



Weekly Auditing and Compliance Tip

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A Golden Rule - Cultivate Compliance and Non-Retaliation

When individuals think of the "Golden Rule," the definition that usually comes to mind is "[d]o unto others as you would want others to do unto you." Sage advice, especially in the healthcare field where a person should consider if they were a patient, how would they like their medical records to be handled or what level of care and compassion would they like to receive?



Depending on the context, there are other definitions of the Golden Rule in a healthcare setting. For example:

- HIPAA/the HITECH Act - Confidentiality, Integrity and Availability of the Information;
- Charging Payers: Use Medicare Guidelines, and keeping the payer confidential from the care team/charge capture staff member; and
- Billing and Coding - If it is not in the medical records, it did not happen.

How do these varying applications of a Golden Rule relate to creating a culture of compliance, free of retaliation when an employee brings a potential legal or ethical issue to a person's attention? First, corporate culture has a lot to



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do with risk as well as respecting and handling information as if it were one's own. Risk = probability x severity. And, in the context of HIPAA and the False Claims Act, the risk of not cultivating a capacity for compliance and avoiding retaliating against employees for bringing concerns to management's attention equates to a high probability that severe and adverse legal, financial, and reputational outcome will commence.

For example, in *Smith v. LHC Grp., Inc.*, No. 17-5850 (6th Mar. 2, 2018), the Sixth Circuit overturned a United States District Court's ruling about an employee who raised legal concerns about false claims being submitted to the U.S. Government. The company, who allegedly did not embrace cultivating compliance, constructively discharged an employee instead of addressing the issues that were raised, changing behavior, and thanking the employee. Relying on definitions from other courts, including the Fifth Circuit, the Sixth Circuit iterated the following items:

- Constructive discharge occurs when "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982) (quoting *Bourque v. Powell Elec. Mfg.*, 617 F.2d 61, 65 (5th Cir. 1980)).
- The Sixth Circuit rejected the lower court's holding that the constructive discharge doctrine requires the employer have a conscious "specific intention," i.e., a subjective intent, for the employee to resign.
- Plaintiff, who worked as the Director of Nursing for home health care providers LHC Group, Inc., and Kentucky LV, LLC. Smith, allegedly discovered that other employees regularly bypassed the proper procedures for determining whether patients' home health care was medically necessary, and patients were admitted without adequate documentation. Subsequently, the Plaintiff reported the scheme to senior management on numerous occasions, but her complaints were ignored. Faced with the dilemma of losing her job or being party to an illegal and unethical scheme, she resigned.

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Then, she sued her employers claiming that they violated the False Claims Act and constructively discharged her in retaliation because she raised fraud issues.

These same premises apply to HIPAA/HITECH Act compliance. Organizations should create a compliance-friendly environment by making certain that the confidentiality, integrity, and availability of the data is adequately addressed through requisite technical, administrative, and physical security measures. This not only extends to the company's internal working, but also the persons that are subcontractors.

A quick way to assess whether or not a subcontractor upholds the same standards is to ask five simple questions:

1. Do you have Business Associate Agreements in place;
2. Do all employees undergo annual training;
3. Is an annual risk assessment done;
4. Is data encrypted at rest and in transit; and
5. Are there adequate policies and procedures?

Answering "Yes" to these five questions is a positive start to the HIPAA Golden Rule of "Confidentiality, Integrity and Availability" of the data.

In sum, the use of Golden Rules throughout different aspects of an organization can help mitigate risk, which, in turn, can reduce financial, legal and reputational damage. The False Claims Act is an example of how costly non-compliance and retaliation can be.

This Week's Audit Tip Written By:

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webinars in April:

Critical Care Services:

What You Need to Know

(What You Need to Know Webinar Series)

April 10, 2018

2pm EST

Speaker: Scott Kraft, CPC, CPMA

Can a Patient Help Document the Encounter?

(Compliance Webinar Series)

April 17, 2018

2pm EST

Speaker, Dr. Warner

Hands On: Physical Therapy and Chiropractic

(Hands on Webinar Series)

April 24, 2018

2pm EST

Speaker: Dr. Evan Gwilliam

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areas of liability associated with a variety of healthcare, legal and regulatory issues including: HIPAA, the HITECH Act, the False Claims Act, Medicare issues, women's health as well as corporate and security regulations.

Conference: Monday, Nov. 12 -
Wednesday, Nov. 14, 2018
Venue: Wyndham Grand Clearwater
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