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Social Media in LTC
2015 MO DHSS Annual Long-Term Care Provider Meetings

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Agenda

- HIPAA Issues and Mandatory Reports
- Social Media in the Workplace
 - Privacy concerns
 - Labor and Employment Concerns
 - Scenarios




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Social Media Postings Involving LTC Residents

Report may be required under licensure law or Medicare/Medicaid conditions of participation

- Is it “infliction of emotional injury or harm”?
- If yes, reportable as possible abuse under Missouri law.
- If facility is certified, also need to consider whether it is reportable as abuse under F223.

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Postings Involving LTC Residents (cont'd)

Reporting required under HIPAA

Unauthorized disclosure of PHI (Protected Health Information) is **presumed** to be a reportable breach **UNLESS** you can demonstrate:

- Low probability that PHI has been “compromised” based on a risk assessment.
- What does “compromised” mean?
- Federal rule doesn’t define. (surprised?)



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Postings Involving LTC Residents (cont'd)

Risk assessment must include at least:

- Nature & extent of PHI involved;
- The unauthorized person(s) who used the PHI and or to whom the disclosure was made;
- Whether the PHI was actually acquired or viewed by the unauthorized person(s); and
- The extent to which the risk to the PHI has been mitigated.

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Postings Involving LTC Residents (cont'd)

- Is it PHI? Can resident be identified?
- Resident’s face or name need not show up for resident to be identifiable.
- Determining the extent of disclosure and mitigating the risk could be very difficult after a social media disclosure.
- Remember – provider has burden to demonstrate low risk that PHI was “compromised.”
- Compare to stolen laptop – may seem unlikely that thief will access data, but if it’s unencrypted, OCR considers it a breach.

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Postings Involving LTC Residents *(cont'd)*

- Having a social media policy, training your workforce on it and enforcing it should be a key part of your overall compliance program.



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What is Social Media?

- Web 2.0: The Interactive Web
- A tool for communicating
- Information is shared globally



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Social Media Overview – the Age of Sharing

- Pinterest continues to gain in popularity—overtook LinkedIn to become No. 3
- Almost 1 billion Facebook users; **54% access via mobile**; 23% of users check Facebook 5 times or more daily; 1 Million websites have integrated with Facebook
- 56% of customer tweets are being ignored
- Over 40 million photos are uploaded to Instagram every day
- The “Twitter Olympics” v. the “Sina Weibo Olympics”
- More apps using location data to connect users
- **Fastest growing segment for social media use: 45-54 year olds**

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Is Social Media Changing Our Definition of "Privacy"?

- Courts allowing access to social media accounts
- Questions arising about who owns the data you share?
- Courts dealing with issues concerning GPS tracking, phone location records, and other location data collected by social media applications arising about owns the data you share?
- Do privacy settings actually make your data private?



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Zuckerberg's Law of Information Sharing

- "I would expect that next year, people will share twice as much information as they share this year, and the next year, they will be sharing twice as much as they did the year before."



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Social Media In the Workplace

- Employees are going to want to access social media at the workplace;
- Employees are going to have access to social media at the workplace – either on their mobile device or computer.
- Which is "safer" for them to use?
 - The computer and it isn't even close. Why? Much harder to take a selfie with a resident with the computer.



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Labor and Employment Issues

- Employee harassment on social media
- Employees and resident families becoming “friends” on Facebook
- Employees discussing work (not residents) on social media
- The right to dislike the boss, company, and working conditions on social media

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Labor and Employment Issues

- Employees have the right to engage in “protected concerted activities” for their mutual aid and protection under Section 7 of the National Labor Relations Act.
- This applies to both union and non-union employees.
- Under this protective umbrella comes a wide variety of rude, mean, and disparaging remarks about supervisors, companies etc. so long as the comments are tied to a workplace concern.

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Scenarios

- An employee complains they are being “harassed” by a co-worker on Facebook.
- Next Steps?



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Next Steps

- Get the facts: Who is doing the harassing? What is the nature of the harassment? When did it occur? Why is it happening? Is it impacting work?
- Take action: (1) find out the answers above; (2) determine if it is harassment based on a protected status such as age, sex, race, disability etc.? (3) take prompt remedial action to ensure harassment ends.

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Scenario 2

- A complaint is received that a resident's image was posted to Facebook by an employee and referencing they were "feeling better in time for their birthday." The picture was posted by the employee on the FB page of the resident's family member who "liked" the picture.



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Next Steps

- Get the Facts:
 - When was it posted and for how long?
 - Who posted it?
 - What exactly was posted?
 - Why was it posted – did the resident and family member ask the employee to do it? Does it even matter if they did?
 - How was it posted?
- Is this reportable as a HIPAA violation?
- What is your policy and practice?

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Scenario 3

- Employee posts: At work today and we are all fed up with Tom Smith. #WorstBossEver #WeNeedARaise #TSmithIsAnIdiot
- It is posted to Twitter, LinkedIn and Facebook
- A picture is then posted to Instagram with a group of employees at the nurses station making the hashtag sign and the above hashtags in the Instagram post.

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Next Steps

- Get the facts: who, what, where, when, why
- Any HIPAA issues?
- Any policy or practice violations?
- Is it “protected concerted activity”?
- Has it lost the protection of the Act?
- Is discipline warranted or legal?
- Other steps – All employee meeting, engage in the discussion on social media?

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