NEWSLETTER BRIEF ISSUE N°24 SUMMER 2013

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THE ADVISOR
ELDER LAW & LONG TERM CARE

Creating a PPACA Mandatory Compliance Program

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Skilled nursing facilities (SNFs), organizations already heavy-laden with oversight and regulatory requirements, are the first health care providers targeted by HHS / OIG to incorporate a mandatory compliance program. The Patient Protection and Affordable Care Act of 2010 (PPACA) catapulted a once-voluntary health care compliance program into a regulated requirement.

Section 6102 of PPACA made changes to title XI of the Social Security Act (42 U.S.C. 1301 et seq.) that includes a requirement that, effective March 23, 2013, skilled nursing facility and nursing facility operating organizations <u>shall</u> have an <u>effective</u> compliance and ethics program that prevents and detects criminal, civil and administrative violations under the Act and promotes quality of care consistent with regulations developed by the Secretary and Inspector General of the Department of Health and Human Services.
Section 6401 of PPACA established the requirement of a mandatory compliance program for all health care providers and suppliers, making it a condition of enrollment in Medicare. This section has no implementation deadline but does require HHS / OIG to establish core elements of the desired effective compliance program. To date, no implementing regulations have been issued that definitively guide providers in the establishment of the type of compliance and ethics program envisioned by the PPACA drafters and certainly no "model compliance program" referenced in the final rule has been made available as a guide. Nonetheless, following the eight minimum required elements noted in Section 6102, nursing facilities have adequate notice and impetus to put their programs in place.

The following eight elements are referenced in the final rule as the minimum components necessary to develop the type of compliance program envisioned:

1. Effective compliance standards and procedures followed by employees and agents;
2. "High-level personnel" with authority to assure compliance are assigned overall responsibility and are sufficiently resourced;
3. Substantial discretionary authority is not delegated to individuals whom the organization knew, or should have known, had a "propensity to engage in criminal, civil, and administrative violations";
4. Effectively communicate standards and procedures to all employees and agents;

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OUR PRESENTERS & ATTENDEES MAKE THE DIFFERENCE

THANK YOU FOR ANOTHER SUCCESSFUL CONFERENCE!

Long Term Healthcare Conference 2013

1. (L-R) Jake Caneda, Health Information Management Consultant, Skilled Healthcare, LLC; Myra Francisco, DON, Alexandria Care Center; Karen Zambrano, Administrator, Elmcrest Care Center.

2. Kippy L. Wroten, Founding Shareholder, W&A.

3. (L-R) Georgia McCullough, Clinical Risk Manager, Memorial Healthcare Services; Debi Witt, Director of Operations, Northern California, Golden Living; Marilynn W. Allemann, L.C.S.W, CPC, President and Owner, Masters Executive Coaching; Regina A. Casey, Shareholder, W&A.

4. Kimberli Poppe Smart, Senior Attorney, W&A.

5. Louis Garcia, Owner/ Administrator, Newport Garden Villa Homes.

6. Darryl A. Ross, Shareholder, W&A.

7. Full house - working together.

8. Laura K. Sitar, Shareholder, W&A.

9. (L-R) Sherri Silverberg, Vice President, Operations, Skilled Healthcare, LLC; Lora A. Ajello, Associate, W&A; Stacey Zartler, Labor Relations Counsel, Kindred Healthcare, LLC; Julie Butenko, Vice President, Operations, Kindred Healthcare.

10.(L-R) Paul Kim, Administrator, Alta Gardens Care Center; Christopher Langevin, Administrator, Montebello Care Center; Spencer Carroll, Administrator, Carehouse Healthcare Center.

Legal Update

HITECH (Health Information Technology for Economic and Clinical Health Act)
Ignore at Your Own Peril

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There has been much discussion lately about data security and the new obligations imposed by the adoption of the final rules related to the **Health Information Technology for Economic and Clinical Health Act (HITECH)** and the ***September 23, 2013*** implementation date. For those who are already working to shore up any weak spots, good job! For those who are just starting, or worse yet, have never heard of HITECH, there is still time. First, you may want to review Wroten & Associates Spring newsletter (www.wrotenlaw.com/pdf/newsletters/2013/Spring-2013-Newsletter.pdf). Second, get moving!

What is HITECH?
HITECH was passed in 2009. It is intended to revise security and privacy requirements placed on healthcare providers and *extend those requirements* to their "business associates." As discussed in our last newsletter, a business associate includes a person or entity providing legal services involving the disclosure of Protected Health Information (PHI).

What is Materially Different?
No matter what your knowledge base is, or your state of preparation for September's enactment date, you must be aware that under HITECH, healthcare providers may now be sanctioned for the failures of their vendors. Additionally, vendors must now become acquainted with HITECH's mandates as they are *directly subject to regulations* as a covered entity. (See 45 CFR §154.502(a).)

Which Vendors Must Now Have Business Associate Agreements?

- Data transmission service providers who may have "routine access" to the PHI.
- Data storage or document storage vendors – whether or not they view the PHI they maintain.
- Operators of portals or other interfaces created on behalf of covered entities that allow patients to share their data with the covered entity.
- Outside Counsel.

So What?
Some readers may question whether they are impacted by this. Some may say…"we have known about the need to protect PHI for years!"; others may appreciate the need but think "I have more important things to worry about!"; some may not know about the requirements at all. HITECH is not simply about "privacy" or PHI. It's also about security, data integrity, restrictions on who may access, protocol to handle breach scenarios, and audits to make sure systems are in place. In short, if you get nothing else from this piece, you must understand that "Privacy" and "Security" are separate and distinct concepts, and related.

Security
Security refers to the systems that are used to protect PHI that is transmitted or maintained in electronic media. Every security plan should balance the following concepts:

- Confidentiality *(disclosure):* Ensuring that data is not disclosed to or made available to unauthorized persons.
- Integrity *(alteration/ destruction):* Data is not to be altered or destroyed without authority.
- Availability *(access):* Data is accessible by authorized individuals and entities when needed.

Important Definitions:
Breach
A breach is, generally, an impermissible use or disclosure under the Privacy Rule that compromises the security or privacy of the protected health information such that the use or disclosure poses a significant risk of financial, reputational, or other harm to the affected individual.

There are three exceptions to the definition of "breach." The first exception applies to the unintentional acquisition, access, or use of protected health information by a workforce member acting under the authority of a covered entity or business associate. The second exception applies to the inadvertent disclosure of protected health information from a person authorized to access protected health information at a covered entity or business associate to another person authorized to access protected health information at the covered entity or business associate. In both cases, the information cannot be further used or disclosed in a manner not permitted by the Privacy Rule. The final exception to breach applies if the covered entity or business associate has a good faith belief that the unauthorized individual, to whom the impermissible disclosure was made, would not have been able to retain the information. (www.hhs.gov/ocr/privacy/hipaa).

Electronic Health Record (EHR)
A real-time patient health record with access to evidence-based decision support tools that can be used to aid clinicians in decision making. The EHR can automate and streamline a clinician's workflow, ensuring that all clinical information is communicated. It can also prevent delays in response that result in gaps in care. The EHR can also support the collection of data for uses other than clinical care, such as billing, quality management, outcome reporting, and public health disease surveillance

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OUR PEOPLE MAKE THE DIFFERENCE

A Volunteer that Makes a Difference

Ann Harvey • Paralegal
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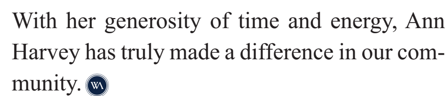
Volunteers make a difference in our communities everyday. Many organizations throughout the United States depend on the generosity of others through time and monetary donations. Without these gifts, many places would not have the opportunity to keep their doors open. Ann Harvey, a paralegal at Wroten & Associates, has selflessly donated her time and energy for years to both Hoag Memorial Hospital Presbyterian and the American Cancer Society.

Ann currently holds the position of Interim Chairman of the Emergency Department Auxiliary Volunteers at Hoag. She actively works with a committee of 35 volunteers setting schedules, creating plans and guidelines, and keeping her Committee informed of Hoag Happenings. In a typical week she puts in 20 + hours of volunteer time and over the last 2 years has volunteered more then 1500 + hours. Ann says that she was always "interested in medicine, education, and the law." That interest is what Ann says made "volunteering at the hospital a natural fit".

Ann also volunteers her time at the American Cancer Society Discovery Shop in Corona Del Mar. In the shop she finds herself working as the cashier, stocking, sales or in the backroom. Ann has dedicated 8 years of volunteer work here. She says that her inspiration comes from "losing three siblings to cancer, the need for further cancer research, and the Discovery Shop offers a chance to give back." The monies raised by the Discovery Shop go to cancer research. The program has been so successful in California plans are in place to go nationwide.



With her generosity of time and energy, Ann Harvey has truly made a difference in our community.

VOLUNTEERS COUNT

- ***In 2011, the number of volunteers reached its highest level in five years, as 64.3 million Americans volunteered through an organization, an increase of 1.5 million from 2010.***
- ***Americans volunteered a total of almost 8 billion hours, an estimated economic value of roughly $171 billion.***
- ***A majority of Americans assisted their neighbors in some way and more than a third actively participated in a civic, religious, or school group.***

The Federal Agency for Service and Volunteering, Volunteering and Civic Life for 2012.

For information on the American Cancer Society Discovery Shop visit:
www.discoveryshop-coronadelmar.org

For information on how to volunteer at Hoag Memorial Hospital or to donate visit:
www.hoag.org

Wroten & Associates Welcomes Andrew R. Quinio

Andrew R. Quinio • Associate
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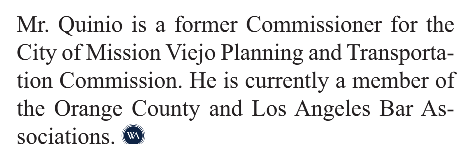
Wroten & Associates is pleased to welcome Associate Andrew R. Quinio to the the firm.

Mr. Quinio obtained his Juris Doctorate from the University of Southern California, Gould School of Law. Upon graduation, Mr. Quinio received the USC Edward and Eleanor Shattuck Award, which is awarded to law students that exhibit the greatest potential for becoming outstanding members of the bar.

During law school, he clerked for the Tax Division of the U.S. Attorney's Office and several complex civil litigation firms. Prior to joining Wroten & Associates, he clerked for the Los Angeles District Attorney's Office.

Mr. Quinio is a former Commissioner for the City of Mission Viejo Planning and Transportation Commission. He is currently a member of the Orange County and Los Angeles Bar Associations.



Leadership Insight

Managing Change in the Workplace

By Marilynn W. Allemann, L.C.S.W., CPC

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Change is inevitable and never easy. Many people's reaction to change is based on fear of the unknown and their reactions can be unpredictable and irrational. Change needs to be understood and managed in a way that people can cope with it effectively. Responsibility for implementing change lies with the management and executives of the organization. Because change is difficult, managers logically need to be a settling influence. The manager has a responsibility to facilitate and enable change and can do so by using face-to-face communication to handle difficult or sensitive aspects of the organizational change.

Some changes need to be made quickly, so be sure to evaluate if, in fact, the change needs to be quickly implemented. Quick changes prevent proper consultation and involvement which may lead to increased resistance and other difficulties that take time to resolve. For more complex changes, be sure to consult with those involved to get them to buy in and support the proposed changes, be sure to allow sufficient time to complete the changes and be able to maintain current organizational operations.

An important step in managing change is building awareness about the need for change and creating a desire for change among employees. The initial communication should be typically designed to create awareness around the business reasons for the change and the risks of not changing. At each step in the process communications should be designed to share the right message at the right time. If possible, email or written notices should be avoided as they often are ineffective in conveying and developing understanding of the planned change.

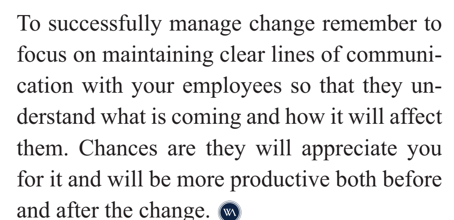
One secret to successfully managing change is effective communication. For example, it is important to define the change, provide the rationale for the change, whom will it impact, be open to questions and challenges, and finally clarify that there is a clear and concise understanding of the change. Making sure that the people affected by the change understand the need for change and have a clear understanding as to how the change will affect them is critical. Participation, involvement and early communication are the most important factors. Involving and informing employees creates a sense of ownership and familiarity among those affected by the change. Additionally, involving employees in designing and implementing the change will increase the chances of success.

> ***"People underestimate their capacity for change. There is never a right time to do a difficult thing. A leader's job is to help people have a vision of their potential."*** - John Porter

John P. Kotter, a Harvard Business School professor and a leading expert on organizational change describes in his books "Leading Change" and "The Heart of Change" eight key principles regarding understanding and managing change. Here is a brief summary of Mr. Kotter's eight step change model:

1. **INCREASE URGENCY**
   Inspire people to move, make objectives real and relevant.
2. **BUILD THE GUIDING TEAM**
   Get the right people with the right commitment and mix of skills.
3. **GET THE VISION RIGHT**
   Get the team to establish a simple vision and strategy.
4. **COMMUNICATE FOR BUY-IN** Involve as many people as possible, communicate the essentials, and appeal and respond to people's needs. De-clutter communication.
5. **EMPOWER ACTION**
   Remove obstacles, enable constructive feedback - reward and recognize progress and achievements.
6. **CREATE SHORT-TERM WINS** Set aims that are easy to achieve.
7. **DON'T LET UP**
   Foster and encourage determination and persistence - encourage ongoing progress reporting.
8. **MAKE CHANGE STICK**
   Reinforce the value of successful change via recruitment, promotion, and new change leaders.

To successfully manage change remember to focus on maintaining clear lines of communication with your employees so that they understand what is coming and how it will affect them. Chances are they will appreciate you for it and will be more productive both before and after the change.



Additional information can be found on Marilynn W. Allemann's website and blog:
www.MWAExecCoach.com.
www.MWAExecCoach.wordpress.com

Please contact Marilynn W. Allemann directly at mwallemann@hotmail.com with any questions.

Employment Law

Who is a Supervisor?
The Supreme Court Provides Clarity for Title VII Harassment Claims

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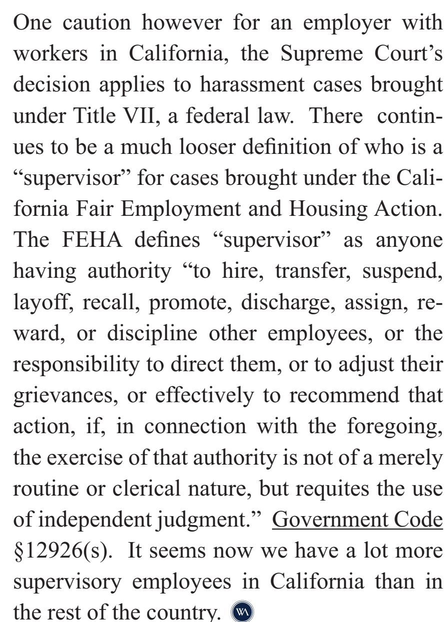
As is often the case the U.S. Supreme Court finished up its term this year with several high profile cases. Lost in the shuffle was an important employment case, *Vance v. Ball State University*, No. 11-556, which clarified the meaning of the word "supervisor" for the purposes of vicarious liability in Title VII workplace harassment cases. The plaintiff in *Vance* alleged a catering specialist where she worked had created a racially harassing environment. The parties hotly contested whether the alleged harasser was plaintiff's supervisor. In a decision likely to warm the hearts of employers across the country, the Supreme Court held a "supervisor" is an individual with the authority to take "tangible job action" against the employee claiming harassment. That authority must include the ability to "hire, fire, demote, promote, transfer, or discipline."

While the Supreme Court's definition may seem obvious, it is an important departure and limitation on the much more flexible definitions which had been used by the Equal Employment Opportunity Commission and a number of federal circuits including the Ninth which defined a supervisor as an individual with the ability to "exercise significant direction over" or "direct and oversee" another's daily work. These looser interpretations tended to unreasonably include lead employees with the ability to direct work, but little real supervisory authority.

The Supreme Court's definition is a win for employers who may be held strictly liable for workplace harassment committed by their supervisors. Employers should consider reviewing job descriptions to make sure they clearly define supervisory and non-supervisory positions using the language set forth in the Supreme Court's decision.



One caution however for an employer with workers in California, the Supreme Court's decision applies to harassment cases brought under Title VII, a federal law. There continues to be a much looser definition of who is a "supervisor" for cases brought under the California Fair Employment and Housing Action. The FEHA defines "supervisor" as anyone having authority "to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requites the use of independent judgment." <u>Government Code</u> §12926(s). It seems now we have a lot more supervisory employees in California than in the rest of the country.

HITECH
Ignore at Your Own Peril

Continued from page 3

and reporting.

<u>**Health Information Technology (HIT)**</u> The application of information processing involving both computer hardware and software that deals with the storage, retrieval, sharing, and use of health care information, data, and knowledge for communication and decision making. Vist: *www.healthit.gov/policy-researchers-implementers/glossary* for more terms.

Keys to Successful Implementation

- Secure Network Infrastructure including sufficient firewall.
- Encryption policies including remote kill features for laptop computers, phones and tablets.
- Password reset policies.
- Automatic Logoff of computer terminals.

Important Deadlines:

September 23, 2013: Covered entities must comply with most of the new Rules' provisions

April 8, 2014 - Microsoft will cease providing security updates for Windows XP3 and Office 2003. The continued use of these products will result in a compliance red-flag for any auditor.

September 22, 2014: Covered entities must amend or modify to make compliant any business associate agreement in place before January 25, 2013. All business associate agreements entered into on or after January 25, 2013 must be compliant by the September 23, 2013 deadline.

The good news? There is still time to put plans in place.

COVER STORY

PPACA Compliance

Continued from page 1

5. Monitoring and auditing systems and a system to report violations without fear of retribution;
6. Consistent enforcement of standards through appropriate disciplinary actions;
7. Reasonably respond to the identified offense and steps to prevent further similar offenses; and
8. Periodic reassessment of the organization's compliance program, making necessary changes to reflect organizational changes.

These eight elements incorporate the seven elements described in Chapter 8 of the 2010 U.S. Federal Sentencing Guidelines Manual (FSG), that have been relied upon as core elements of voluntary compliance program guidance. HHS / OIG looks to these specific elements because they incorporate prevention, detection, correction of inappropriate behavior and ensure compliance with all applicable federal laws, regulations and requirements.

There are risks inherent in not having a Compliance Program including the potential for exclusion from Medicare and Medicaid funding when enforceable, mandatory programs are not in existence. The greater risk, however, comes from the prevailing culture that may take hold in the absence of written policies, standards and practices that result in the submission of erroneous and fraudulent claims. In addition to program exclusion, such practices, if they remain unchecked, may bring civil penalties and criminal prosecutions.

The following are steps that you can take now towards meeting the intent of Section 6102, in the absence of more directive regulations. Organizations are at varying levels of readiness with their Compliance Program. The following is a list of activities that will aid a new program in developing their foundation and will provide a check point for existing, more robust programs.

Conduct a risk/gap assessment of your current compliance efforts and develop an action plan to demonstrate your organization's commitment to achieving compliance with the mandatory requirements. Policies, procedures and standards that relay the organization's commitment to compliance are foundational. Policies may be added over time based upon trends in the industry and occasionally, a policy may become obsolete and be retired. Currently, there is a strong federal commitment, with financial backing, to find and confront fraud in long term care based on the failure to provide quality care. A more robust policy or series of policies directed at quality of care in the organization is timely in light of these federal efforts.

Within the assessment of your existing compliance plan and subsequent action plan, the following should be included:

- Review existing policies and procedures for currency, accuracy, applicability and completeness. Policies and standards should express the organization's commitment to compliance with all applicable laws. A sampling of policies to analyze include: Code of Conduct, Claims Submission, Reporting of Compliance Concerns and Investigation, Responding to External Compliance Investigations/ Inquiries (including how to respond to search warrants, subpoenas or requests), HIPAA Privacy and Security Plan, Coding and Documentation, Disciplinary Guidelines, Compliance Officer and Compliance Committee.

- Establish a Compliance Plan, program and process. Identify the "high-level personnel" who are in charge of the compliance program and draft a description of their duties, authorities and responsibilities.

- Implement personnel checks to avoid giving discretionary authority to individuals who are on the OIG List of Excluded Individuals/Entities (LEIE). Conduct a check that reasonably determines whether the individual has a history of the conduct that shows a "propensity to engage in criminal, civil, and administrative violations".

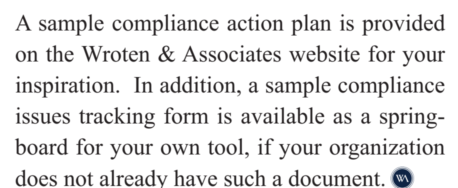
- Evaluate the mechanism of disseminating policies and procedures and subsequent changes. Determine written evidence of dissemination of policies and procedures. Audit for compliance (e.g., if the written evidence is a signed statement by the staff that they have received and reviewed the information, is that signature in their personnel file). Establish mechanism to routinely assess staff comprehension (e.g., annual compliance test/refresher, online quizzes, routine inquiries during rounds).

- Review/establish audit schedule including quality of care, billing and documentation audits. Develop protocol for post-audit action plan to address audit findings and evaluate for follow-through. Develop "safe" reporting mechanisms such as Compliance Hotline and anonymous online or physical mailboxes for reporting. Examine policies and procedures for language inclusive of anti-retaliation culture.

- Review/develop mechanisms to assess for compliance with policies and procedures and code of conduct. Establish discipline policy related to violation of standards. Establish routine audit activities for enforcement of the discipline policy.

- Develop/analyze mechanism to track compliance concerns. Review response to identified concerns for reasonableness and thoroughness. Analyze policy or procedure changes in response to identified concern, implemented to avoid repeat occurrence.

- Annually, or more often in early stages or as needed, review the compliance program, trending of compliance concerns, outcome of staff testing and audits, etc. and make necessary changes to support a culture of compliance at all levels in the organization.



A sample compliance action plan is provided on the Wroten & Associates website for your inspiration. In addition, a sample compliance issues tracking form is available as a springboard for your own tool, if your organization does not already have such a document.

Our LTC Blog Makes the Difference

blog *noun* \'blôg , 'bläg\

Definition: a website on which an individual or group of users record opinions, information, etc. on a regular basis.

WHY W&A BLOG?

The Wroten & Associates LTC Blog is a knowledge bank that can answer industry questions, or resolve problems. It is about LTC, for LTC.

Areas of Information include:

- Employment
- General Interest
- HIPAA/HITECH
- In The News
- Wage and Hour

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QUICK INFO

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