LHA IMPACT LAWBRIEF

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Louisiana Hospital Association

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Headlines:

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Notices:

ARTICLE SUBMISSION: The LHA Society of Hospital Attorneys encourages its members to submit articles on topics of interest. Writing an article that is published in *Lawbrief* is a great way to promote your name in the healthcare community and advertise your knowledge. If you have written an article and would like to have it considered for publication in *Lawbrief*, please email it in Word format (no PDFs please) to LHA Advocacy Coordinator Meaghan Musso at mmusso@lhaonline.org. **NOTE:** To submit articles for publication in Lawbrief, the author must be an active member of the LHA Society of Hospital Attorneys, and articles cannot contain footnotes.

LEGAL & REGULATORY EDUCATION PROGRAMS & WEBINARS:

Dec. 4	Innovations in Fall and Fall-Injury Prevention and Reduction Strategies Within Hospitals	Baton Rogue
Dec. 4	MRI Safety: Complying with ACR, CMS, TJC and More	Webinar
Dec. 4	OPPS APC Final Changes for 2019	Webinar
Dec. 5	Healthcare Economics: Why the Delivery Models Must Change	Webinar
Dec. 5	Water Damage 101 & Mold Remediation in Hospitals	Baton Rouge
Dec. 6	At the Heart of Saving Lives: The Telecardiology Opportunity	Webinar
Dec. 11	CMS Hospital Surgery and PACU Standards: Are You in Compliance?	Webinar
Dec. 11	Tax Reform Impact on Tax Exempt Hospitals - What Tax Cuts?	Webinar
Dec. 12	Behavioral Health Policy Advocacy: How to Use Data Effectively	Webinar
Dec. 13	Assessing Physician Demand to Support the Hospital's Strategy	Webinar
Jan. 8	Provider-Based Rule: Update for 2019	Webinar
Jan. 10	Unconscious Bias, Stereotypes & Discrimination in the Healthcare Setting	Webinar
Jan. 22	LAPS PSO: Communication & Early Resolution After Medical Injury: The Massachusetts Experience	Baton Rouge
Jan. 23	Thriving with a Multi-Generational Workforce	Webinar
Jan. 29-30	2019 LHA Winter Healthcare Leadership Symposium	Baton Rouge

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Articles:

Billeaudeau Effect: Recent Court Rulings Prove Uncertainty on Uncapped Credentialing Claims
By: Adam Thames

Louisiana law imposes on healthcare providers a duty to investigate, select, and retain only qualified and competent physicians to care for their patients. Historically, a healthcare provider's liability and resulting exposure for breaching these obligations, often categorized as negligent credentialing, was considered inherently related to medical treatment and thus subject to the Louisiana Medical Malpractice Act (LMMA), including the limitations of liability, or "cap" on money damages, recoverable by an aggrieved patient. In October 2016, the Louisiana Supreme Court removed this layer of protection in the landmark decision of *Billeaudeau v. Opelousas Gen. Hosp. Auth.*, effectively subjecting healthcare providers to financial exposure beyond the $500,000 damages cap imposed by the LMMA.

The Supreme Court's decision sent shockwaves across the legal and medical community as it was in stark contrast to how Louisiana courts historically treated negligent credentialing claims. The Third Circuit Court of Appeal has since issued four separate rulings in *Billeaudea*u that have ramifications on healthcare providers that go well beyond that case; and, in some instances, only serve to provide more uncertainty as to how our courts are going to treat the now-uncapped credentialing claims.

For instance, in *Billeaudeau II*, the Third Circuit held that the defendant-hospital, Opelousas General Hospital Authority, was a "political subdivision" for purposes of the Louisiana Governmental Claims Act (LGCA). The LGCA limits tort liability on any claims for "political subdivisions" to $500,000 on general damages with no cap on medical and special damages. This is welcomed news for public hospitals as it confirms at least some monetary cap on damages that are recoverable for negligent credentialing. Unfortunately, however, private hospitals and providers do not fall under the LCGA and are still subject to fully uncapped exposure for negligent credentialing.

The Supreme Court's decision also has ramifications on the type and extent of insurance available to providers to cover these now-uncapped claims. In *Billeaudeau III*, for example, the Third Circuit found that at least one of the defendant-hospital's general liability policies did not insure negligent credentialing. Specifically, the policy excluded "bodily injury" for performance or failure to perform "healthcare professional services," which was defined to include the work of any accreditation or standards committee in evaluating a provider's professional services or failure to execute a decision or directive of a formal accreditation committee. The court rejected the plaintiff's argument that coverage should apply, because employees outside of those on the actual committee assisted in gathering information related to the credentialing process, finding that the work of the committee included the work of all those tasked with gathering or providing information to the committee members for review. In upholding the coverage exclusion, the appellate court specifically noted that it was mindful of the dilemma caused by this newfound uncapped exposure for negligent credentialing.

In *Billeadeau IV*, the Third Circuit found that the defendant-hospital was not required to put its "claims made" liability insurer on notice of negligent credentialing until the trial court determined that this particular cause of action fell outside the scope of the LMMA. The Court also found that the insurer's bodily injury exclusion in the policy did not exclude coverage for a patient's mental pain and suffering related to negligent credentialing and that it had to honor its duty to defend the hospital from those allegations.

Finally, the Supreme Court's rulings will have a drastic impact on the presentation of evidence at trial and the jury's fact-finding duties. In *Billeadeau V*, Plaintiffs settled their medical malpractice claims against the doctor and hospital, but reserved their right to seek damages in excess of $200,000 against the Louisiana Patient's Compensation Fund and Oversight Board and for negligent credentialing against the hospital. The hospital filed a motion for partial summary judgment regarding the need to allocate fault to claims, not parties, and asked the trial court to require the jury to allocate a percentage of fault to each party and to further assigned a percentage of fault for both theories of liability asserted against the

hospital: medical malpractice and negligent credentialing. The district court granted the motion, which was affirmed by the Third Circuit. Thus, a jury or fact-finder is now tasked with apportioning fault between claims of credentialing and medical malpractice, as well as apportioning fault among all parties and non-parties, when deciding dual claims of medical malpractice and negligent credentialing.

Short of a legislative amendment, this new landscape of uncapped liability for negligent credentialing is here to stay. Healthcare providers and those who sit on the committees formed to investigate, select and retain physicians must appreciate the seriousness of this ruling and its continued effect. It is critical now more than ever for healthcare providers to be proactive in reviewing credentialing policies and procedures to ensure compliance, maintain adequate insurance to protect against this now-uncapped exposure and notify all insurers – general and professional liability carriers – as soon as a claim for negligent credentialing is made.

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FLSA Claims for Automatic Meal Break Deductions Continue to Plague Healthcare Industry
By: Melissa Shirley

The continued wave of FLSA lawsuits shows an alarming trend and emphasis on wage and hour related disputes both in the private and federal enforcement contexts. In fiscal year 2017, the Department of Labor, Wage and Hour Division reportedly collected an average of $740,000 in back wages for workers per day. In the context of private litigation, the top ten most expensive FLSA lawsuits for 2017 reportedly amounted to more than $180 million. And, while the long-term care industry was fortunate to avoid this particular "top 10" list, it is far from insulated from wage and hour lawsuits in a variety of contexts, including alleged violations of the FLSA based upon the practice of making automatic meal deductions from the healthcare workers' compensation.

Fundamental to wage and hour law is the FLSA's requirement that employers must pay for all hours that it suffers or permits an employee to work. Meal breaks of at least thirty minutes in duration may be excluded from "hours worked," and therefore unpaid, if employees are completely relieved of duty for purposes of eating a meal. Many organizations utilize automatic deductions for regular meal periods, an increasingly dangerous practice, particularly in the context of patient care workers in the healthcare setting. Many times, employees with mounting success, recall frequent and lengthy interruptions in their meal breaks to tend to patient or resident needs and the employer is left to try to prove the contrary. Several recent cases illustrate such a scenario:

Cooley, et al v. HMR of Alabama, Inc. d/b/a Robert L. Howard Veterans Home (Sept. 2018) The plaintiffs are 44 employees of a nursing home, performing services as Certified Nursing Assistants and Licensed Practical Nurses. They filed suit against their employer, arguing that they worked without compensation during their meal breaks over several years. Specifically, the workers claimed that they routinely worked more than forty hours per week without full compensation because the company automatically deducted meal breaks from their pay even when the workers were not "completely relieved from duty." The work allegedly performed during the meal breaks included "caring for patient needs" and "tending to patients." Initially, the district court dismissed the FLSA claims, stating that the work allegedly performed was insufficiently described and too amorphous. However, very recently, the federal court of appeal reversed the dismissal, allowing all 44 plaintiffs' claims to proceed in the litigation process.

Williams v. Bethel Springvale Nursing Home (July 2018)
The plaintiff, a Registered Nurse, was employed by the defendant nursing home for approximately two years. She alleged that, throughout that period, her employer engaged in various violations of the FLSA, including automatically deducting compensation from the employee's meal period. The plaintiff alleged to have worked through her meal period on a near daily basis, without compensation. Following a bench trial, the court ruled in favor of the employee with respect to the meal time allegations, stating, "Given the corroboration from other former Bethel employees that nurses often had their meal breaks interrupted, and the fact that the plaintiff was the only nurse available to tend to patients' needs and administer

medications during the night shift, the court places some credence in plaintiff's testimony that she often performed compensable work during her unpaid meal breaks…Given the testimony of all witnesses, the court finds an approximation that plaintiff worked through an average of one-half of each of her meal breaks reasonable."

Ridley v. Regency Village Skilled Nursing & Rehab Center (March 2018)
The plaintiffs claimed to be a group of "similarly situated" employees for purposes of asserting that they constituted a proper "class" or "collective action," because they all provided direct patient care and were all subject to the same policy surrounding meal breaks. The class included licensed vocational nurses, registered nurses, certified medical assistants, and certified nursing assistants. Regency's timekeeping software automatically deducted thirty minutes for lunch breaks. The plaintiffs alleged that Regency knew that the staff often worked through lunch breaks and expected them to do so. The court recently declined to dismiss the lawsuit, as the allegations gave rise "to a plausible claim for relief." Further, citing the plaintiffs' evidence that they were subjected to interruption during their lunch breaks, the court granted conditional certification of the class/collective action.

Myers v. Marietta Memorial Hospital, (Sept. 2017)
Plaintiffs alleged that the hospital's policy of automatically deducting thirty minutes for a meal break for nurses and patient care technicians violated the FLSA. Importantly, the hospital had established policies by which employees could cancel the automatic deduction when unable to take an uninterrupted meal break. Nonetheless the court granted class certification, because the evidence demonstrated that employees were at times not even scheduled for lunch breaks, managers were aware that employees were working through the breaks, and managers were actively discouraging employees from canceling the automatic deductions.

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