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April 23, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 600

Dear Governor O'Malley:

We have reviewed and hereby approve Senate Bill 600, "Workers' Compensation Commission - Authorization for Release of Medical Information - Work-Related Injury or Occupational Disease," for constitutionality and legal sufficiency. In reviewing the bill, we have concluded that the provisions of the bill are not inconsistent with the federal Health Insurance and Portability Accountability Act of 1996, ("HIPAA").

Senate Bill 600 provides that a claim application form filed under the Workers' Compensation Act must include an authorization by the claimant for the release of medical information to the claimant's attorney, the claimant's employer, and the insurer of the claimant's employer. The medical information to be disclosed is limited to information relevant to the claim, and includes information relating to the history, findings, office and patient charts, files, examination and process notes, and physical evidence. The authorization is effective for period of one year, and does not restrict the redisclosure of medical information relating to the authorization to a medical manager, health care professional, or certified rehabilitation practitioner. Senate Bill 600 also amends the State Confidentiality of Medical Records Act to require a health care provider to disclose a medical record on receipt of an authorization filed under the provisions of the bill.

HIPAA required the Department of Health and Human Services to develop systems to protect the privacy and security of health care information. 88 *Opinions of the Attorney General* 205 (2003). The resulting regulations establish national standards for the protection of health information. *Id.* They also provide express standards for when health information may be disclosed. Under 45 C.F.R. § 160.203(b) a state law that relates to the privacy of individually

identifiable health information that is contrary to "a standard, requirement, or implementation specifications adopted under this subchapter" is preempted unless it is more stringent than the standards set by the federal regulations.
A state law is "more stringent" if it gives the patient greater power to withhold permission or effectively block disclosure. *Law v. Zuckerman*, 307 F.Supp.2d 705, 711 (D.Md. 2004). In *Law v. Zuckerman,* the Court held that Maryland's law requiring disclosure to a health care provider or to the provider's insurer or legal counsel with respect to a civil action against the health care provider by the patient, was less stringent than federal law, which permitted, but did not require disclosure, and required that certain procedures be followed prior to disclosure. Moreover, while recognizing that a patient could reasonably be inferred to consent to the release of medical records in this instance by filing suit, the Court held that inferred consent did not satisfy the intended purpose of HIPAA. *Id*. at 711, n.1.

Senate Bill 600 does not infer consent from the filing of a claim, but requires actual authorization as a condition of filing a claim. It is not clear that mandating authorization would avoid the problem raised in *Law v. Zuckerman*. However, 45 C.F.R. § 164.512(l) permits disclosure without authorization of the patient where the disclosure is authorized by and to the extent necessary to comply with laws relating to Workers' Compensation. Since Senate Bill 600 would require disclosure, and the material to be disclosed is limited to that relevant to the claim, it is our view that the requirement of disclosure in the bill falls within this exception.

Very truly yours,

/s/

Douglas F. Gansler
Attorney General

DFG/KMR/kmr
sb0600.wpd

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Allan H. Kittleman
Fred Ryland, Esquire