23rd National HIPAA Summit

Self-Insureds Preparation for Health Plan Certification

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Agenda

- Health Plan Identifiers
- HHS Final Rule (CMS-0040F) Adopting Unique Identifier (HPID) for Health Plans
- What is Being Regulated Here?
- HPID and Transactions and Code Sets—from the Employer's Perspective
- What the Future Holds

Health Plan Identifiers

HIPAA and Health Plan Identifiers

- HIPAA administrative simplification provisions include a requirement that HHS adopt health identifiers
- Under the ACA, health plan identifiers (or "HPIDs") are intended to streamline electronic transactions health care professionals and financial institutions
  - ACA requires health plans to adopt a HPID
  - HPID is a ten-digit "unique identifier"
- Plans will use the HPID in standard HIPAA transactions

HHS HDIP Rule

The Final HPID Rule

- Health plans were required to obtain an HPID no later than November 5, 2014, except that "small health plans" had until November 5, 2015
- The implementation date for using HPIDs in all standard transactions was deferred until November 7, 2016
- From and after this latter date, *any* health plan identified in any standard transaction—whether by another HIPAA covered entity or a business associate—was required to use its HPID

HPID Rule Delayed

- Effective October 31, 2014, CMS announced a delay:
  - Until further notice, enforcement "of 45 CFR 162, Subpart E, the regulations pertaining to health plan enumeration and use of the Health Plan Identifier (HPID) in HIPAA transactions adopted in the HPID final rule (CMS-0040-F)" are delayed indefinitely
  - Delay applies to "all HIPAA covered entities, including healthcare providers, health plans, and healthcare clearinghouses"
- The delay was based on the recommendation of the National Committee on Vital and Health Statistics (NCVHS)
- This enforcement discretion will allow HHS "to . . . consider any appropriate next steps"

What is Being Regulated?

GHPs as Regulated Entities

- What is the regulated entity?
- Per the Supreme Court (*Pegram v. Herdrich*), a group health plan is the combination of
  - The set of promises an employer makes to its employees vis-à-vis health care coverage
  - The accompanying administrative scheme
- In the case of a fully-insured plan
  - The group health plan is not the contract or policy
  - Although the contract or policy may furnish important terms

Group Health Plans

- Any ERISA covered group health plan (except for a plan with fewer than 50 participants that is self administered)
  - Health Reimbursement Arrangements/MERPs
  - Medical flexible spending arrangements
  - But not (most) Health Savings Accounts
- Health insurance issuers (insurance companies, etc.)
- HMOs
- All governmental programs
  - Medicare, Medicaid
  - State high risk pools, etc.

Employer Dual Roles

- Employers have dual roles: employer function and sponsor of group health plan
- Employment Records are not PHI (e.g., FMLA requests, sick leave, fitness-for-duty exams, drug screening programs, and OSHA)
- BUT, if an employer needs information from its health plan, then it is PHI
- ACA conundrum: documenting offers of coverage by an unrelated employer—Barred by HIPAA?

FMLA Example

- Employer comes into contact with employee's medical information when handling workers' comp, disability and FMLA claims
- DOL has made clear (73 Fed. Reg. p. 67,034) that FMLA certifications must comply with HIPAA
  - Medical information submitted by an employee in connection with an FMLA claim is not PHI
  - But a covered entity/provider must obtain employee's written authorization to release documentation verifying an employee's FMLA claim

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Transactions & Code Sets: The Employer's Perspective

The Employer's View

- For many health plans, it is their business associate that is conducting standard transactions
- Example: a TPA might transmit information about claims or sending payment, so the TPA would be the party that is complying with the transaction/code set rules on behalf of the health plan
- Similarly, the TPA will conduct payment transaction with a covered entity healthcare provider; TPA that must comply with the EFT/remittance advice transaction
- These obligations are usually dealt with in a cursory fashion (if at all) in BA agreements

What the Future Holds

Making the HPID Rules Work

- HHS has merely delayed the HPID rules, it has not (nor can it) eliminate them
- The delayed rules were at odds with the way that employer's interact with HIPAA
- TPAs should be able to act on the employer's and GHP's behalf under ordinary notions of agency law

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Questions and Answers

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