



# Second National HIPAA Summit

HIPAA Security Regulations:  
Enforcement - Audit Trails,  
Surveillance, Self-Reporting, Due  
Process and Right to Counsel (Session  
#203)



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# Employee Privacy Rights

- ◆ Electronic Communications Privacy Act of 1986
  - ◆ prohibits eavesdropping on public phone lines
    - phone calls and email
  - ◆ exceptions

# ECPA Exceptions

- ◆ Owner of communications system can monitor to maintain and protect system
- ◆ Employer can monitor in the regular course of business (CSR exception)
- ◆ One party consents (explicit or implicit)

# Invasion of Privacy

- ◆ Surveillance, monitoring, invasion directly related to reasonable goal of employer
  - ◆ generally allowed by courts

# Medical Staff Rights

- ◆ Health Care Quality Improvement Act
  - ◆ entity must report to Board or Medical Examiners if it takes a professional review action that adversely affects clinical privileges for more than 30 days

# HCQIA

- ◆ Professional review action is action based on competence or professional conduct that affects, or could affect adversely the health or welfare of a patient or patients

# HCQIA

- ◆ Due Process required
- ◆ Adequate notice and hearing
  - ◆ includes right to counsel at the hearing

# Medical Staff Bylaws

- ◆ Usually specify conditions for termination of privileges
  - ◆ what are sufficient grounds
  - ◆ notice
  - ◆ hearing
- ◆ Some states have very specific laws
- ◆ Summary suspension

# Self-Reporting

- ◆ Federal Corporate Sentencing Guidelines
  - ◆ Felony and Class A misdemeanors
  - ◆ Reduction in culpability score if self-report prior to imminent threat of disclosure or government investigation
    - culpability score determines multiplier

# Self-Reporting

- ◆ OIG Voluntary Disclosure Program
  - ◆ fraudulent, abusive and wasteful activities
    - any violation of federal criminal, civil or administrative law

# Self-Reporting

## ◆ Risks

- ◆ turning light on self
- ◆ hands over info that otherwise might not be discovered
- ◆ no assurance of how government will react

# Employee Reactions

- ◆ Suit for wrongful termination, slander, defamation, invasion of privacy
- ◆ Corporate compliance program including security and privacy
- ◆ HR policies

# Patient Reaction

- ◆ Corporate negligence doctrine
  - ◆ hospital liable for negligence of physicians and for own negligence in failing to identify potential causes of injury from physicians on medical staff

# Due Process

- ◆ 4th and 14th Amendments
  - ◆ due process
  - ◆ government action only
- ◆ Private hospitals found to engage in government action
  - ◆ quasi-public
- ◆ State statute and case law

# Due Process

- ◆ Personal reputation a liberty interest protected by the 4th and 14th Amendments
  - ◆ damage to reputation can foreclose employment opportunities

# Due Process

- ◆ Once granted, physician may have liberty and property interest in staff privileges
  - ◆ medical staff bylaws
- ◆ employees may have property interest in employment
  - ◆ employment agreement or employer handbook

# Process Due

- ◆ Institutional and factual context
- ◆ Notice
- ◆ Statement of allegations
- ◆ Opportunity to prepare; access to documents

# Process Due

- ◆ Hearing with reasonably impartial panel
  - ◆ requirements vary by state
  - ◆ summary dismissal
- ◆ Right to counsel
  - ◆ HCQIA
  - ◆ State law
  - ◆ Bylaws
  - ◆ U.S. Constitution

# Questions?

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