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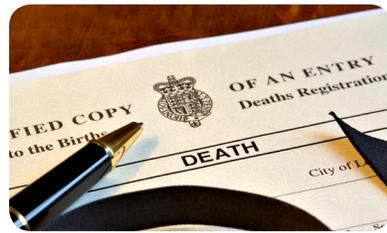
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Issue 2, 2013

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## Nursing Homes Must Abide by HIPAA Rules When Disclosing Deceased Resident PHI

Danielle Trostorff, 504.566.5224, [dtrostorff@bakerdonelson.com](mailto:dtrostorff@bakerdonelson.com)



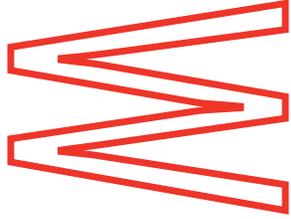
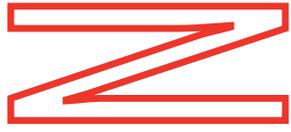
The Health Insurance Portability and Accountability Act (HIPAA) as amended by the Health Information Technology for Economic and Clinical Health Act (HITECH) contains the HIPAA Privacy and Security rules. On January 25, 2013, the U.S. Department of Health and Human Services modified the HIPAA Privacy, Security, Enforcement and Breach Notification Rules to add additional protections and to improve workability, effectiveness and flexibility and to reduce the burden for regulated entities. It also implemented section 105 of Title I of the Genetic Information Nondiscrimination Act (GINA) to strengthen protections for genetic information. Those amended rules became effective on March 26, 2013.

HIPAA has long addressed disclosure restrictions for HIPAA-protected health information (PHI). On April 9, 2013, the U.S. Court of Appeals for the 11th Circuit affirmed the Northern District of Florida holding that a Florida statute was preempted by HIPAA and its implementing regulations. The Florida statute permitted licensed nursing homes to release a former deceased resident’s medical records to the spouse, guardian, surrogate or attorney in fact without need for a HIPAA authorization and without regard to the authority of the individual making the request to act in the deceased resident’s stead. The Court interpreted the law to authorize sweeping disclosures “for any conceivable reason” or no reason at all.

The original action, seeking a declaratory judgment that the Florida statute was preempted by HIPAA, was brought by various nursing home facilities which had refused to release the residents’ medical records to the requesting parties because they were not “personal representatives” under HIPAA. The District Court ruled in favor of the nursing homes and the state appealed. The U.S. Court of Appeals, in its ruling affirming the District Court’s decision, noted that amendments to HIPAA, referenced above, had been enacted pending the appeal. However, it found the amendments were largely immaterial to the issue before the Court.

The state contended on appeal that the provisions of the Florida law did not impede the goals of HIPAA and should not be preempted. It argued that the Florida statute empowers an individual to act on the deceased resident’s behalf and meets the definition of “personal representative” under HIPAA. The nursing homes argued otherwise.

The District Court agreed with the nursing homes and the U.S. Court of Appeals affirmed. The HIPAA rule regarding disclosure of a deceased individual’s PHI limits disclosure to narrowly delineated circumstances. The time limitation stating that a deceased person’s record was protected for a period of 50 years following the death of the individual was not contained in the HIPAA rule



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## Nursing Homes Must Abide by HIPAA Rules When Disclosing Deceased Resident PHI, *continued*

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until the January 25, 2013 amendments, which became effective March 26, 2013. However, the protection against disclosure as permitted under the broad Florida law did apply under the HIPAA rules in effect when the action was brought. HIPAA treats a personal representative as the protected deceased individual for purposes of the disclosure requirements under HIPAA. *See*, 45 CFR 164.502 (f) and (g). 45 CFR 164.502(g)(4) provides that “[i]f under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual’s estate, a covered entity must treat such person as a ‘personal representative’...” under the HIPAA rules with respect to PHI. 45 CFR 164.510 already delineated a covered entity’s permitted use and disclosure of PHI subject to an individual’s advance notice and right to agree or object. 45 CFR 164.510(b) delineated the circumstances under which a covered entity could disclose PHI directly relevant to family members, other relatives, close personal friends or others identified by the individual, or involved in the care or payment for the health care of the individual. The recent HIPAA amendment adds a provision that a covered entity may disclose to a family member, or other relatives, close personal friends of the individual or any other persons identified by the individual who were involved in the individual’s care or payment for health care prior to the individual’s death, PHI of the individual that is relevant to such person’s involvement, unless doing so is inconsistent with any prior expressed preference of the individual that is known to the covered entity. *See*, 45 CFR 164.510(b)(5).

Therefore, the Court concluded the regulation permits disclosure to personal representatives as defined under the Rule and to two other groups of people: (1) those involved in the deceased individual’s health care, and (2) those who paid for the deceased individual’s health care.

As it relates to the other two groups of people, covered entities may disclose only PHI that is relevant to such person’s involvement; i.e., information that is relevant to the care of the deceased individual or to the payment of the deceased individual’s health care costs. The Court also recognized that the HIPAA rule, 45 CFR 164.512(a)(1), permits a covered entity to use and disclose PHI as “required by law.” While the State argued that the Florida law permitted such a disclosure required by Florida law, it only raised this argument on appeal. The Court declined to consider the argument for the first time on appeal.

Nursing homes and other providers and suppliers are cautioned when receiving requests for deceased resident or patient medical records or other PHI to carefully determine whether disclosure is authorized under the HIPAA rule and applicable state law. They should also remember that the HIPAA disclosure protection now applies for a period of 50 years.



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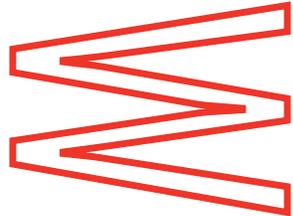
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## Top 10 Recommendations to Avoid Litigation

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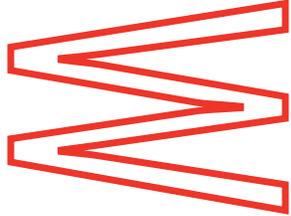


Nursing homes and assisted living facilities have been targeted by plaintiff's attorneys who advertise heavily in an effort to solicit plaintiffs for malpractice suits. Often, the plaintiffs are unhappy family members of residents who have experienced falls, pressure wounds, unexplained injuries or death at nursing homes. In our practice defending long term care facilities, we encounter common trial themes that are designed to tug at the heartstrings of jurors.

These themes include "profits over people," corporate negligence, understaffing and general neglect. There are, however, some relatively simple and straightforward actions that nursing homes can take to avoid litigation, even in the current litigious environment. These are our top 10 recommendations:



10. **Conduct Background Checks.** State and federal regulations require nursing homes to conduct background checks on their caregivers. Such a practice helps long term care facilities weed out bad apples and focus on employees who truly care about the residents they treat. Consider conducting background checks on potential residents as well. Having a registered sex offender as a resident will provide a plaintiff's attorney with compelling ammunition if there is a case of resident-on-resident abuse.
9. **Go the Extra Mile After Discharge.** It is important to show residents and their families that you care both during a person's residency and after. Maintaining a positive relationship with families following a resident's discharge is an effective means for avoiding litigation later. If a resident passes away, have representatives from the facility attend visitation or the funeral and send a card or memorial to the family. Additionally, consider inviting the family members of former residents to the facility for an annual memorial service to honor the individuals who resided at the facility in the past.
8. **Train Your Staff.** Training your staff is not only required to satisfy federal and state regulations, but it can also be vital to avoid litigation. Often in litigation, family members report instances where they were told by CNAs and nurses that the facility was "understaffed" so they could not timely change or feed their loved one. Other times, family members report complaints from staff about the condition of the facility, problems with equipment and the absence of supplies. Staff members should be trained on appropriate communication and interaction with residents and their families, remembering that customer service and satisfaction are crucial to the success of a facility.
7. **Set Realistic Expectations.** Frequently, family members who sue long term care facilities do not understand the nature of their loved one's medical condition and expect nursing homes to improve and even cure a resident's illnesses. Setting realistic expectations about a resident's outcome can help family members understand the disease process and decrease the likelihood of a lawsuit if an inevitable medical complication occurs. Maintain accurate marketing materials that do not overstate your facility's services; communicate with family members regularly about the level of care provided to their loved ones; conduct regular tours of the facility with family members and provide educational opportunities about common issues such as falls and pressure wounds. Education is key to manage the expectations of family members and to avoid litigation.



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## Top 10 Recommendations to Avoid Litigation, *continued*

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6. **Use an Arbitration Agreement.** Talk to your counsel to determine if your facility is in a jurisdiction that will enforce arbitration agreements. If so, implement an arbitration agreement. We have been involved in cases that have been abandoned by plaintiff's lawyers once an arbitration agreement has been enforced. While such an outcome is rare, more often than not, arbitration is a much better forum than our judicial system, and having a dispute decided by an educated arbitrator is often much more desirable than a jury.
5. **Communicate with the Resident and Family.** Families file suit when they do not understand (1) that a resident's condition is deteriorating, (2) the reason a resident's condition is deteriorating and (3) the possible outcomes of a resident's condition. Talk to your medical director and the physicians in your facility to ensure they communicate regularly with residents and their families. We recommend using written communication tools such as a quarterly questionnaire that are completed by families and ask questions like, "Are you satisfied with the care delivered to your loved one?" and "Is there anything you would like to change about the care received by your loved one?" Such communications can help open a dialogue between the facility and family members (and they make excellent exhibits at trial).
4. **If You Have a Policy, Follow It.** This may seem obvious, but we regularly represent long term care facilities that have written policies and procedures that are not implemented in practice. Such conduct provides fodder for plaintiff's lawyers who can obtain admissions from caregivers that specific policies adopted by a facility were "violated." Review your policies and procedures. If they include procedures that you do not follow, either change your practice or update your policies and procedures manual.
3. **Document Appropriately.** Caregivers are humans. They work hard, often under stressful circumstances, and they may get frustrated with the residents. However, train your staff to ensure that their frustrations are voiced in the appropriate internal and confidential forums rather than expressed in the residents' charts.
2. **Document Accurately.** Inaccurate documentation alone can make a plaintiff's case. Documenting on a resident when she is out of the facility can make a jury question the credibility of the staff that cared for a resident. Likewise, failing to document the administration of treatments or medications enables a plaintiff's lawyer to argue that "it wasn't done if it wasn't charted." Regular chart audits and quality assurance measures to ensure accurate documentation can effectively strip a plaintiff's lawyer of such arguments and avoid criticism from their nurse experts.
1. **Provide Quality Care.** Above all else, provide quality nursing care. Hire and retain staff who genuinely care for the residents at your facility and work diligently to avoid preventable accidents and incidents.



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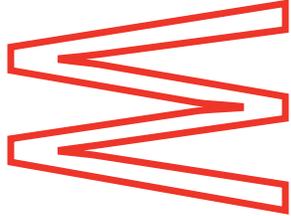
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## Man Convicted of Forcing Foreign Nurses to Work in U.S. Nursing Homes

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A Colorado businessman was convicted last month by a federal jury in Denver on 89 counts including mail fraud, visa fraud, human trafficking and money laundering. This case was investigated by the U.S. Immigration and Customs Enforcement’s (ICE) Homeland Security Investigations (HSI), the Department of State’s Diplomatic Security Service, and the U.S. Department of Labor’s Office of the Inspector General, Office of Labor Racketeering and Fraud Investigations.



Kizzy Kalu, owner of Foreign Healthcare Professionals Group, recruited foreign-born nurses to work as nurse instructors and nurse instructor supervisors for a non-existent university in Denver. Mr. Kalu, through his company, filed fraudulent H-1B non-immigrant petitions with the United States Citizenship and Immigration Service. Mr. Kalu also made false representations to the foreign nationals in regard to the professional nature of their jobs and the wages to be paid. Upon arrival in the U.S., the nurses were informed that the positions at the university were no longer available. Mr. Kalu used methods of coercion, including the threat of causing their deportation, to force the foreign nationals to work at various nursing homes and other long term care facilities in Colorado earning below the prevailing wage. Those facilities paid Foreign Healthcare Professionals Group for the hours the foreign nationals worked. Mr. Kalu retained approximately 40 percent of the money earned from the labor of the foreign nationals. In addition, Mr. Kalu collected \$6,500 from each nurse for assistance in obtaining their visas.

Kizzy Kalu was convicted of the following charges nineteen counts of commercial carrier/mail fraud, which carries a penalty of not more than 20 years in federal prison per count; three counts of visa fraud, which carries a penalty of not more than 10 years in federal prison per count; nine counts of trafficking in forced labor, which carries a penalty of not more than 20 years in federal prison per count; 13 counts of forced labor, which carries a penalty of not more than 20 years per count; 15 counts of encouraging and inducing aliens to enter the United States, which carries a penalty of not more than 10 years in prison per count; and 30 counts of money laundering, which carries a penalty of not more than 20 years in prison per count. Each of the 89 counts also carries a fine of up to \$250,000.

The conviction of Kizzy Kalu brings to light the government’s efforts to eliminate visa fraud and prevent abusive businesses from luring foreign national workers with false promises of well-paying jobs. ICE is aggressively pursuing criminal and civil enforcement against employers who knowingly violate the law. Criminal investigations will increasingly focus on employers who abuse and exploit workers or otherwise engage in egregious conduct. Employers hiring foreign workers need to navigate the process of sponsorship carefully and understand that immigration is an extremely complicated body of law that constantly changes with new statutes from Congress; regulations, procedures and policy directives from numerous federal agencies; and decisions from judicial and administrative courts.



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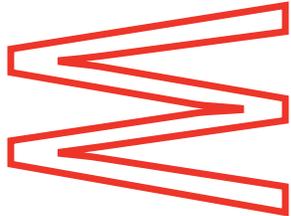
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## Be Prepared for an OSHA Inspection Before It Happens

Carla Gunnin, 404.589.3404, [cgunnin@bakerdonelson.com](mailto:cgunnin@bakerdonelson.com)

If OSHA pays you a visit anytime in the next few months, you can expect that they will look at egress issues at your workplace. In the June 17 edition of OSHA's *Quick Takes*, OSHA issued the following:



“OSHA is reminding compliance officers to check for adequate means of egress at all workplaces. This follows the recent disastrous fire and explosion that killed at least 119 workers on June 4, 2013, at a poultry processing plant in China.



A memorandum sent to the agency's regional administrators and state plan designees directs field inspectors, when conducting inspections, to be mindful of whether employers have provided and maintained adequate means of egress from work areas. This includes checking that an adequate number of exit routes are provided, that the exit routes are free and unobstructed, and that exit doors are not locked. See OSHA's Emergency Exit Routes Fact Sheet (PDF\*) for more information on employers' responsibilities to ensure that their workers are able to exit the workplace quickly and safely.”

Who is affected? Most employees in the nation come under OSHA's jurisdiction. OSHA covers private sector employers and employees in all 50 states, the District of Columbia and other U.S. jurisdictions, either directly through federal OSHA or through an OSHA-approved state program. In particular, OSHA has guidance specifically for [nursing homes](#) as it relates to egress. Be prepared for an OSHA inspection before it happens.

## In the Trenches

### Join Baker Donelson at Tennessee Health Care Association's Annual Conference

Join Baker Donelson's [Long Term Care](#) Industry Service Team members [Ben Bodzy](#), [Angie Davis](#), [Rusty Gray](#), [Jonathan Hancock](#) and [Alison Shaw](#) for their [program](#) at THCA's Annual Conference & Trade Show in Nashville August 18 – 21, 2013.

Our attorneys will present, “Common Employment Law Mistakes” on Monday, August 19, 2:00 p.m. – 4:00 p.m. Central. The program will address the following:

- Common mistakes employers make with regard to wage and hour law compliance
- Implementing FMLA and attendance policies
- Responding to union activity
- Avoiding retaliation claims
- How to institute an effective social media policy



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## In the Trenches

### Attorney Speaks at Industry Conference about New QA Improvement Program Regulations

Baker Donelson’s [Long Term Care](#) Industry Service Team leader [Christy Crider](#) moderated a panel at ACI’s Second National “Long Term Care Regulatory Boot Camp.” The panel, “Understanding the New Quality Assurance Improvement Program Regulations” included Lynn K. Fieldhouse, Vice President and general counsel of litigation services and Jean M. Stiles, corporate compliance officer for Signature Healthcare LLC. The program addressed:

- Examining root cause analysis
- How to deal with this new process
- Protecting the documents you create in a quality assurance environment
- How to investigate internally before the government comes in to investigate
- What to do internally when you get served
- Creating an appropriate plan to train staff and prepare for investigations

### Memphis Team Successfully Defends Hospital

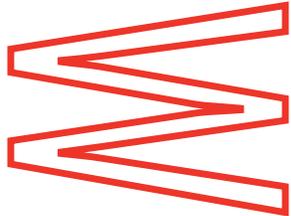
[Craig Conley](#) and [Ormonde Deallaume](#) began a jury trial in Memphis, Tennessee on July 15, 2013 for a hospital client. After jury selection, opening statements, effective cross examination of the plaintiff by Craig and possible pending exclusion of the plaintiff’s nurse expert based upon Ormonde’s arguments, plaintiff’s counsel non-suited both the hospital and the doctor.

### Memphis Team Wins Dismissal for Hospital

In June, [Leigh Chiles](#) and [Jill Steinberg](#) tried a jury trial for a hospital client in Division 9 of Shelby County Circuit Court. The plaintiffs agreed to dismiss our client with prejudice and proceed only as to the co-defendant. Julia Kavanagh provided essential help.

### New Orleans Team Hosts AMRPA Regional Meeting

On June 24, Baker Donelson’s New Orleans office hosted the [American Medical Rehabilitation Providers Association \(AMRPA\) Regional Meeting](#). [Donna Fraiche](#) moderated a panel discussion featuring fellow Baker Donelson attorneys [Danielle Trostorff](#), [Monica Frois](#) and [Alisa Chestler](#) on the topic of health law and regulatory updates.





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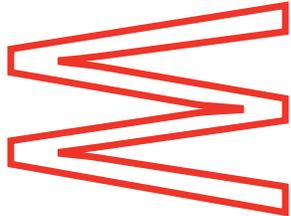
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## Join Us For Our Monthly Long Term Care Webinar Series



**9.10.2013:** What You Need to Know About Government Investigations of Long Term Care Facilities

**10.22.2013:** Top 10 Employment Law Mistakes Long Term Care Employers Make

**11.12.2013:** Early Resolution with Families of Your Long Term Care Facility's Residents

**12.10.2013:** Corporate Compliance, HIPAA and Privacy for Your Long Term Care Facility

**1.14.2014:** How to Conduct Effective Internal Investigations

For more information, please contact:

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