

HOOPER LUNDY & BOOKMAN, INC.

HEALTH LAW PERSPECTIVES

Newsletter

Volume 8, No. 3

April 2006

When To Notify Your Patients of a Security Breach

By Michael Gelfond

Few sectors utilize computers the way that the healthcare industry does. Hospitals, healthcare organizations and medical professionals keep the life history of thousands of patients on their computers. They may store a patient's name, address, phone number, social security number, insurance information and, most uniquely, their healthcare information. Now what happens if someone hacks such a computer network and accesses this information? Or what if someone simply walks out an office with a laptop that contains medical records? *Most importantly, in California, the healthcare organization or medical professional must notify their patients as soon as possible and there is no exception if only one or two patients' information was improperly disclosed.*

The breaches in confidentiality are becoming more known due to patient notification laws. For example, according to ZDNET News (April 8, 2005) a medical group's office in San Jose, California was broken into and two new computers were stolen in March 2005. Unfortunately, the medical group's computers contained not only patient billing information, but patient records and a part of the group's year end audit. At final count, the computers contained data on nearly 185,000 patients. Ironically, the medical group had just begun the process of encrypting its patient and financial information in response to concerns about security. It had not completed the process when the two computers were stolen.

Not all security breaches are caused by theft, sometimes all one has to do is hit the wrong button. On February 20, 2006, the Associated Press reported that earlier in the month a confidential list of 4,500 Florida residents that have AIDS and another 2,000 that are HIV positive was mistakenly emailed to over 800 health workers throughout the county. The county official who emails the monthly health statistics accidentally attached the wrong file which contained the names and addresses of these AIDS patients and HIV-positive individuals. Multiple state investigations have been launched to look into this incident.

California Civil Code Sec. 1798.82 includes specific requirements regarding when a company must notify patients of unauthorized access or disclosure of personal information.

Who is covered? Under California law all companies that do business in California or that have customers in the state must notify consumers/patients whenever their personal information may have been compromised. Therefore, the law covers not only hospitals or physician offices located in California but also healthcare organizations that service California residents, such as telemedicine providers.

What type of access triggers the law? California law states that "unauthorized acquisition of computerized data that compromises the security,

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confidentiality, or integrity of a patient’s personal information” must be reported to any patient who is a California resident.

What type of information is covered? The law covers all “personal information,” which is defined as a last name paired with a first name or first initial and at least one of the following:

- a social security number,
- a driver’s license or California Identification Card number, or
- a number from a bank account, credit card or debit card, along with a password or security code that would give access to the account.

The law exempts personal information that a company has stored in an encrypted format, and thus encrypting data may be the easiest way to avoid the need to notify patients.

What are the consequences of failing to notify? Failing to notify a patient can result in a lawsuit filed by the patient.

What steps should you take to comply with the notification law?

- If the unauthorized access is due to theft or other illegal action, the organization should immediately report to the appropriate law enforcement agency and should fully cooperate with any investigation.
- The organization must disclose the breach to affected patients as quickly as possible, and without unreasonable delay. A delay is reasonable if the delay is caused by: (a) a law enforcement agency determines that the disclosure will impede the criminal investigation; or (b) to determine the scope of the breach and restore the integrity of the affected data systems.

- The organization should also consider the viability of encrypting all electronically held “personal information” as defined above.

What type of notice should be given to patients? We recommend mailing letters to all affected patients notifying them of the security breach. The letters should at a minimum identify the type of information that was compromised, and provide contact information for the company’s information security/privacy officer, the three credit bureaus, the California Department of Consumer Affairs, Federal Trade Commission and the U.S. Department of Justice. Additionally, the letter should urge the patients to monitor their financial accounts for any signs of suspicious activity. The letter can also be posted on the company website.

For additional information, please contact Elspeth Delaney or Mr. Gelfond at 310.551.8111. in Los Angeles, Heidi Lamb at 415.875.8507 in San Francisco or Stephen Treadgold at 619.744.7304.

Court Rules on ER Balance Billing and Reimbursement

A state appellate court recently issued a published decision with key holdings in three significant managed care issues affecting emergency services. (*Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2nd Appellate Dist., Div. 3, Feb. 16, 2006).

First, the court addressed whether non-contracted Emergency Room (ER) physicians can balance bill patients for the balance of the physician’s fee not paid by the health care service plan or its delegate. The court held that California

Health and Safety Code section 1379 does not prohibit balance billing by non-contracted ER physicians since that provision only applies to negotiated, written contracts, rather than implied in law or implied in fact contracts. In reaching its decision, the court noted that a number of managed care regulations show that the Department of Managed Health Care (DMHC) anticipated that non-contracted providers could balance bill patients: *e.g.*, (a) a plan’s duty to warn patients in its Explanations of Coverage that the patient risks being directly liable to non-contracting providers; (b) the plan’s duty to disclose all of its written contracts with providers in the licensing process (which does not make sense for after-the-fact implied contracts); and (c) the DMHC’s consideration of a regulation that would have prohibited balance billing, but which never was enacted.

Second, the court ruled held that ER physicians are not required to accept the Medicare rate as full reimbursement from a health care service plan or its delegate. In reaching this ruling, the court pointed to express comments by the DMHC that the Medicare and Medicaid government program rates “are not designed to reimburse the provider for the fair and reasonable value of the services rendered and are therefore an inappropriate criteria” for non-contracted provider claims payment. (emphasis added). The court also referenced the DMHC’s six-part test in the AB 1455 regulations [28 CCR 1300.71] for determining reasonable and customary charges: *i.e.*, (1) the provider’s training, qualifications, and length of time in practice; (2) the nature of the services provided; (3) the fees usually charged by the provider; (4) the prevailing provider rates charged in

the general geographic area in which the services were rendered; (5) other aspects of the economics of the medical provider's practice that are relevant; and (6) any unusual circumstances in the case. 28 CCR § 1300.71(a)(3)(C). And, the court noted that there is a statute which expressly requires "reasonable" compensation to be paid to transferring hospitals or physicians that provide emergency services. In a footnote, the opinion noted that a payor might be able to show that the Medicare rate is the "reasonable rate" in "a particular fee dispute involving a specific injury or medical diagnosis," but there is no authority to support the proposition that Medicare rates would be reasonable "as an across-the-board rate."

Finally, the court confirmed that a health plan may litigate the reasonableness of the amount charged by ER physicians (just as providers have the right to challenge the reasonableness of payments by health plans). In so holding, the court pointed to comments by the DMHC which had "expressed concern that rates unilaterally charged by providers . . . may not constitute reasonable charges." While there is no strict rule for what rates a court or arbitrator might find to be "reasonable and customary," the safest approach in California at this time probably is for providers to develop their billed charges based as much as possible on the DMHC's six factors set forth in AB 1455.

For additional information, please contact Glenn Solomon (310)

551-8179 or Daron Tooch (310) 551-8192 in Los Angeles office, Craig Cannizzo (415) 875-8511 in San Francisco office, or Mark Johnson (619) 744-7301 in San Diego.

New Federal Law Requires Employee Fraud & Abuse Education by January 2007

New provisions of the federal Deficit Reduction Act, which President Bush signed into law on February 8, 2006, requires providers to take steps to prevent waste, fraud and abuse. Under the new law, health care providers that receive at least \$5 million in Medicaid payments must have a False Claims Employer Education Program. States will be required to certify to the U.S. Department of Health and Human Services that the state has a mechanism to ensure compliance with this requirement. All entities must establish such a program by January 1, 2007, the effective date of the provision.

The Education Program must include various components, such as:

Written policies for the entity that provide detailed information about both federal and any state False Claims Acts, administrative remedies for false claims, whistleblower protections under such laws, and the role of these laws in preventing waste, fraud and abuse in federal health care programs.

The written policies must cover all employees, management, independent contractors, and agents of the company.

- The written policies must include detailed information regarding the company's policies for detecting and preventing waste, fraud and abuse.
- The employee handbook must include a specific discussion of the laws described above, information on the rights of whistleblowers, and the company's policies for detecting and preventing waste, fraud and abuse.

With the increasing emphasis on fraud and abuse in health care, and an effort by government at both the state and federal level to scrutinize providers closely, clients are advised to review their policies and employee handbooks to ensure that the information required by the new law is included. Additionally, health care facilities may want to review any changes with legal counsel to ensure that their company complies with any whistleblower statutes, without overly exposing itself to suits by qui tam relators.

For additional information on the new law or related issues, please contact our fraud & abuse specialists: Mark Reagan in San Francisco at 415.875.8501, Brad Tully or David Henninger in Los Angeles at 310.551.8111 or Mark Johnson in San Diego at 619.744.7301.



CALENDAR

- April 23-26** **HCCA 10th Annual Compliance Institute**, Las Vegas. HLB Attorney Elspeth Delaney co-presents *Sarbanes-Oxley: Best Practices for Private and Nonprofit Health Care Entities*; Mark Hardiman presents *Current OIG Enforcement Initiatives: A Road Map for High Risk Compliance Areas*.
- April 25** **Meds/PDN**. HLB Attorney Linda Randlett Kollar co-presents *Behavioral Health and the Law*.
- May 2** **Los Angeles County Bar Association**. HLB Attorney Elspeth Delaney presents *Health Care Nuts & Bolts: Fraud & Abuse and Contracting*.
- May 5-7** **California Society for Healthcare Attorneys Spring Seminar, Lake Tahoe**. HLB Attorney Daron Tooch presents *Workers' Compensation Update*. HLB Attorney Elizabeth Saviano presents *Primary Care Access for Vulnerable Populations*.

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