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Economic Affairs Interim Committee

61st Montana Legislature

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CLAUDIA (CJ) JOHNSON, Secretary

HIPAA Subcommittee DRAFT MINUTES

March 30, 2010

Room 137, Capitol Building
Helena, Montana

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. The minutes are accompanied by an audio recording. For each action listed, the minutes indicate the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time may be used to locate the activity on the audio recording.

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COMMITTEE MEMBERS PRESENT

REP. CHUCK HUNTER, Chair
REP. DON ROBERTS

NANCY BUTLER
ERIN MACLEAN
JUDY BOVINGTON

STAFF PRESENT

PAT MURDO, Research Analyst
BART CAMPBELL, Staff Attorney
FONG HOM for Cj JOHNSON, Secretary

CALL TO ORDER AND ROLL CALL

00:00:01 Rep. Hunter called the HIPAA subcommittee meeting to order at 8:03 a.m. The secretary visually noted the roll. All members are present. Rep. Hunter asked the audience and members to introduce themselves.

- Erin MacLean
- Diana Ferriter
- Jerry Keck
- Thom Danenhower
- Larry Jones
- Jacqueline Lenmark
- Carl Kochman
- Kevin Braun
- Nancy Butler
- Bart Campbell
- Rep. Roberts
- Judy Bovington - via polycom phone

AGENDA

Recap of HIPAA Information

Rep. Hunter gave an overview of why this meeting is taking place. He said it is this work group's agenda to find a connection between the Health Information Portability and Accountability Act (HIPAA law) and Workers' Compensation for sharing information with employers.

00:02:04 Ms. MacLean gave a PowerPoint presentation called "Permitted Disclosures of Protected Health Information." **(Exhibit 1)** She outlined what is permissible under the law for disclosure of the Workers' Compensation system in Montana. Ms. MacLean provided a handout that explains the HIPAA statutes. **(Exhibit 2)**

00:09:31 Mr. Jones talked about the right to privacy issues that have developed regarding Workers' Compensation. He addressed draft language in Section 39-71-604, MCA, "Application for Compensation -- disclosure and communication without prior notice of health care information". **(Exhibit 3)**

00:15:40 Ms. Murdo gave an overview of Workers' Compensation and its related statutes and history in Montana. **(Exhibit 4)** Ms. Murdo directed the committee to a note on the bottom of page 6, Exhibit 4, which references a letter from the Department of Health and Human Services Office of Civil Rights to the Social Security Administration in 2003. The letter says "a HIPAA-covered entity may not condition treatment, payment, or eligibility for benefits on an individual's authorization".

Discussion

00:22:13 Rep. Hunter talked about the Workers' Compensation Act, and specific language that is needed to allow medical providers to share personal health information with employers regarding early return to work issues - the reason the

subcommittee has been appointed. He talked about disclosure issues in Workers' Compensation in general and asked if there is a "hole" in terms of employers receiving information that would assist in an employee's return to work.

- 00:23:07 Ms. Butler said there is nothing is expressed in black and white regarding what insurers can do. She talked about:
- medical information being high on the list for privacy;
 - employers' involvement because they are paying into the system for the employee's Workers' Compensation claim;
 - when medical providers are involved, it is better to err on the side of caution;
 - examiners making judgments on a case-by-case basis;
 - retaining the ability to use the constitution for balancing tests to decide what information an employer might be entitled to; and
 - language that expresses what information can be shared with employers.
- 00:26:32 Rep. Roberts talked about the medical field going forward with electronics regarding health histories. He said it is important that guidelines be established. The more a practitioner is aware of what a job entails, and that may require talking with an employer, the more positive the outcome.
- 00:27:15 Ms. Bovington said she is concerned about the method and the balancing test.
- 00:28:44 Ms. MacLean said that if any statutes are passed, the committee should consider if the employee has a subjective or an actual expectation of privacy, and if society is willing to recognize that expectation as reasonable.
- 00:29:41 Rep. Hunter commented that as an employer it is unclear whom to call and from whom they can get information, such as the insurer or the physician, and what type of information can be shared. Rep. Hunter said he talked to Dr. Petrisko in Billings who did not feel any need to change the structure in the law and the way information is shared. Rep. Hunter said he also talked to Jim Hunt, an attorney, who expressed his concern in changing the law regarding the claimant's interests. Mr. Hunt said that is information between the provider and the employee. If the employer were present it would become a disservice.
- 00:31:56 Mr. Keck of the Department of Labor and Industry (DLI) talked about one of the issues before the Labor Management Advisory Council (LMAC) regarding how to reduce time away from work and help facilitate a worker's return to work. He said that a proposal before the LMAC is to use vocational rehabilitation services more quickly after an injury. One option would be for an injured worker, insurer, or employer to call DLI and ask for a vocational rehabilitation counselor be assigned to facilitate the discussion on return to work.
- 00:33:46 Ms. Ferriter talked about the WorkSafeMT Stay at Work/Return to Work committee. She said the committee has trial attorneys, insurers, and medical providers, who have developed a stay at work, return to work best practices document. She said the committee would like to educate medical providers to

keep the employee involved in all discussions and let them know the benefits of returning to work early. Ms. Ferriter said there may not be as many issues of disclosure if both the employee and the employer are included in the discussions regarding return to work.

- 00:35:17 Mr. Keck informed the committee that he will provide copies of the WorkSafeMT Stay at Work/Return to Work document.
- 00:35:27 Rep. Roberts talked about the inconvenience of the whole process. He suggested the worker may need to be present. Mr. Keck said that is part of the constitutional issue. He talked about the weakness in the system being no one person to address getting a worker back to work. Another issue is at what point is the insurer involved. The discussion may not involve protected health information, but rather information about doing a time of injury job or modifying the job to meet an injured workers' constraints.
- 00:38:56 Ms. MacLean said that medical providers are afraid of violating Montana or HIPAA law. She said that medical providers will refrain from disclosure until they know that they are not violating HIPAA. She referenced a new federal act relating to HIPAA regarding penalties when there is a violation with HIPAA. She said the medical providers would feel more comfortable with specified terms of what information a provider can disclose.
- 00:40:38 Rep. Hunter asked what type of disclosure could be made more clear to an insurer. Ms. MacLean replied there is a statement in statutes that HIPAA doesn't apply to allow disclosure within Workers' Compensation, but that a statute could still spell out to whom disclosure can be made and what can be disclosed. She said as far as disclosure to insurers, there is a dispute regarding ex parte communication.
- 00:42:03 Rep. Roberts said in the process of dealing with health care there is personal information that becomes part of the equation. Some factors are more delicate than others and may be important, such as mental health factors. Mr. Keck agreed.
- 00:43:31 Mr. Keck added that in most instances the injured worker wants to go back to work and the employer wants him to. He described a disclosure form that might help a return-to-work discussion. He suggested that a facilitator, such as a vocational rehabilitation counselor, can help with discussions among the willing parties to get a person back to work. Another issue is when a worker doesn't want to go back to work. An insurer may need to know certain information for benefit decisions if a worker does not want to go back to work.
- 00:45:00 Rep. Hunter asked about the disclosure form. Mr. Keck said once the department was contacted the department would make clear to the worker that for a return to work conversation to happen among all parties, the worker would need to sign a form that was compliant with HIPAA.
- 00:46:33 Ms. Ferriter commented that forms can be given to medical providers and

employers who then gives that form to the injured worker. She said the form was part of the best practices for stay at work, return to work program.

- 00:47:01 Rep. Roberts noted that the doctor becomes an advocate for the patient.
- 00:48:33 Mr. Danenhower of the Montana Municipal Interlocal Authority said they use a form for disclosure of information that allows communication if needed. He said the committee needs to consider in a case where an worker is injured:
- is there a disease complication; and
 - what is the impact on the injury?
- He asked about the rare claims in which a claimant becomes addicted to pain killers and fights with the doctor because the worker does not want to return to work and is not interested in the doctor's advice, etc. He said this is where ex parte communication becomes very valuable in working through those types of claims.
- 00:51:15 Mr. Jones discussed effective communication and getting accurate information in a timely manner from the health care provider so the injured worker can return to work. As to what information can be communicated, the draft language in Exhibit 3 (5) is appropriate. He said the department's proposal may slow the information process down. Also, he said there is a concern from claimants attorneys that ex parte communication could provide an opportunity for mischief in that the insurer could give misinformation to a health care provider.
- 00:53:43 Mr. Kochman said that Ms. Ferriter and Mr. Keck covered the issues from WorkSafeMT well. He noted that physicians are uncomfortable being in the middle, because they are an advocate for the patient.
- 00:55:01 The committee discussed draft language to incorporate into Exhibit 3.
- 01:08:23 Rep. Hunter said the committee is looking for direction. He said that Ms. Butler's handout, Exhibit 3, could be a proposal. Rep. Roberts called it a good guideline.
- 01:09:57 Rep. Hunter asked Mr. Campbell to take ideas heard today and draft language to make a bill from Exhibit 3. Mr. Campbell provided his e-mail address for added comments. Rep. Hunter asked that comments be sent to Mr. Campbell by April 9, 2010.
- 01:13:56 Ms. Murdo talked about denying benefits, and stated that HIPAA doesn't apply to Workers' Compensation.
- 01:14:22 The committee discussed the next meeting being a teleconference call. Ms. Murdo informed them that a teleconference is considered a meeting.

Adjournment

- 01:15:51 Rep. Hunter adjourned the HIPAA subcommittee at 9:18 a.m.