

2017 Michigan Rural Health Conference

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Health Law Update



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Overview

- American Health Care Act
- Practice of Physician Assistants
- Advance Practice Registered Nurses Expanded Scope of Practice
- Medical Residents are both employees and *students* of hospitals
- HIPAA Enforcement Actions

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Practice of Physician Assistants

- “Practice as a physician assistant” means the practice of medicine with a participating physician under a practice agreement
- A Physician’s Assistant shall not engage in the practice as a physician assistant except under the terms of a practice agreement, which must include all of the following:

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Practice of Physician Assistants

1. A process between the Physician Assistant (PA) and participating physician for:
 - communication
 - availability; and
 - decision making

when providing treatment for a patient

(This process must utilize the knowledge and skills of the PA and participating physician based on their education, training and experience)

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Practice of Physician Assistants

2. A protocol for designating an alternative physician for consultation when the participating physician is not available
3. The signature of the PA and the participating physician
4. A termination provision that allows the PA or the participating physician to terminate the practice agreement upon 30 days prior written notice

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Practice of Physician Assistants

5. Shall not include as a duty or responsibility of the PA or participating physician an act, task or function that the PA or participating physician is not qualified to perform (education, training or experience) or that is outside the scope of the PA's or participating physician's license; and
6. Requires the participating physician to verify the PA's credentials

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Practice of Physician Assistants

- Physician supervision is not required
- Changes deleted a provision that prohibited a physician from delegating ultimate responsibility for the quality of services

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Practice of Physician Assistants

- “The number of PA’s in a practice agreement with a participating physician and the number of individuals to whom a physician has delegated the authority to perform acts, tasks or functions are subject to Section 16221” (grounds for disciplinary action)
 - Now governed by the practice agreement

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Practice of Physician Assistants

- The board may prohibit or restrict the delegation of a medical care service, or may require higher levels of supervision if the board determines the medical care service “requires extensive medical training, education or ability, or poses serious risks to the health and safety of patients”
- The department, in consultation with the board, may adopt administrative rules concerning the prescribing of drugs by a PA, which may define the drugs or classes of drugs a PA may prescribe

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Practice of Physician Assistants

- A physician group or health facility can designate one or more physicians to enter into the practice agreement
 - a physician is not required to countersign orders written by the PA
- A PA who is a party to a practice agreement may “prescribe a drug in accordance with procedures and protocols for the prescription established by rule of the department” using the PA’s name and DEA registration

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Practice of Physician Assistants

- Failure to comply with the requirements of a practice agreement is now grounds for license disciplinary action
- Updating Hospital’s patient rights policy to include “or a physician’s assistant with whom the physician has a practice agreement”
- Training to identify victims of human trafficking

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Advance Practice Registered Nurses Expanded Scope of Practice

- Add a definition of an “APRN” which includes:
 - Nurse midwife
 - Nurse Practitioner; and
 - Clinical Nurse Specialist
- Can prescribe non-scheduled prescription drugs and schedule 2-5 controlled substances as a delegated act of a physician
 - for schedule 2-5 drugs, must use both the APRN’s and physician’s name and DEA registration

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Advance Practice Registered Nurses Expanded Scope of Practice

- APRN can order, receive and dispense starter dose drugs
 - for schedule 2-5 drugs, as a delegated act of a physician, and must use both APRN’s and physician’s name and DEA registration

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Advance Practice Registered Nurses Expanded Scope of Practice

- Expanded Practice allows the APRN to:
 - make calls and go on rounds in private homes, public institutions, emergency vehicles, ambulatory care clinics, hospitals, intermediate/extended care facilities, nursing homes and other health care facilities
 - order physical therapy, speech therapy and order restraints; and
 - HIV notification and counselling

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Advance Practice Registered Nurses Expanded Scope of Practice

- Need to update Hospital's patient rights policy to include "or advanced practice registered nurse"
- Billing has not caught up with scope of practice – still need collaborative agreement to bill under Medicaid and Medicare

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Medical Residents are Employees and Students

- A second year student joined the residency program at Mercy Hospital
- The resident alleged that the program director sexually harassed her and retaliated against her because she complained about his behavior
- The resident complained to the hospital's human resource department about the program director's behavior

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Medical Residents are Employees and Students

- The resident was referred by the human resource department to a psychiatrist
- The resident was put on a corrective action plan and then terminated from the program
- The resident has not been able to complete her residency because no other program has accepted her

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Medical Residents are Employees and Students

- Two years later the resident filed a law suit alleging hostile environment, quid pro quo and retaliation
- The resident never filed a claim with the EEOC or pursued any of Title VII's administrative requirements
- Title VII (discrimination at work) vs. Title IX (in education)
- Title IX does not require administrative action before the plaintiff can file a law suit

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Medical Residents are Employees and Students

- The Civil Rights Restoration Act of 1987 amended Title IX to define "education program or activity" as "all of the operations" of certain kinds of entities, "any part of which" is extended federal funding
- "First, Doe's allegations raise the plausible inference that Mercy is a private organization principally engaged in the business of providing healthcare, 20 U.S.C. § 1687(3)(A)(ii), whose operation of an ACGME-accredited residency program makes its mission, at least in part, educational"

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Medical Residents are Employees and Students

- “Second we find it plausible Mercy’s operation of a residency program makes its mission, at least in part, educational under Title IX because of Mercy’s “affiliat[ion]” with Drexel Medicine, a university program plausibly covered by Title IX,”
- Based on this, the court concluded that the resident could sue the hospital under Title IX

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Medical Residents are Employees and Students

- Preparing, communicating and enforcing policies and procedures prohibiting sexual harassment and discrimination
- It is important to set forth clear reporting alternatives for resident and medical student concerns and investigation of all complaints
- Training faculty, staff, residents and students to ensure they understand the laws and their responsibilities under the laws
- Training can play a significant role in defending against discrimination and harassment claims

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Medical Residents are Employees and Students

- Immediately taking steps to ensure the integrity of the investigation and protect the Resident
 - Separate adverse parties immediately
- Upon conclusion of the investigation, immediately take remedial action designed to effectively end prohibited conduct
 - Such remedial action can include: discharge, discipline, additional training, counseling, re-assignment, etc.

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HIPAA Enforcement Actions

- Office for Civil Rights ("OCR") announced on February 1, 2017, that it imposed a HIPAA civil money penalty of \$3.2 million on a Texas medical center ("Medical Center")
- OCR issued the penalty for wrongful disclosure of unsecured electronic protected health information ("ePHI") and for extended noncompliance with HIPAA requirements
- The Medical Center filed breach notification reports that stemmed from the loss of an unencrypted, non-password protected personal device and the theft of an unencrypted laptop from a Medical Center location

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HIPAA Enforcement Actions

- OCR's investigation determined that the Medical Center failed to implement risk management plans and to utilize encryption or a comparable security measure on its devices
- In addition, OCR found that the Medical Center was aware of its security and privacy deficiencies, as they had been previously identified by third-party assessments, yet did not implement critical corrections

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HIPAA Enforcement Actions

- It is critical to not only identify potential security gaps in mobile devices, laptops and storage devices but to implement corrective remedies in a timely manner
- In determining the amount of a HIPAA enforcement action penalty, OCR may consider the length of time that a known compliance deficiency remained uncorrected
- It is critical to ensure breach notification is made without undue delay and no more than 60 days from the date a breach is discovered.

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