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CORRIDORS

News for North Carolina Hospitals
from the Health Care Attorneys of Poyner Spruill LLP

EHR Incentives for Hospitals—Defining the First Milestones in Achieving "Meaningful Use"

by Pam Scott

Hospitals and medical professionals planning to take advantage of electronic health record (EHR) incentives created under the American Recovery and Reinvestment Act of 2009 (last year's federal stimulus package) now have a clearer idea of what they will have to accomplish to qualify for the incentives with recent rules issued by the feds. The Recovery Act authorizes the Centers for Medicare & Medicaid Services (CMS) to provide reimbursement incentives for hospitals and eligible professionals who become "meaningful users" of certified EHR technology. On January 13, 2010, the federal government published standards for the EHR incentive program. CMS' proposed rules include a draft definition of the core concept of "meaningful use," offering a detailed framework for determining how challenging a task demonstrating meaningful use of EHR technology will likely be.

The proposed meaningful use criteria are based upon a series of specific objectives, each of which is linked to a proposed measure that all hospitals and eligible providers must meet in order to demonstrate that they are meaningful users. These objectives and measures include use of EHR technology in a way that improves quality, safety and efficiency of health care delivery; reduces health care disparities; engages patients and families; improves care coordination; improves population and public health; and ensures adequate privacy and security protections for personal health information. The first payment year for which hospitals and eligible medical professionals can qualify for EHR incentives is 2011.

The current plan is to implement the meaningful use criteria in stages. The initial stage of criteria will focus on collecting health information electronically in coded formats, using EHR data to track key clinical conditions and coordinate care, implementing clinical decision support tools, and reporting clinical quality measures and public health data. For Stage 1, which begins in the 2011 payment year, CMS proposes approximately two dozen objectives/measures that hospitals and eligible professionals must meet to qualify to receive EHR incentives. The proposed criteria call for hospitals to submit at least 10% of orders electronically, and for eligible physicians to submit at least 80% of their orders electronically. In 2011, hospitals would report results for all objectives/measures, including clinical quality measures to CMS, or for Medicaid hospitals to the States, through attestation.

The second stage of meaningful use criteria would be proposed by the end of 2011. Stage 2 criteria will focus on structured information exchange and continuous quality improvement. Finally Stage 3, which will focus on decision support for "national high-priority conditions" and population health, would come out in 2013. CMS is urging interested stakeholders to comment on its first comprehensive attempt at framing the EHR incentive program, to help inform its development of the final meaningful use criteria.

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RALEIGH CHARLOTTE ROCKY MOUNT SOUTHERN PINES WWW.POYNERSPRUILL.COM

301 Fayetteville St., Suite 1900, Raleigh, NC 27601/P.O. Box 1801, Raleigh, NC 27602-1801 P: 919.783.6400 F: 919.783.1075

The H-1C Visa Program Has Expired: What Other Options Are Available to Bring in Foreign Nurses?

by Jennifer Parser

With the expiration of the H-1C visa for nurses on December 21, 2009, employers must consider other alternatives to hire foreign nurses. The need for visa alternatives is even more critical as the U.S. Department of Labor predicts a growing need for registered nurses due to an aging population and technological advances that emphasize preventive health care. In fact, health care is one of the two industry sectors expected to have the largest employment growth, adding four million jobs between 2008 and 2018. The proposed Comprehensive Immigration Reform for America's Security and Prosperity Act will also affect employers hiring foreign nurses.

The following nonimmigrant visas are only available to registered nurses (RNs). Licensed practical nurses and licensed vocational nurses currently must apply for a permanent resident visa and, upon approval, wait for a visa number, since only a limited number are available annually.

TN Visa

A registered nurse who is a Canadian or Mexican national (but not necessarily born there) can work in the United States as a TN visa holder under the North American Free Trade Agreement, known as NAFTA. In addition to being qualified as a nurse by their home countries, such registered nurses must have been certified by the Commission of Graduates of Foreign Nursing Students International (CGFNS) and its division, the International Commission of Health Care Professionals (ICHP), in order to obtain the VisaScreen certificate. If approved for TN visa status, Canadian nurses do not need the actual visa inserted in their passports, but Mexican nurses must obtain the visa at a US consulate in Mexico. The TN visa is issued for one year, and extensions can be indefinite and up to three years in length per extension. Although extendible indefinitely, the TN visa carries with it strong nonimmigrant intent so that its issuance is dependent upon the TN visa holder continuing to demonstrate strong ties with Canada or Mexico and an intent to return there at the expiration of the authorized stay.

H-1B Visa

The H-1B visa option is intended for a "specialty occupation," which is normally an occupation requiring a US bachelor's degree or equivalent. This can sometimes be used for RNs, but not always since it is possible to be an RN without obtaining a US bachelor's degree or its foreign equivalent. However, if the RN's practice area necessarily requires four years of post-secondary school education, he or she may qualify for H-1B visa status. Some examples of nurses who require more advanced training to qualify for an H-1B are clinical nurse specialists, nurse practitioners, certified registered nurse anesthetists, nurse managers or supervisors, and critical care nurses.

To obtain any of the above visas, all RNs must pass the national licensing exam, known as the National Council Licensure Examination (NCLEX-RN). In addition, an RN must meet state licensing requirements where he or she will practice and be certified by the CGFNS for the VisaScreen certificate.

The proposed Comprehensive Immigration Reform for America's Security and Prosperity Act (CIR ASAP) will affect the ability of employers to obtain H-1B visas insofar as the employer will be subject to stricter recruitment requirements of US workers before an H-1B visa for a foreign RN will be granted. Further, under CIR ASAP, the Department of Labor will be authorized to conduct annual audits of employers that rely heavily on H-1B visa holders.

Immigrant or Permanent Resident Visas for Nurses

Only RNs or physical therapists are exempt from labor certification, the first step to permanent US residence. Labor certification is the process of proving to the US Department of Labor that the prospective employer attempted to hire a US worker, either a US citizen or permanent resident, through a detailed recruitment process but was unsuccessful. Unlike registered nurses, licensed practical nurses and licensed vocational nurses are not exempt from the labor certification process. As a result,

they can only be hired through the lengthy immigrant, or permanent resident, visa process, which includes the labor certification component. Therefore, since licensed practical nurses and licensed vocational nurses are not eligible for nonimmigrant visas, they must wait abroad until the labor certification process is complete, the immigrant visa is approved, and there is a visa available to them. This results in a long delay since the nursing profession falls into an immigrant visa category, known as the third preference, that has only a limited number of visas annually and is perennially oversubscribed. Even though RNs and professional nurses are listed on Schedule A, Group I as pre-certified for employment in the United States by the Department of Labor, the third preference category still applies to them, so they also have a lengthy wait. The challenge to an employer is to keep its foreign employers in the United States in nonimmigrant visa status while waiting for a permanent resident visa to be both approved and available.

The date on which a petition for permanent residence is filed is extremely important because this is the date that places the applicant in line for a visa and is known as the "priority date." A nurse can change employers once the application is approved, even if a visa is not available, and still retain the same priority date. Once a visa becomes available, a nurse may only apply to adjust status to permanent resident from within the US if here on a valid nonimmigrant visa with the CGFNS certificate, a full and unrestricted RN license in the state of the intended employment or proof of passing the NCLEX, and a VisaScreen certificate.

Under the proposed CIR ASAP, an RN with a pending permanent resident visa petition will be able to continue working whether a visa is currently available.

Relevant Sections of Proposed Comprehensive Immigration Reform for America's Security and Prosperity Act

Title III of proposed CIR ASAP deals with general visa reform, some of which will affect employers hiring foreign nurses. Unused employment-based and family-sponsored permanent resident visas from 1992 through 2008 will be recaptured for use, thereby increasing the number of visas available and hopefully addressing the backlog in nurses' visas. Any unused visas each year will become available the following fiscal year. The percentage of visas available per country issued yearly can be increased, alleviating the huge backlog for nurses from countries like the Philippines. Children of Filipino World War II veterans will be exempt from annual numerical limitations on visas for Filipino nationals, also potentially alleviating the backlog of Filipino nurses awaiting visas.

Employers that use recruiting agencies will have to provide the US Secretary of Labor with information about those recruiters. The employer will be liable for the actions of its recruiter and be subject to civil penalties, in essence becoming responsible for their recruiters' compliance with US immigration law.

It is a good time for hospitals and health care facilities to voice their opinions and concerns to their local Congressional representatives as CIR ASAP comes under consideration. Meanwhile, Poyner Spruill LLP is happy to assist employers with hands-on guidance in hiring foreign-trained nurses and to pro-actively provide visa-related information that will affect hiring foreign nurses.

Jennifer Parser practices in the areas of immigration, employment and international law. She is licensed in the state of New York, and is not licensed in North Carolina. Jennifer may be reached at **jparser@poyners.com** or **919.783-2955**.

Poyner Spruill Article on Hospice COPs Among Most Read Law Firm Articles in 2009

Kudos to Ken Burgess of Poyner Spruill LLP, whose brief but fact-filled article entitled "SNF-Hospice Contracts Under the New Hospice Medicare Conditions of Participation" was placed on the *National Law Review*'s list of the dozen most read legal articles in 2009. The article was submitted to the *National Law Review* on August 23, 2009, and was based on follow-up questions from an article published in *Corridors'* sister publication, *Shorts on Long Term Care*, which addresses legal developments of interest to the nursing home industry. To subscribe to *Shorts* via email, please visit our web site and click on sign up for alerts.

There's a Guy at the Door with a Badge

by Chris Brewer and Ken Burgess

Hearing these words is every health care provider's worst nightmare. But, with the increasing use of state and federal police powers to investigate allegations of fraud, abuse and neglect at hospitals and other health care facilities, the odds of hearing them at some point are growing.

Most providers have no idea what to do if a state or federal official shows up at their facility with an official search warrant asking for documents. Obviously, the first step is to contact your attorney for advice. Request permission from the officer or agent serving the warrant to call your attorney before the search begins. But what if they will not delay the search or you can't reach your attorney?

We've developed a few guidelines to help providers that find themselves in that position and need to know what to do, at this moment, while they are contacting or waiting to hear back from counsel. These apply in any situation where state or federal officials show up at your facility, armed with search warrants issued by an enforcement agency (such as the State Attorney General, the FBI, the Office of the Inspector General, etc.) or a state or federal court:

1. Be courteous and professional. Do not interfere with the search. Cooperate in the document production but do not volunteer information. Do not conceal or destroy any documents. Cease all regularly scheduled destruction of documents.

2. Get the name of the lead agent, the agency for which he or she works, and his or her address and telephone number.

3. Request a copy of the search warrant, including the affidavit. Note the areas the agents can search and the items they can seize. If the agents begin to search places or seize items not identified in the search warrant, bring it to the lead agent's attention. Fax a copy of the warrant to your attorney.

4. Identify attorney-client and other privileged information. The agents are permitted to seize this information but should keep it segregated.

5. Request permission to have a few employees accompany agents to monitor the search. Tell these employees not to make any substantive statements to the agents. Have employees take notes clearly indicate (a) the areas searched, (b) the documents or items seized, (c) the questions asked by agents, and (d) the names of employees interviewed by agents. Try to make a record of everything said by the agents conducting the search.

6. The agents may detain all persons on the premises while the warrant is being executed. Ask permission to send nonessential employees home. If permission is granted, advise employees to take home only personal possessions and not to take any hospital documents or files with them, including electronic files. Advise employees who do leave that they will be contacted regarding when to return to work, or that they should contact a designated individual at a certain time and date to find out when to return to work.

7. Develop an employee announcement advising employees that the premises are being searched pursuant a search warrant, the hospital is cooperating with officials executing the warrant, and employees are not to interfere with the search.

8. Explain to employees their rights.

    - Ask that the agents refrain from interviewing employees until your attorney arrives. Inform the employees they have the right not to be interviewed by the government. It is the individual's choice whether he or she agrees to be interviewed. If employees agree to be interviewed, they can have counsel to represent them at the interviews.

- Advise employees that they may be contacted at home by government agents, and their same rights to be interviewed or to decline apply there as well. Also advise employees that even if they choose not to be interviewed, they could still be subpoenaed to testify before a grand jury.
- The company should not instruct employees to decline to be interviewed. That choice belongs fully to each employee.
- The company should determine whether it is willing to pay for representation of its employees. If so, it should inform employees.
- Have employees inform the hospital if they have been contacted by a government agent, been interviewed, or received a grand jury subpoena. Debrief any employees who are interviewed or questioned.
- Provide a name and telephone number of a company representative employees can contact if they have questions.

9. Make a list in advance of documents or equipment essential to ongoing patient care and business operations. Ask the agents to allow photocopies to be made of essential documents that will be removed or to agree to a workable arrangement to provide prompt access.

10. Create a list of documents or items seized during the search. Request a written inventory prepared by the agents of the documents or items seized. Request any property that is seized but not listed or not sufficiently described on the inventory to be added. If the agents refuse, request a "receipt" of items seized during the search that are not adequately described on the inventory.

Hospitals following these simple guidelines will significantly improve their ability to manage both their immediate responses to search warrants and the subsequent effects of the disclosure, while educating their employees how to avoid uncertainty and act responsibly.

For more information about this article or other health care law–related issues, please contact **Chris Brewer** at **919.783.2891** or **cbrewer@poynerspruill.com** or **Ken Burgess** at **919.783.2917** or **kburgess@poynerspruill.com**.

EHR Incentives... continued from page one

In addition to CMS' proposed rules addressing meaningful use and other aspects of the EHR incentive program, the Office of the National Coordinator for Health Information Technology (ONC) released a closely linked interim final rule that outlines the standards, implementation specifications and certification criteria that must be met by certified EHR technology to exchange health care information among providers and between providers and patients. The objective is to define a common language to ensure accurate and secure exchange of health information across different EHR systems. The details spelled out in the EHR certification rule include standard formats for clinical summaries and prescriptions; standard terms to describe clinical problems, procedures, lab tests, medications and allergies; and standards for the secure transmission of this information over the Internet. This interim final rule will go into effect 30 days after publication, with an opportunity for public comment and refinement during the 60-day period after publication.

Both the CMS and ONC rules, which were published in the Federal Register on January 13, 2010, are open for public comment through March 15, 2010.

For more information on EHC incentives or other health care law related issues, please contact **Pam Scott** at **919.783.2954** or **pscott@poynerspruill.com**.

HITECH Pit Stop

by Pam Scott

Want to know more about Health IT and HITECH developments from the feds' perspective?

Check out ONC's Health IT Buzz Blog at http://healthit.hhs.gov/blog/onc/

Working on your breach notification policies and procedures?

Explore the risk assessment tool developed by NCHICA's Privacy and Security Officials Workgroup at http://www.nchica.org/

A Proposed New Year's Resolution

by Bryn Wilson

For 2010, a good New Year's resolution from an employment law perspective would be to review your existing personnel policies, paying particular attention to your electronic usage policy.

Employers may assume that anything sent or viewed by their employees on a work-owned or work-issued computer or cell phone can be reviewed by the employer. However, courts around the country are placing limits on what employers can lawfully access, even on an employer-owned computer. And the critical piece in analyzing these cases is usually the employer's electronic usage policy–or lack thereof.

There is a definite upward trend in litigation over this issue, because many companies are routinely accessing employee hard drives and obtaining information that is harmful to the employee. Such information often results in disciplinary action against an employee or is used against a former employee who has sued the employer. When deciding whether the employer had the right to access and/or use employee information on work computers, software systems or cell phones, courts focus on the employer's electronic usage policy. The critical issue is whether the employee had a reasonable basis for believing that information sent on the employer's computer or cell phone—even if sent from an employee's private, password-protected email account (like gmail.com or hotmail.com)—would be subject to review by the employer. However, even the strongest language in an electronic usage policy may not be sufficient if a supervisor or manager tells employees that in actual practice the company will not review their electronic communications.

These difficult issues will be clarified next year, because the Supreme Court has just agreed to hear a case on this subject. The case before the Supreme Court involves an electronic usage policy that prohibited personal use of the employer's computer and limited the number of text messages that could be sent per month over company-issued pagers. In practice, the supervisor told employees that the employer wouldn't review their messages as long as employees who exceeded the permitted text message amount reimbursed the overage charges. When one employee repeatedly exceeded the permissible texting amounts, the supervisor obtained copies of the messages from the cellular provider and reviewed them to see if they were work-related. The employer discovered many of the text messages were sexual in nature and had been sent to fellow employees. The employee was fired, and he in turn sued his employer for invasion of privacy. One of the questions the Supreme Court will consider is whether the employee had a legitimate expectation of privacy in the content of his text messages.

The Supreme Court's decision will provide more information about best practices for electronic usage policies. Until that time, we recommend adopting a very explicit and strict policy in which it is clear to employees that anything transmitted over their work computers or cell phones is subject to being accessed by the employer, and that no supervisor or manager has the authority or ability to vary the electronic usage policy.

For more information on employment law issues, please contact Bryn Wilson at 919.783.1117 or bwilson@poynerspruill.com.

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