“The Benefits (and Dangers) of Outsourcing Medical Practice Ancillary Support Services Overseas”

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I. Outsourcing of Coding and Billing Functions: The Basics

- Generally speaking, whenever a health care provider chooses to outsource a practice’s coding and / or billing functions, “outsourcing” has occurred.

- There are a number of reasons why health care providers hire third-party billing companies:
  - Reduces overhead, equipment and labor costs.
  - Engages a company with a level of knowledge, experience and expertise that few in-house billing personnel can match.
  - Facilitates the collection of accounts receivable.
  - Allows a provider to focus on what they do best – taking care of patients.
• The world-wide growth and accessibility of the Internet, coupled with the implementation of electronic medical billing, has made it easier than ever to "outsource" a variety of business functions to companies outside of the United States.

• There are two basic overseas outsourcing business models currently in use:

  - United States-based companies that outsource coding and billing work sent to them, often without the knowledge of the client health care provider.

  - Third-party billing companies based outside of the United States that market their services directly to American physicians, clinics, hospitals and other health care providers.
Why would a health care provider choose to outsource its coding and billing functions to an overseas company?

- Much lower costs.
- Quick turnaround.
- Quality work that is equal to or better than what they have encountered when working with American companies.
- Allows a provider to focus on what they do best – taking care of patients.

II. Benefits of Overseas Outsourcing:
Collectively, it is easy to see why many health care providers have decided that the benefits of utilizing an overseas third-party billing company are almost too good to pass up. Unfortunately, many providers fail to consider the negative aspects of overseas outsourcing and primarily choose to focus on the cost-savings to be achieved with this practice. Several of these disadvantages include:

- Once patient medical and financial is transferred overseas, it is virtually impossible to guarantee that this information will remain private.
- Contract, business associate agreement and indemnification clause issues.
- It is extremely difficult to exercise due diligence when using an overseas billing company.
- Patient considerations.
IV. Is it Legal to Transmit PHI and Patient Financial Information Overseas?

• In light of the risks outlined above, you may wonder if it is even legal to outsource your coding, billing, medical transcription or other ancillary service to a company operating outside of the United States.

• While you might expect to find federal statutory restrictions barring the overseas disclosure or transfer of sensitive patient medical and financial information, no such restraints have been implemented at this time.

• Notably, as early as 2004, legislation was introduced in the Senate that would have placed a number of safeguards in place to protect patient health information that has been shared with an overseas subcontractor.

• Among its various provisions, the “Safe-ID Act” (S. 2312 (108th)) would have required that an individual be notified and given an opportunity to object to the disclosure of his/her financial or health information to an overseas organization prior to the disclosure taking place.
III. Is it Legal to Transmit PHI and Patient Financial Information Overseas?

• The “Safe-ID Act” (S. 2312 (108th)) would have also required that:

“A business enterprise that knowingly and directly transfers personally identifiable information to a foreign branch, affiliate, subcontractor, or unaffiliated third party shall be liable to any person suffering damages resulting from the improper storage, duplication, sharing, or other misuse of such information by the transferee.” (emphasis added).
IV. Is it Legal to Transmit PHI and Patient Financial Information Overseas?

• The Safe-ID Act was referred to committee but no further action on the legislation was taken. It was reintroduced in 2005 as the “Safeguarding Americans from Exporting Identification Data Act” (S. 10 (109th)), with the same result. In 2009, legislation entitled the “Notify Americans Before Outsourcing Personal Information Act” (H.R. 427 (111th)) was introduced in the House of Representatives. As with prior legislative efforts of this type, it was referred to committee where no action was ultimately taken.

• Several states have taken action to restrict the unfettered transfer of personal data to companies operating overseas, but actions to restrict the transmission of PHI and patient financial information to overseas billing companies have yet to be enacted.
IV. Is it Legal to Transmit PHI and Patient Financial Information Overseas?

While Congress has failed to enact broad, legislative controls to safeguard the utilization, disclosure and/or overseas transfer of PHI and patient financial information, the Centers for Medicare and Medicaid Services (CMS) has taken action to restrict Medicare contractors from outsourcing any system function overseas without first obtaining the permission of CMS. As the “Medicare Business Partners Systems Security Manual” states:

“All external information system services shall include specific provisions requiring the service provider to comply with CMS IS policies, standards, and guidelines; and shall be monitored for compliance. CMS shall define the remedies for any loss, disruption, or damage caused by the service provider’s failure to comply. Service providers shall be prohibited from outsourcing any system function overseas, unless explicitly authorized, in writing, by the CMS CIO or his/her designated representatives with concurrence from CMS’ personnel security department.” (emphasis added).

V. Expanded Obligations of Business Associates:

• While the federal government has not barred the overseas outsourcing of coding, billing and other ancillary services, recent regulatory enhancements arising out of the “Omnibus Final Rule” have greatly raised the bar to be met by both health care providers (as covered entities) and third-party billing companies (as business associates). The Omnibus Final Rule contains some of the most significant changes to the HIPAA privacy, security and enforcement rules since their inception.

• The new rule also strengthens the ability of the Department of Health and Human Services (HHS) Office for Civil Rights (OCR) to enforce the rules and levy fines for any “Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules; Final Rule.” Federal Register/ Vol. 78, No. 17 / Friday, January 25, 2013.

V. Expanded Obligations of Business Associates:

• Like the covered entities that they serve, overseas billing companies functioning as business associates are required by law to fully assess their security risks.

• A business associate must perform its own security risk analysis to determine what the organization must do to address its security policies, procedures, and workforce training under HIPAA.

• Even if an overseas billing company were to diligently work to adhere to these requirements, the simple fact is that there is very little, if anything, that either the government or a covered entity can do if a breach occurs.

• In light of the fact that most overseas billing companies are effectively judgment-proof, the government will have little option other than to hold the covered entity liable.
V. Expanded Obligations of Business Associates:

• Ultimately, a health care provider cannot relieve itself of its obligations under HIPAA or HITECH by sending one or more of its ancillary functions overseas.

• Instead, we believe that the opposite is true – health care providers will remain responsible not only for their own acts, but also the acts of their business associates and any respective subcontractors that may be brought into the picture – with, or without, their knowledge.

• This is a significant wrinkle in the use of overseas contractors. While there are many benefits, including reduced costs and efficiency, these incentives may be overshadowed by the privacy and security risks outlined above.
VI. Final Overseas Outsourcing Thoughts:

• Whether or not to engage in overseas outsourcing is currently an issue of significant debate among health care providers, domestic coders, billers, transcriptionists and the various organizations which represent their interests. The American Transcription Association (ATA) is one of the few organizations that has taken a clear position of the issue on overseas outsourcing. In its article titled “Off-Shoring Should be Off Limits,” the ATA notes that there is really no way to hold overseas transcriptionists liable for a breach. According to the article:

“Unlike US medical transcriptionists, foreign transcriptionists are not held to the Health Insurance Portability and Accountability Act (HIPAA) which is meant to protect a person’s medical records in terms of transporting and storage. That being said, foreign transcriptionists are not liable or penalized for the improper use of the information they receive and can, consequently, do as they please. In fact, there was a case where a foreign transcriptionist threatened to post personal patient information on the Internet if they did not receive their pay within a certain time frame.”

http://www.ataus.org/2010/05/off-shoring-should-be-off-limits/
VI. Final Overseas Outsourcing Thoughts:

• The ATA has been much more vocal regarding its opposition to offshore outsourcing than have many other similarly affected coding and billing associations. While many American coding and billing associations oppose offshore outsourcing, few, if any, have restricted membership in their organization to only American-based and operated third-party billing companies.

• This is understandable when you consider the fact that both Current Procedural Terminology (CPT) and International Classification of Diseases (ICD) coding and classification systems are used and applied in many countries around the world. Importantly, the CPT coding classification scheme was developed (and is maintained) by the American Medical Association (AMA).

• Coders and billers around the world rely on the advice, guidance and training of American coding and billing associations who work with these coding practices and systems on a daily basis. Nevertheless, there is a distinct difference between encouraging offshore outsourcing and recognizing that overseas coders and billers assisting health care providers in their own countries can greatly benefit from belonging to an American coding or billing association where they can gain knowledge and experience from their American counterparts.
VII. Cloud Considerations:

- As one expert on cloud computing issue recently stated:

  “You have to remember, **90% of all data break-ins are caused by someone inside the company with keys to the castle** – a systems administrator that’s being paid to tap a customer list or download customers’ credit card information… there’s a lot of temptation in these data centers.” (Ref: The Dachas Group).

- “**Potential Insiders with Keys**” can exist anywhere your information is maintained.
  - **Your practice** if your server is maintained locally. How are you restricting local access? How do staff members access your server if it is offsite?
  - **Outsiders** when you use third-party IT resources to maintain your equipment. Remember, you have little or no control over who they hire.
  - **A Cloud Service Provider (CSP).** Even if your information is encrypted, how secure is it from your hosting company?
VII. Cloud Considerations:

- **Security**: The security of Protected Health Information (PHI) and other sensitive information entrusted to you is *paramount – it cannot be ignored or delegated*.

- **As Third-Party Billers, You are Responsible for PHI Entrusted to You – Regardless of Your Role.** Importantly, your obligation to safeguard PHI applies regardless of whether you are a Covered Entity or a Business Associate (whether a Contractor or Subcontractor).

- **Federal, State and International Laws and Regulations**: As a Covered Entity or Business Associate, you must adhere to a myriad of federal and state laws and regulations under HIPAA, HITECH and the various states which might be implicated.
IV. Primary Security Issues

- **In-house Breaches by Cloud Personnel:** Health care providers have no real way of knowing if cloud provider staff are reliable or trustworthy. If a disgruntled employee accesses or steals sensitive data, there is little, if any, way that a health care provider can take remedial steps to quickly address the problem.

- **Cloud Provider Financial Stability:** Is the cloud provider financially sound? If the provider were to declare bankruptcy, what would happen to its servers (and most importantly, to your information)? Who really owns this information?
VII. Cloud Considerations:

• **Contracts of Adhesion**: Check out your agreement with the cloud provider – many of these contracts are essentially “contracts of adhesion.” These contracts ultimately leave you with no bargaining power and allow the cloud provider to do practically anything with your data. Check out the agreement – it may initially appear to safeguard your information when in reality it allows the cloud provider to move its server, transfer the information to other data storage devices and make changes to the applications on its system.

• **You Can Never Really be Sure that the Relationship is “Terminated”:** After a while, you may choose to “terminate” the agreement. How can you ever be sure that your information is not backed-up on the cloud provider’s server or storage system. *In other words – once the information leaves your control, it is gone forever!*
VII. **Cloud Considerations:**

- **Cloud Provider Financial Constraints:** Cloud providers are businessmen. Thus, they are under the same financial constraints as you are. Security measures taken will be as inexpensive as possible to provide you with a satisfactory level of comfort.

- **Liability:** Both HIPAA and HITECH will hold you responsible for breaches. Moreover, you won’t learn of security risks until it is too late.

- **Business Associate Agreement Issues:** If you choose to use cloud computing, you need to ensure that the cloud provider agrees to adhere to all HIPAA / HITECH requirements set out in your Business Associate Agreement.

- **Indemnification Concerns:** Indemnification agreements may not be worth the paper they are written on. How will you enforce it? Typical agreement language might state:

  “CSP shall defend, indemnify, and hold harmless Customer and its affiliates and their respective officers, directors, employees, and representatives from and against any and all losses, damages, costs, or expenses... due to CSP's material breach....”
VII. Cloud Considerations:

Steve Wozniak, co-founder of Apple, stated:

“I think it’s going to be horrendous. I think there are going to be a lot of horrible problems in the next five years…

With the cloud, you don’t own anything. You already signed it away.”
VIII. Conclusion: Outsourced Billing and Coding

• There are **NO** guarantees that overseas subcontractors are compliant or even *know* about HIPAA or HITECH.

• There is **NO** way to verify overseas subcontractors are compliant even if they claim to be.

• **The solution?** In the case of subcontracting, it is best to hire a U.S. company for billing and coding services, if not use your own “in-house” personnel.
QUESTIONS

This outline is provided as general information only. It does not constitute legal advice and should not be used as a substitute for seeking legal counsel. Robert W. Liles is an attorney with the Washington, DC / Baton Rouge, LA / Houston, TX / McAllen, TX firm of Liles Parker PLLC. He may be contacted at (202) 298-8750 or by e-mail at rliles@lilesparker.com

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