued the step-by-step guide, "*Standing Together: An Emergency Planning Guide for America's Communities*," for small, rural and suburban communities to both prepare for and successfully respond to major local and regional emergencies-whether they are hurricanes, floods, terrorist attacks, major infectious outbreaks, hazardous materials spills, or other catastrophic occurrences. The comprehensive planning guide provides 13 essential steps that local government and public health leaders can use to establish an effective community-based emergency management planning and response process.

For a complete copy of the Joint Commission planning guide and a presentation highlighting the recommended planning strategies, see the news release at:

http://www.jcaho.org/news+room/news+release+archives/em_planning_guide.htm

CMS Announces New Efforts To Combat Fraud As Medicare Drug Benefit Set To Begin

With the Medicare prescription drug coverage set to begin in January 2006, the Centers for Medicare and Medicaid Services (CMS) announced October 7 a series of steps to ward off fraud and abuse as beneficiaries start enrolling in the new benefit.

The three-prong approach CMS detailed includes using eight new Medicare Rx Integrity Contractors (MEDICs) that specialize in identifying fraud, waste, and abuse; working with law enforcement, prescription drug plans, consumer groups, and other partners to protect consumers and enforce Medicare's rules; and providing basic tips for consumers to protect themselves from fraud.

The agency said these antifraud efforts build on lessons learned from the Medicare-endorsed discount drug card.

For more information on CMS' antifraud efforts, go to

<http://www.cms.hhs.gov/media/press/release.asp?Counter=1690>

CMS Issues Final Rule Mandating Flu Shots In Long Term Care Facilities

The Centers for Medicare and Medicaid Services (CMS) issued a final rule October 7 requiring long term care (LTC) facilities to offer residents immunization against influenza annually and a one-time, lifetime immunization against pneumococcal disease unless medically contraindicated or refused by the resident or that resident's legal representative.

In "Medicare and Medicaid Programs; Condition of Participation: Immunization Standard for Long Term Care Facilities; Final Rule," (70 Fed. Reg. 58833), CMS modifies an August 15, 2005 proposed rule (70 Fed. Reg. 47759) by not only requiring LTC facilities to provide education to residents or their legal representatives prior to immunization, but also mandating that such education include potential side-effects in addition to potential benefits. To read CMS press release, <http://www.cms.hhs.gov/media/press/release.asp?Counter=1688>

WHO Appoints Public Health Expert to Lead UN Response to Avian Influenza communities

On September 29, 2005, the U.N. Secretary General has appointed Dr. David Nabarro, one of the most senior public health experts at the World Health Organization (WHO), to lead coordination of the UN response to avian influenza and a possible human influenza pandemic. The appointment is critical as the world is fast recognizing the risk of an imminent human influenza pandemic, and is taking steps to reduce the risk and to get prepared. To this end, the WHO has sent all countries detailed guidance on actions they need to take. Implementing these actions requires coordination across UN agencies, countries, civil society, across sectors within countries and the private sector. Implementation also requires funding.

As Senior UN system Coordinator for Avian and Human Influenza, Dr. Nabarro will be responsible for ensuring an effective and coordinated contribution by the UN system to controlling the current epidemic of avian influenza that is particularly affecting countries in Asia. He will also ensure that the UN system supports effective local, national, regional and global preparations for a potential human influenza pandemic - so as to reduce the human toll, as well as the economic and social disruption, that this pandemic could cause. For more information, please visit:

<http://www.who.int/mediacentre/news/releases/2005/pr45/en/index.html>

PAHO to Assist Member Countries with Pandemic Planning

On September 29, 2005, Officials of the Pan American Health Organization (PAHO) outlined their plan for a regional approach to influenza pandemic preparedness and response, during the 46th Directing Council meeting, which took place at PAHO headquarters in Washington, DC.

The plan sets forth activities to promote pandemic preparedness among PAHO member countries, to monitor and prevent the spread of avian influenza in the region, and to provide guidance at the regional and country level on what to do should a human flu pandemic erupt. For more information, please visit: <http://www.paho.org/English/DD/PIN/pr050929a.htm>

HEALTH LAW CASES

[McNutt ex rel. United States v. Haleyville Med. Supplies, Inc., 2005 U.S. App. LEXIS 19482 \(11th Cir. 2005\).](#)

This case allows a Stark anti-kickback violation to be brought as a fraud claim under the False Claims Act, which in this instance was creatively prosecuted as a qui tam whistleblower action. The court reasoned that the provider committed fraud by submitting Medicare claims in which the provider certified compliance with the all provisions of the law, including, presumably, the anti-kickback law. The noncompliance here was not the typical False Claims Act claim of failure to provide the services actually billed the federal government, but rather the payment of kickbacks for referrals that were falsely stated on Medicare claims to be rent costs. The obvious implications in allowing private enforcement of anti-kickback violations via qui tam whistleblower actions with its lucrative plaintiff incentives is that providers now have greater exposure to actual prosecution and increased liability for violations of the anti-kickback laws. *This case summary was provided by Jerry Dickinson, Assistant General Counsel, New Mexico Department of Health.*

High Court: State Cannot Stop Inmate's Planned Abortion POSTED: 7:36 am PDT October 17, 2005 The Supreme Court refused Monday to prevent a Missouri prison inmate from getting an abortion. Without comment, the high court lifted a temporary stay blocking a federal judge's ruling that Missouri officials had to drive the woman to a clinic to have the procedure over the weekend. [High Court: State Cannot Stop Inmate's Planned Abortion](#) Oct 17, 2005 TheKCRACHannel.com, California - Health

Court Says Physicians Lacked Standing To Pursue Antitrust Claims Against Emergency Medicine Certification Board

The Second Circuit dismissed October 7 a proposed class action by a group of physicians who alleged the American Board of Emergency Medicine (ABEM) and various others violated federal antitrust law in connection with their process for certifying physicians in emergency medicine.

Plaintiffs contended that the ABEM certification requirements were designed to keep the number of emergency medicine physicians with the credential low, which allowed these physicians to command "super remuneration" for their services to the detriment of competition.

In addition to concluding that the Western District of New York, where the action was initiated, lacked personal jurisdiction and venue, the appeals court said transferring the case to another jurisdiction would not be in the interest of justice because plaintiffs lacked antitrust standing.

To read the case, *Daniel v. American Bd. of Emergency Med.*, No. 03-6153(L), 2005 WL 2470530 (2d Cir. Oct. 7, 2005), <http://www.ca2.uscourts.gov/>

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 FSB@NMCounsel.com