

Department of Legislative Services
Maryland General Assembly
2005 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 247

(Senator Forehand)

Education, Health, and Environmental Affairs

Health and Government Operations

**Health Care Decision Making Forms - Health Insurance Portability and
Accountability Act - Personal Representatives**

This bill revises the optional health care decision making form contained within statute. Specifically, the bill clarifies that a health care agent is a personal representative and is entitled to act as such provided that individual acts in accordance with the Health Insurance Portability and Accountability Act (HIPAA) to: (1) receive protected health information; and (2) make an informed decision regarding an individual's health care when the individual's attending physician and a second physician determine the individual is incapable of doing so.

Fiscal Summary

State Effect: None. The change would not directly affect governmental finances.

Local Effect: None.

Small Business Effect: None.

Analysis

Current Law: When a person is admitted to a health care facility, the facility must provide information regarding the person's right to make decisions concerning health care, including the right to accept or refuse treatment, and the right to make an advance directive, including a living will.

Any competent individual can make a written advance directive regarding the provision of health care or the withholding or withdrawal of health care for themselves. A person may appoint an agent to make health care decisions for the person. A written advance directive must be dated, signed by or at the express direction of the declarant, and subscribed by two witnesses.

Any competent individual may make an oral advance directive to authorize the providing, withholding, or withdrawing of any life-sustaining procedure or to appoint an agent to make health care decisions for the individual. An oral directive has the same effect as a written directive if it is made in the presence of the attending physician and one witness and if the substance of the oral directive is documented in the patient's medical record. The documentation must be dated and signed by the attending physician and witness.

An advance directive becomes effective when the declarant's attending physician and a second physician certify in writing that the patient is incapable of making an informed decision. If a patient is unconscious or unable to communicate, a second physician's certification is not required.

It is the declarant's responsibility to notify the attending physician that an advance directive was made. If the declarant becomes comatose, incompetent, or otherwise incapable of communication, any other person may notify the physician of the existence of the advance directive. The attending physician must make the advance directive a part of the patient's medical record.

A competent individual may make an advance directive to outline the mental health services that may be provided to the individual if he or she becomes incompetent and needs mental health services either during, or as the result of, the incompetency. This advance directive may: (1) designate an agent to make mental health services decisions for the individual; (2) identify mental health professionals, programs, and facilities the individual prefers to provide the mental health services; (3) state preferred medications for psychiatric treatment; and (4) instruct how third parties are notified and how information about the mental health services the individual receives is released to the third parties.

Chapter 356 of 2004 requires the Department of Health and Mental Hygiene (DHMH), in consultation with the Office of the Attorney General, to develop an information sheet providing information relating to advance directives and develop a plan to make it widely available. The information sheet may not contain or promote a specific advance directive form. DHMH must implement the plan by June 30, 2005. An insurance carrier (excluding managed care organizations) must include the advance directive information sheet in the carrier's member publications, on the carrier's web site if the carrier

maintains a web site, and at a member's request. The Motor Vehicle Administration must make driver's license and identification card applicants aware of and informed of how to obtain the advance directive. DHMH must report to the Senate Education, Health, and Environmental Affairs Committee and the House Health and Government Operations Committee by October 1, 2005 on the bill's implementation.

HIPAA requires the federal Department of Health and Human Services to establish national standards for electronic health care transactions and addresses health information security and privacy issues. A federal regulation implementing the HIPAA privacy and security requirements established the "Privacy Rule" which guarantees patients access to their medical records, gives them more control over how their protected health information is used and disclosed, and provides an avenue of recourse if their medical privacy is compromised. Protected health information is any health information that identifies an individual and is maintained or exchanged electronically or in hard copy.

Health care organizations covered by the Privacy Rule are: all health care providers who electronically transmit certain administrative and financial health information; all health plans; and all health care clearinghouses.

Background: Health care facilities must provide patients, upon admittance, with information regarding how to make an advance directive under requirements set by the federal government and the Joint Commission on Accreditation of Healthcare Organizations.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of Health and Mental Hygiene; *HIPAA Basic Facts*, Centers for Disease Control and Prevention; Department of Legislative Services

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