LEGAL HOT TOPIC:

HOME HEALTH, HOSPICE, AND PERSONAL SERVICES RECORD RETENTION

By Robert Markette: Hall, Render, Killian, Heath & Lyman

This issue’s legal hot topic focuses on helping your agency determine what documentation you have, how long you should keep it, and what purpose it serves.
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Why it's Important.

Home health, hospice and private duty providers generate a significant amount of documentation in their day to day operations. This documentation may be paper copies or electronic. The documentation ranges from payroll records to records documenting each patient visit and many other types of documentation. Each of these documents serves the purpose of memorializing some aspect of the provider’s operations. Because these documents record the operations of the company, they are extremely important when responding to surveys, payer audits, government investigations and even lawsuits.

Although these records are extremely important, they also take up valuable storage space, either physical storage space in file cabinets and file rooms or storage space on servers. Because providers are continuously generating documentation, they need to consider how much of this documentation they keep and for who long. If the provider keeps too little for too short a period, they may destroy important documents prematurely and be without them when needed for a survey, government investigation or lawsuit. Of course, if the provider were to err in the other direction and retain everything forever, the provider would be buried in mountains of documents and the sheer volume would render the documentation not only burdensome to maintain, but too voluminous to provide any value when needed. Because each of these outcomes can be equally disastrous, providers need to consider what they must keep, what they can destroy and when they can destroy it.

Making this determination is extremely important. It is important to consider this matter in advance, so that a provider may carefully consider how long to retain key documents. These decisions can then be memorialized in yet another document – a record retention and destruction policy. Having a record retention and destruction policy is a key aspect of provider compliance. Having such a policy written out in advanced ensures that documents are not destroyed until they are no longer needed. Having such a policy also protects a provider from claims that it destroyed documents in an effort
to deny another party evidence, which can be a key consideration in later investigations and lawsuits.

Developing a record retention and destruction policy requires carefully considering a number of factors. A provider must consider what types of records are involved. The provider must also consider what statutes and regulations apply and whether there are any specific statutory or regulatory record retention requirements. The provider must also consider what statutes of limitation apply that would operate to bar a future lawsuit. The provider must also consider practical issues such as how much storage space is available and how to access stored documents. Finally, when presented with alternative storage deadlines or a range of options, a provider will need to considers its comfort with the various risks presented by different timeframes for retention of records.

II. Types of Records.

Homecare providers generate a number of different types of records. These records include operational records, clinical records, corporate records, employment records and financial records to name just a few. Each type or category of record is the result of a particular aspect of the agency’s operations and the statutes and regulations that govern their operations. Because different statutes and regulations have different requirements, a provider will most likely not have one rule that applies to all of its records.

The varying statutory and regulatory requirements will result in multiple record retention timeframes. The only way a provider might avoid this would be to adopt a single time frame for all record retention. This could only be done safely if the provider chose the longest record retention time frame that applied to any of its records and applied it to all of its records. This would result in a simple rule for agency personnel to follow, because there would be only one applicable deadline. The tradeoff would be that the provider would end up retaining some documents significantly longer than necessary, which may result in increased costs to the provider for additional storage space. A provider that chose to implement a single time frame would likely choose ten (10) years as the overall retention timeframe. The basis for this will be explained in more detail below.

If a provider desired to implement a more record specific policy, with more relevant, document category specific time frames, the provider would want to consider the following categories and related issues.

A. Organizational Records

Organizational/Corporate records include the foundational documents of the company and related records. These include the entity’s bylaws/operating agreement, organizational resolutions, minutes of board meetings, minutes of shareholder meetings, notices of meetings, amendments to foundational documents, records of ownership transfers, records of votes of the governing body, votes of the shareholders, etc. Corporate documents such as operating agreements, shareholders agreements or partnership agreements also set the ground rules for how the owners relate to each other. These documents cover fundamental issues such as what constitutes a quorum,
whether representation is based upon ownership percentages, withdrawal provisions, wind down provisions, and other matters. These documents not only demonstrate that the corporate formalities were followed, but what constitutes those formalities for the particular entity.

Having and maintaining these documents are important for a number of reasons. For example, shareholders may need to prove that the appropriate corporate formalities were followed to avoid the corporate veil being pierced. Piercing the corporate veil results in a loss of the limited liability protections afforded by certain corporate forms such as corporations, LLCs, and Limited Liability Partnerships. Piercing the corporate veil can occur where owners have failed to treat the corporation as a separate legal entity by following the applicable corporate formalities, such as holding regular shareholder meetings, holding regular board meetings, commingling funds or failing to act according to properly approved resolutions. Proving that the corporate formalities were followed requires the owners to have, and document, regular owners meetings, board meetings, votes taken by the owners and/or the board and similar matters. These documents may need to be relied upon later to demonstrate that the owners followed the corporate formalities and that the limitations on liability should apply.

Corporate records of this type are also important for surveys and disputes amongst shareholders. Surveyors will often request corporate records to determine if the governing body of the organization is properly discharging its duties. In a shareholder/member/partner dispute, an owner may make any number of representations about the operation of the company and how the particular shareholder was disadvantaged. The other shareholders will only be able to defend their actions to the extent they have the appropriate documentation available to demonstrate they acted reasonably and followed the applicable procedures.

Corporate records are the proof of the existence of the company and the reasonable and appropriate operation of the company. They should be maintained as long as the company is operational. This will often be done through the creating, keeping and maintaining of corporate record books.

B. Financial Records and Tax Records

Financial records and Tax records are also important to maintain. Financial records may be needed to demonstrate the reasonableness of decisions to let staff go as a downsizing measure or to respond to a shareholder dispute over particular business decisions. Tax return records and related financials are important, because they may be needed to demonstrate later compliance with payroll tax requirements, income tax requirements and similar tax issues. Financial/Tax records include purchasing records, bank records, payer reimbursement records, profit and loss statements, balance sheets, income statements, prior year’s tax returns, quarterly tax deposit records, employee compensation records, expense records and similar documents. Because they document the financial condition of the company, prove payments were made and similar matters, they are important to have and to properly maintain. Because they may be important in a number of contexts, there are a number of applicable time periods.

Although these documents can be relevant to everything from shareholder disputes to providing wages were paid appropriately, these types of documents may be most important for responding to IRS claims. Many, if not all, documents relating
to the company’s finances will be necessary to verify statements made on tax returns. The IRS requires entities to maintain records for so long as the contents of the records may become material to the administration of an Internal Revenue Service Code provision. These records may become material for at least as long as the IRS may bring an action against the provider. Under federal law, the IRS may bring an action against an organization for seven years. During the seven year period, the provider may find itself subject to an IRS action in which these financial documents would be material. Seven years is the minimum time period for which these financial and operational records should be kept.

Providers may consider keeping some records longer than seven years. For example, if a provider purchased a vehicle or a building and deducted the depreciation of the vehicle or building, the provider would need to keep the records related to the depreciation deductions for the entire period over which the depreciation deductions were taken, plus an additional seven years to ensure the period in which the IRS may bring an action had passed.

Although the general statute of limitation is 7 years, there is no statute of limitations for claims where the provider has willfully attempted to evade taxation in any manner or has failed to file a return. If the IRS suspects such willful avoidance of tax obligations or identifies a missing tax return, the IRS can pursue an action against the provider more than seven years later.

Financial records are also relevant to Medicare and Medicaid cost report issues. Medicare requires a provider to maintain cost reports and supporting documentation for five years. Many of the documents that were used to support the Medicare cost report will be maintained for at least seven years, because they will be subject to the longer IRS record retention requirements. Although this means some of the supporting records will be kept longer, a copy of the provider’s Medicare cost report, along with the supporting working papers, proof of submission, proof of receipt and documentation that it has been accepted by the intermediary should be maintained for at least five years from the month in which it is filed. It is recommended that copies of cost reports and related working papers be maintained permanently.

Medicaid cost report requirements lead to a similar conclusion. Indiana requires providers whose reimbursement is determined by OMPP “maintain financial records for a period of not less than three (3) years following submission of financial data to the office.” 405 I.A.C. 1-5-3. As with Medicare, the financial records that support your cost report filing will be maintained for at least seven years, due to IRS requirements. Despite this requirement, it is recommended that a complete copy of your Medicaid cost report, working papers and proof of delivery be maintained for at least three years from the date of submission, because a failure to submit the cost report can lead to significant penalties. If there is any doubt about a submission, the burden will be on the provider to prove the submission of the cost report. Providers ought to consider retaining the copies permanently.

C. Other Operational Documents

1. Licenses and Permits

Providers should keep copies of all licenses, permits, certifications, accreditations and similar documents for as long as the license, permit, certification, accreditation or other document is effective. Once they have expired, a provider can determine how long to keep a copy of the expired document. There are no statutes governing this retention
period. Providers may wish to keep them as proof of the provider's status related to claims submission, in the event an auditor later tries to deny a provider was properly enrolled. It is recommended that these records be kept for at least five years. Some providers may opt to keep them longer and treat them as corporate records.

2. Contracts

Providers have many different contracts, ranging from contracts for copiers to contracts for supplemental staffing or medical directors. Providers also have written contracts with their clients. Personal services agencies/private duty providers are required to have service agreements. Home health agencies and hospice have these as well, although for home health and hospice they are only an issue for contract purposes when the client/patient is paying for the care out of pocket. Under Indiana law, a breach of contract action related to a written contract may be brought up to ten years after the alleged breach. For this reason, it is recommended that copies of contracts, and documentation related to the contractual relationship – invoices, payments, etc. – that would be relevant to proving performance under the agreement be kept for at least ten years. This ensures the availability of the documentation for the entire time frame in which a breach of contract claim may be brought.

This requirement includes the service agreements personal services agencies have with their clients or that home health and hospice agencies have regarding private duty services. Because these agreements are written contracts, the client or the client's family could bring a lawsuit up to ten years after the relationship ends. This means that private duty providers need to retain copies of the client service agreements and all related documentation – clinical records, employee timesheets, etc. for ten years.

D. Clinical Records

Clinical records include medical records generated by home health and hospice providers and non-medical records of services provided by personal services agencies. Clinical records are important to maintain for a number of reasons. Clinical records are the proof of the care that was provided to the patient/client. They may be needed to demonstrate the quality of care, to defend against claims of malpractice, etc. They are needed for survey purposes to show the care provided, to show the plan of care or service plan was followed and to show what the staff did at each visit to the home. Providers need them for billing purposes, because they show that the care for which the client or payer was billed was provided. These records also show the patient's eligibility, etc. Not having these records or not maintaining them for an appropriate amount of time can result in the agency failing to have evidence that is extremely important for later billing audits, lawsuits and surveys. This can prove to be extremely detrimental to the agency.

For this reason, it is recommended that copies of contracts, and documentation related to the contractual relationship – invoices, payments, etc. – that would be relevant to proving performance under the agreement be kept for at least ten years.
files the cost report to which the record applies. Medicare also requires providers to
maintain clinical records for a patient for five years after the date of discharge, when
there is no requirement under state law. If state law has a requirement, the provider
should follow that requirement. For minors, the records are to be kept for three years
after the minor reaches the age of majority under state law. Because Medicare defers
to state law, providers must consider what Indiana law requires regarding record
retention requirements.

1. Indiana Medical Record Retention

Indiana law specifically requires health care providers to retain the originals or
“microfilms” of medical records for at least seven years. The statute specifically
includes home health agency in the definition of providers, but does not mention either
hospice or personal services agencies. It is understandable that personal services is not
mentioned, because personal services providers are expressly non-medical providers.
The omission of hospice is surprising but, despite this omission, seven years is the
baseline from which all homecare providers should start when discussing retention of
medical records. As we will discuss below, the period of retention will likely be longer.

Although the statute requires providers to retain medical records for seven years, it
does not expressly state when the seven years starts. Although it does not expressly
state the date of discharge as the date on when the seven years begins to run, it is likely
that the intent of this statute was to keep all records for seven years after a patient was
discharged. Except in the case of certain long term chronic patients who are on service
for more than three years, we will see that this question is not as important, as other
considerations lead us to conclude maintaining the these records for more than seven
years is necessary.

2. Medical Malpractice

In addition to the statutory requirements for record retention, providers must consider
potential causes of actions and their related statutes of limitations. A provider’s
clinical records can be key evidence in a number of types of cases and destroying
them prematurely can put the provider in the position of attempting to respond to a
claim without key evidence. One such claim that must be considered when discussing
retention of medical records is medical malpractice. Medical malpractice claims are
not commonly brought against home health or hospice providers and are never brought
against personal services agencies, but home health and hospice are not excluded from
such claims. Because such a claim is possible, providers must consider the statute of
limitations for such claims.

Indiana requires claims for medical malpractice to be filed within two years of the
alleged malpractice. This means that clinical records ought to be maintained for at least
two years, but this is less than the aforementioned seven year retention requirement for
medical records. Providers who comply with the seven year requirement will maintain
their records for sufficient time to be comfortable that any malpractice action has passed
beyond its statute of limitations period.

If the medical malpractice claim involves a minor under the age of six, the claim must
be filed before the minor’s eighth birthday. The provision for minors under the age of
six raises the possibility that a minor’s medical records may not be needed until after
the seven years required for medical records retention. For providers that care for
pediatric patients, it is recommended that, for medical malpractice claims purposes,
provider retain these records for 8.5 years. This is recommended to ensure that, even
where a claim is filed at the last minute and service is delayed, the provider would continue to have the relevant records.

3. **Licensure and Survey Considerations**

Clinical records are also important for demonstrating compliance with licensure requirements, payor requirements and claims submission requirements. For licensure and enrollment purposes, surveyors do not look back past the last survey, which is usually within the last three years. When audited by payers – Medicare, Medicaid and Medicaid Waiver, the review periods can vary. For example, Medicare auditors are only allowed to look back three years, unless they identify good cause for looking back more than three years. Again, both of these considerations are addressed for home health and hospice providers by the Indiana requirement to retain records for seven years.

4. **False Claims Act and Related Compliance Considerations**

Although there are a number of applicable regulatory provisions, providers’ decisions about retaining clinical records and billing records will be primarily driven by state and federal false claims acts, because they have the largest statute of limitations periods. The Federal False Claims Act (“FCA”) allows a plaintiff to bring an action within six years of the alleged false claim. The FCA provides a longer period of time in which the government can file where the government does not know about the misconduct. The government may bring an action later than six years, if: (1) the government was unaware of the conduct, (2) it brings the action within three years of learning of the conduct and (3) it brings the action no more than ten years after the misconduct. Indiana has a state law, the False Claims and Whistleblower Protection Act, that adopts the same statute of limitations provisions. This means that the state or federal government could bring a claim against a provider under the FCA or FCWPA ten years after the misconduct occurred.

These two statutes allow recovery of claims under Medicare, Medicaid and Medicaid Waiver. This means that home health, hospice and private duty providers are all potentially subject to liability for false claims. It is recommended that clinical records, as well as related claims records, be kept at least ten (10) years. Providers may want to consider keeping clinical records and related claims records longer, as an action under the FCA or FCWPA could be filed under seal. This means that it could be months, or even years, after the ten year statute of limitations expired before the provider was served. A provider who disposed of records at ten years, but was not served a copy of the complaint until year eleven, would be at a decided disadvantage in defending a case. However, this is a relatively rare occurrence and the low risk may be offset by the burden of maintaining records more than ten years.

E. **Employment**

Employment records are another form of documentation that providers generate and then need to maintain for some period of time. Basic employment/personnel records include Payroll records, employment eligibility verification, personnel records, employee health records, employee workplace exposure records, personnel records related to EEOC charges, FMLA records, and employee benefit plan information. Each of these categories are the subject of different federal regulations with different retention requirements or related statutes of limitations.
Payroll records are those records related to the agency’s payroll process. These records include timesheets, employee pay rate information, information on employee pay calculations and amounts remitted to the employee. These records are all directly relevant to the employer’s compliance with the Fair Labor Standards Act (“FLSA”). The FLSA allows employees to bring a lawsuit against an employer for two years after an alleged violation. If the employer willfully violated the FLSA, the employee has three years to bring the law suit. An employer will want to consider retaining these records for at least two years, but likely three years, to ensure their availability to respond to a later allegation by a former employee. Keeping these records is especially important, because a single employee may choose to sue the employer on behalf of similarly situated employees, which can turn a small matter into a very large matter rather quickly.

Employers are required to maintain proof that they verified an employee’s eligibility for employment (immigration status) for three years from the date of hire or one year after termination, whichever is later. This means that you will keep the proof that you verified the employee’s eligibility in their personnel file for the entire time they were employed. When the employee separates, you will have to determine whether one year from separation or three years from hire is later and retain the documentation accordingly.

Personnel records are necessary for a number of reasons. Surveyors will review personnel files to verify compliance with licensure and certification standards. Employers will document disciplinary action, job decisions, competency evaluations, license verification, exclusion list checks, automobile insurance and a number of other matters in the employee’s personnel file. Personnel files also include job applications, performance evaluations, background checks and other information. These materials need to be maintained appropriately, because of their importance for demonstrating compliance with a number of applicable laws.

The Equal Employment Opportunity Commission has issued regulations which require employers to maintain these records for one year from the making of the record or one year from any decision made based upon the record, whichever is later. However, it is best to maintain all of these records in the employee’s record for the entire time the employee is employed. The personnel file can be maintained for at least a year after an employee separates from employment to ensure compliance with the EEOC regulation.

If the EEOC brings a charge against an employer, the retention requirements change. The default rule is always to preserve records that may be instrumental to pending litigation. Destroying records that may prove relevant to litigation can lead to charges of obstruction, spoliation and other steep penalties. This means that whenever an employee receives a notice of an EEOC charge, any routine record destruction must stop with regards to the records of the employee(s) involved in the charge. In addition to this general guidance, the EEOC regulations specifically require that records related to an EEOC charge be maintained until the EEOC charge is resolved.

Homecare employers must also consider OSHA requirements related to record retention. OSHA regulations contain specific requirements related to employee workplace exposure records. These requirements apply to issues related to exposure to blood borne pathogens, which is an area of potential concern for homecare providers. If a homecare employer has an incident involving exposure to blood borne pathogens, the resulting employee exposure records must be maintained for
the duration of the employee’s employment plus thirty years. OSHA has a similar requirement for medical records relating to all exposure records related to an employee’s exposure to harmful or toxic substances.

Another employment related law is Employee Retirement Income Security Act (“ERISA”). Providers who are subject to any ERISA report filing requirements must maintain documents related to the reports and sufficiently detailed supporting documentation for six years from the date of filing or from the date the report would be filed, if not for an applicable exemption or simplified reporting requirement.

Providers who have a union will also need to comply with document retention requirements contained in federal labor law. For example, providers must maintain documentation that verifies payments to union representatives and labor consultants, as well as other related documents, for five years. Providers with a union must maintain copies of collective bargaining agreements and individual employee contracts for at least three years.

F. HIPAA

HIPAA has policy specific documentation requirements. Providers must keep copies of all HIPAA policies and procedures for at least six years from the date the policy or procedure was last in effect. This means that, as providers review and revise their policies and procedures, the old versions must be maintained for six years.

III. Record Retention When There are Pending Matters.

Record retention policies should also address suspending record destruction in certain instances. When a provider is sued, or is notified of a government investigation, routine destruction of records pursuant to the written policy should stop. This is required to ensure that no records which are relevant to the litigation are destroyed. Destroying records relating to pending litigation can lead to very severe sanctions and can lead to the loss of evidence that would tend to support the provider’s defense. A provider that destroys records in this situation may also be perceived as intentionally trying to deny evidence to another party. A provider’s record retention policies ought to specifically state how a “litigation hold” can be put into place as soon as notice of litigation is received and maintained throughout the pending matter.

IV. Practical Considerations – Storing Records for Extended Periods.

Some of the applicable statutes of limitations require a provider to retain copies for ten years. For physical records, this can amount to a significant amount of storage space, which can be quite costly. The need for storage space for physical records can be mitigated by storing closed files electronically. A provider could have a policy that required some, or all, records to be scanned and stored electronically, with the originals being shredded. This can significantly reduce the amount of storage space a provider requires, but it creates several other risks.

If a provider chooses to scan and store documents, it is important that the electronic copies are complete, accessible and secure. Reducing a significant volume of paper records to electronic copies makes it much easier to store them, but this process has a number of related risks. Storing documents electronically requires scanning every page of the documents to be stored electronically, storing it in a format that can be accessed later and destroying the originals. A provider needs to be certain the originals
are all scanned, in their entirety, before the paper originals are destroyed. Providers have created major compliance issues when they destroyed original paper copies before verifying the electronic copies. The result of the failed process is that the providers have no copies of the documents in question and are left to hope the documents never become relevant.

Reducing paper document to electronic copies also makes it easier for someone to steal a much larger volume of records. One extremely large breach of patient privacy was due to the loss of electronic backups that contained significant volumes of old patient records. Providers who opt to store old files electronically to save space, must carefully consider how those records are secured. Providers must also consider how to prevent electronic copies from being altered or destroyed inadvertently. This will include some form of routine backup of the archived documents. Finally, the electronic copies must be accessible. Electronic copies are of no value to a provider if they cannot be accessed when needed.

V. Conclusion.

Providers generate significant volumes of paper work as a result of their operations. This paperwork is necessary to prove compliance with the many laws that apply to providers, but it is also burdensome to maintain, due to the sheer volume. Providers can address both of these issues by carefully considering, and implementing, a document retention policy. Such a policy will ensure documents are kept for as long as they are needed and only destroyed when all applicable statutes of limitations and other regulatory requirements have passed. Providers who do not have a record retention policy may find themselves without key records when they need them, or worse, being accused of intentionally destroying evidence.

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