



COMMONWEALTH of VIRGINIA

STATE BOARD OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

DRAFT MEETING AGENDA

Wednesday, October 9, 2019*

DBHDS Western State Hospital*
103 Valley Center Dr, Staunton, VA 24401

*(Event Schedule for October 8-9, Business Dinner Agenda, and all directions, pages 35-36)

CONCURRENT COMMITTEE MEETINGS

Wednesday, October 9, 2019

8:30 a.m. – 9:30 a.m.

8:30	Planning and Budget Committee	p.14
	Policy and Evaluation Committee	p.15
9:30	Adjourn	

REGULAR MEETING

Wednesday, October 9, 2019

9:45 a.m. – 3:00 p.m.

1.	9:45	Call to Order and Introductions	Paula Mitchell <i>Chair</i>	
2.	9:50	Approval of October 9, 2019 Agenda ➤ <i>Action Required</i>		
3.	9:55	Approval of Draft Minutes Regular Meeting, July 17, 2019 Biennial Planning Meeting, July 16, 2019 ➤ <i>Action Required</i>		p.3
4.	10:00	Public Comment (3 minute limit per speaker)		
5.	10:15	Update on Children’s Services	Nina Marino <i>Director, Office of Children’s Services</i>	
6.	10:45	BREAK for CCCA and WSH Tour (1 hour) RETURN FROM TOUR , collect lunch (15 min)		
7.	12:15	Commissioner’s Report	Mira Signer <i>Acting Commissioner</i>	

			Heidi Dix <i>Deputy Commissioner Compliance, Regulatory and Legislative Affairs</i>	
8.	12:45	Overview of Facilities A. Western State Hospital B. Commonwealth Center for Children and Adolescents	Mary Clare Smith <i>WSH Director</i> Jaime Bamford <i>CCCA Director</i>	
9.	1:15	A. Initiate Periodic Review: 12VAC35-225 Requirements for Virginia's Early Intervention System ➤ <i>Action requested: Initiate periodic review.</i> B. Petitions for Rulemaking 1. R.C. Carter 2. R.C. Carter ➤ <i>Action required.</i> C. General Update – Regulatory Matrix	Ruth Anne Walker <i>Director, Regulatory Affairs</i> Catherine Hancock <i>Part C Administrator</i> Emily Bowles <i>Assistant Director for Licensing, Quality, Regulatory Compliance, and Training Office of Licensing</i>	p.18 p.22 p.17
10.	1:35	Committee Reports A. Planning and Budget Committee B. Policy and Evaluation Committee	Ruth Anne Walker Heidi Dix	p.16 p.15
11.	1:45	Update on the Virginia Association of Community Services Boards (VACSB)	Jennifer Faison <i>Executive Director</i>	
12.	2:15	Miscellaneous A. Board Liaison Reports B. Quarterly Budget Report		
13.	2:30	Other Business		
14.	2:45	Adjournment	Chair	

NEXT MEETING: The next meeting of the State Board will be on Wednesday, December 11, 2019, at a location to be decided in the Richmond area.

STATE BOARD OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES
DRAFT MEETING MINUTES

Wednesday, July 17, 2019
DBHDS Central Office, Jefferson Building
1220 E. Bank Street
Richmond, Virginia 23219

REGULAR MEETING

Members Present	Paula Mitchell, Chair ; Elizabeth Hilscher, Vice Chair; Jack Bruggeman; Rebecca Graser; Sandra Price-Stroble.
Staff Present	Jae Benz, Director of Licensing Emily Bowles, Legal and Regulatory Manager, Office of Licensing. Heidi Dix, Deputy Commissioner, Division of Compliance, Legislative, and Regulatory Affairs (CLRA) Jessica Gains, Fellow, Office of Human Rights Taneika Goldman, Deputy Director, Office of Human Rights Deborah Lochart, Human Rights Director Emily Lowrie, CLRA Senior Policy Advisor Josie Mace, Financial and Policy Analyst, Office of Budget Development Susan Puglisi, Regulatory Research Specialist Ruth Anne Walker, Director of Regulatory Affairs
Staff Present via Telecom	S. Hughes Melton, MD, Commissioner
Others Present	Jack Barrett, Chair, State Human Rights Committee Rebecca S. Herbig, disAbility Law Center of Virginia Mark P. Hickman, Commonwealth Strategy Group W. Scott Johnson, Hancock Daniel Sarajini Rao, Department of Planning and Budget Jennifer Wicker, Virginia Hospital and Healthcare Association
Call to Order and Introductions	At 10:02 am Paula Mitchell called the July 17, 2019, State Board of Behavioral Health and Developmental Services meeting to order. A call for introductions took place prior to proceeding.
Approval of Agenda	<i>At 10:04 am the Board voted unanimously to adopt the July 17, 2019 agenda with one amendment requested by Ms. Mitchell to add an action item in regard to the letter to the Governor.</i>
Approval of Draft Minutes, Regular Meeting April 10, 2019	<i>At 10:06 am the Board approved the minutes of the April 10, 2019, State Board of BHDS Meeting as circulated.</i>
Officer Elections	As Ms. Mitchell was running for re-election as chair, she turned the meeting

over to Mr. Bruggeman to conduct the officer elections.

A. Presentation of the Slate of Candidates

As the Nominating Committee Chair and temporary meeting chair, Mr. Bruggeman gave the presentation of candidates for chair and vice chair: Ms. Mitchell as Chair and Ms. Hilscher as Vice Chair.

B. Nominations from the Floor

Mr. Bruggeman called for nominations from the floor; there were none.

C. Election

In separate requests, Mr. Bruggeman called for a vote on each officer position. *Upon a motion by Elizabeth Hilscher and a second by Becky Graser, Paula Mitchell was elected chair unanimously. Upon a motion by Becky Graser and a second by Paula Mitchell, Elizabeth Hilscher was elected vice chair unanimously.*

Report Out from the Biennial Planning Meeting

At 10:15, Heidi Dix reported on the previous day's biennial planning meeting, held in accordance with the Bylaws. Ms. Dix stated that she and Meghan McGuire presented information on a number of topics. Specifically, Ms. McGuire provided a review of strategic planning, priorities into this year, ensuring the board is aware of what is going on with census and other budget requests. The following themes were covered: At the December meeting, it will be appropriate to do an update on exiting the Settlement Agreement as DBHDS is working to finalize indicators for compliance this fall. Behavioral health initiatives, like STEP-VA (System Transformation Excellence and Performance, an innovative initiative for individuals with behavioral health disorders featuring a uniform set of required services, consistent quality measures, and improved oversight in all Virginia communities), need to continue regardless of Medicaid expansion and Behavioral Health (BH) Redesign, to ensure a public safety net for those who will still be uninsured. It is important that DBHDS Central Office has enough resources for oversight and implementation. Mr. Bruggeman noted yesterday that we should not minimize the need to grow number of waiver slots but focus on appropriate rates as well. Ms. Dix noted the continued need to focus on reducing the Priority 1 Waitlist. In summary, potential focus areas are:

- CITACs (Crisis Intervention Treatment and Assessment Sites) and detoxification, 23 hour crisis stabilization.
- Supporting resources for DBHDS for those topics identified in the strategic plan.
- Waiver redesign, waiver slots - continue working on elimination of the Priority 1 Waitlist, but the greater concern is on waiver rates (regional variation addressed).
- Gap in regard to uninsured and the need for resources like STEP-VA that supports the uninsured.

Upon a motion by Jack Bruggeman and a second by Elizabeth Hilscher, the plans were approved.

	<p><i>Upon a motion by Sandra Price-Stroble and a second by Jack Bruggeman, the plans for the letter to the Governor was approved.</i></p> <p>Staff will send a draft for review in time for a final letter to be sent by the end of August.</p>
<p>Report Out from the Policy and Evaluation Committee</p>	<p>At 10:25 Emily Lowrie, Senior Policy Analyst in the CLRA Division, reported that the Policy Development and Evaluation Committee reviewed the following policies, and the schedule of policy review.</p> <p>It was recommended that Policy 6005 remain unchanged. <i>Upon a motion by Becky Graser and second by Mr. Bruggeman, the recommendation of the committee was adopted.</i></p> <p>Ms. Hilscher (Chair of Policy Committee) then shared that the committee is currently reviewing policies 1016, 1035, and 1028. The committee will review policies 1044, 2011, and 3000 at the next Policy Development and Evaluation Committee meeting.</p>
<p>Commissioner's Report</p>	<p>At 10:38 Ms. Mitchell turned the floor over to S. Hughes Melton, MD, DBHDS Commissioner who participated by phone. Dr. Melton expressed thanks to the Board for their time. He requested Board members ask questions to start the discussion.</p> <p>Ms. Mitchell asked about the Medicaid GF reduction to CSBs and how that is going. Dr. Melton noted the report was due May 15 and there was no data yet, the August 15th report is shaping up and there is no conclusive data yet but it is expected there will be some data in time for that report. He noted that DBHDS expects some CSBs will see alignment with their reductions and some may get revenue more than reduction, while others will have a reduction more than what they get back in revenue. The August 15th report will help the department to discern how next year's reductions might go and what additional changes need to be made.</p> <p>Ms. Hilscher noted that she saw the Commissioner present at last SJ47 meeting and is aware of JLARC report. She felt very strongly that Mira Signer is the point of contact and DBHDS is on top of things with the STEP-VA. She asked about the recommendation from JLARC that every step is not the most logical to take for each CSB, instead of implementing each step in order. She was concerned about how this will work for implementation. PROPOSED EDIT: Specifically, how the department will handle from <u>the</u> implementation perspective with funding requests. Dr. Melton said that DBHDS does not see how the department could operationalize that recommendation. He agrees with CSBs that each CSB has opportunities and resources within each step that is different from other CSBs, and while they are expected to utilize the resources to meet the standards of each step, there must also be flexibility with each CSB to use those dollars within the step.</p>

Ms. Glaser indicated she and other providers are frustrated with provider bills and working with MCOs, particularly because there are six of them. She asked if there were efforts underway to streamline processes. Dr. Melton noted that DBHDS is working with DMAS to help in resolving this administrative burden. DMAS has gathered a group of providers recently to understand the challenges. DBHDS has also asked the Virginia Association of Community Services Boards (VACSB) to get data from all 40 CSBs to identify themes and major pain points to provide feedback to DMAS and MCOs. He noted that DBHDS serves in a supportive role in this, but is working with DMAS. DBHDS was able to resolve specific billing issues last year for CSBs.

Dr. Melton then provided a general overview of DBHDS activities. He discussed hospital census pressures and the TDO workgroup, and noted that budget development is underway. Investments will be shaped around the Governor's priorities, STEP-VA, hospital census, and exiting the Settlement Agreement. He provided updates on STEP-VA, BH Redesign, the Settlement Agreement, and alternative transportation.

Report Out from the Planning and Budget Committee

Plans for the Grant Review Committee

At 11:17, Ms. Dix reported that the Planning and Budget Committee, members reviewed the role and purview of the committee. Ms. Mitchell and Ms. Graser were in attendance. With Ms. Dix, there was a review of the statement of purpose for the committee, the history of the committee, and generally what had been done in the past. Essentially, there was agreement to have a standing agenda when the committee meets before each board meeting based on the bylaws and some other key things that members want to cover. The committee will review the standing items whenever it meets to be sure nothing needs to be changed, including any calendar items for the committee or the board.

PROPOSED SENTENCE AMENDMENT TO CLARIFY: The Board liaison will talk about the schedule for the next Dec meeting in a little more detail at the October meeting. At the October meeting, Josie Mace will do an overview of the Board's budget, and confirm sufficient funding for resources for speakers on certain topics. Also, the committee would receive an update on the strategic plan in October so the committee can make recommendations to the Board about it. For to do items, the committee will look at the current bylaws for needed updates. There was general discussion around revisiting the practice of making sure at future board meetings that there are more perspectives from external stakeholders on the topics at hand. Ms. Dix spoke with VACSB to reinstate the traditional 30 minute presentation at each board meeting and VACSB is in agreement. There was brief discussion of the function of the Grant Committee and members will look at how it operated and ensure the board is operating per the bylaws.

Regulatory Actions

At 11:30, Ms. Walker reviewed the three regulatory action items before the board.

A. Licensing Regulations, 12VAC35-105: ISP grace period.

This first item included proposed amendments intended to align DBHDS and

DMAS regulations as to when a quarterly review or a revised assessment of the ISP must be documented in order to decrease administrative burdens and allow more time to provide services.

Upon a motion to by Elizabeth Hilscher and a second by Jack Bruggeman, the board approved the amendments and initiation of the proposed stage of the standard process for this action to amend 12VAC35-105, the Licensing Regulations.

B. Licensing Regulations, 12VAC35-105, Require a provider statement to any other provider.

Members considered the language to address the new requirement in Chapter 776 of the 2019 General Assembly through the creation of a new subsection in the licensing regulations, 12VAC35-105-~~435~~ regarding the provision of a provider statement to any other provider

Upon a motion to by Jack Bruggeman and a second by Becky Graser, the board approved the amendments and initiation of a fast track action to amend 12VAC35-105, the Licensing Regulations.

C. New Regulation, Certified Recovery Residences, 12VAC35-270.

The third and final regulatory action item also came from 2019 General Assembly action through the recommendation to create a new chapter. Emily Lowrie provided background on the department’s work on this issue before and during the session. Ms. Graser asked about the levels of recovery homes. Ms. Lowrie confirmed that levels of housing that provide clinical services within the home will continue to be licensed by DBHDS and this regulatory action is intended to address the housing that does not provide clinical services within the home.

Upon a motion by Elizabeth Hilscher and a second by Becky Graser, the board approved initiation of a fast track to promulgate a new regulation for certified recovery residences.

D. General Update – Regulatory Matrix

Ms. Walker reviewed the Regulatory Matrix of the status of pending regulatory action in the meeting packet. There are currently two pending actions, both with the Governor’s Office.

Ms. Walker mentioned three other regulatory issues:

1. An invitation to membership in a regulatory advisory panel to review draft amendments to Chapter 12VAC35-105 (“Licensing Regulations”) in response to the periodic review that concluded in December 2017. The purpose of a RAP, established in accordance with the department’s Public Participation Guidelines (12VAC35-12-70, Appointment of Regulatory Advisory Panel) is to ‘provide professional specialization or technical assistance when the agency determines that such expertise is necessary to address a specific regulatory issue or action....’ Since the

periodic review, the Office of Licensing developed draft revisions to both the structure and the content of the Licensing Regulations. In regard to structure, currently language addressing all disabilities is contained in Chapter 105. This all-in-one structure is actually very rare across Virginia agencies or in other states. As is most typical, a ‘general chapter’ was developed to apply to three disability-specific chapters (developmental, behavioral health, and substance abuse). Further, it was deemed necessary to develop the general chapter first. The RAP mentioned above will convene to review the draft new general chapter and provide feedback to the department. [Note: Once development of disability-specific chapters is finalized, additional RAPs will be formed for the same review process. This is planned to occur in the spring of 2020.]

Ms. Walker explained the difference of this drafting effort of the response to periodic review of the Licensing Regulations from other current discussions regarding only behavioral health redesign.

- Response to Periodic Review: Draft changes for the response to periodic review will be in a separate action and are not expected to take effect until at least 2021 following the [standard process](#), which takes an average of 18 months to two years to complete.
- Behavioral Health Redesign: The [current effective](#) Licensing Regulations will be the vehicle for any required department regulatory changes that come from the behavioral health redesign. Such changes would likely be [emergency regulations](#) as authorized by the General Assembly.

2. Emily Bowles, Legal and Regulatory Manager for the Office of Licensing reported on the implementation efforts related to the emergency regulation in effect for compliance with the DOJ Settlement Agreement with Virginia, including two new guidance documents and related training.
3. Ms. Bowles distributed a one-page background document on the federal Family First Prevention Services Act that reforms the federal child welfare financing streams in Title IV-E and Title IV-B of the Social Security Act to provide services to families who are at risk of entering the child welfare system. Ms. Walker stated that staff did not want to get into a discussion with the board at this meeting, but merely wished to provide initial awareness that these changes related to qualified residential treatment programs (QRTP) are mandatory and will bring significant change to the system.

BREAK

At 11:50 the Board took a break to collect their lunches before resuming.

State Human Rights Committee

At 12:00 Ms. Mitchell welcomed Deborah Lochart, Human Rights Director, John Barrett, Chair of the State Human Rights Committee, and Taneika Goldman, Deputy Director of the Office of Human Rights. Mr. Barrett

	<p>informed the board of the work the SHRC accomplished towards their work plan objectives over the past year to include facility seclusion and restraint review, VCBR appeals, and Settlement Agreement updates. The annual SHRC report was presented by Ms. Goldman with a brief overview of the human rights system and structure of the human rights program including statistics of complaints reported and reviewed over the last year and a description of the complaint, hearing, and appeal process. The local human rights committees (LHRCs) are made up of approximately 154 volunteers across 22 committees. There are 27 total staff within the Office of Human Rights.</p>
<p>Board Liaison Reports</p>	<p>At 12:30 Board members reported on liaison activities. Members reported on their contacts in their communities since the April meeting.</p> <p>Ms. Mitchell reminded members of the previous decision to submit liaison reports in writing, and that members would be starting this practice in October. Members can consider the receipt of the meeting packet as a reminder to send in written liaison report. Staff will compile for hard copy distribution at the meeting.</p> <p>Staff will update and resend letters to facility directors and CSB executive directors to remind them of their board liaison contact, and notify board members when the letters are sent. Staff will also set reminders biannually for this information to be reconfirmed.</p>
<p>Public Comment</p>	<p>There were no citizens wishing to provide public comment.</p>
<p>Update on the 2019 Biennial Budget</p>	<p>At 12:50, Josie Mace, Financial and Policy Analyst in the Office of Budget Development, gave a presentation to the board on the results of the 2019 General Assembly. Ms. Mace answered questions about funding for Central State Hospital (CSH), STEP-VA crisis services, and the process for submission of agency budget requests.</p> <p>Staff will provide further detail on the CSH building planning. Also, staff will bring to the Planning and Budget Committee the board budget report and discuss how often to give updates on it to the full board.</p>
<p>Meeting Schedule</p>	<p>At 1:15 pm Ms. Mitchell reminded members of the dates already confirmed with the other results of the planning meeting, including that the October meeting date changed to the 9th (previously the 2nd). See Attachment 1 for the full schedule of meetings and locations through December 2020.</p>
<p>Adjournment</p>	<p>Having no further business the meeting adjourned at 1:35 p.m. The next meeting will be held on Wednesday, October 9, 2019, in Staunton with tours of Western State Hospital and the Commonwealth Center for Children and Adolescents.</p>

STATE BOARD OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES
DRAFT MEETING MINUTES

Tuesday July 16, 2019 12:30 p.m.
DGS, 5th Floor Conference Room, Washington Building,
1100 Bank Street, Richmond, VA 23219

BIENNIAL PLANNING MEETING

Members Present	Paula Mitchell, Chair ; Elizabeth Hilscher, Vice Chair; Jack Bruggeman; Varun Choudhary; Rebecca Graser; Sandra Price-Stroble.
Staff Present	Heidi Dix, Deputy Commissioner, Division of Compliance, Legislative, and Regulatory Affairs (CLRA) Emily Lowrie, CLRA Senior Policy Analyst Meghan McGuire, Senior Advisor for External Affairs Ruth Anne Walker, Director of Regulatory Affairs
Lunch	12:30 p.m.
Welcome & Introductions	<p>At 1:30, Paula Mitchell, Chair, called the meeting to order, thanked members for adjusting their schedules by one week at staff’s request during the transition of board liaison duties. Ms. Mitchell reviewed the purpose of the biennial planning meeting to set the board’s priorities and meeting dates through December of next year. Per the bylaws, the meeting is held in odd years when the Commonwealth prepares for a new two-year budget cycle following the next General Assembly Session. She stated it was a time to refresh on the board’s core responsibilities and to receive updates on the strategic planning of the department in order to set board priorities for meeting topics and communication to the Governor, Secretary, and General Assembly money committee chairs on the priorities the board hopes they also see as important for the new biennium.</p> <p>Ms. Mitchell stated that board members serve as volunteers appointed by the Governor and while as such members are not an administrative day-to-day hands-on board, each member’s individual experiences through professions or families or both provide those in elected or appointed office with an in-the-trenches perspective that helps them make decisions they need to for the Commonwealth.</p> <p>She reminded members that anything discussed at the meeting for planning would be voted on at the regular business meeting tomorrow. No formal action would be taken at this meeting. Ms. Mitchell also thanked Jack Bruggeman for the wonderful tours to locations in northern Virginia for the April meeting.</p>

**A. Agency
Strategic Plan
Update**

At 1:35, Meghan McGuire, Senior Advisor for External Affairs, recalled that the last interaction with the board was in December at the Virginia Tech Center when the board looked at some of the strategic planning activities. Ms. McGuire thanked the board for their time then and expressed appreciation for their input in the strategic planning process.

Ms. McGuire reported that the strategic plan was as the point of finalization, and her purpose at this meeting was to provide the goals and activities that have culminated through the process and well-vetted, though these goals and corresponding activities have not been sent out among agency directors yet. At the next meeting regular meeting as part of the commissioner's report, Dr. Melton will walk through the goals and activities in more detail and next steps.

The strategic planning goals are meant to be somewhat lofty for the purpose of being broad enough that any section of the agency can fall up under these goals. For example, the title of Goal 1 – 'Grow system capacity.' The corresponding activities are a little more specific such as STEP-VA, outpatient crisis services, and other things to reduce state hospitalizations; and an equity activity to better speak to different populations (social determinants of health).

Goal 2 – Develop and align people and resources. This gets to how resources are distributed in facilities versus in the community. The activities associated with this goal include: state hospital census (short and long-term solutions for that, such as data management).

Goal 3 High value care. This is kind of a new term. Providing a certain kind of care, with outcomes improving, but more of the person-centered lens. Under this goal, activities include provider equality and development, policies and procedures, better ways to evaluate.

Goal 4 – Culture of collaboration. Mutually define agreements, standardizations, working with stakeholders, so it is clear what the system should look like going forward. This includes communications and workforce.

Goal 5 – Be a learning and leading system. This includes peers and professional development. There are many instances where peer involvement has increased the quality multi-fold, but there are pieces to incorporate to be sure that happens more often; also, working on stigma and equity, but dependent on all partners; tracking impact and behavior change with better surveys, trainings, learning opportunities.

Ms. McGuire went on to explain what the agency will do with these developed goals and activities, how the agency plans to use them as the structure to move forward. VT will develop an annual dashboard of whatever priorities the agency wants to pull out of this plan. Each year,

leadership will decide what things to highlight on a quarterly basis and with a visual presentation.

For these priorities we have six focus areas: Under Goal 1 – there will be an accountability requirement to show

- STEP-VA progress, including outcomes for same day access.
- Data management – now OneMind called Millennium.
- Data warehouse – another important piece to read what is coming in from the system.
- High value care – in the first year dashboard, there will be a focus on the Settlement Agreement to show substantial compliance, and a period of compliance after hit all marks; this will be a heavy list.
- Performance contract because will be a big change from who we've done that get away from 25 exhibits. We created a new office for this new structure.

The next year, VT has developed a tool for metrics by talking with over 400 people throughout the system. Offices will be able to choose from among those metrics the things most pertinent for the office, and show how to achieve progress.

Board members discussed the different aspects of the system with Ms. McGuire and Ms. Dix, including: STEP-VA, Ms. Hilscher recalled at the last SJ47 meeting that Dr. Melton referenced how some CSBs had a different, more logical order for accomplishing the steps than another region that has a different population. That requires a more robust conversation on how things are working.

Ms. Mitchell inquired about Medicaid expansion across multiple managed care organizations (MCOs), and significant impact in that either payments are taking much longer (reimbursement for services) or counting on expansion to cover much of those expenses, with a large shortfall – and what is being done to fill the gaps. Ms. Glaser concurred that the denials are at such a high rate with MCOs and there is a lot of confusion with CSB fiscal departments. Ms. McGuire stated that the legislature is watching it very closely.

The board expressed appreciation to Ms. McGuire for showing how the goals and activities were developed down through the process.

B. Agency Initiatives Update

At 2:16, Heidi Dix, *Deputy Commissioner, Compliance, Regulatory & Legislative Affairs (CRLA)*, provided an update on agency initiatives including legislative priorities under development going into the fall.

Break

Ms. Mitchell initiated a break at 2:45 p.m.

<p>Board Planning Session</p>	<p>At 3:00, p.m., Ms. Mitchell initiated the planning session of the meeting. She reminded members that the purpose of the biennial planning meeting is to set the board’s priorities and meeting dates through December of the following year. The priorities will be crafted by staff into a draft letter for board review via email following this meeting, to be sent to the Governor and others in August.</p> <p>The board reviewed and discussed the information on strategic planning and legislative issues. Members confirmed the feeling that the discussion ended in a good place with the draft decisions on meeting dates, meeting topics, and priorities to mention in the letter. Members planned to confirm everything tomorrow officially.</p>
<p>C. Review of Powers & Duties</p> <p>D. Orientation</p>	<p>At 4:15, Ruth Anne Walker led members through a review of board powers and duties, and a brief orientation review.</p>
<p>Adjourn</p>	<p>At 4:55 p.m., the meeting was adjourned.</p>

**State Board of Behavioral Health and Developmental Services
2019-2020 MEETING SCHEDULE**

Adopted July 17, 2019

DATE*	Location	Topics <i>(annual topics in italics)</i>
Oct: 9 **CHANGE (Wed) <i>(previously 10/2)</i>	Wednesday (hotel TBD) Thursday: Commonwealth Center for Children and Adolescents Western State Hospital Staunton	<ul style="list-style-type: none"> ➤ Children ➤ Performance Contract Update ➤ <i>(Bylaw review in gubernatorial year every fourth year)</i>
Dec: 11 (Wed)	Richmond	<ul style="list-style-type: none"> ➤ Behavioral Health Redesign ➤ Pre-Session Update ➤ <i>Adoption of Comprehensive State Plan in odd years</i>
2020		
April: 2 (Thurs)	Piedmont Geriatric Hospital (PGH) Crewe	<ul style="list-style-type: none"> ➤ Geriatric Care ➤ Facility Staffing Initiatives –VCBR Update ➤ <i>Post- GA Session legislative and budget review</i>
July: 15 (Wed)	Central Office, DBHDS Richmond	<ul style="list-style-type: none"> ➤ <i>Opioid-SOR Grant Updates</i> ➤ <i>Strategic Plan Update—Dashboard/Metrics Development</i> ➤ <i>Review priorities for the biennium, including budget in odd years and elect officers every year</i>
Oct: 14 (Wed)	Southwestern Virginia Mental Health Institute (SWVMHI) Marion	<ul style="list-style-type: none"> ➤ Settlement Agreement ➤ Jails/Forensic Update
Dec: 2 (Wed)	Richmond	<ul style="list-style-type: none"> ➤ <i>Adoption of Comprehensive State Plan in odd years</i>

**Note that the afternoon/evening prior to the regular meeting Board members arrive and participate in other events.*

STATE BOARD OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

POLICY AND EVALUATION COMMITTEE

DRAFT MINUTES

July 17, 2019

DBHDS Central Office, 8:30 – 9:30 a.m.

Richmond, Virginia

Members Present: Beth Hilscher, Chair; Jack Bruggeman; Sandra Price-Stroble.

Members Absent: Djuna Osborne.

Guests: Mark Hickman, Commonwealth Strategy Group.

Staff: Emily Lowrie, committee staff; Tiffany Ford; Chaye Neal-Jones; Taylor Melton; Stacy Pendleton; Ruth Anne Walker.

I. Call to Order

Committee Chair Beth Hilscher called the meeting to order at 8:40.

II. Welcome and Introductions

Ms. Hilscher welcomed all present and all present introduced themselves.

III. Policy Discussion

Stacy Pendleton presented on the current Policy 1028 (SYS) 90-1 (Human Resources Development) and provided suggested edits to the Policy.

Tiffany Ford presented on the current Policy 1035 (SYS) 05-2 (Community Services Board Single Point of Entry and Case Management Services) and provided suggested edits to the Policy.

Tiffany Ford presented on the current Policy 1019 (SYS) 86-23 (Policy Goal of the Commonwealth for a Comprehensive, Community-Based System of Services) and provided suggested edits to the Policy.

Staff Recommendation: *Direct staff to Send out Draft Policies for Review - Policy 1028 (SYS) 90-1, Policy 1035 (SYS) 05-2, and Policy 1019 (SYS) 86-23.*

On a motion from Mr. Bruggeman, and a second from Ms. Price-Stroble, the committee agreed to direct staff to send out the draft policies for review.

IV. Next Meeting: October 9, Staunton

V. Scheduled Review Fall 2019: *Policy 2011 (ADM) 88-3, Policy 3000 (CO) 74-10, Policy 1044 (SYS) 12-1.*

On a motion from Ms. Price-Stroble, and a second from Mr. Bruggeman, the committee agreed to review the policies.

VI. Adjournment

STATE BOARD OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES
PLANNING AND BUDGET COMMITTEE
DRAFT MINUTES

July 17, 2019
Richmond, Virginia

Members Present: Paula Mitchell, Chair; Rebecca Graser.
Members Absent: ?.
Staff Present: Heidi Dix.
Call to Order: The meeting was called to order at 8:30 a.m.

I. Review: Role and Purview of the Committee.

There was a review of the bylaws and history of the committee, and what had been done in the past. Essentially, there was agreement to have a standing agenda when the committee meets before each board meeting based on the bylaws and some other key things that members want to cover. The committee will review the standing items whenever it meets to be sure nothing needs to be changed, including any calendar items for the committee or the board.

II. Workplan

For to do items, the committee will look at the current bylaws for needed updates. There was general discussion around revisiting the practice of making sure at future board meetings that there are more perspectives from external stakeholders on the topics at hand.

III. Plans for October Meeting

At the October meeting, Josie Mace will do an overview of the Board's budget, and confirm sufficient funding for resources for speakers on certain topics. Also, the committee would receive an update on the strategic plan in October so the committee can make recommendations to the Board about it.

IV. Grant Review Committee

There was brief discussion of the function of the Grant Committee and members will look at how it operated and ensure the board is operating per the bylaws.

V. Adjournment

The Planning and Budget Committee meeting was adjourned at 9:45 a.m.

REGULATORY ACTIVITY STATUS REPORT: OCTOBER 2019 (REVISED 09/25/19)

<div style="display: flex; align-items: center;"> <div style="background-color: #4F81BD; color: white; padding: 2px 5px; font-weight: bold; margin-right: 5px;">Board</div> <div>STATE BOARD OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES</div> </div>						
VAC CITATION	CHAPTER TITLE (FULL TITLE)	REGULATIONS IN PROCESS			LAST ACTIVITY	LAST PERIODIC REVIEW*
		PURPOSE	STAGE	STATUS		
<u>12 VAC 35-46</u>	Children's Residential <i>(Regulations for Children's Residential Facilities)</i>	To articulate requirements to assure the health, safety, care, and treatment for children who receive services from providers licensed by DBHDS.	Periodic Review Completed; under development	<ul style="list-style-type: none"> Current: Comment period ended 02/08/2018. Staff will initiate draft revisions and seek stakeholder comment in coming months. 	01/22/2013	12/05/2017
<u>12 VAC 35-105</u>	Licensing-Adult <i>(Rules and Regulations for Licensing Facilities and Providers of Mental Health, Mental Retardation and Substance Abuse Services)</i>	To provide specific standards for licensing of organizations and facilities providing behavioral health and developmental disability services. ('Overhaul')	Periodic Review Completed; under development	<ul style="list-style-type: none"> Current: Comment period 12/15/2017. Staff has initiated revisions and will seek stakeholder comment. RAP and public comment on initial draft in progress. 		12/05/2017
<u>12 VAC 35-105</u> Certain sections.		In accordance with the CMS Final Rule and the Settlement Agreement: clarifications for the health, safety, care and treatment for adults who receive services from providers of residential services.	Proposed	<ul style="list-style-type: none"> Current: Emergency effective 09/1/2018 (expires 02/29/2020). To Governor's Office 5/27/2019. 	09/01/2018	
<u>12 VAC 35-105</u> Section 675.		ISPs: To allow documentation of each quarterly review or a revised assessment 'no later than 15 calendar days from the date the review was due to be completed.'	Proposed	<ul style="list-style-type: none"> Previous: Governor approved 01/04/2019. Ten objections filed (3/14/19). July: shift to standard process. Current: DPB review proposed 8/29/2019. 	02/04/2019	
<u>12 VAC 35-105</u> NEW Section 435.		<i>In accordance with Chapter 776 of the 2019 General Assembly, to require a provider statement to any other provider when a criminal history background check is required.</i>	Fast Track	<ul style="list-style-type: none"> Current: DPB review 8/29/2019. 		
<u>NEW</u> <u>12 VAC 35-270</u>	Certified Recovery Residences	<i>In accordance with Chapter 220 of the 2019 General Assembly, to establish certification of recovery residences.</i>	Fast Track	<ul style="list-style-type: none"> Current: Attorney General review in progress 08/16/2019. 		

*Shows the last time the Periodic Review feature on Town Hall was used for this regulation. A comprehensive periodic review may also have been included during other standard regulatory actions.

Regulatory Package: Three Action Items

I. Required Periodic Reviews

Background: Existing regulations must be examined at least every four years to review statutory authority and assure that the regulations do not exceed the Board's statutory authority. Investigation should be conducted for any alternatives to the regulation and any need to modify the regulation to meet current needs.

Purpose: Four regulations are submitted to the Board for consideration for review. Three pertain to admission to or leave from DBHDS facilities; the fourth is the public participation guidelines regulation required of all non-exempt state agencies.

Action Requested: Direct that a periodic review be initiated for the following regulations.

VAC Citation	Title	Last Activity	Date
<u>12 VAC 35-225</u>	Requirements for Virginia's Early Intervention System (Part C)	Fast-Track Stage Published	01/11/2016

Next Steps:

- If approved, staff initiates the periodic review. ([periodic review process chart](#))
- At the conclusion of the 21-day comment period, staff develops recommended Board action on each of the regulations, for consideration at the October meeting. The choices for action are:
 - A. Propose to retain the regulation in its current form.
 - B. Propose to amend or abolish the regulation. (Notice of Intended Regulatory Action)
 - C. Propose to amend the regulation through an exempt action.

The current Part C regulations may be [viewed on Town Hall](#).

II. Two Petitions for Rulemaking:

Background: A petition for rulemaking is a request made by any individual that an agency or board develop a new regulation or amend an existing regulation. The steps for submitting a petition for rulemaking to an agency are set out in [§ 2.2-4007 A](#) of the Code of Virginia. In addition, in order to qualify as a "petition for rulemaking," the communication must (1) state the substance and purpose of the regulatory action that is requested (including reference to any applicable VAC sections), and (2) reference the legal authority of the agency to take the action requested.

Two petitions for rulemaking were received (August 14 and 27, respectively) and posted for public comment [as required](#).

Petition Title	R. C. Carter Petition for Rulemaking
Date Filed	8/14/2019
Petitioner	R.C. Carter

<p>Petitioner's Request</p>	<p>Initial Agency Notice Date Received: August 5, 2019. Title of Regulation: 12VAC35-105. Rules and Regulations for Licensing Providers by the Department of Behavioral Health and Developmental Services. Statutory Authority: § 37.2-400 of the Code of Virginia.</p> <p>To develop a new regulation requiring providers to 1) Obtain verification from the Virginia Employment Commission required under Virginia Unemployment Compensation Act, § 60.2-212.C. and 2) Submit an SS-8 Form to the Internal Revenue Service.</p>
<p>Substance</p>	<p>Pursuant to § 2.2-4007. Any person may petition an agency to request the agency to develop a new regulation or amend an existing regulation. The purpose of this rulemaking request is to develop a new regulation requiring providers to 1) Obtain verification from the Virginia Employment Commission required under Virginia Unemployment Compensation Act, § 60.2-212C and 2) Submit an SS-8 Form to the Internal Revenue Service.</p> <p>Mental health providers licensed by the Department of Behavioral Health and Developmental Services that employ 1) QMHP's as independent contractors to provide direct care services to individuals receiving services and 2) LMHP's employed to provide direct care services unrelated to their fee-for-services activities have been violating the following State and Federal Laws by not obtaining confirmation of their worker's status from the appropriate State and Federal agencies under 1) Virginia Unemployment Compensation Act, § 60.2-212C and 2) Internal Revenue Service Ruling 87-41.</p> <p>The Virginia Unemployment Compensation Act, § 60.2-212C requires verification from the employer before classifying their workers as independent contractors. Because Virginia's common-law rule states, "Services performed by an individual for compensation <u>is employment unless the Commission determines that an individual is not an employee</u>".</p> <p>In addition, the IRS states anyone who performs services for you is your employee <i>if you can control what will be done and how it will be done</i>. Even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed. Some mental health providers classify their workers as independent contractors which contradicts the following regulations 12VAC35-105-420.; 12VAC35-105-440.; 12VAC35-105-450.; 12VAC35-105-470.; 12VAC35-105-580.; 12VAC35-105-590.; 12VAC35-105-645.; 12VAC35-105-693.; 12VAC35-105-700.; 12VAC35-105-800.; and 12VAC35-105-830. These regulations directly require licensed providers to maintain control over their programs based on their policies & procedures.</p> <p>First, I propose that a regulation be developed requiring providers be cited</p>

	<p>for noncompliance with the Virginia Unemployment Compensation Act, § 60.2-212C by not verifying their worker’s employment status with the appropriate State and Federal agencies such as 1) Virginia Employment Commission and 2) IRS by filing Form SS-8 with the Internal Revenue Services prior to employing and paying Independent Contractors for services controlled by the provider’s policies and procedures as required under Chapter 105 of the Code of Virginia.</p> <p>Second, I propose that existing providers currently employing workers as “Independent Contractors” be required to show documentation of compliance with the Virginia Employment Commission and show they’ve filed Form SS-8 with the IRS and if the provider is found to have been an employer pay all penalties and interest under Section 60.2-513 of the Virginia Unemployment Compensation Act, Federal Insurance Contributions Act, and Federal Unemployment Tax Act.</p>
Comment Received	<p>The public comment period for the Contractor vs. Employee began on September 2, 2019, and ended on September 22, 2019. A majority of the comments received focused on the difference between an independent contractor and employee. Many commenters mentioned the extra expense of categorizing workers as employees versus independent contractors. Others commented that misclassifying employees was considered to be payroll fraud. Commenters also pointed out that in 2018, the Governor of Virginia created a taskforce to develop and implement a comprehensive plan with measurable goals to reduce worker misclassification and payroll fraud in Virginia.</p>
Staff Recommendation to the State Board	<p>The department recommends that the State Board deny the request for the following reasons:</p> <ol style="list-style-type: none"> 1. DBHDS does not enforce compliance with the Virginia Unemployment Compensation Act, other state employment law, or federal tax law. 2. The Office of Regulatory Affairs conducted substantial research related to the use of contract employees (for the response to periodic review draft) and as a result, draft regulations propose amendments (during the planned response to periodic review ‘overhaul’ of the regulations) to account for the misuse of contract employees in licensed services.

Petition Title	R.C. Carter Petition for Rulemaking
Date Filed	8/27/2019
Petitioner	R.C. Carter
Petitioner's Request	<p>Initial Agency Notice Date Received: August 13, 2019. Title of Regulation: 12VAC35-105. Rules and Regulations for Licensing Providers by the Department of Behavioral Health and Developmental Services. Statutory Authority: § 37.2-400 of the Code of Virginia.</p>

	<p>To amend 12VAC35-105-520. Risk Management., in accordance with the Virginia Court of Appeals in Gregory Allen Moyer v. Commonwealth of Virginia (2000), \"when interpreting the law one must consider other sections of law in determining legislative intent,\" in order that the new Office of Licensing Associate Director of State Operations develop and coordinate the oversight of the interpretation and implementation of the additional 42 policies and procedures that providers are required to have in writing in accordance with the HIPAA Act under Risk Analysis and Risk Management which can be found under the following sections 45 CFR §164.306, 45 CFR §164.308, 45 CFR §164.310, 45 CFR §164.312, 45 CFR §164.314, and 45 CFR §164.316.</p> <p><i>*NOTE: See legal references pasted below.</i></p>
<p>Substance</p>	<p>The purpose of this rulemaking request is to amend 12VAC35-105-520. According to VA Court of Appeals: Gregory Allen Moyer v. Commonwealth of Virginia (2000). <u>"when interpreting the law one must consider other sections of law in determining legislative intent"</u>. Under 12VAC35-105-150.(5) "The provider including its employees, contractors, students, and volunteers shall comply with the provider's own policies. All required policies shall be in writing".</p> <p>The Federal law requires any provider regardless of size, who electronically transmits health information in connection with certain transactions such as claims, benefit eligibility inquiries, referral authorization requests, or other transactions for which HHS has established standards under the HIPAA Transactions Rule. As of All providers using electronic technology in connection with a standard transaction whether transmitted directly or uses a billing service or other third party to do so on its behalf. Health care providers include all "providers of services" and any other person or organization that furnishes, bills, or is paid for health care services by Medicaid or Medicare.</p> <p>On April 5, 2005 the HIPAA Act passed legislation requiring that providers document in writing under 45CFR §164.316 their risk analysis and risk management policies/ procedures and processes. Providers are required at minimum to write 20 new policies and maximum of 42 policies addressing their organization's REQUIRED and ADDRESSABLE administrative safeguards, physical safeguards, technical safeguards, organizational safeguards which are required to be written policies and procedures.</p> <p>Currently under 12VAC35-105-520. Risk Management the state regulations do not mention the Federal Risk Analysis policies and procedures that providers are required to document and these rules are preemptive to Virginia's current regulations under 12VAC35-105-520., which is stated under 45 C.F.R. § 160.203.</p> <p>"A <u>standard, requirement, or implementation specification</u> adopted under</p>

	<p>this subchapter that is <u>contrary</u> to a provision of <u>State law</u> preempts the provision of <u>State law</u>".</p> <p>The Office for Civil Rights (OCR) is the agency within the U. S. Department of Health and Human Services that investigates complaints about failures to protect the privacy of health information. It does so under its authority to enforce the Privacy and Security Rules.</p> <p>A. Administrative Safeguards (REQUIRED)-45CFR §164.308 B. Physical Safeguards (REQUIRED)-45CFR §164.310 C. Technical Safeguards (REQUIRED)-45CFR §164.312 D. Organizational Safeguards (REQUIRED)- 45CFR §164.314 E. Written Policies and Procedures and Documentation- (REQUIRED)-45CFR §164.316</p> <p><u>Solution</u> On August 10th, 2019 the Office of Licensing created a new role as Associate Director of State Operations that is in charge of developing and coordinating the oversight of licensed providers throughout all 5 regions by 1) Developing both provider training and technical assistance training for staff related to the implementation and monitoring of regulations and 2) Conducting risk management and quality improvement activities.</p> <p>Therefore, since the Associate Director of State Operations is in charge of the I propose that this new Associate Director of State Operations develop and coordinate the oversight of the interpretation and implementation of the additional 42 policies and procedures that providers are required to have in writing in accordance with the HIPAA Act under Risk Analysis and Risk Management which can be found under the following sections 45 CFR §164.306, 45 CFR §164.308, 45 CFR §164.310, 45 CFR §164.312, 45 CFR §164.314, and 45 CFR §164.316.</p>
Comment Received	<p>The public comment period for the HIPAA policies petition began on September 16, 2019, and will close at 11:59PM on October 6, 2019. To date, no comments have been received.</p>
Staff Recommendation to the State Board	<p>Pending further comment, at the time of this writing the recommendation is that the State Board deny the request for amendment for the following reasons:</p> <ol style="list-style-type: none"> 1. Regulation 12-VAC35-105-870 B 4 already states that the provider's record management policy be consistent with applicable state and federal laws including the Health Insurance Portability and Accountability Act (HIPAA) (Public Law 104-191) and implementing regulations (45 CFR Parts 160, 162, and 164). Therefore, technically, compliance with these provisions is already required under DBHDS licensing regulations. 2. There are federal agencies tasked with enforcement of HIPAA including the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) and Centers for Medicare and Medicaid Services (CMS).

	3. Currently, the way the Licensing Regulations (12VAC35-105) are written, any changes that occur at the federal level are automatically captured in the regulations because providers are only required compliance with the federal law and do not include specific provisions. If the regulations are changed to specifically include text from HIPAA, the regulations will have to be changed every time that the federal laws change.
Comment Period	Ends 10/6/2019 Currently 0 comments

Action Requested: Consider the staff recommendations for each petition and make a decision to grant or deny the petitioner's two requests.

Next Steps:

- The agency's decision is published in the Register and appears on the Town Hall.

***Legal References submitted with August 27, 2019 Petition**

LEGAL REFERENCES & FEDERAL RISK ANALYSIS/MGMT GUIDANCE

§ 164.308 Administrative safeguards.

(a) A [covered entity](#) or [business associate](#) must, in accordance with [§ 164.306](#):

(1)

(i)Standard: Security management process. Implement policies and procedures to prevent, detect, contain, and correct security violations.

(ii)Implementation specifications:

(A)Risk analysis (Required). Conduct an accurate and thorough assessment of the potential risks and vulnerabilities to the [confidentiality](#), [integrity](#), and [availability](#) of [electronic protected health information](#) held by the [covered entity](#) or [business associate](#).

(B)Risk management (Required). Implement security measures sufficient to reduce risks and vulnerabilities to a reasonable and appropriate level to comply with [§ 164.306\(a\)](#).

(C)Sanction policy (Required). Apply appropriate sanctions against [workforce](#) members who fail to comply with the security policies and procedures of the [covered entity](#) or [business associate](#).

(D)Information system activity review (Required). Implement procedures to regularly review records of [information system](#) activity, such as audit logs, [access](#) reports, and [security incident](#) tracking reports.

(2)Standard: Assigned security responsibility. Identify the security official who is responsible for the development and implementation of the policies and procedures required by this subpart for the [covered entity](#) or [business associate](#).

(3)

(i)Standard: Workforce security. Implement policies and procedures to ensure that all members of its [workforce](#) have appropriate [access](#) to [electronic protected health information](#), as provided under [paragraph \(a\)\(4\)](#) of this

section, and to prevent those [workforce](#) members who do not have [access](#) under [paragraph \(a\)\(4\)](#) of this section from obtaining [access](#) to [electronic protected health information](#).

(ii)Implementation specifications:

(A)Authorization and/or supervision (Addressable). Implement procedures for the authorization and/or supervision of [workforce](#) members who work with [electronic protected health information](#) or in locations where it might be accessed.

(B)Workforce clearance procedure (Addressable). Implement procedures to determine that the [access](#) of a [workforce](#) member to [electronic protected health information](#) is appropriate.

(C)Termination procedures (Addressable). Implement procedures for terminating [access](#) to [electronic protected health information](#) when the employment of, or other arrangement with, a [workforce](#) member ends or as required by determinations made as specified in [paragraph \(a\)\(3\)\(ii\)\(B\)](#) of this section.

(4)

(i)Standard: Information access management. Implement policies and procedures for authorizing [access](#) to [electronic protected health information](#) that are consistent with the applicable requirements of [subpart E](#) of this part.

(ii)Implementation specifications:

(A)Isolating health care clearinghouse functions (Required). If a [health care clearinghouse](#) is part of a larger organization, the clearinghouse must implement policies and procedures that protect the [electronic protected health information](#) of the clearinghouse from unauthorized [access](#) by the larger organization.

(B)Access authorization (Addressable). Implement policies and procedures for granting [access](#) to [electronic protected health information](#), for example, through [access](#) to a [workstation](#), [transaction](#), program, process, or other mechanism.

(C)Access establishment and modification (Addressable). Implement policies and procedures that, based upon the [covered entity](#)'s or the [business associate](#)'s [access](#) authorization policies, establish, document, review, and [modify](#) a [user](#)'s right of [access](#) to a [workstation](#), [transaction](#), program, or process.

(5)

(i)Standard: Security awareness and training. Implement a security awareness and training program for all members of its [workforce](#) (including management).

(ii)Implementation specifications. Implement:

(A)Security reminders (Addressable). Periodic security updates.

(B)Protection from malicious software (Addressable). Procedures for guarding against, detecting, and reporting [malicious software](#).

(C)Log-in monitoring (Addressable). Procedures for monitoring log-in attempts and reporting discrepancies.

(D>Password management (Addressable). Procedures for creating, changing, and safeguarding passwords.

(6)

(i)Standard: Security incident procedures. Implement policies and procedures to address security incidents.

(ii)Implementation specification: Response and reporting (Required). Identify and respond to suspected or known [security incidents](#); mitigate, to the extent practicable, harmful effects of [security incidents](#) that are known to the [covered entity](#) or [business associate](#); and document [security incidents](#) and their outcomes.

(7)

(i) **Standard: Contingency plan.** Establish (and implement as needed) policies and procedures for responding to an emergency or other occurrence (for example, fire, vandalism, system failure, and natural disaster) that damages systems that contain [electronic protected health information](#).

(ii) **Implementation specifications:**

(A) Data backup plan (Required). Establish and implement procedures to create and maintain retrievable exact copies of [electronic protected health information](#).

(B) Disaster recovery plan (Required). Establish (and implement as needed) procedures to restore any loss of data.

(C) Emergency mode operation plan (Required). Establish (and implement as needed) procedures to enable continuation of critical business processes for protection of the security of [electronic protected health information](#) while operating in emergency mode.

(D) Testing and revision procedures (Addressable). Implement procedures for periodic testing and revision of contingency plans.

(E) Applications and data criticality analysis (Addressable). Assess the relative criticality of specific applications and data in support of other contingency plan components.

(8) **Standard: Evaluation.** Perform a periodic technical and nontechnical evaluation, based initially upon the [standards](#) implemented under this rule and, subsequently, in response to environmental or operational changes affecting the security of [electronic protected health information](#), that establishes the extent to which a [covered entity](#)'s or [business associate](#)'s security policies and procedures meet the requirements of this subpart.

(b)

(1) Business associate contracts and other arrangements. A [covered entity](#) may permit a [business associate](#) to create, receive, maintain, or transmit [electronic protected health information](#) on the [covered entity](#)'s behalf only if the [covered entity](#) obtains satisfactory assurances, in accordance with [§ 164.314\(a\)](#), that the [business associate](#) will appropriately safeguard the information. A [covered entity](#) is not required to obtain such satisfactory assurances from a [business associate](#) that is a [subcontractor](#).

(2) A [business associate](#) may permit a [business associate](#) that is a [subcontractor](#) to create, receive, maintain, or transmit [electronic protected health information](#) on its behalf only if the [business associate](#) obtains satisfactory assurances, in accordance with [§ 164.314\(a\)](#), that the [subcontractor](#) will appropriately safeguard the information.

(3) **Implementation specifications:** Written contract or other arrangement (Required). Document the satisfactory assurances required by paragraph (b)(1) or (b)(2) of this section through a written contract or other arrangement with the [business associate](#) that meets the applicable requirements of [§ 164.314\(a\)](#).

[68 FR 8376, Feb. 20, 2003, as amended at 78 FR 5694, Jan. 25, 2013]

§ 164.310 Physical safeguards.

A [covered entity](#) or [business associate](#) must, in accordance with [§ 164.306](#):

(a)

(1) **Standard: Facility access controls.** Implement policies and procedures to limit physical [access](#) to its electronic [information systems](#) and the [facility](#) or facilities in which they are housed, while ensuring that properly authorized [access](#) is allowed.

(2) **Implementation specifications:**

(i) **Contingency operations (Addressable).** Establish (and implement as needed) procedures that allow [facility access](#) in support of restoration of lost data under the disaster recovery plan and emergency mode operations plan in the event of an emergency.

(ii) **Facility security plan (Addressable).** Implement policies and procedures to safeguard the [facility](#) and the equipment therein from unauthorized physical [access](#), tampering, and theft.

(iii)*Access control and validation procedures (Addressable)*. Implement procedures to control and validate a [person's access](#) to facilities based on their role or function, including visitor control, and control of [access](#) to software programs for testing and revision.

(iv)*Maintenance records (Addressable)*. Implement policies and procedures to document repairs and modifications to the physical components of a [facility](#) which are related to security (for example, hardware, walls, doors, and locks).

(b)Standard: Workstation use. Implement policies and procedures that specify the proper functions to be performed, the manner in which those functions are to be performed, and the physical attributes of the surroundings of a specific [workstation](#) or class of [workstation](#) that can [access electronic protected health information](#).

(c)Standard: Workstation security. Implement [physical safeguards](#) for all [workstations](#) that [access electronic protected health information](#), to restrict [access](#) to authorized users.

(d)

(1)Standard: Device and media controls. Implement policies and procedures that govern the receipt and removal of hardware and [electronic media](#) that contain [electronic protected health information](#) into and out of a [facility](#), and the movement of these items within the [facility](#).

(2)Implementation specifications:

(i)*Disposal (Required)*. Implement policies and procedures to address the final disposition of [electronic protected health information](#), and/or the hardware or [electronic media](#) on which it is stored.

(ii)*Media re-use (Required)*. Implement procedures for removal of [electronic protected health information](#) from [electronic media](#) before the media are made available for re-use.

(iii)*Accountability (Addressable)*. Maintain a record of the movements of hardware and [electronic media](#) and any [person](#) responsible therefore.

(iv)*Data backup and storage (Addressable)*. Create a retrievable, exact copy of [electronic protected health information](#), when needed, before movement of equipment.

[68 FR 8376, Feb. 20, 2003, as amended at 78 FR 5694, Jan. 25, 2013]

§ 164.312 **Technical safeguards.**

A [covered entity](#) or [business associate](#) must, in accordance with [§ 164.306](#):

(a)

(1)Standard: Access control. Implement technical policies and procedures for electronic [information systems](#) that maintain [electronic protected health information](#) to allow [access](#) only to those [persons](#) or software programs that have been granted [access](#) rights as specified in [§ 164.308\(a\)\(4\)](#).

(2)Implementation specifications:

(i)*Unique user identification (Required)*. Assign a unique name and/or number for identifying and tracking [user](#) identity.

(ii)*Emergency access procedure (Required)*. Establish (and implement as needed) procedures for obtaining necessary [electronic protected health information](#) during an emergency.

(iii)*Automatic logoff (Addressable)*. Implement electronic procedures that terminate an electronic session after a predetermined time of inactivity.

(iv)*Encryption and decryption (Addressable)*. Implement a mechanism to encrypt and decrypt [electronic protected health information](#).

(b)Standard: Audit controls. Implement hardware, software, and/or procedural mechanisms that record and examine activity in [information systems](#) that contain or [use electronic protected health information](#).

(c)

(1)Standard: Integrity. Implement policies and procedures to protect [electronic protected health information](#) from improper alteration or destruction.

(2)Implementation specification: *Mechanism to authenticate electronic protected health information (Addressable).* Implement electronic mechanisms to corroborate that [electronic protected health information](#) has not been altered or destroyed in an unauthorized manner.

(d)Standard: Person or entity authentication. Implement procedures to verify that a [person](#) or entity seeking [access](#) to [electronic protected health information](#) is the one claimed.

(e)

(1)Standard: Transmission security. Implement technical security measures to guard against unauthorized [access](#) to [electronic protected health information](#) that is being transmitted over an electronic communications network.

(2)Implementation specifications:

(i)*Integrity controls (Addressable).* Implement security measures to ensure that electronically transmitted [electronic protected health information](#) is not improperly modified without detection until disposed of.

(ii)*Encryption (Addressable).* Implement a mechanism to encrypt [electronic protected health information](#) whenever deemed appropriate.

§ 164.314 Organizational requirements.

(a)

(1)Standard: Business associate contracts or other arrangements. The contract or other arrangement required by [§ 164.308\(b\)\(3\)](#) must meet the requirements of paragraph (a)(2)(i), (a)(2)(ii), or (a)(2)(iii) of this section, as applicable.

(2)Implementation specifications (Required) -

(i)*Business associate contracts.* The contract must provide that the [business associate](#) will -

(A) Comply with the applicable requirements of this subpart;

(B) In accordance with [§ 164.308\(b\)\(2\)](#), ensure that any [subcontractors](#) that create, receive, maintain, or transmit [electronic protected health information](#) on behalf of the [business associate](#) agree to comply with the applicable requirements of this subpart by entering into a contract or other arrangement that complies with this section; and

(C) Report to the [covered entity](#) any [security incident](#) of which it becomes aware, including breaches of unsecured [protected health information](#) as required by [§ 164.410](#).

(ii)*Other arrangements.* The [covered entity](#) is in compliance with [paragraph \(a\)\(1\)](#) of this section if it has another arrangement in place that meets the requirements of [§ 164.504\(e\)\(3\)](#).

(iii)*Business associate contracts with subcontractors.* The requirements of paragraphs (a)(2)(i) and (a)(2)(ii) of this section apply to the contract or other arrangement between a [business associate](#) and a [subcontractor](#) required by [§ 164.308\(b\)\(4\)](#) in the same manner as such requirements apply to contracts or other arrangements between a [covered entity](#) and [business associate](#).

(b)

(1)Standard: Requirements for group health plans. Except when the only [electronic protected health information](#) disclosed to a [plan sponsor](#) is disclosed pursuant to [§ 164.504\(f\)\(1\)\(ii\)](#) or (iii), or as authorized under [§ 164.508](#), a [group health plan](#) must ensure that its plan documents provide that the [plan sponsor](#) will reasonably and

appropriately safeguard [electronic protected health information](#) created, received, maintained, or transmitted to or by the [plan sponsor](#) on behalf of the [group health plan](#).

(2)*Implementation specifications (Required)*. The plan documents of the [group health plan](#) must be amended to incorporate provisions to require the [plan sponsor](#) to -

- (i) Implement administrative, physical, and [technical safeguards](#) that reasonably and appropriately protect the [confidentiality](#), [integrity](#), and [availability](#) of the [electronic protected health information](#) that it creates, receives, maintains, or transmits on behalf of the [group health plan](#);
- (ii) Ensure that the adequate separation required by [§ 164.504\(f\)\(2\)\(iii\)](#) is supported by reasonable and appropriate security measures;
- (iii) Ensure that any agent to whom it provides this information agrees to implement reasonable and appropriate security measures to protect the information; and
- (iv) Report to the [group health plan](#) any [security incident](#) of which it becomes aware.

[[68 FR 8376](#), Feb. 20, 2003, as amended at [78 FR 5694](#), Jan. 25, 2013; [78 FR 34266](#), June 7, 2013]

§164.316 Policies and procedures and documentation requirements.

A [covered entity](#) or [business associate](#) must, in accordance with [§ 164.306](#):

(a)*Standard: Policies and procedures*. Implement reasonable and appropriate policies and procedures to comply with the standards, [implementation specifications](#), or other requirements of this subpart, taking into account those factors specified in [§ 164.306\(b\)\(2\)\(i\)](#), (ii), (iii), and (iv). This [standard](#) is not to be construed to permit or excuse an action that violates any other [standard](#), [implementation specification](#), or other requirements of this subpart. A [covered entity](#) or [business associate](#) may change its policies and procedures at any time, provided that the changes are documented and are implemented in accordance with this subpart.

(b)

(1)*Standard: Documentation*.

- (i) Maintain the policies and procedures implemented to comply with this subpart in written (which may be electronic) form; and
- (ii) If an action, activity or assessment is required by this subpart to be documented, maintain a written (which may be electronic) record of the action, activity, or assessment.

(2)*Implementation specifications*:

- (i)*Time limit (Required)*. Retain the documentation required by [paragraph \(b\)\(1\)](#) of this section for 6 years from the date of its creation or the date when it last was in effect, whichever is later.
- (ii)*Availability (Required)*. Make documentation available to those [persons](#) responsible for implementing the procedures to which the documentation pertains.
- (iii)*Updates (Required)*. Review documentation periodically, and update as needed, in response to environmental or operational changes affecting the security of the [electronic protected health information](#).

[[68 FR 8376](#), Feb. 20, 2003, as amended at [78 FR 5695](#), Jan. 25, 2013]

Guidance on Risk Analysis Requirements under the HIPAA Security Rule

Introduction

The Office for Civil Rights (OCR) is responsible for issuing annual guidance on the provisions in the HIPAA Security Rule.¹ (45 C.F.R. §§ 164.302 – 318.) This series of guidances will assist organizations² in identifying and implementing the most effective and appropriate administrative, physical, and technical safeguards to secure electronic protected health information (e-PHI). The guidance materials will be developed with input from stakeholders and the public, and will be updated as appropriate.

We begin the series with the risk analysis requirement in § 164.308(a)(1)(ii)(A). Conducting a risk analysis is the first step in identifying and implementing safeguards that comply with and carry out the standards and implementation specifications in the Security Rule. Therefore, a risk analysis is foundational, and must be understood in detail before OCR can issue meaningful guidance that specifically addresses safeguards and technologies that will best protect electronic health information.

The guidance is not intended to provide a one-size-fits-all blueprint for compliance with the risk analysis requirement. Rather, it clarifies the expectations of the Department for organizations working to meet these requirements.³ An organization should determine the most appropriate way to achieve compliance, taking into account the characteristics of the organization and its environment.

We note that some of the content contained in this guidance is based on recommendations of the National Institute of Standards and Technology (NIST). NIST, a federal agency, publishes freely available material in the public domain, including guidelines.⁴ Although only federal agencies are required to follow guidelines set by NIST, the guidelines represent the industry standard for good business practices with respect to standards for securing e-PHI. Therefore, non-federal organizations may find their content valuable when developing and performing compliance activities.

All e-PHI created, received, maintained or transmitted by an organization is subject to the Security Rule. The Security Rule requires entities to evaluate risks and vulnerabilities in their environments and to implement reasonable and appropriate security measures to protect against reasonably anticipated threats or hazards to the security or integrity of e- PHI. Risk analysis is the first step in that process.

We understand that the Security Rule does not prescribe a specific risk analysis methodology, recognizing that methods will vary dependent on the size, complexity, and capabilities of the organization. Instead, the Rule identifies risk analysis as the foundational element in the process of achieving compliance, and it establishes several objectives that any methodology adopted must achieve.

Risk Analysis Requirements under the Security Rule

The Security Management Process standard in the Security Rule requires organizations to “[i]mplement policies and procedures to prevent, detect, contain, and correct security violations.” (45 C.F.R. § 164.308(a)(1).) Risk analysis is one of four required implementation specifications that provide instructions to implement the Security Management Process standard. Section 164.308(a)(1)(ii)(A) states:

RISK ANALYSIS (Required).

Conduct an accurate and thorough assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of electronic protected health information held by the [organization].

The following questions adapted from NIST Special Publication (SP) 800-66⁵ are examples organizations could consider as part of a risk analysis. These sample questions are not prescriptive and merely identify issues an organization may wish to consider in implementing the Security Rule:

- Have you identified the e-PHI within your organization? This includes e-PHI that you create, receive, maintain or transmit.
- What are the external sources of e-PHI? For example, do vendors or consultants create, receive, maintain or transmit e-PHI?
- What are the human, natural, and environmental threats to information systems that contain e-PHI?

In addition to an express requirement to conduct a risk analysis, the Rule indicates that risk analysis is a necessary tool in reaching substantial compliance with many other standards and implementation

specifications. For example, the Rule contains several implementation specifications that are labeled “addressable” rather than “required.” (68 FR 8334, 8336 (Feb. 20, 2003).) An addressable implementation specification is not optional; rather, if an organization determines that the implementation specification is not reasonable and appropriate, the organization must document why it is not reasonable and appropriate and adopt an equivalent measure if it is reasonable and appropriate to do so. (See 68 FR 8334, 8336 (Feb. 20, 2003); 45 C.F.R. § 164.306(d)(3).)

The outcome of the risk analysis process is a critical factor in assessing whether an implementation specification or an equivalent measure is reasonable and appropriate. Organizations should use the information gleaned from their risk analysis as they, for example:

- Design appropriate personnel screening processes. (45 C.F.R. § 164.308(a)(3)(ii)(B).)
- Identify what data to backup and how. (45 C.F.R. § 164.308(a)(7)(ii)(A).)
- Decide whether and how to use encryption. (45 C.F.R. §§ 164.312(a)(2)(iv) and (e)(2)(ii).)
- Address what data must be authenticated in particular situations to protect data integrity. (45 C.F.R. § 164.312(c)(2).)
- Determine the appropriate manner of protecting health information transmissions. (45 C.F.R. § 164.312(e)(1).)

Important Definitions

Unlike “availability”, “confidentiality” and “integrity”, the following terms are not expressly defined in the Security Rule. The definitions provided in this guidance, which are consistent with common industry definitions, are provided to put the risk analysis discussion in context. These terms do not modify or update the Security Rule and should not be interpreted inconsistently with the terms used in the Security Rule.

Vulnerability

Vulnerability is defined in NIST Special Publication (SP) 800-30 as “[a] flaw or weakness in system security procedures, design, implementation, or internal controls that could be exercised (accidentally triggered or intentionally exploited) and result in a security breach or a violation of the system’s security policy.”

Vulnerabilities, whether accidentally triggered or intentionally exploited, could potentially result in a security incident, such as inappropriate access to or disclosure of e- PHI. Vulnerabilities may be grouped into two general categories, technical and non- technical. Non-technical vulnerabilities may include ineffective or non-existent policies, procedures, standards or guidelines. Technical vulnerabilities may include: holes, flaws or weaknesses in the development of information systems; or incorrectly implemented and/or configured information systems.

Threat

An adapted definition of threat, from NIST SP 800-30, is “[t]he potential for a person or thing to exercise (accidentally trigger or intentionally exploit) a specific vulnerability.”

There are several types of threats that may occur within an information system or operating environment. Threats may be grouped into general categories such as natural, human, and environmental. Examples of common threats in each of these general categories include:

- Natural threats such as floods, earthquakes, tornadoes, and landslides.
- Human threats are enabled or caused by humans and may include intentional (e.g., network and computer based attacks, malicious software upload, and unauthorized access to e-PHI) or unintentional (e.g., inadvertent data entry or deletion and inaccurate data entry) actions.
- Environmental threats such as power failures, pollution, chemicals, and liquid leakage.

Risk

An adapted definition of risk, from NIST SP 800-30, is:

*“The net mission impact considering (1) the probability that a particular [threat] will exercise (accidentally trigger or intentionally exploit) a particular [vulnerability] and (2) the resulting impact if this should occur
..... [R]isks arise from legal liability or mission
loss due to—*

- 1. Unauthorized (malicious or accidental) disclosure, modification, or destruction of information*
- 2. Unintentional errors and omissions*
- 3. IT disruptions due to natural or man-made disasters*
- 4. Failure to exercise due care and diligence in the implementation and operation of the IT system.”*

Risk can be understood as a function of 1) the likelihood of a given threat triggering or exploiting a particular vulnerability, and 2) the resulting impact on the organization. This means that risk is not a single factor or event, but rather it is a combination of factors or events (threats and vulnerabilities) that, if they occur, may have an adverse impact on the organization.

Elements of a Risk Analysis

There are numerous methods of performing risk analysis and there is no single method or “best practice” that guarantees compliance with the Security Rule. Some examples of steps that might be applied in a risk analysis process are outlined in NIST SP 800-30.⁶

The remainder of this guidance document explains several elements a risk analysis must incorporate, regardless of the method employed.

Scope of the Analysis

The scope of risk analysis that the Security Rule encompasses includes the potential risks and vulnerabilities to the confidentiality, availability and integrity of all e-PHI that an organization creates, receives, maintains, or transmits. (45 C.F.R. § 164.306(a).) This includes e-PHI in all forms of electronic media, such as hard drives, floppy disks, CDs, DVDs, smart cards or other storage devices, personal digital assistants, transmission media, or portable electronic media. Electronic media includes a single workstation as well as complex networks connected between multiple locations. Thus, an organization’s risk analysis should take into account all of its e-PHI, regardless of the particular electronic medium in which it is created, received, maintained or transmitted or the source or location of its e-PHI.

Data Collection

An organization must identify where the e-PHI is stored, received, maintained or transmitted. An organization could gather relevant data by: reviewing past and/or existing projects; performing interviews; reviewing documentation; or using other data gathering techniques. The data on e-PHI gathered using these methods must be documented. (See 45 C.F.R. §§ 164.308(a)(1)(ii)(A) and 164.316(b)(1).)

Identify and Document Potential Threats and Vulnerabilities

Organizations must identify and document reasonably anticipated threats to e-PHI. (See 45 C.F.R. §§ 164.306(a)(2) and 164.316(b)(1)(ii).) Organizations may identify different threats that are unique to the circumstances of their environment. Organizations must also identify and document vulnerabilities which, if triggered or exploited by a threat, would create a risk of inappropriate access to or disclosure of e-PHI. (See 45 C.F.R. §§ 164.308(a)(1)(ii)(A) and 164.316(b)(1)(ii).)

Assess Current Security Measures

Organizations should assess and document the security measures an entity uses to safeguard e-PHI, whether security measures required by the Security Rule are already in place, and if current security measures are configured and used properly. (See 45 C.F.R. §§ 164.306(b)(1), 164.308(a)(1)(ii)(A), and 164.316(b)(1).)

The security measures implemented to reduce risk will vary among organizations. For example, small organizations tend to have more control within their environment. Small organizations tend to have fewer variables (i.e. fewer workforce members and information systems) to consider when making decisions regarding how to safeguard e-PHI. As a result, the appropriate security measures that reduce the likelihood of risk to the confidentiality, availability and integrity of e-PHI in a small organization may differ from those that are appropriate in large organizations.⁷

Determine the Likelihood of Threat Occurrence

The Security Rule requires organizations to take into account the probability of potential risks to e-PHI. (See 45 C.F.R. § 164.306(b)(2)(iv).) The results of this assessment, combined with the initial list of threats, will influence the determination of which threats the Rule requires protection against because they are “reasonably anticipated.”

The output of this part should be documentation of all threat and vulnerability combinations with associated likelihood estimates that may impact the confidentiality, availability and integrity of e-PHI of an organization. (See 45 C.F.R. §§ 164.306(b)(2)(iv), 164.308(a)(1)(ii)(A), and 164.316(b)(1)(ii).)

Determine the Potential Impact of Threat Occurrence

The Rule also requires consideration of the “criticality,” or impact, of potential risks to confidentiality, integrity, and availability of e-PHI. (See 45 C.F.R. § 164.306(b)(2)(iv).) An organization must assess the magnitude of the potential impact resulting from a threat triggering or exploiting a specific vulnerability. An entity may use either a qualitative or quantitative method or a combination of the two methods to measure the impact on the organization.

The output of this process should be documentation of all potential impacts associated with the occurrence of threats triggering or exploiting vulnerabilities that affect the confidentiality, availability and integrity of e-PHI within an organization. (See 45 C.F.R. §§ 164.306(a)(2), 164.308(a)(1)(ii)(A), and 164.316(b)(1)(ii).)

Determine the Level of Risk

Organizations should assign risk levels for all threat and vulnerability combinations identified during the risk analysis. The level of risk could be determined, for example, by analyzing the values assigned to the likelihood of threat occurrence and resulting impact of threat occurrence. The risk level determination might be performed by assigning a risk level based on the average of the assigned likelihood and impact levels.

The output should be documentation of the assigned risk levels and a list of corrective actions to be performed to mitigate each risk level. (See 45 C.F.R. §§ 164.306(a)(2), 164.308(a)(1)(ii)(A), and 164.316(b)(1).)

Finalize Documentation

The Security Rule requires the risk analysis to be documented but does not require a specific format. (See 45 C.F.R. § 164.316(b)(1).) The risk analysis documentation is a direct input to the risk management process.

Periodic Review and Updates to the Risk Assessment

The risk analysis process should be ongoing. In order for an entity to update and document its security measures “as needed,” which the Rule requires, it should conduct continuous risk analysis to identify when

updates are needed. (45 C.F.R. §§ 164.306(e) and 164.316(b)(2)(iii).) The Security Rule does not specify how frequently to perform risk analysis as part of a comprehensive risk management process. The frequency of performance will vary among covered entities. Some covered entities may perform these processes annually or as needed (e.g., bi-annual or every 3 years) depending on circumstances of their environment.

A truly integrated risk analysis and management process is performed as new technologies and business operations are planned, thus reducing the effort required to address risks identified after implementation. For example, if the covered entity has experienced a security incident, has had change in ownership, turnover in key staff or management, is planning to incorporate new technology to make operations more efficient, the potential risk should be analyzed to ensure the e-PHI is reasonably and appropriately protected. If it is determined that existing security measures are not sufficient to protect against the risks associated with the evolving threats or vulnerabilities, a changing business environment, or the introduction of new technology, then the entity must determine if additional security measures are needed. Performing the risk analysis and adjusting risk management processes to address risks in a timely manner will allow the covered entity to reduce the associated risks to reasonable and appropriate levels.⁸

In Summary

Risk analysis is the first step in an organization's Security Rule compliance efforts. Risk analysis is an ongoing process that should provide the organization with a detailed understanding of the risks to the confidentiality, integrity, and availability of e-PHI.

Resources

The Security Series papers available on the Office for Civil Rights (OCR) website, <http://www.hhs.gov/ocr/hipaa>, contain a more detailed discussion of tools and methods available for risk analysis and risk management, as well as other Security Rule compliance requirements. Visit <http://www.hhs.gov/ocr/hipaa> for the latest guidance, FAQs and other information on the Security Rule.

Several other federal and non-federal organizations have developed materials that might be helpful to covered entities seeking to develop and implement risk analysis and risk management strategies. The Department of Health and Human Services does not endorse or recommend any particular risk analysis or risk management model. The documents referenced below do not constitute legally binding guidance for covered entities, nor does adherence to any or all of the standards contained in these materials prove substantial compliance with the risk analysis requirements of the Security Rule. Rather, the materials are presented as examples of frameworks and methodologies that some organizations use to guide their risk analysis efforts.

The National Institute of Standards and Technology (NIST), an agency of the United States Department of Commerce, is responsible for developing information security standards for federal agencies. NIST has produced a series of Special Publications, available at <http://csrc.nist.gov/publications/PubsSPs.html>, which provide information that is relevant to information technology security. These papers include:

- Guide to Technical Aspects of Performing Information Security Assessments (SP800-115)
- Information Security Handbook: A Guide for Managers (SP800-100; Chapter 10 provides a Risk Management Framework and details steps in the risk management process)
- An Introductory Resource Guide for Implementing the Health Insurance Portability and Accountability Act (HIPAA) Security Rule (SP800-66; Part 3 links the NIST Risk Management Framework to components of the Security Rule)
- A draft publication, Managing Risk from Information Systems (SP800-39)

*The Office of the National Coordinator for Health Information Technology (ONC) has produced a risk assessment guide for small health care practices, called *Reassessing Your Security Practices in a Health IT Environment*, which is available at http://healthit.hhs.gov/portal/server.pt/gateway/PTARGS_0_10741_848086_0_0_18/SmallPracticeSecurityGuide-1.pdf.*

The Healthcare Information and Management Systems Society (HIMSS), a private consortium of health care information technology stakeholders, created an information technology security practices questionnaire, available at <http://www.himss.org/content/files/ApplicationSecurityv2.3.pdf>. The

questionnaire was developed to collect information about the state of IT security in the health care sector, but could also be a helpful self-assessment tool during the risk analysis process.

The Health Information Trust Alliance (HITRUST) worked with industry to create the Common Security Framework (CSF), a proprietary resource available at <http://hitrustcentral.net/files>. The risk management section of the document, Control Name: 03.0, explains the role of risk assessment and management in overall security program development and implementation. The paper describes methods for implementing a risk analysis program, including knowledge and process requirements, and it links various existing frameworks and standards to applicable points in an information security life cycle.

¹ Section 13401(c) of the Health Information Technology for Economic and Clinical (HITECH) Act.

² As used in this guidance the term “organizations” refers to covered entities and business associates. The guidance will be updated following implementation of the final HITECH regulations.

³ The HIPAA Security Rule: Health Insurance Reform: Security Standards, February 20, 2003, 68 FR 8334.

⁴ The 800 Series of Special Publications (SP) are available on the Office for Civil Rights’ website –specifically, *SP 800-30 - Risk Management Guide for Information Technology Systems*. (<http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/securityruleguidance.html>.)

⁵ See *NIST SP 800-66, Section #4 "Considerations When Applying the HIPAA Security Rule."* Available at <http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/nist80066.pdf>

⁶ Available at <http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/nist800-30.pdf>.

⁷ For more information on methods smaller entities might employ to achieve compliance with the Security Rule, see #7 in the Center for Medicare and Medicaid Services’ (CMS) Security Series papers, titled “Implementation for the Small Provider.” Available at <http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/smallprovider.pdf>.

⁸ For more information on methods smaller entities might employ to achieve compliance with the Security Rule, see #6 in the Center for Medicare and Medicaid Services’ (CMS) Security Series papers, titled “Basics of Risk Analysis and Risk Management.” Available at <http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/riskassessment.pdf>.

(end legal references)

Comments Received on Petition for Rulemaking 8/14/2019

9/3/19 11:19 pm

Commenter: Hunt

reason unclear

There are no barriers or restrictions preventing a provider from initiating those actions. What is the petitioners purpose for wanting this regulatory amendment?

9/11/19 7:39 pm

Commenter: TIG

Higher Payroll Costs

PROVIDERS nor the DEPARTMENT of LICENSING consider what are the legal definitions of EMPLOYEES or INDEPENDENT CONTRACTORS under federal law or state law even though 12VAC35-105-150. states providers "MUST" comply with ALL APPLICABLE FEDERAL, STATE, LOCAL LAWS and/or REGULATIONS INCLUDING LAWS REGARDING EMPLOYMENT PRACTICES.

The PROVIDERS nor the DEPARTMENT of LICENSING know under federal law 1) that IRS Form SS-8 legally "MUST" be filed with the IRS at which time it will be legally determined whether or not that employer can legally employ workers as EMPLOYEES or INDEPENDENT CONTRACTORS before an employer hires individuals as independent contractors for the purposes of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act and

2) The PROVIDERS nor the DEPARTMENT of LICENSING request that the Virginia Unemployment Commission determine whether or not an individual should be legally classified as an employee or independent contractor which is discussed under the § 60.2-212.(C) of the Virginia Unemployment Act.

Our review of employee misclassification in Virginia found that:

1. **Employers who properly classify workers:**
 - a. **pay higher payroll costs and**
 - b. **may be less competitive in their respective industries.**
2. **Several other states, the IRS, and the U.S. Government Accountability Office have found that misclassification can:**
 - a. **impact government revenues as well as**
 - b. **employers and workers.**
3. **Misclassified workers are often denied certain legal rights and benefits.**
4. **A Virginia Employment Commission (VEC) audit of one percent of Virginia employers found:**
 - a. **5,639 workers were misclassified in 2010.**
5. **Based on estimates in other states, Virginia could have on the order of:**
 - a. **40,000 misclassifying employers and**
 - b. **214,000 misclassified workers.**
6. **Worker misclassification:**
 - a. **lowers Virginia's state income tax collections, leading to estimated foregone revenues on the order of \$1 million for workers identified during VEC audits and**
 - b. **\$28 million in total based on other states' findings in 2010.**

9/11/19 11:42 pm

Commenter: ANONYMOUS

The IRS identified 20 factors

Generally, a **worker** who performs services for an employer is an employee if the employer can control both *what* will be done and *how* it will be done. The key factor is that the employer has the right to control the details of how the services are performed, even if the employee has substantial freedom of action. By contrast, an **independent contractor** performs services required by an employer but is not subject to the employer's control about how the services are performed.

The Virginia Unemployment Compensation Act, § 60.2-212C provides that "Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless the Commission determines that such individual is not an employee for purposes of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, based upon application of the 20 factors set forth in Internal Revenue Service Ruling 87-41".

Generally speaking, a **worker is an employee** if his or her employer:

- Furnishes tools, materials and equipment needed to do the work;
- Sets the hours of work;
- Withholds payroll federal and state income taxes and Social Security taxes;
- Receives direction and training from the employer about how to do the work; and
- Is paid by the hour, week, or month instead of being paid at the completion of a job.

To help determine whether a worker is an employee, **the IRS identified 20 factors** that may indicate whether the employer can exercise enough control to establish an employer-employee relationship. Not all the factors must be present to find an employee/employment relationship, but **the factors are guides** to assess the likelihood as to **whether an individual is an employee or an independent contractor**.

The 20 factors and Virginia's exemptions to employee classification can be found **here**. *An employer who misclassifies workers may be subject to penalties under Section 60.2-513 of the Virginia Unemployment Compensation Act.*

If you need help determining if you have been classified properly please contact Dona Ellis at 804-786-3004 or by e-mail by clicking here (link sends e-mail). A Tax Representative will review your situation and be able to determine proper worker status.

9/11/19 11:47 pm

Commenter: Guy Fawke

Why Is Misclassification A Problem?

Why Is Misclassification A Problem?

According to the Virginia Department of Labor and Industry's June 2, 2015 Policy Memorandum, misclassification of employees as independent contractors is harmful for three major reasons.

First, Misclassification is a form of payroll fraud that deprives the Commonwealth of millions of dollars in tax revenues. The costs to Virginias' taxpayers, employers and employees are in the tens, if not hundreds, of millions of dollars.

Second, misclassified workers suffer. Employees misclassified as independent contractors are denied legal protections and benefits, including workers' compensation, medical and family leave, unemployment insurance, minimum wage protections, overtime, health insurance, retirement benefits, and occupational safety and health protections.

Third, Misclassification hurts competition and undermines employers who properly classify workers by giving an unfair advantage to employers who misclassify their workers.

According to VOSH's 2015 Employee Misclassification brochure, employers who misclassify fail to purchase workers' compensation insurance, pay unemployment insurance and payroll taxes, or comply with minimum wage and overtime laws, resulting in a forty percent reduction in costs. This places those employers at a competitive advantage in the bidding process for new projects. Additionally, employers who properly classify workers may be liable for additional unemployment tax and workers' compensation rates, which are adjusted upwards to cover costs avoided by misclassification of workers.

9/12/19 12:26 am

Commenter: Sponge Bob

Help with Deciding

Help with Deciding

To better determine how to properly classify a worker, consider these three categories – Behavioral Control, Financial Control and Relationship of the Parties.

Behavioral Control: A worker is an employee when the business has the right to direct and control the work performed by the worker, even if that right is not exercised. Behavioral control categories are:

- Type of instructions given, such as when and where to work, what tools to use or where to purchase supplies and services. Receiving the types of instructions in these examples may indicate a worker is an employee.
- Degree of instruction, more detailed instructions may indicate that the worker is an employee. Less detailed instructions reflects less control, indicating that the worker is more likely an independent contractor.
- Evaluation systems to measure the details of how the work is done points to an employee. Evaluation systems measuring just the end result point to either an independent contractor or an employee.
- Training a worker on how to do the job -- or periodic or on-going training about procedures and methods -- is strong evidence that the worker is an employee. Independent contractors ordinarily use their own methods.

Financial Control: Does the business have a right to direct or control the financial and business aspects of the worker's job? Consider:

- Significant investment in the equipment the worker uses in working for someone else.
- Unreimbursed expenses, independent contractors are more likely to incur unreimbursed expenses than employees.
- Opportunity for profit or loss is often an indicator of an independent contractor.
- Services available to the market. Independent contractors are generally free to seek out business opportunities.
- Method of payment. An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time even when supplemented by a commission. However, independent contractors are most often paid for the job by a flat fee.

Relationship: The type of relationship depends upon how the worker and business perceive their interaction with one another. This includes:

- Written contracts which describe the relationship the parties intend to create. Although a contract stating the worker is an employee or an independent contractor is not sufficient to determine the worker's status.
- Benefits. Businesses providing employee-type benefits, such as insurance, a pension plan, vacation pay or sick pay have employees. Businesses generally do not grant these benefits to independent contractors.
- The permanency of the relationship is important. An expectation that the relationship will continue indefinitely, rather than for a specific project or period, is generally seen as evidence that the intent was to create an employer-employee relationship.
- Services provided which are a key activity of the business. The extent to which services performed by the worker are seen as a key aspect of the regular business of the company.

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- Services provided which are a key activity of the business. The extent to which services performed by the worker are seen as a key aspect of the regular business of the company.

9/12/19 12:28 am

Commenter: K.B.

Employee (Common-Law Employee)

Under common-law rules, anyone who performs services for you is your employee ***if you can control what will be done and how it will be done***. This is so even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed.

Example: Donna Lee is a salesperson employed on a full-time basis by Bob Blue, an auto dealer. She works 6 days a week, and is on duty in Bob's showroom on certain assigned days and times. She appraises trade-ins, but her appraisals are subject to the sales manager's approval. Lists of prospective customers belong to the dealer. She has to develop leads and report results to the sales manager. Because of her experience, she requires only minimal assistance in closing and financing sales and in other phases of her work. She is paid a commission and is eligible for prizes and bonuses offered by Bob.

Bob also pays the cost of health insurance and group-term life insurance for Donna. Donna is an **employee** of Bob Blue.

9/12/19 12:30 am

Commenter: John Rolfe, Sr.

Independent Contractor Defined

You are not an independent contractor if you perform services that can be controlled by an employer (what will be done and how it will be done). This applies even if you are given freedom of action. What matters is that the employer has the legal right to control the details of how the services are performed. If an employer-employee relationship exists (regardless of what the relationship is called), you are not an independent contractor and your earnings are generally not subject to Self-Employment Tax. However, your earnings as an employee may be subject to FICA (Social Security tax and Medicare) and income tax withholding.

For more information on determining whether you are an independent contractor or an employee, refer to the section on Independent Contractors or Employees.

9/12/19 12:33 am

Commenter: D.B.

Statutory Employees

If workers are independent contractors under the common law rules, such workers may nevertheless be treated as employees by statute (statutory employees) for certain employment tax purposes

9/12/19 12:38 am

Commenter: Latrice Shaw

Obtaining a determination or opinion.

§ 60.2-212.2. Obtaining a determination or opinion.

If an employing unit is unsure of the status of an individual performing services for it, the employing unit may obtain a written determination pursuant to § 60.2-500.

9/12/19 12:45 am

Commenter: VOSH

MISCLASSIFICATION AND PAYROLL FRAUD

NUMBER SIXTEEN (2018) ESTABLISHING AN INTER-AGENCY TASK FORCE ON WORKER MISCLASSIFICATION AND PAYROLL FRAUD

Importance of the Issue

The misclassification of employees as “independent contractors” undermines businesses that follow the law, deprives the Commonwealth of millions of dollars in tax revenues, and prevents workers from receiving legal protections and benefits.

A 2012 report of the Joint Legislative Audit and Review Commission (JLARC) found that one third of audited employers in certain industries misclassify their employees. By failing to purchase workers' compensation insurance, pay unemployment insurance and payroll taxes, or comply with minimum wage and overtime laws, employers lower their costs as much as 40%, placing other employers at a competitive disadvantage.

Based on state and national studies, JLARC estimated that worker misclassification lowers Virginia's state income tax collections as much as \$28 million a year. Agencies with relevant enforcement responsibilities, including the Virginia Employment Commission, the Department of Labor and Industry, the Department of Professional and Occupational Regulation, the State Corporation Commission's Bureau of Insurance, the Department of Taxation, and the Workers' Compensation Commission each

address only one component of this practice and may not fully coordinate their efforts. In its study, JLARC recommended the establishment of a task force with representatives from the agencies listed above.

Establishment of the Task Force

Pursuant to the authority vested in me as Governor under Article V of the Constitution of Virginia, and the Code of Virginia, in order to examine the issue of worker misclassification and payroll fraud, I hereby create an Inter-Agency Taskforce on Worker Misclassification and Payroll Fraud (Taskforce).

Initiatives

The purpose of the Taskforce is to develop and implement a comprehensive plan with measurable goals to reduce worker misclassification and payroll fraud in Virginia. The activities of the Taskforce should include, but not be limited to:

1. Reviewing statutes and regulations related to worker misclassification and payroll fraud;
2. Evaluating current enforcement practices of the agencies involved;
3. Developing procedures for more effective inter-agency cooperation and joint enforcement;
4. Developing educational materials and an outreach strategy for employers;
5. Advising on any technological or other improvements in worker misclassification and payroll fraud detection;
6. Recommending any appropriate changes to relevant legislation or administrative rules;
7. Identifying ways to involve external stakeholders in the Taskforce's work;
8. Identifying ways to hold companies working on state contracts who commit payroll fraud through misclassification of workers accountable; and
9. Identifying ways to deter such misconduct through incentives and enforcement mechanisms.

The Taskforce will be chaired by the Secretary of Commerce and Trade and will include representatives from the Virginia Employment Commission, the Department of General Services, the Department of Labor and Industry, the Department of Professional and Occupational Regulation, the State Corporation Commission's Bureau of Insurance, the Department of Taxation, the Workers' Compensation Commission, and the Office of the Attorney General.

The Taskforce shall develop a work plan by November 1, 2018. The Taskforce shall report to the Governor on its progress by August 1, 2019.

Effective Date of the Executive Order

This Executive Order shall be effective upon its signing and, pursuant to §§ 2.2-134 and 2.2-135 of the Code of Virginia, shall remain in full force and effect for a year from its signing or until superseded or rescinded.

Given under my hand and under the Seal of the Commonwealth of Virginia this 10th day of August, 2018.

9/12/19 12:46 am

Commenter: Sara Ross

WORKER MISCLASSIFICATION AND PAYROLL FRAUD

The misclassification of employees as "independent contractors" undermines businesses that follow the law, deprives the Commonwealth of millions of dollars in tax revenues, and prevents workers from receiving legal protections and benefits.

Commenter: Concerned Citizen

JLARC

A 2012 report of the Joint Legislative Audit and Review Commission (JLARC) found that one third of audited employers in certain industries misclassify their employees. By failing to purchase workers' compensation insurance, pay unemployment insurance and payroll taxes, or comply with minimum wage and overtime laws, employers lower their costs as much as 40%, placing other employers at a competitive disadvantage.

Based on state and national studies, JLARC estimated that worker misclassification lowers Virginia's state income tax collections as much as \$28 million a year. Agencies with relevant enforcement responsibilities, including the Virginia Employment Commission, the Department of Labor and Industry, the Department of Professional and Occupational Regulation, the State Corporation Commission's Bureau of Insurance, the Department of Taxation, and the Workers' Compensation Commission each address only one component of this practice and may not fully coordinate their efforts. In its study, JLARC recommended the establishment of a task force with representatives from the agencies listed above.

9/12/19 1:10 am

Commenter: R. Smith

Classifying a worker as an independent contractor

Classifying a worker as an independent contractor rather than an employee significantly affects an employer's obligations towards the worker and can result in liability for misclassification. Employees are entitled by law to certain benefits and protections to which independent contractors are not entitled. Therefore, employers who misclassify their employees as independent contractors face potential liability for various unpaid employee expenses such as payroll taxes, workers' compensation and unemployment insurance premiums, and even minimum wage and overtime payments, which are not owed to independent contractors. Employees are also protected by various federal and state anti-discrimination and medical leave protections under which independent contractors are not protected.

Various tests and factors apply when determining a worker's classification as employee or independent contractor in different contexts. How the parties define their relationship is not determinative; instead, the relevant inquiry is how the employment relationship works in practice. Traditionally, courts in Virginia and North Carolina have focused on the level of control exerted by the employer over the means and manner of the work performed. Other relevant considerations include whether the worker sets his own work hours, and whether the worker uses his own equipment, facilities and materials or those of the employer. The factors that the United States Supreme Court has considered significant in determining whether an employer/employee relationship exists are (1) the nature and degree of control by the principal; (2) the amount of the worker's investment in facilities and equipment; (3) the degree to which the worker's opportunities for profit and loss are controlled by the employer; (4) the skill and initiative required to perform the job; and (5) the permanency of the relationship. None of these factors is controlling, and proper classification depends on the economic reality of the individual relationship. Variations of this economic realities test are used to determine employee status under federal laws such as the Fair Labor Standards Act and for federal social security tax purposes. The IRS considers twenty different factors when determining employee status. Under any of these tests, if the factors weigh in favor of employee status, then the worker should be classified as an employee and is entitled to all benefits and protections of an employee.

In response to the frequency of employee misclassification in Virginia, an inter-agency task force on worker misclassification and payroll fraud was established in Virginia in 2014. The executive order establishing the task force provides that: "[t]he misclassification of employees as 'independent contractors' undermines businesses that follow the law, deprives the Commonwealth of millions of dollars in tax revenues, and prevents workers from receiving legal protections and benefits." Further, a 2012 report of the Joint Legislative Audit and Review Commission (JLARC) found that "one third of audited employees in certain industries misclassify their employees." The executive order goes on to note that

“by failing to purchase workers’ compensation insurance, pay unemployment insurance and payroll taxes, or comply with minimum wage and overtime laws, employers lower their costs up to 40%, placing other employers at a competitive disadvantage.” It is estimated that worker misclassification lowers Virginia’s state income tax collections as much as \$28 million a year.

The Virginia initiative will mean that, in addition to potential federal liability, such as substantial IRS penalties, Virginia employers will also face increased state enforcement of payroll requirements and potential liability and state-imposed penalties for employees who are misclassified as “independent contractors.” If an individual has been misclassified as an “independent contractor,” the employer could therefore be obligated to pay penalties as well as significant amounts of unpaid taxes, insurance premiums, wages, overtime payments, benefits, and attorneys’ fees of the misclassified employee.

In North Carolina, Senate Bill 694 (entitled "The Employee Fair Classification Act") crossed over from the North Carolina Senate to the House on April 29, 2015. The bill had unanimous Senate approval. The proposed law is targeted to remedy and deter what has been perceived as an excessive worker misclassification problem in North Carolina. Senate Bill 694 would create a special agency in the State budget office to investigate complaints of independent contractor misclassification, issue substantial fines and limit access to government contracts for employers who are caught in violation of the law. The bill gives the agency the ability to revoke or suspend the licenses of certain tradespeople (including plumbers, HVAC and sprinkler contractors) who violate the law. The bill also provides for coordination with relevant State agencies and District Attorneys’ offices for criminal prosecution of employers who fail to pay civil money penalties. Importantly, the proposed legislation contains an amnesty provision to encourage employers to voluntarily phase into compliance. Finally, the bill would codify a list of eight (8) traditional and common law factors that have been applied in various manners over decades of court decisions to determine whether employees are properly classified as independent contractors. Senate Bill 694 has been referred to the Committee on Rules, Calendar, and Operations of the House. Its progress can be tracked here.

Related Posts

- When Are Your Subcontractor's Employees Your Employees?
- Worker Misclassification – What Employers Need to Know in Light of New Enforcement Efforts
- Misclassified Employees Not Barred From Recovering Damages Based on Value of ERISA Plan Benefits They Should Have Been Provided: *Gray v. FedEx Ground Package System, Inc.*

9/12/19 1:13 am

Commenter: Mr. Knight

So how do you know if a worker an 'employee' or an 'independent contractor?'

In most cases, a worker will be considered an employee if the employer can control two things: **what** will be done, and **how** it will be done. Alternatively, independent contractors are not under the employer's control when performing their services.

9/12/19 1:15 am

Commenter: The Truth

Why is worker misclassification an issue?

It isn't uncommon for some businesses -- particularly small businesses -- to use "independent contractors." The reality is that they may not need full-blown employees, and by using independent contractors employers can cut costs significantly because they do not need to pay certain taxes and

benefits. In fact, employers can lower their costs by up to 40 percent by using independent contractors instead of regular employees.

However, employers can run into trouble if they misclassify a worker as an "independent contractor" when they are actually considered "employees" under the law. Indeed, the penalties for misclassifying an employee and not paying payroll taxes can be severe -- not to mention the misclassified employees may be able to seek their rightful benefits under the law.

9/12/19 1:23 am

Commenter: B. McFerrin

Worker Misclassification Prevention

Worker misclassification occurs when an employer improperly classifies a worker as an *independent contractor* instead of as an *employee*. Some employers in Virginia are concerned about the unfair competitive advantage gained by those who misclassify workers to avoid paying taxes and benefits (lowering their costs by up to 40 percent).

For worker classification purposes, "contractor" refers to someone working under an employment contract or agreement, NOT only construction-related activities.

- **Employees** have taxes withheld from their paychecks and have legal protections such as the minimum wage law, unemployment benefits, and workers' compensation insurance.
- **Independent contractors** are generally responsible for paying all of their own taxes and benefits, and are often not eligible for these and other legal protections.

Employee misclassification undermines those businesses that follow the law by allowing unscrupulous employers to undercut bids because they avoid payroll costs. Virginia is committed to leveling the playing field for employers that play by the rules.

Although DPOR does not enforce wage, unemployment benefit, or workers' compensation laws, we work in concert with other state agencies (DOLI, VEC, VWC) to protect the public's health, safety and welfare, while promoting our Commonwealth's strong business climate.

9/12/19 1:26 am

Commenter: Unfair Advantage

Review of Employee Misclassification in Virginia

KEY FINDINGS

Our review of employee misclassification in Virginia found that:

1. Employers who properly classify workers pay higher payroll costs and may be less competitive in their respective industries.
2. Misclassified workers are often denied certain legal rights and benefits.
3. A Virginia Employment Commission (VEC) audit of one percent of Virginia employers found 5,639 workers were misclassified in 2010.
4. Based on estimates in other states, Virginia could have on the order of 40,000 misclassifying employers and 214,000 misclassified workers.
5. Worker misclassification lowers Virginia's state income tax collections, leading to estimated foregone revenues on the order of \$1 million for workers identified during VEC audits and \$28 million in total based on other states' findings in 2010.
6. A comprehensive approach to the problem of employee misclassification would include strategies to prevent misclassification before it happens, find it when it occurs, and penalize employers who misclassify.

SUMMARY OF RECOMMENDATIONS

The Governor should establish a task force on employee misclassification consisting of VEC, the Virginia Workers' Compensation Commission, the Department of Labor and Industry, and the Department of Taxation. The agencies should work together to

- (1) develop a clear definition of "employee";
- (2) develop procedures to share the information they gather about misclassification; and

(3) produce educational materials for workers, employers, and citizens about what misclassification is, what its consequences are, and how to report it.

Misclassification of employees should be made illegal in Virginia, and employers who misclassify workers should be penalized financially. If misclassifying employers are working on state contracts, they should be issued a stop work order and possibly disbarred from bidding on future state or local contracts for a specified period of time.

9/12/19 1:28 am

Commenter: T. Roy

Develop procedures for more effective inter-agency cooperation and joint enforcement

The purpose of the task force is to develop and implement a comprehensive plan with measurable goals to reduce worker misclassification and payroll fraud in Virginia, according to the executive order. The activities of the task force would include:

- Review statutes and regulations related to worker misclassification and payroll fraud;
- Evaluate current enforcement practices of the agencies involved;
- Develop procedures for more effective inter-agency cooperation and joint enforcement;
- Implement a pilot project for joint enforcement;
- Develop educational materials and an outreach strategy for employers;
- Advise on any technological improvements in worker misclassification and payroll fraud detection; and,
- Recommend any appropriate changes to relevant legislation or administrative rules.

9/12/19 1:32 am

Commenter: Samantha Scott

The increased interest in addressing worker misclassification is not unique to Virginia.

Many states have turned their attention to this issue and the loss of social security, Medicare, unemployment and income taxes that are often the result of misclassification. In 2009, Maryland granted similar responsibilities to a Workplace Fraud Task Force. Since its formation, the Maryland Task Force has established education and outreach programs and has created a Worker Misclassification Database to allow agencies to share information, track cases of misclassification and identify areas for audit.

9/12/19 1:37 am

Commenter: K. Davis

Misclassification of Employees as Independent Contractors

Misclassified employees often are denied access to critical benefits and protections they are entitled to by law, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces. Employee misclassification generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers' compensation funds.

9/12/19 1:38 am

Commenter: Denise P.

Supreme Court

The factors that the Supreme Court has considered significant, although no single one is regarded as controlling are:

- (1) the extent to which the worker's services are an integral part of the employer's business (examples: Does the worker play an integral role in the business by performing the primary type of work that the employer performs for his customers or clients? Does the worker perform a discrete job that is one part of the business' overall process of production? Does the worker supervise any of the company's employees?);
- (2) the permanency of the relationship (example: How long has the worker worked for the same company?);

(3) the amount of the worker's investment in facilities and equipment (examples: Is the worker reimbursed for any purchases or materials, supplies, etc.? Does the worker use his or her own tools or equipment?);

(4) the nature and degree of control by the principal (examples: Who decides on what hours to be worked? Who is responsible for quality control? Does the worker work for any other company(s)? Who sets the pay rate?);

(5) the worker's opportunities for profit and loss (examples: Did the worker make any investments such as insurance or bonding? Can the worker earn a profit by performing the job more efficiently or exercising managerial skill or suffer a loss of capital investment?); and

(6) the level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise (examples: Does the worker perform routine tasks requiring little training? Does the worker advertise independently via yellow pages, business cards, etc.? Does the worker have a separate business site?).

9/12/19 1:45 am

Commenter: TTD

MISCLASSIFICATION GET THE FACTS ON UNDER THE FAIR LABOR STANDARDS ACT Employee or Independent Contra

1. Receiving a 1099 does not make you an independent contractor under the FLSA.
2. Even if you are an independent contractor under another law (for example, tax law or state law), you may still be an employee under the FLSA.
3. Signing an independent contractor agreement does not make you an independent contractor under the FLSA.
4. Having an employee identification number (EIN) or paperwork stating that you are performing services as a Limited Liability Company (LLC) or other business entity does not make you an independent contractor under the FLSA.
5. Employers may not misclassify an employee for any reason, even if the employee agrees.
6. You are not an independent contractor under the FLSA merely because you work offsite or from home with some flexibility over work hours.
1099
7. Whether you are paid by cash or by check, on the books or off, you may still be an employee under the FLSA.
8. "Common industry practice" is not an excuse to misclassify you under the FLSA.

9/12/19 1:50 am

Commenter: Tony D.

What's the Difference Between an Independent Contractor and an Employee?

Description	Employee	Contractor
Employment Laws	Covered by a number of federal and state employment and labor laws	Not covered by employment and labor laws
Hiring Practice	A potential employee completes an application that is handled by Human Resources. The approved applicant receives a job offer. After a person accepts the position, the employer must ask for additional information about the employee such as date of birth, marital status, and citizenship status.	A potential contractor normally interacts with the person or department that wants a certain service or task completed. A potential contractor might complete a proposal. The contractor enters into a contract, including a Statement of Work with the legal or procurement section of the business.
Tax Documents	Provides name, address, Social Security number, tax filing status, and number of exemptions on a W-4	Provides name, address, Taxpayer Identification Number, and certification about back up withholding visit disclaimer page on a W-9

Description	Employee	Contractor
Payer's Tax Reporting Requirements	Reports all money paid to the employee during the tax year on a W-2	Reports payments of \$600 or more in a calendar year on a Form 1099
Reporting to Other Agencies	Reports for state and federal Unemployment Insurance	None
Value of Work or Contract	Earns either an hourly rate or a salary	A contract may be for a total amount. It could be for an hourly, daily, or weekly amount that ends on a specific date or a total amount to be paid when the job is completed.
When Paid	An employee pay period must remain the same unless formally changed. Pay periods vary from one week to one month. Federal and state laws require that an employee be paid on the normal pay date or earlier if the pay check is not negotiable on the normal pay date, which can occur on holidays.	Accounts Payable pays a contractor after receiving an invoice. The terms of the contract or Statement of Work dictate when payments are made, such as upon completion of a task or by periodic amounts. Contractors are not paid by payroll staff in most businesses.

9/12/19 1:56 am

Commenter: Sara F.

The IRS and Department of Labor's Focus on Worker Classification

Intentionally or not, many workers in the United States are classified as independent contractors (IC). In classifying a worker as an IC instead of an employee, putative employers can eliminate the following expenses:

- The employer's share of Social Security (FICA) and Medicare taxes
- Overtime and minimum wage payments
- Employee health insurance premiums
- Employee retirement benefits, vacation, holiday, and sick pay
- Other employee fringe benefits, such as stock options
- Federal and state unemployment compensation taxes (FUTA and SUTA)
- Workers' compensation insurance premiums.

9/12/19 1:59 am

Commenter: S.D.

SMH

There are agencies paying \$27.00-\$40.00/hours.

9/12/19 2:02 am

Commenter: Just Sue

Employee or Contractor -Settlements

- Landmark Microsoft case -\$97 million
- 5 construction companies -\$70,000 each and banned from bidding on public projects for 4 years. State's attorney (IL) labels act as fraud
- XPO Logistics case –class action lawsuit brought by drivers settles for \$2.8 million in Illinois
- FedEx case -\$228 million settlement for misclassifying FedEx Ground drivers in California
- Lyft case –Lyft agrees to settle a worker misclassification class action suit for \$12.25 million

9/12/19 2:04 am

Commenter: CMD

Employee or Contractor?

All of the following must be met for IC classification:

- A. The worker is free of control and direction with respect to the means of how the work is performed
- B. The worker has his own business providing the same services to others in the market
- C. The work is: Outside the usual course of the company's business

9/12/19 2:11 am

Commenter: Sean C.

Common Red Flags

1. Worker completed an employment application

2. Control

- Company tells the worker what, when, and how to do their job
- Worker is given an employee handbook
- Worker undergoes orientation program ?

3. Pay

- Worker is paid through the company payroll system instead of accounts payable
- Worker does not furnish an invoice ?

4. Hours

- Worker has to punch a clock
- Worker gets paid overtime ?

5. Benefits

- Worker gets paid for company holidays, vacation, and sick leave
- Worker gets a free parking space, meals, etc.

9/12/19 2:16 am

Commenter: Chris Tosh

Virginia Inter-agency Task Force

Purpose of Task Force

- Review statutes and regulations related to worker misclassification and payroll fraud
- **Gather information on prevalence of misclassification in various industries**
- Evaluate current enforcement practices of the agencies involved
- Develop procedures for more effective inter-agency cooperation and joint enforcement
- Implement project for joint enforcement
- Enhance technology for detection

9/12/19 2:18 am

Commenter: Donnie Wahl

How Do You Get Caught?

- Random IRS audit of your business –field agents are now questioning why workers are not on the payroll
- Targeted audits• You terminate the services of your IC and that person promptly files an unemployment insurance claim
- The IC gets hurt and files a workers' comp claim
- **The IC, shocked that he actually has to pay taxes, files form 8919 and/or SS-8 with the IRS to force employee classification**

9/12/19 2:19 am

Commenter: T. Ferris

The Most Common Question

- All of my contractors sign IC agreements. Why is that not good enough?
- Because... – Many agreements are poorly written – The facts on the ground do not correlate with the terms of the agreement
- Employers are not permitted to draft around their withholding and unemployment tax compliance requirements

9/12/19 2:21 am

Commenter: Tim Rein

Fixing Misclassifications –Current Year

- Place misclassified workers on payroll right away!
- All payments since the beginning of the year must be run through payroll –do NOT issue a W-2 and a 1099-MISC.
- Back withholding taxes are calculated at the regular rates. You will then need to seek any reimbursement from the employee for the taxes retroactively withheld.
- The taxes are reported on and remitted with form 941-X (amended quarterly federal payroll tax return).
- State unemployment tax returns will need to be corrected as well.
- Determine if 530 relief applies –this may give federal relief, but not state relief.

9/12/19 2:28 am

Commenter: Derrick Wyche

Fraud is Okay in Virginia

The DBHDS does not care about payroll fraud!

9/17/19 3:48 pm

Commenter: McGhee

Labor Board issue

This seems to be a Labor Board issue not a DBHDS issue and there is laws already in place to cover this.



COMMONWEALTH of VIRGINIA

STATE BOARD OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

MEETING AGENDA

Tuesday, October 8, 2019

6:15 p.m. – 8:00 p.m.

Valley Community Services Board

85 Sangers Lane

Staunton, VA 24401

- 6:15** **Welcome and Introductions**
Paula Mitchell, Chair
State Board of Behavioral Health & Developmental Services

David Deering, Executive Director
Valley Community Services Board
- 6:25** **DINNER**
- 6:40** **PRESENTATION – Valley Community Services Board**
David Deering

Lydia Campbell, Adult Mental Health Case Manager
and Permanent Supportive Housing Coordinator

Stacie Jackson, Local System Manager, Infant & Toddler
Connection of Staunton-Waynesboro
- 7:20** **COMMENTS/DISCUSSION**
- 7:40** **REMARKS**
Dr. Mary Clare Rehak Smith, Director
Western State Hospital

Dr. Jaime Bamford, Director
Commonwealth Center for Children and Adolescents

Area CSB Representatives
- 7:55** **CLOSING REMARKS**
Heidi Dix, Deputy Commissioner
Department of Behavioral Health & Developmental Services

Paula Mitchell
- 8:00** **ADJOURNMENT**

EVENT SCHEDULE

Tuesday-Wednesday, October 8-9, 2019

Tuesday, October 8th	<u>COMMUNITY LOCATION TOUR AND BUSINESS DINNER</u>
<u>4:00 p.m.</u>	Board members are checking in at the hotel and preparing to travel to community tour and Valley Community Services.
<u>5:00 p.m.</u>	A van will be provided to take out of town members to the locations.
<u>6:15 – 8:00 p.m.</u>	BUSINESS DINNER Attendees: State Board members, DBHDS staff, Valley Community Services staff and Board members, other guests.
<u>8:15 p.m.</u>	Arrive at Hotel

Wednesday, Oct 9th	<u>REGULAR BOARD MEETING SCHEDULE</u>
	WESTERN STATE HOSPITAL 103 VALLEY CENTER DR, STAUNTON, VA 24401
<u>8:30 a.m.</u>	Committee Meetings
<u>9:45 a.m.</u>	Regular Meeting at 9:45 a.m. – 2:45 p.m. (see Agenda, p.1 for business items)
<u>2:45 p.m.</u>	Adjournment

For those members staying overnight, this page has **driving directions to the:**

Directions to the Stonewall Jackson Hotel

- **Note:** The Parking Garage that is attached to the hotel is on the corner of Johnson and New Streets. The directions below take you to the front entrance so you can unload. Then circle around to the parking garage.
 1. Take Interstate 81 to Exit 222.
 2. Follow 250 West (Richmond Road) for approximately 2 1/2 miles toward "Historic Downtown Staunton".
 3. You will begin to see signs to the Stonewall Jackson Hotel.
 4. When Hwy 250 ends at a "T" intersection, turn right and go under the train tracks.
 5. Follow the Historical Signs to Coalter Street.
 6. Proceed up Coalter Street and make a left onto Frederick Street.
 7. At the 1st traffic light, make a left onto Market Street.
 8. Proceed 1 1/2 blocks, the hotel will be on the right hand side.
- **From Points East:** Take 64 West to Interstate 81 to Exit 222. Proceed as above.

From the hotel to Western State Hospital: Head south on S Market St. Turn right at Kalorama. Take the 1st left onto Greenville. Take the 2nd right to stay on Greenville Ave. Take the 1st left onto Richmond Ave/US 250, proceed 1.7 mi, turn left onto N Frontier Dr., keep straight onto VA-714 / National Ave, turn right onto Valley Center Dr, turn left to stay on Valley Center Dr, destination will be on the right.

DIRECTIONS

Wednesday, October 9, 2019

**Virginia Department of Behavioral Health and Developmental Services,
Western State Hospital, 103 Valley Center Dr, Staunton, VA 24401**

Time: **Committees at 8:30 a.m.**, Regular Board Meeting at 9:45 a.m.

- **Planning and Budget Committee** will meet in the room where the board meeting will be.
- **Policy and Evaluation Committee** will meet in a smaller nearby room.

Regular Meeting Location: **DBHDS Western State Hospital
103 Valley Center Dr, Staunton, VA 24401**

This page has **driving directions to the DBHDS Western State Hospital**, 103 Valley Center Dr, Staunton, VA 24401 103 Valley Center Dr, Staunton, VA 24401.

DIRECTIONS TO WESTERN STATE HOSPITAL (WSH):

- I81 - TAKE EXIT 222 FOR STAUNTON.
- TURN ONTO ROUTE 250 WEST. TURN RIGHT ONTO N FRONTIER DR.
- KEEP STRAIGHT ONTO VA-714 / NATIONAL AVE.
- TURN RIGHT ONTO VALLEY CENTER DR, TURN LEFT TO STAY ON VALLEY CENTER DR.
- DESTINATION WILL BE ON THE RIGHT.

If you have any questions about the information in this meeting packet,
contact Ruth Anne Walker, ruthanne.walker@dbhds.virginia.gov, 804.225.2252.