

HR Client Advisory

August 2008

**HIPAA Compliance Failure Results in \$100,000 Hit
And Corrective Action Plan**

Marking a first in enforcement, the U.S. Department of Health & Human Services (HHS) has entered into a Resolution Agreement calling for the payment of \$100,000 by a Seattle company, Providence Health & Services (Providence), covered by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rule.

The settlement stemmed from computer equipment containing protected health information. On several occasions between September 2005 and March 2006, backup tapes, optical disks, and laptops, all containing unencrypted electronic protected health information, were removed from the Providence premises and were left unattended. The media and laptops were subsequently lost or stolen, compromising the protected health information of over 386,000 patients. As required under state notification laws, Providence notified the patients of the security breach. Providence also reported the stolen media to HHS. HHS received over 30 complaints about the stolen tapes and disks. Rather than to fine Providence, HHS entered into an agreement whereby Providence agrees to pay \$100,000 and implement a detailed Corrective Action Plan to ensure that it will appropriately safeguard identifiable electronic patient information against theft or loss.

Most privacy complaints are filed with OCR (Office of Civil Rights) and CMS (Centers for Medicare and Medicaid Services) which received more than 6,700 last year – many involving the workplace. For example, a Motorola employee was automatically enrolled in a "depression program" by her employer after her prescription drug management company reported that she was taking anti-depressants. Most are resolved without fines. This Providence case is the first to be resolved through the formality of a Resolution Agreement with a substantial payment and formal corrective action.

Though it did not admit liability, under the Resolution Agreement, in addition to the fine, Providence is required to implement a rigorous Corrective Action Plan which includes: revising the policies and procedures regarding physical and technical safeguards, such as encryption; detailing the procedures for the off-site transport and storage of electronic media containing patient information, subject to HHS approval; training employees on the safeguards; and conducting audits and site visits of facilities. The agency will be required to submit compliance report to HHS for the next three years.

The outcome is a reminder that careless handling of protected health information can trigger regulatory consequences, fines and, perhaps worse, damage to a company's reputation.

Winter Holidays Need Summer Attention

Now's the time to consider your holiday closing schedules. Christmas (12/25/08) and New Year's Day (1/1/09) both fall on a Thursday. According to the Connecticut HR Reports survey, 56% of employers plan to close on the Friday after Christmas, and 30% on the Friday after New Year's Day.

Reminder on Upcoming Seminar Sessions

Date: Tuesday, September 9, 2008

Location: Four Points by Sheraton, Meriden, CT

Morning Session: **Sexual Harassment Prevention**

Afternoon Session: **The New Definition of "Dependent" in Employer Health Plans**

Contact the firm by telephone or email for more information or if you would like to register to attend.

Robert Noonan & Associates LLC.

Phone: 860-349-7010 fax: 860-349-7011 e-mail: robertnoonan@robertnoonan.com

New Commission May Crack Down on Employee Misclassification

Public Act 08-156 was signed into law by the Governor on June 12, 2008 and took effect July 1, 2008. The law establishes a joint enforcement commission and an advisory board on the issue of employee misclassification. The enforcement commission will focus on two particular problems—the classification of individuals as independent contractors rather than employees, and the misclassification of non-exempt employees as exempt. In considering the Act, the legislature noted that misclassification often involves an employer's motive in misclassifying as avoiding paying workers' compensation insurance premiums and unemployment taxes.

The Commission will coordinate the civil prosecution of violations of state and federal laws as a result of employee misclassification and will report suspected violation of state criminal law to the State's attorney. Also, by February 1, 2010, and each succeeding year, the Commission will report on its actions for the preceding year and make recommendations for administrative or legislative

action. The law has more express emphasis on employers in the construction industry, creating an Employee Misclassification Advisory Board to advise the commission on misclassification specifically in the construction industry.

What Does this Law Mean for Employers in CT?

Employee misclassification has always been the source of a potential problem for employers—an expensive one. Misclassified employees can recover two years of back overtime pay and the independent contractor can hit the employer with workers' compensation claims that are not covered by insurance. The new law sends a clear message that the state will be becoming tougher and more vigilant, on misclassification identification and correction.

Employers need to remember that the exempt/non-exempt problem must be examined under both state and federal law before the proper classification can be made. In addition, those used as independent contractors should be asked to provide their own coverage for work related injuries or their independent contractor status should be reconsidered.

E-Verify for Federal Contractors – Available for All Employers

As of June 9, 2008, President George W. Bush has amended Executive Order 12989 to direct all federal departments and agencies to require contractors, as a condition of each future federal contract, to agree to use an electronic system to verify workers' employment eligibility. In response to this Executive Order, Secretary Michael Chertoff designated E-Verify as the system of choice.

In order to access the system, employers must first submit a Memorandum of Understanding (MOU) to the system and obtain a password. Once the employer is on the system, the system will provide the employer with the required posters, in English and Spanish, which notify individuals of the employer's participation. The employer is then free to enter social security information and verify the social security number. It is important to recognize that the system cannot determine immigration status, only eligibility for employment. Further, the system should not be used selectively – rather all similarly situated new hires should be verified and the e-verify records must be kept separate from the personnel file.

E-Verify states that it provides online access to over 444 million records in the SSA database and more than 60 million records in Department of Homeland Security immigration databases. However, E-Verify has been criticized by Society for Human Resource Management and others for having a less-than-reliable database.

EEO-1 Filing Due September 30th

The Employer Information Report EEO-1, otherwise known as the “EEO-1”, must be filed with the U.S. Equal Employment Opportunity Commission's EEO-1 by **September 30, 2008**. Employers have been receiving notices beginning in July 2008. All companies should receive 2008 EEO-1 filing materials by mail no later than mid-August 2008.

The EEOC states that the **preferred method** for completing the 2008 EEO-1 reports is the web-based filing system. The system requires the employer log into the company's database with a Login ID and Password.

The EEO-1 must be filed by all private employers who are subject to Title VII of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972) with 100 or more employees excluding state and local governments, primary and secondary school systems, institutions of higher education, Indian tribes and tax-exempt private membership clubs other than labor organizations and those entities; subject to Title VII who have fewer than 100 employees if the company is owned or affiliated with another company, or there is centralized ownership, control or management (such as central control of personnel policies and labor relations) so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees.

In addition, also obligated to file are all federal contractors (private employers) who have 50 or more employees, and are: 1) prime contractors or first-tier subcontractors, and have a contract, subcontract, or purchase order amounting to \$50,000 or more; 2) serve as a depository of Government funds in any amount; or, 3) issuing savings bonds and notes are also obligated.

Verifying Employment: New Justice Dept. Guidance on Avoiding Discrimination

The Department of Justice (DOJ) has issued guidance discrimination in the employment verification process. The guidance states that upon receiving an allegation of discrimination from a worker, the agency first will look to determine whether the complainant is an authorized worker. Once the worker’s eligibility is confirmed, it will then investigate whether the employer engaged in unlawful discrimination.

The DOJ warns that an employer who receives a no-match letter from the Social Security Administration and terminates employees without attempting to resolve the mismatches, or who treats employees differently “or otherwise acts with the purpose or intent to discriminate based upon national origin or other prohibited characteristics,” may be charged with discrimination.

The DOJ will not find reasonable cause for a discrimination claim if:

- An employer follows all of the safe harbor procedures outlined in the Department of Homeland Security’s no-match rule; and,
- If all employees with name-number mismatches were treated the same.

The guidance is available on the DOJ website: <http://www.usdoj.gov/crt/osc/>.

.....

• The Law Firm of Robert D. Noonan, Esq. provides legal services to employers.

• The firm:

- Represents primarily employers in employment discrimination cases;
- Writes and reviews employee handbooks;
- Advises employers on day-to-day workplace issues;
- Trains supervisors and managers in sexual harassment, interviewing, leave issues, performance appraisals and the law of the workplace.

• Robert Noonan & Associates\EmpACTS of New England LLC, (860) 349-7010 or robertnoonan@robertnoonan.com.

.....