The Trump Administration and the New Congress

What EMS Needs to Know in this Time of Uncertainty

A National EMS Law Webinar
May 3, 2017

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Steve Wirth is a founding partner of Page, Wolfberg & Wirth, LLC, and is one of the best known EMS attorneys and consultants in the United States. Widely regarded as the nation’s leading EMS law firm, PWW represents private, public and non-profit EMS organizations, as well as billing companies, software manufacturers and others that serve the nation’s ambulance industry. In a distinguished public safety career that spans four decades, Steve has worked in virtually every facet of EMS – as a first responder, firefighter, EMT, paramedic, flight paramedic, EMS instructor, fire officer, and EMS executive – and was one of central Pennsylvania’s first paramedics. Steve brings a pragmatic business-oriented perspective to his diverse legal practice having served for almost a decade as senior executive of a mid-sized ambulance service, helping to build the company from the ground up.

Steve is a dynamic and sought after speaker at regional, state and national conferences on a variety of EMS and public safety subjects. He has authored numerous articles and book chapters on a wide range of EMS leadership, reimbursement, risk management, corporate compliance and workplace law topics. A contributing writer for JEMS, (where he serves on the editorial board), EMS Insider and EMS World, Steve has co-authored the highly acclaimed and popular compliance manuals and video training programs produced by PWW. He enjoys teaching and is an adjunct instructor for the University of Pittsburgh EMS degree program.

Steve graduated cum laude from Duquesne University School of Law and was a member of the school’s national trial and appellate advocacy competition teams. He is admitted to all Pennsylvania state courts, all federal district courts in Pennsylvania, and the United States Court of Appeals for the Third Circuit. Steve also holds a Master of Science degree in Health Services Administration with an emphasis in organizational behavior.

Steve remains in touch with patient and field provider issues as an active EMS provider and nationally certified firefighter with Hampden Township Fire Rescue where he serves as Incident Safety Officer and Medical Officer. He is a life member of the Nippenose Valley Fire Co. near Jersey Shore, PA, where he started his public safety career as a junior firefighter and served as Deputy Fire Chief. Steve has volunteered for many charitable organizations and is currently on the board of the Pennsylvania Fire and Emergency Services Institute and the Pennsylvania EMS Providers Foundation. Steve is a Certified Ambulance Coder (CAC) and a founder of the National Academy of Ambulance Coding (NAAC). He is a past Commissioner for the Commission on Accreditation of Ambulance Services (CAAS), and served as Chair of the Panel of Commissioners. Steve was the recipient of the prestigious James O. Page Leadership Award in 2013.
Douglas M. Wolfberg  
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Doug Wolfberg is a founding partner of Page, Wolfberg & Wirth, and one of the best known EMS attorneys and consultants in the United States. Widely regarded as the nation’s leading EMS law firm, PWW represents private, public and non-profit EMS organizations, as well as billing companies, software manufacturers and others that serve the nation’s ambulance industry. Doug answered his first ambulance call in 1978 and has been involved in EMS ever since. Doug became an EMT at age 16, and worked as an EMS provider in numerous volunteer and paid systems over the decades. Doug also served as an EMS educator and instructor for many years.

After earning his undergraduate degree in Health Planning and Administration from the Pennsylvania State University in 1987, Doug went to work as a county EMS director. He then became the director of a three-county regional EMS agency based in Williamsport, Pennsylvania. He then moved on to work for several years on the staff of the state EMS council. In 1993, Doug went to the nation’s capital to work at the United States Department of Health and Human Services, where he worked on federal EMS and trauma care issues. Doug left HHS to attend law school, and in 1996 graduated magna cum laude from the Widener University School of Law. After practicing for several years as a litigator and healthcare attorney in a large Philadelphia-based law firm, Doug co-founded PWW in 2000 along with Steve Wirth and the late James O. Page. As an attorney, Doug is a member of the Pennsylvania and New York bars, and is admitted to practice before the United States Supreme Court as well as numerous Federal and state courts. He also teaches EMS law at the University of Pittsburgh, and teaches health law at the Widener University School of Law, where he also serves as a member of the University’s Board of Trustees and has endowed the Douglas M. Wolfberg Scholarship at the Commonwealth Law School.

Doug is a know as an engaging and humorous public speaker at EMS conferences throughout the United States. He is also a prolific author, having written books, articles and columns in many of the industry’s leading publications, and has been interviewed by national media outlets including National Public Radio and the Wall Street Journal on EMS issues. Doug is a Certified Ambulance Coder (CAC) and a founder of the National Academy of Ambulance Coding (NAAC). Doug also served as a Commissioner of the Commission on Accreditation of Ambulance Services.
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Today's Presenters:

Steve Wirth
Doug Wolfberg

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Today’s Webinar

- New Workplace Agenda
- OSHA and Safety Under Trump
- HHS Initiatives
- The Latest on Health Care Reform
- MediCAID Plans
- HIPAA Happenings

MAJOR CHANGES ARE ON THE HORIZON

Many of These Changes Have Already Begun

Trump Administration - Day 1

- On 1/20 - Memo issued to Heads of Executive Departments and Agencies
  - No new Regulations until the new head has reviewed and approved
  - Withdraw all Regulations sent to OMB but not published
  - Repeal all published Regulations not yet in effect

Trump Administration – Day 4

- OMB Acting Director explained
  - Postponing published effective date
  - Withdrawing unpublished Regulations
  - Exceptions for issues Regulations
  - Emergency situations or other urgent situations relating to health, safety, financial or national security
Trump Administration – Day 10

On 1/30 - “2-For-1-Rule” Issued
- For every new Regulation issued, 2 existing Regulations must be rescinded
- Incremental cost for 2017 new Regulations will be $0

Trump Administration – Day 52

On 3/13 - Comprehensive Plan for Reorganizing Executive Branch issued
- OMB has 180 days to collect proposed plan from each agency
- Seek public comments
- Within 180 days later, submit proposal to President

Trump Administration – Day 66

On 3/27 – Trump repealed “Blacklisting” rule
- Required Federal Contractors to disclose labor violations
- This was done through the Congressional Review Act

NEW WORKPLACE AGENDA
Are the Obama Administration’s New Overtime Rules Dead on Arrival?

New Overtime Regulations

Scheduled to go into effect on 12/2/16
- Enjoined by a TX Federal District Court on 11/22/16
- Appealed to the 5th Circuit on 12/2/16

New Overtime Regulations

1/20/17 – Pres. Trump issues Memo halting non-implemented Regulations pending review
- DOL has now requested its 3rd delay to the 5th Circuit appeal
- DOL’s brief now due on 6/30/17
FLSA Coverage

- General Rule
  - Employees are entitled to minimum wage and overtime
- “White Collar” Overtime Exemptions
  - Administrative
  - Executive
  - Professional
  - Outside sales/Computer

3-Part Test to be Exempt from Overtime

- **Salary Basis** – Employee paid a salary not subject to reductions because of quality or quantity of work
- **Duties** – Employee must perform exempt job duties
- **Salary Level** – Currently $455/week ($23,660/year)

New Overtime Regulations

- Would have increased the salary level to $913/week ($47,476/year)
- This new salary level (and its automatic adjustments) are what has been enjoined so far
- No changes to the job duties test

Overtime Rules – Impact on EMS

- New rules – more “middle management” and front line positions could potentially no longer be exempt from overtime:
  - Billing Office Managers
  - Field Supervisors
  - Communications Center Supervisors
  - Training/CQI Supervisors

New Secretary of Labor: Alex Acosta

- Former NLRB member
- DOH Assistant Attorney General for Civil Rights
- U.S. Attorney for the Southern District of FL

Uncertainty at DOL

- Many key positions at DOL unfilled
  - Wage & Hour
  - OSHA
  - Pensions & Benefits
- Leaves repeal of new regulations and revisions in the air
- Big proposed budget cuts - $2.5 billion
Changes at the NLRB

NLRB

5 member NLRB currently has a 2:1 Democratic majority – 2 empty seats
Outspoken member Philip A. Miscimarra was named as acting chairman
Trump has a short list of 3 candidates to fill the empty seats

NLRB

None of the 3 candidates is pro-Union
One is a strong “management rights” attorney
Would give the NLRB a 3-2 Republican majority – first in many years – which could swing balance in favor of employers

“Quickie Election Rule”

Elections now held between 10-21 days of a petition – median was 38 days under old rule
Challenges to voter eligibility and appropriateness of bargaining unit now done post-election
New “micro-unit” rule favors unions in determining appropriate bargaining unit

“Quickie Election Rule”

Since rule in place, unions are winning 72% of all representation elections!
Key EMS Issue: Need to maintain an “issue free” workplace to limit perceived employee need to seek a union
New rules make it hard for employers to educate employees on the “pros” and “cons” of a union

Other Possible Changes at DOL

Joint Employment Definition
Has expanded since 2011
When 2 or more employers are joint employers, both have responsibility to recognize & bargain with Union
Example – staffing agencies
Possible Changes to Joint Employer Definition

- Trump NLRB could reverse recent joint employer decisions
- Could revert to traditional NLRB principles:
  - Joint employment only when both employers actually and directly control terms & conditions of employment

Other Possible Changes at DOL

- Expansion of Section 7 Rights to Non-Unionized Work Places
  - Recent NLRB decisions have held policies of non-Unionized employers to violate the NLRA when engaged in – "concerted activity for mutual aid or protection"
  - Social Media Policies in particular have come under fire – several NLRB General Counsel guidance documents issued under Obama

OSHA and Safety Under Trump

Changes to Record-Keeping Requirements

- On 4/3 – President Trump signed House Joint Resolution 83
  - Finalized Congressional Review Act ("CRA") process
  - Nullified new OSHA Record-Keeping Requirements (known as "Volks" Rule)

Changes to Record-Keeping Requirements

- Means that OSHA is now prohibited from issuing employer’s citations for failing to records injuries or illnesses beyond the 6-month statute of limitations in the OSH Act
- Employers are still required to maintain illness and injury records for 5 years
- Employers should continue to update OSHA 300 logs
Change Between Enforcement and Compliance?

During Obama Administration, OSHA was focused on being an agency of enforcement.

- Compliance/outreach jobs replaced with enforcement jobs

Change Between OSHA Enforcement and Compliance?

Under Trump Administration, expect to see more compliance efforts

- Strong potential that OSHA may reverse course
- May see more compliance assistance and outreach
- May see a repeal of some of the 22 whistleblower statutes OSHA oversees

HHS Initiatives

There’s Two New Sheriffs in Town

CMS: Seema Verma

- Health care consultant
- Assisted VP Pence with Indiana Medicaid expansion when he was governor
- Advocates a Medicaid “overhaul”

HHS: Tom Price Wants An Enforcement Shift

- Less focus on the “necessity of individual claims”
- “Rooting out blatant fraud”
- “Catching bad actors in real-time”
Why?

He’s a provider, too

So, We Might See Less…

- Scrutiny of medical records to evaluate medical necessity
- Subjective
- Leads to incorrect denials and recoupments
- Focus on technicalities
- Penalizing providers for legitimate errors

But, We Might See More…

- Prepayment audits
- Screening of individuals and agencies
- Data mining
- Focus on true “fraudsters”

CMS Fraud Prevention Initiative
New Tools to Fight Fraud and Protect Taxpayer Dollars

Already Seeing Shift From “Pay and Chase”

- CMS denied more than 6,000 applications from March 25, 2011 through December 31, 2015
- CMS revoked billing privileges of 43,000 provider/suppliers

Courts Reeling In FCA Lawsuits?

Some “Common Sense?”

- “Mere difference of opinion between physicians, without more, is not enough to show falsity.”
- “Opinions, medical judgments, and ‘conclusions about which reasonable minds may differ cannot be false’ for the purposes of an FCA claim.”
Fighting Statistical Sampling

Price: Critical of Value Based Reimbursement?

The Latest on Health Care Reform

American Health Care Act (AHCA)

Parts of the ACA That May Remain Under AHCA

Parts of the ACA Likely to Go Away Under AHCA

- Pre-existing condition coverage*
- *Uncertainty about whether the ACA’s “community rating” system will remain, however
- Out of pocket cap
- Lifetime and annual limits
- Dependents covered until age 26
- Exchanges would stay same
- Federal plans must cover essential benefits

- Expanded MediCAID eligibility
  - Currently in 32 states
  - Would be reversed in 2020
  - Back to 100% of FPL (was up to 133%)
- Essential benefits for MediCAID plans
- ACA’s bronze/silver/gold/platinum levels
Parts of the ACA Likely to Go Away Under AHCA
- Employer mandate
- Small-business tax credits (would end in 2020)
- Premium limits adjusted so younger people might see lower premiums and older people higher premiums

Bottom Line for EMS
- Likely increase in uninsured (CBO estimates 24 million)
- Employer mandate gone in 2020
- All plans in Federal exchanges would have to cover emergency ambulance services
- MediCAID plans could opt out of ambulance coverage

AHCA Pulled March 24, 2017
- CBO said 24 million people who would be covered under Obamacare wouldn’t be under the AHCA
- Older Americans would pay much more

What Conservatives Wanted
- No “essential health benefits”
- No surcharge for failure to have coverage
- State exceptions for covering pre-existing conditions
- Greater rollback of Medicaid

AHCA Bill Fired?...
Not Yet...

Enter, the MacArther Amendment
- Waivers for states:
  - Allow states to charge those with certain preexisting conditions more
  - States could define their own essential benefits
- If Federal government doesn’t deny the waiver within 60 days, a state’s exceptions automatically go into effect
What About the Obamacare Fraud and Abuse Provisions?

- Enhanced screening
- Temporary moratoria
- Withholding for “credible allegations of fraud”
- Mandatory compliance programs
- Enhanced CMPs
- 60-day overpayment rule

Fraud and Abuse Provisions…

Enforcement Under Trump

- Big FCA cases and settlements will continue – Both parties are aligned on this
- New AG Jeff Sessions critical of repeated extensions of the seal in FCA cases – may affect US intervention in cases
- New US Attorneys may influence FCA policies – relators may “shop” for districts where USAs are more likely to intervene

Enforcement Under Trump

- Trump’s Rhetoric Signals Fraud Focus – criticism of drug industry pricing, Boeing and Air Force One – may mean greater scrutiny of how HC providers bill taxpayers
- Supreme Court May Affect FCA – Most major FCA cases decided were close to unanimous so new justices – like Neil Gorsuch - may not have a huge impact

Ambulance Payment Reform?

- Ambulance providers serve your community 24/7/365. This time, we need your help!
- Support EMS excellence through fair Medicare reimbursement. Please...
- SUPPORT BILL S.967!

Medicare Ambulance Access, Fraud Prevention, and Reform Act

- If passed, would permanently incorporates the current temporary 2% urban, 3% rural, and super rural bonus payments into MFS.
- If passed, would require CMS to submit a report to Congress detailing features of a reformed payment system for ambulance services no later than July 1, 2019.
Medicare Ambulance Access, Fraud Prevention, and Reform Act

- If passed, would require HHS to establish a process for prior authorization of dialysis patients.
- If passed, would change treatment of ambulance “suppliers” to make them “providers” for certain purposes under Medicare.

Medicare Ambulance Access, Fraud Prevention, and Reform Act

- If passed, would develop a data collection system that defines the various types of ambulance entities as well as the relevant cost and required data elements.

Medicaid Plan

- Trump Administration and Congress proposing to convert to a system of block grants to the states.
  - This would effectively “cap” the Federal share of Medicaid funds.
  - States would have to either:
    - Increase their own spending, or
    - Reduce benefits.

Block Grants Instead of Blank Checks

Bottom Line for Providers

- Could be bad news for ambulance services and other healthcare providers.
- Medicaid reimbursement is already significantly below cost.
- Won’t improve anytime soon – will likely get worse.

HIPAA Happenings
HIPAA’s New Top Cop
Roger Severino
Former director at Heritage Foundation
Plans to maintain OCR’s current enforcement stance

What OCR Will Focus on Under Trump
Plans for cyber threats
Conducting a comprehensive risk analysis
Mobile device security
Monitoring audit logs
Addressing insider threats

OCR on Ransomware
“We expect that agencies will have a response plan for cyberattacks, including ransomware”

OCR’s Enforcement Stance
Focus remains on “voluntary compliance” (no penalties), but OCR will send a message with a big settlement amount for ignoring risks
Example: if the agency that knows its employees are taking photos on the scene and it has no policy regarding the practice

You Need Encryption
If you don’t use it, you’d better have a good reason for not encrypting data and good secondary measures (strong firewalls, malware, etc.).
All devices and storage media
During transmission and at rest

Will You be Investigated?
If you report a breach:
OCR Washington investigates all breaches involving more than 500 individuals
OCR tasked regional offices with a “small breach initiative”
Patient complaints – 17,000/year
Random audits
Phase 2 HIPAA Audits are Underway!

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