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FOULSTON SIEFKIN ISSUE ALERT

HIPAA: RECENT PENALTIES MAKE POLICY REVIEW A GREAT IDEA

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THE RELEASE OF THE HIPAA/HITECH regulations appears imminent and now is a good time to take stock of HIPAA compliance efforts. The new regulations will necessitate changes to most HIPAA compliance programs, presenting an opportunity for covered entities to evaluate the effectiveness of their current programs and make appropriate changes.

Two recent actions by the Department of Health and Human Services emphasizes the need for efficient and effective HIPAA compliance. On February 14, 2011 Massachusetts General Hospital entered into a Resolution Agreement with the Health and Human Services Office of Civil Rights ("OCR"), paying a one-million dollar fine. Also in February, the office issued a Notice of Proposed Determination against Cignet Health Center, with a \$4,351,600 fine.

The Massachusetts General Hospital Agreement involved an employee who removed (1) sixty-six billing encounter forms containing protected health information (names, dates of birth, medical record numbers, health insurers and policy numbers, diagnoses and provider names); and (2) the daily office schedule for three days, consisting of 192 patient names. While riding the subway, the employee placed the documents, which were not in an envelope, on the seat next to her and forgot them when she exited. The documents were never recovered. In addition to paying the one million dollar fine, Massachusetts General Hospital entered into a three year monitored Corrective Action Plan ("CAP") which included the following requirements:

- Maintaining policies and procedures including specific procedures governing the removal of documents from the health system premises, laptop encryption, USB drive encryption
- Annual HIPAA Compliance assessments and policy updates
- OCR approval of all policies
- Training of Massachusetts General's workforce on all policy updates with workforce certification
- An annual review of training materials
- A requirement that members of the workforce may not physically remove PHI from the premises for use or transport offsite until they are trained
- OCR monitoring of the CAP with periodic reports made to OCR

The take-away from the Massachusetts General case is two-fold. First, each covered entity should be knowledgeable about members of their workforce's

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removal of Protected Health Information (“PHI”) from the premises, and each covered entity should have policies governing how removal may be accomplished. Each covered entity (even though the documents in this instance were paper) should utilize password protected or encrypted devices if PHI is removed. Second, the fine gives insight into what the OCR will consider PHI. For example, some covered entities may not consider the information on their daily schedule PHI, but it is apparent that the OCR believes that office scheduling data is PHI.

The Cignet situation involved an every-day occurrence for covered entities—patient-requested copies of health information under the right of access as set forth in 45 C.F.R. 164.524. For 41 patients who requested access, Cignet did not respond to their requests and did not provide patients with copies of their health information, prompting complaints to the OCR. Cignet failed to provide records to the OCR during the investigation and the Department of Justice filed for enforcement of a subpoena to obtain the records in a federal court process. Cignet’s actions resulted in the imposition of a Civil Monetary Penalty. The Notice of Proposed Determination demonstrates how fines will be calculated. The OCR determined that Cignet violated HIPAA because it knew or reasonably could have known that patients were not being afforded access to their records. The OCR thus imposed a \$100 per day penalty for each day that access was not provided to each patient. Based upon a \$100 per day fine with a total of 278 days in 2008, 9,261 days in 2009 and 3,977 days in 2010, the fine was calculated at \$1,351,600. The OCR also determined that Cignet violated HIPAA by failing to cooperate, constituting “willful neglect,” and calculated for each individual a \$50,000 per day penalty (\$50,000 for a total of 4,859 calendar days). Because the total calculated exceeded the calendar year limit, the fine was reduced to \$3,000,000 (\$1,500,000 per year).

The take-away from the Cignet case is also two-fold. First, each covered entity should review their individual rights policies and be certain that the policies are being followed. Second, always cooperate with an OCR investigation.

With new regulations looming on the horizon, now is the time to begin review of HIPAA compliance efforts and evaluate of what works, and what does not work within your organization. Because some policy changes will be inevitable with the new regulations, this evaluation should lead to a more effective experience-based compliance plan.

FOR FURTHER INFORMATION

If you have questions or want more information, you should contact your legal counsel to ensure compliance with the new HIPAA/HITECH regulations. If you do not have regular counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to specifically meet your business needs. Marta Fisher Linenberger and Brooke Bennett Aziere are available to assist you. Marta Fisher Linenberger can be reached at 785-233-3600 or mmlinenberger@foulston.com and Brooke Bennett Aziere can be reached at 316.291.9768 or baziere@foulston.com. If you are looking for general health care counsel you may contact Scott Palecki at (316) 291-9578 or spalecki@foulston.com.

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