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Effective and Compliant Records Management Policies for Long Term Care Providers

by Karen S. Lovitch*

Records management has taken on added significance for companies nationwide since the Enron and Arthur Andersen scandals and the enactment of the Sarbanes-Oxley Act in 2002. In light of these recent developments, all corporations should examine their records management policies and practices to evaluate compliance with federal, state, and industry standards. This process is especially important for long term care providers in light of the hostile litigation and enforcement environment in which they must operate. Discovery requests in malpractice and other legal actions as well as subpoenas in government investigations routinely request a lengthy laundry list of resident and other facility documentation that can be used against the provider. Although the first priority must be to retain records consistent with good business practices and applicable law, a long term care provider also must consider what records it is *not* required to keep for a specified period of time and determine how long it should maintain them. A provider cannot be required to produce records that it has lawfully destroyed.

Records Management Policy Basics

Records management policies establish protocols for handling the various types of records that a company produces and receives from outside sources.¹ Every company should tailor its policies to its specific needs, but some generalizations are possible. Records management policies usually cover issues such as responsibility for oversight of the policy's implementation, the exact definition of a record, the types of records that a company should preserve permanently, treatment of certain types of records such as duplicate copies of the same record and electronic records, and circumstances in which the company should never destroy records, such as when litigation or an investigation is pending or reasonably anticipated.²

Records management policies are not complete without a retention schedule, which provides a detailed inventory of every type of record that the company produces or keeps on file.³ The schedule usually is divided into categories of records, such as accounting/finance, human resources, and sales/marketing, and it sets forth a minimum time frame for retention of each possible type of record within those categories.⁴

Advantages of Effective and Compliant Records Management Policies

Most, if not all, companies understand that retaining and periodically destroying certain types of records makes good business sense for a variety of reasons. In the context of the Arthur Andersen case, companies learned the importance of preserving documents upon discovering possible wrongdoing that could lead to a government investigation or litigation. However, the advantages of effective and compliant records management policies extend far beyond this scenario.

¹ Daniel B. Trinkle and Breton Leone-Quick, "The Importance of Records Management for Biotech and Life Sciences Companies," *Journal of Biotech and Business*, Vol. 6, No. 3, (2003), p. 27; Michael E. Arruda, Margaret R. Prinzing, and Shruti A. Rana, "Documents? What Documents?," *Journal of Biotech and Business*, (Jan./Feb. 2003), p. 23.

² *Ibid.*, p. 27.

³ *Ibid.*

⁴ *Ibid.*

Compliance With Legal Requirements/OIG Guidance

Given the scrutiny paid to the operations of long term care providers and the specific record-keeping requirements applicable to them, they must not only develop records management policies but also implement those policies effectively to ensure legal compliance.⁵ Nursing facilities, in particular, must pay close attention to the compliance ramifications of having effective records management policies in light of the Compliance Program Guidance issued by the Department of Health and Human Services' Office of Inspector General (OIG).⁶ The OIG has recommended that nursing facilities establish policies and procedures for the creation, distribution, retention, and destruction of documents.⁷ Implementation of the OIG's Compliance Program Guidance is voluntary, but heeding the OIG's recommendations is nevertheless prudent because sound records management policies will assist long term care providers in complying with the countless record retention requirements imposed by law.

Protection from Charges of Obstruction of Justice or Improper Destruction of Records

Effectively designed and implemented records management policies can prove invaluable in civil and criminal litigation.⁸ Such policies can provide protection from civil liability for improper destruction of records and, perhaps more importantly, charges of criminal obstruction of justice under state or federal law.

This protection is implemented through the policy's stop function, which instructs employees how and when to suspend routine destruction of records pursuant to the policy.⁹ The stop function plays an important part in litigation because a company may be subject to sanctions for destroying documents if it "knows or reasonably should know that the evidence might be relevant to a possible action."¹⁰ The legal term for this concept is "spoliation" of evidence.

A finding of spoliation can adversely affect a party's position in litigation. The court has wide discretion in imposing sanctions and can even dismiss the case or enter a default judgment. Courts also can impose monetary sanctions upon litigants who destroy documents that are relevant to a pending or potential case, or that reasonably could lead to the discovery of admissible evidence. Monetary sanctions may include fines or reasonable attorneys' fees and expenses and can be very costly. Spoliation also can result in tort liability in some states.

Finally, as demonstrated by the Arthur Andersen case, criminal obstruction of justice charges can result in harsh criminal penalties. Most criminal obstruction of justice statutes provide for hefty fines as well as imprisonment, and prosecutors often pursue charges against the company as well as the individuals involved in the destruction.

Defense Against "Fishing Expeditions"

Nearly all companies are aware by now that the unlawful destruction of documents can cause enormous damage to a company's finances as well as to its reputation, but few focus on the fact that the *lawful* routine destruction of documents pursuant to properly implemented policies often can benefit a company. Most long term care providers are familiar with the "fishing expeditions" conducted by plaintiffs' lawyers and government investigators. Notably, in many instances, the documentation requested by litigants or by government investigators is not required by law to be maintained for a specified period of time. If the provider lawfully destroys such documents when litigation is not threatened or expected, the chances that such a fishing expedition will result in success are greatly reduced because a provider cannot be required to produce documents that it has lawfully destroyed.

Administrative Convenience and Cost Savings

Yet another benefit of effective and compliant records management policies is that they save the company time and money. To provide a full response to any subpoena or discovery request, the company must search through *all* potentially relevant paper or electronic records, which could result in enormous administrative costs for the company. If documents are routinely, lawfully destroyed, an employee's search for documents can be expedited, whether responding to requests for documents received in connection with a subpoena or discovery request or just carrying out day-to-day duties. In addition, the lawful, routine destruction of documents can result in a cost savings for companies if less storage space is required for hard copy and electronic documents.

Creation of Effective and Compliant Records Management Policies

Effective records management policies come in many different packages, but every company's policies should reflect its specific needs and legitimate business purposes. Legal compliance and administrative convenience, rather than a desire to purge potentially damaging documents from the company's files, should motivate the adoption of appropriate records management policies.¹¹ Every long term care provider planning to create new policies or to re-evaluate its existing policies and practices should begin by consulting a knowledgeable health care attorney because compliant policies must be premised upon an understanding of legal requirements as well as industry standards.

Step One: Establish a Comprehensive List of Records

The process should begin with an evaluation of the types of records retained by the company. All department heads should be surveyed to

⁵ See Trinkle and Leone-Quick, p. 28 (discussing the importance of effective implementation for biotech companies).

⁶ Publication of the OIG Compliance Program Guidance for Nursing Facilities, 65 Fed. Reg. 14289, 14298 (Mar. 16, 2000).

⁷ *Ibid.*

⁸ See Trinkle and Leone-Quick, p. 28.

⁹ *Ibid.*, p. 29.

¹⁰ *Ibid.*

¹¹ *Ibid.*

make this determination, and personnel at the facility and corporate levels likely should be included as well. Based upon the results of this survey and the company's current records management policies, if any, the company should, with the assistance of legal counsel, create a comprehensive list of records.

Step Two: Draft the Policies

As stated above, the purpose of records management policies is to establish protocols for the organization, storage, and destruction of various paper and electronic records that a company produces and receives from outside sources. Although every company's policies differ according to individual needs, all should consider certain key issues.

Defining a "Record"

The term "record" must be defined so that employees understand how to execute the company's records management policies. Generally, a "record" includes hard copy and electronic documents, incoming as well as outgoing information, and all documents regardless of their location, including those kept at an employee's home. The definition also should encompass records an employee may consider personal, such as e-mail and calendars detailing business activities.

The inclusion of electronic records presents challenges for all companies, including long term care providers. According to at least one account, 93 percent of all business documents are created electronically and only 30 percent are ever printed to paper.¹² Records management policies should require the routine destruction of all electronically stored copies and versions of the documents consistent with the destruction of hard copy documents. The destruction of electronic records in every storage location must be ensured.¹³ In addition, such destruction must be permanent so that the documents cannot be recreated or otherwise retrieved at a later date.¹⁴

Suspension of Routine Destruction

The circumstances in which routine destruction must cease should be clearly articulated in every company's records management policies. Employees should receive instructions regarding how to proceed upon receiving notification of the suspension of routine destruction and upon gaining knowledge of a pending or threatened proceeding because one employee's knowledge may be imputed to the entire company.

Document Storage Methods

A records management policy likely cannot succeed unless it is premised on a uniform, centralized system of storage.¹⁵ This issue is especially significant for long term care providers because they must store a wide variety of patient care, administrative, and other records. In the long term care industry, the focus understandably is on the provision of quality patient care rather than on mundane administrative concerns like creating effective storage systems. As a result, many long term care providers may have inadequate storage systems in need of

re-evaluation. Long term care providers should reconsider their methods for storing electronic records (single vs. multiple hard drives, individual computers vs. CD-rom/discs or both), the use of centralized filing areas or storage spaces, and the possible need for off-site storage.¹⁶

Step Three: Develop a Retention Schedule

Every company's records management policies should be accompanied by a retention schedule consisting of a retention period for each type of document on the company's comprehensive list of records. The company should work closely with knowledgeable health care counsel to determine these retention periods.

Legally Mandated Retention Periods

As stated above, statutes and regulations dictate the retention periods for many documents. A long term care provider must cast a very wide net to determine the relevant state and federal statutes and regulations because those applicable to all businesses apply, as do those governing only health care providers or specific provider types, such as nursing homes or assisted living facilities.

Federal law sets a number of retention periods that are relevant to long term care providers. For instance, the statutes and regulations enforced by various agencies within the Department of Labor speak to retention of a variety of documents, including pre-employment tests, employment applications, job opening advertisements, and employee injury reports. An example of a more specific document retention requirement is the federal regulation (42 C.F.R. § 483.75(l)(2)(i)-(ii)) requiring long term care facilities certified to participate in Medicare, Medicaid, or other federal health care programs to maintain medical records for a certain period of time.

Many record retention periods are established by state law as well. These requirements are particularly important because many federal statutes and regulations, including the federal regulation governing medical records kept by long term care facilities, defer to state law. States regulate the retention of a variety of general business and other records, including, of course, resident records.

Determining applicable legal obligations in this regard is complicated by the fact that retention requirements often appear in agency manuals and other forms of agency guidance, particularly at the state level. For instance, state Medicaid program manuals and issuances often announce record retention requirements, and those requirements occasionally conflict with the standards set by the Medicare program.

Providers should work with knowledgeable health care counsel to determine whether to exceed legal requirements based on industry standards and other considerations. Business needs, standards set by accreditation agencies or industry trade associations, or applicable audit or survey periods may lead a provider to keep documents for a longer period of time.

¹² Michele C. S. Lange, "Sarbanes-Oxley Has Major Impact on Electronic Evidence," *National Law Journal* (Jan. 2, 2003).

¹³ See Trinkle and Leone-Quick, *p.* 30.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

Providers also must consider the relevant statutes of limitation, which often allow a litigant to file suit long after retention periods have expired. For instance, the federal False Claims Act allows a whistleblower to bring an action up to ten years after the alleged violation occurred. Moreover, most states have established statutes of limitation for certain types of legal actions, and they can vary widely. Long term care providers unfortunately must assume that certain records — particularly those related to patient care — may become the subject of a lawsuit or government investigation at some point in time. Providers therefore must work with legal counsel in deciding whether to retain documents beyond the legally required retention periods consistent with statutes of limitation. Such decisions are very difficult given the complexities of predicting whether certain documents will help or hurt in litigation.

Retention Periods Set by Contract

Long term care providers contract with a variety of entities, such as third party payors, laboratories, and companies furnishing pharmacy services. Providers should consider whether these and other contracts require retention of relevant records for a specified period of time.¹⁷ A long term care provider should actively negotiate record retention requirements in every contract to ensure consistency with its own records management policies.

Retention Periods Not Governed by Law or Contract

To determine retention periods that are not dictated by law or contract, providers should begin with an evaluation of the document's purpose. For each category or subcategory of documents, a provider should consider who creates the document, who uses the document, and for what purpose. In other words, a document should be retained consistent with business needs.

Many of the same considerations bearing on the decision whether to exceed retention requirements mandated by law apply here as well. Providers should consider the applicable statutes of limitation and standards set by accreditation agencies and industry trade associations. For example, according to the standards of the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), the retention period for medical record information should be "determined by law and regulation and by its use for resident care, legal, research, or educational purposes."¹⁸ The intent accompanying this JCAHO standard provides that records should be retained for "the period of time required by state law, or five years from the discharge date when there is no requirement in state law."¹⁹ Providers also may seek guidance from the American Health Information Management Association, known as AHIMA, which has published recommendations for health care providers on the retention of patient health information.²⁰

Finally, applicable audit or survey periods may affect a long term care provider's decisions on retention of records. For example, a nursing

home may decide to retain a document responsive to a regulatory requirement (either a specific requirement or the general requirement under 42 C.F.R. § 483.75(b) that a facility comply with applicable state and federal laws and regulations) long enough to ensure that it is available at the time of the next annual survey.

Step Four: Implement Effectively

Once crafted, a records management policy is of little use unless the company actually implements the policy consistent with its terms at every level. Having a corporate policy that is ignored or unenforced at the facility or the department level is potentially as damaging as having no policy at all.

Every company should designate a Records Management Officer who is responsible for administering the policies in a centralized, cohesive fashion. He or she must work with a variety of other people, including management, information services representatives, and legal counsel, to ensure proper implementation on an ongoing basis. The Records Management Officer also serves as a resource for employees who have questions or concerns about records management.

Effective implementation depends upon the awareness and understanding of all employees. The Records Management Officer must ensure that all employees receive training with regard to the policies, and then follow up this training with periodic reminders and refresher sessions, which are most effective when no litigation or investigation is threatened or pending. Employees (particularly department heads and managers) should be reminded that failure to comply with the policies will be addressed in annual performance evaluations and can have legal ramifications not only for the company but also for the individual employee.

Conclusion

Although nearly every company gives lip service to appropriate document destruction and retention, few actually take the action necessary to implement effective and compliant records management policies. In the current operating environment, which is characterized by frequent government investigations and litigation as well as ongoing compliance and corporate responsibility concerns, this issue — which can and has destroyed an entire company — must take center stage for all companies. The resources spent on developing and properly implementing records management policies will benefit the company in countless ways by complementing its existing compliance, risk management, and cost containment efforts.

If you would like further information on these or any long term care or health law issues, please contact the authoring attorney, or the Mintz Levin attorney who ordinarily handles your legal affairs.

¹⁷ Arruda, et al., p. 25.

¹⁸ Joint Commission on Accreditation of Healthcare Organizations, *Comprehensive Manual for Long Term Care*, (2003-2004), p. IM-11.

¹⁹ *Ibid.*

²⁰ Donna M. Fletcher and Harry B. Rhodes, *Practice Brief: Retention of Health Information (Updated)*, (June 2002), available at http://library.ahima.org/xpedio/groups/public/documents/ahima/pub_bok1_012545.html.