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New Patient Rights Rules for Idaho Hospitals

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The Idaho Department of Health and Welfare has implemented new patient rights rules for hospitals effective July 1, 2019. (*See* IDAPA 16.03.14.220 to .350). The rules were advanced by patient advocacy groups and, to a large degree, incorporate standards that parallel—but do not exactly mirror—existing law and/or Medicare conditions of participation for hospitals. Because many of those regulatory conditions did not apply to critical access hospitals ("CAHs"), CAHs may need to implement new policies and procedures to satisfy the rules. All Idaho hospitals as well as providers rendering services in hospitals should check their existing policies and practices against the new rules, including the following:

Notice of Patient Rights (IDAPA 16.03.14.220.01 to .04 and .15). The hospital must implement a procedure to notify the patient, the patient's personal representative, or caregiver of their rights in advance of furnishing or discontinuing care whenever possible. In emergencies, the notice may be given after emergent care is provided. The notice must be given in a language or format that the patient and/or legal representative understands. The rule does not otherwise specify the method or manner of the required notice, e.g., whether specific written or oral notice is required, or whether some other method such as publication on a website or at the facility is sufficient. It appears that the Idaho rule only requires notice of the rights specified in the new rules (*i.e.*, those identified in IDAPA 16.03.14.220 to .350); however, the Idaho rule should be coordinated with existing Medicare conditions of participation for hospitals that generally require a written notice of certain patient rights (*See* 42 C.F.R. § 482.13), and CAH requirements relating to patient visitation. (*See* 42 C.F.R. § 482.13 485.635(f)). The new rule does not specify whether the hospital must give notice of all rights in advance, or only those relevant to the patient's care. For example, it is not clear whether the hospital must notify the patient or personal representative of rights concerning restraints or seclusion if there is no indication that the patient will require restraints or seclusion. Finally, the hospital must provide patients with contact information for the Idaho state survey agency, which the rules identify as:

Idaho Bureau of Facility Standards
P.O. Box 83720, Boise, Idaho 83720-0009
3232 Elder Street, Boise, Idaho 83705
(208) 334-6626

Informed Consent (IDAPA 16.03.14.220.03 to .06). The hospital must identify who is responsible for making medical decisions and representing the patient if the patient is unable to make those decisions. Idaho Code §§ 39-4503 and 39-4504 set forth the standards for determining whether a

patient lacks capacity and, if not, the hierarchy of surrogate decisionmakers. Consistent with those statutes, the patient or their personal representative has a right to make informed decisions regarding the patient's care, to be informed of the patient's health status, to be involved in care planning and treatment, and to request or refuse treatment; however, this right does not allow the patient to demand treatment or services that are medically necessary or inappropriate. Other Idaho statutes address whether care may be withdrawn or withheld over the objection of the patient or their surrogate. (*See*, *e.g.*, I.C. §§ 39-4513 and 39-4514).

Documenting Informed Consent (IDAPA 16.03.14.220.06). Although I.C. § 39-4507 states, "[i]t is not essential to the validity of any consent for the furnishing of hospital, medical, dental or surgical care, treatment or procedures that the consent be in writing or any other specific form of expression…", the new DHW rules require that the hospital obtain written consent for general treatment at the hospital. If the hospital is not able to obtain this consent, the reasons must be documented. In addition to the general consent, the hospital must obtain an informed written consent from each patient or the patient's representative for the provision of specific medical and/or surgical care except in medical emergencies. The consent must include an explanation of risks, benefits, and alternatives for high-risk procedures, sedation, and other procedures or services as defined by the hospital's governing body. The rule appears to impose a standard that is more specific and may differ from that set forth in I.C. § 39-4506, which states:

> Consent, or refusal to consent, for the furnishing of health care, treatment or procedures shall be valid in all respects if the person giving or refusing the consent is sufficiently aware of pertinent facts respecting the need for, the nature of, and the significant risks ordinarily attendant upon such a person receiving such care, as to permit the giving or withholding of such consent to be a reasonably informed decision. Any such consent shall be deemed valid and so informed if the health care provider to whom it is given or by whom it is secured has made such disclosures and given such advice respecting pertinent facts and considerations as would ordinarily be made and given under the same or similar circumstances, by a like health care provider of good standing practicing in the same community.

As a practical matter, the hospital and CAH conditions of participation already impose fairly specific and more detailed requirements for documenting informed consent, so the new Idaho statute should not drastically change hospital practices.

Advance Directives (IDAPA 16.03.14.220.07). Consistent with the federal Patient Self-Determination Act and Medicare conditions of participation (*see*, *e.g.*, 42 C.F.R. §§ 482.13(b) and 483.10(b)), the new rules confirm that the patient has the right to formulate advance directives and to have hospital staff and practitioners comply with these directives. The hospital must document whether the patient has an advance directive. If the patient has an advance directive, the hospital must document what it includes. If

the patient does not have an advance directive, the hospital must offer the patient assistance to create one and document the patient's response. Idaho Code §§ 39-4509 to 39-4515 address advance directives, including living wills, durable powers of attorney for health care, and POSTs; however, these are not the only valid method by which a patient may express their treatment wishes. “Any authentic expression of a person's wishes with respect to health care should be honored.” (I.C. § 39-4509(3)).

Privacy (IDAPA 16.03.14.220.08 and .09). The new rules address at length a patient's right to privacy, including the right to privacy during personal care. Any determination that the patient must be continuously observed for safety reasons must be based on an individualized assessment and be part of the patient's plan of care. The patient has the right to meet privately with his or her attorney, practitioners, and representatives of the state protection agencies or advocacy groups.

Video and Audio Monitoring and Recording (IDAPA 16.03.14.220.09). The hospital must have policies and procedures when it uses continued observation of patients and/or video recording of patients. The hospital must obtain the patient's or patient's legal representative's written consent for video or audio recording except in common areas, and such recordings must be included as part of the patient's medical record except recording in common areas. Monitors used for observing patients must not be visible or audible to unauthorized persons. When patients are video monitored, the hospital must turn the camera off or utilize an electronic privacy option during personal care where the patient may be exposed, such as bathing, dressing, and toileting. Monitoring during these times must be done by staff members in person. Video and audio monitoring and recording must also be turned off during meetings with the patient and an attorney, a practitioner, state protection agencies or advocacy groups. Closed circuit television may be used to monitor common areas when signs are clearly posted that video monitoring or video recording is occurring.

Patient Safety (IDAPA 16.03.14.11 and .12). The patient has the right to receive care in a safe setting and free from abuse, neglect, and harassment. If hospital staff become aware of potential abuse or neglect of a patient, the hospital must protect the patient from future harm and report suspicions to the appropriate legal entity. Idaho statutes address reporting of child or vulnerable adult abuse or neglect to state agencies or law enforcement (*see*, *e.g.*, I.C. §§ 16-1605 and 39-5303), but it is not entirely clear to which “legal entity” other non-criminal forms of adult abuse or neglect should be reported.

Patient Access to Records (IDAPA 16.03.14.13 and .14). Consistent with HIPAA, the patient has the right to the confidentiality of his or her clinical records and the right to access their records; however, the new rules require that the hospital allow the patient to access information contained in his or her clinical records within three (3) business days. HIPAA would allow the hospital up to thirty (30) days to respond to a request for records. (45 C.F.R. § 164.524(b)(2)).

In addition, HIPAA allows the hospital to decline access in certain

situations, including situations where the information was obtained from another under a promise of confidentiality or where the practitioner determines that it is not in the patient's best interest to disclose the information. (*Id.* at § 164.524(a)(2)-(3)). It is not clear whether DHW would respect these exceptions to the right of access. Consistent with HIPAA, the patient may request their clinical records in hard copy or electronic format. When the patient requests the information electronically, the hospital must provide it on a currently popular media storage device, and the information must be provided in a coherent format. Under the new rules, the hospital may not charge the patient a rate for copies that is higher than that of the local library. Under HIPAA, however, the hospital may not charge the patient more than a reasonable fee based on its actual labor costs in creating and delivering the records (but not identifying, retrieving, or compiling them), the cost of supplies for creating the paper copy or electronic media, and postage. (*See id.* at § 164.524(c)(4)). The net effect is that the hospital may only charge the lesser of the amounts allowed by HIPAA or what the local library would charge. For more information concerning HIPAA and the patient's right to access information, *see* https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html).

Patient Grievances (IDAPA 16.03.04.225). The hospital must establish and explain to its patients the hospital's grievance process by which the patient may submit a formal, informal, written or verbal complaint. If not resolved at the time of the complaint, the complaint must be treated as a grievance, investigated, and documented. The hospital's process must specify the time for review and response to the grievance. The hospital must provide a written notice of its decision that contains the name of the hospital contact person; the steps taken to investigate the grievance; and the results of the grievance process.

Restraints and Seclusion (IDAPA 16.03.14.230 to .234). The new rules contain lengthy and detailed requirements for restraints and seclusion which generally track the Medicare conditions of participation for hospitals. (*See* 42 C.F.R. 482.13(e)). In addition, Idaho now requires that all hospitals—including CAHs—have a written restraint and seclusion policy that incorporates the regulatory requirements, including but not limited to specifying which personnel may assess the need for restraint and seclusion; how the patient will be assessed; how the patient will be monitored; and how services will be rendered during the period of restraint or seclusion. Patients who are restrained but who are not violent or self-destructive must be monitored at intervals not greater than fifteen (15) minutes. Patients who are restrained or secluded for violent or self-destructive behavior must be monitored continuously. The new regulations contain fairly extensive documentation requirements for restraint or seclusion situations, as well as required training for staff. Idaho hospitals should review the new regulations carefully and compare them to their existing restraint and seclusion policies.

Law Enforcement Restraints (IDAPA 16.03.14.229). The new hospital rules do not apply to restraints applied by non-hospital employed or contracted law enforcement officials, including handcuffs, manacles, shackles or other restrictive devices; however, the rules confirm that use of

such devices by hospital staff are not considered safe, appropriate health care restraint interventions. When law enforcement applies such restraints, the law enforcement officer must maintain custody of the prisoner/patient, and the officer is responsible for the use and monitoring of such restraints consistent with Idaho law. The hospital remains responsible for an appropriate patient assessment and the provision of safe, appropriate care to its patient while in custody of the officer.

Conclusion. The new rules impose some additional requirements on Idaho hospitals, especially CAHs. All Idaho hospitals should compare the new rules to their existing practices and policies to ensure compliance and/or make required changes.

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