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Blue Cross Exec Tests HIPAA By Describing \$12M Patient

By **Jeff Overley**

Law360, New York (June 1, 2017, 11:04 PM EDT) -- An executive at Iowa health insurer Wellmark Blue Cross & Blue Shield possibly stepped into a Health Insurance Portability and Accountability Act minefield by divulging information about a patient whose \$12 million in annual medical bills have contributed to insurance market instability, attorneys say.

The disclosure by Laura Jackson, a Wellmark executive vice president, occurred during a speech at a recent Rotary Club of Des Moines meeting and was reported this week by The Des Moines Register. According to a Rotary Club summary of the speech, Jackson revealed that a Wellmark policyholder who has made headlines for racking up \$12 million in yearly bills — and thereby creating financial challenges in the market for Affordable Care Act coverage — is a 17-year-old boy with hemophilia.

In interviews on Thursday, seven attorneys told Law360 that such a disclosure — if done without permission from the boy's family — would at the very least come close to running afoul of HIPAA's privacy protections.

"I think the comments are definitely questionable," said Matthew Fisher, a partner at Mirick O'Connell DeMallie & Lougee LLP.

Day Pitney LLP counsel Eric Fader said that the disclosure likely fell short of a HIPAA violation, but he added, "If my client did this, I would cringe a little bit, and I would rather that they not have done it."

Under HIPAA, the details about age, gender and diagnosis would not automatically be considered identifying information, which includes names, addresses, dates of birth and Social Security numbers. However, the details could still be problematic because HIPAA is triggered if "there is a reasonable basis to believe that the information can be used to identify the individual."

"It's still [protected health information] if whatever information that is disclosed can be combined with other information that's publicly available ... to identify who that individual actually is," Fox Rothschild LLP partner Elizabeth Litten said.

Experts cited several reasons to think that Wellmark — which did not immediately respond to two requests for comment on Thursday — should perhaps be concerned. For one, divulging the patient's precise age would make it easier to identify him.

"There was no reason they had to identify him as a 17-year-old," Fox Rothschild partner Michael Kline said. "They could have said it's a teenager or a young person."

Attorneys also said that publicizing the patient's gender seemed unnecessary, even if hemophilia mainly affects males. It is also possible, attorneys said, that family acquaintances who know the boy's diagnosis would connect him to the \$12 million in medical costs after learning of Wellmark's disclosure. In addition, identification may be more feasible given that Iowa has only three million residents and that hemophilia affects only 20,000 Americans.

"If there are only a handful of male teens in the state that suffer from hemophilia ... [regulators] could argue that there is a reasonable basis that this information could be used to identify the patient," according to one BigLaw attorney who requested anonymity to speak freely.

Making matters more perilous, federal HIPAA enforcers are known for exacting stiffer punishments from deep-pocketed companies, and they have recently shown an interest in punishing small breaches of patient privacy. In fact, the federal government's two most recent HIPAA settlements both stemmed from disclosures of information about a single patient.

Those types of disclosures can in some ways be more jarring than mega-breaches that involve millions of patients but little in the way of sensitive medical records or information about medical bills. As one example, **a HIPAA settlement last month** involved a medical center's disclosure of information about a patient's HIV status, medical care, sexually transmitted diseases, medications, sexual orientation, mental health and physical abuse to the patient's employer.

"There is the potential for disproportionate personal harm arising out of it," Fisher said of single-patient breaches.

Experts said that Wellmark's desire to acknowledge the existence of an extraordinarily expensive patient is understandable in light of challenges facing the ACA. But they also cautioned that offering details risked thrusting the patient into the law's fiery political debate.

"I think you would err on the side of being conservative even more so when it's such a politically charged issue," said Dianne Bourque of Mintz Levin Cohn Ferris Glovsky and Popeo PC.

Even if Wellmark received family authorization to discuss some details about the patient, experts said that there appeared to be little reason to do so, and that protection from legal liability would depend on the precise wording of any authorization. In any event, the sensitivity of the situation was evidenced by the significant chatter it generated among HIPAA specialists.

"If people are raising concerns about these statements, it illustrates that privacy is an important topic," Holland & Knight LLP partner Shannon Salimone said. "Companies that want to talk about or release data on specific patients should proceed with extreme caution."

--Editing by Kat Laskowski and Breda Lund.