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Editor's Column

NEW DISCLOSURE RULES and ANOTHER RED FLAGS DELAY

Several items of interest to long-term healthcare providers have recently crossed my desk:

New Federal Disclosure Rules for Providers:

While this issue's main story deals with some of the better known aspects of the federal healthcare reform law, one somewhat hidden provision should be noted by owners and managers of nursing facilities. The Patient Protection and Affordable Care Act (the "PPACA") contains provisions, effective immediately, which require the facility, regardless of its tax status, to make certain disclosures to the following officials:

- The state LTC ombudsman;
- The federal Secretary of HHS;

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CALIFORNIA TAKES ACTION TO IMPLEMENT HEALTHCARE REFORM (WHILE OTHER STATES FIGHT IT)

by

Michael A. Manley, Esq.

Most people believe the recently enacted federal healthcare reform law ("The Patient Protection and Affordable Care Act" or "PPACA") will roll out over the next four years or so automatically, on its own, but that is not the case. Many of its provisions anticipate state legislative and/or administrative action in order to become fully effective.

Many state legislatures and governors are beginning to set up the infrastructure necessary to implement the PPACA; California is at the forefront of these activities. Early in June the State Assembly passed A.B. 1602, authored by Assembly Speaker John A. Perez, which proposes to enact this state's response to healthcare reform. This legislation now moves to the State Senate for that body's consideration. Initially just a so-called "spot bill" (a placeholder, to be fleshed out later), A.B. 1602 has begun to resemble a full-fledged state response to the federal action.

Speaker Perez' measure has five principal parts. If enacted as it now reads it would:

1. Prohibit individual insurance companies or

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400 CAPITOL MALL, SUITE 1800
SACRAMENTO, CA 95814
TEL: (916) 492-5000 ~ FAX: (916) 446-4535

WWW.DIEPENBROCK.COM

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- The Office of the Inspector General of HHS; all upon request.

The information to be disclosed includes (1) the name of any person having an ownership interest of 5% or more in the facility; (2) the name of any entity with a security interest in the facility of 5% or more; (3) the name, title and period of service of each board member; (4) the name, title and period of service of each managing employee of the facility; and (5) a variety of other items of information regarding persons or entities working at, or on contract for, the facility.

The Secretary of HHS has until 2012 to develop a standardized format for this reporting, but since the requirement to report is immediate, to the extent a facility reports such information on its IRS Form 990, to CMS as part of its Medicaid report, or otherwise to HHS, it has fulfilled its requirement. The reporting requirements are somewhat complex, so you should consult legal counsel.

Red Flags Delayed Again

The Federal Trade Commission ("FTC") has once again delayed enforcement of the so-called "Red Flags Rule," this time through December 31, 2010.

The rule was designed by Congress as an anti-fraud

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group health insurance plans from establishing lifetime limits on the dollar value of health insurance benefits to be paid to an insured;

2. Prohibit the limiting age of dependent health care coverage sold in California to be less than 26 years;
3. Effective September 23 of this year, require health insurers to provide coverage for certain preventive procedures, such as approved immunizations and periodic health screenings for minors;
4. Prohibit the imposition of coverage limitations for pre-existing health conditions; and
5. Create the "California Health Benefits Exchange," to be governed by a board comprised of appointees of the Governor, the Assembly Speaker and the Senate Rules Committee, to arrange for, administer and supervise the sale of qualified health insurance policies pursuant to rules established by the federal Secretary of Health and Human Services ("HHS").

While the first four provisions of A.B. 1602 essentially conform California law to specific elements of the PPACA, the establishment of a state insurance exchange is required by the federal act in order to implement a key part of healthcare reform.

The PPACA provides that in 2014 all citizens must obtain qualifying health care insurance or pay a monetary penalty. To the extent they cannot obtain insurance through their employers, citizens will be able to shop for coverage on each state's health insurance exchange, where private insurance carriers offering plans approved by the exchange may market their products. To the extent that persons seeking coverage have a qualifying lower income, they may receive financial assistance via the exchange.

In the three and a half years until the federal mandate kicks in, state insurance exchanges may offer policies providing for catastrophic health insurance

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measure which requires creditors and financial institutions to implement programs to detect and respond to “red flags” which indicate identity theft. Its implementation has been delayed repeatedly.

This time the delay in implementation was urged by members of Congress, and the FTC has asked that body to limit the scope of coverage under the rule. If Congress does so, it is possible that nursing facilities may escape coverage under Red Flags.

Please let us know if there are specific topics you would like us to cover in future issues of “Of Counsel.”

*Michael A. Manley,
Editor*

About Diepenbrock Harrison

Diepenbrock Harrison has roots in Sacramento, California’s capital, which date back to the 1800s. Our practice focuses on acquisition, development and protection of property, permits and business opportunities, and resolving regulatory disputes.

We are active in the legal aspects of the healthcare arena, and specialize in representing senior care and living providers. We are members of Aging Services of California and the California Association of Health Facilities.

coverage, with higher than normal deductibles.

A.B. 1602 is not the only California legislation seeking to implement the PPACA in the state. Senate Bills 900, 1088 and 890 also deal with specific parts of the federal law; all three have passed the State Senate and await action in the Assembly. The best bet is that the authors of these four bills will collectively produce a comprehensive legislative response that will be sent to Governor Schwarzenegger for final action later this year.

California is not alone in moving quickly to implement the new federal law. The legislatures and/or administrations of 17 other states have taken action to study or to implement PPACA.

While these 18 states are undertaking actions in accordance with the federal statute, at least one of the governmental branches in 39 states have challenged the PPACA via state constitutional amendments, law changes or other actions. In one state, Idaho, both houses of the legislature have called for the adoption of a new “28th Amendment” to the U.S. Constitution to provide that Congress may not make any law requiring a citizen to have health insurance. It takes three-quarters of the states to amend the federal constitution, so the likelihood of such action appears marginal. However, in 30 states constitutional amendments at the state level have been proposed to bar the mandating of health coverage, and in 16 states bills have been introduced to similarly amend local law.

Legal scholars are nearly unanimous in opining that such actions by the states are most likely to fail. Mark A. Hall, professor of law and public health at Wake Forest University says that states may not “opt out” of federal laws they might find distasteful. “There is no way this challenge will succeed in court,” he says.

Timothy Stoltzfus Jost, professor of health law at Washington and Lee University of School of Law concludes as follows: “States can no more nullify a federal law like this than they could nullify the civil rights laws by adopting (state) constitutional amendments. States cannot nullify federal law. This principle is simply beyond debate, and state legislators, many of them lawyers, know

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that.” Writing in the New England Journal of Medicine, Jost concludes “(t)he purpose of these laws, therefore, is not legal but rather political.”

What happens if a state refuses to create its state health insurance exchange? The PPACA foresees just such a possibility, and gives the Secretary of HHS the power to do so administratively for such a state. The likelihood is that prior to January 2014, when federal mandatory health insurance requirements become effective, most – if not all – of the states will have their insurance exchanges in place.

Michael A. Manley is of counsel for Diepenbrock Harrison. He has specialized in health, long term care, and senior housing law for the past 30 years. To reach Michael with questions or comments e-mail him at mmanley@diepenbrock.com or call him at (916) 492-5066.

Diepenbrock Harrison is an associate member of Aging Services of California and The California Association of Healthcare Facilities.

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