The Impact of HIPAA Privacy and Security on IT and Business Process Outsourcing

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1

Agenda

- Overview of Outsourcing
- Traditional Outsourcing Issues and HIPAA Wrinkles
- HIPAA-Specific Issues

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Overview of Outsourcing

Introduction

- Outsourcing is more than just licensing of technology or procurement of services
- Outsourcing typically involves:
  - Divestiture of non-core business activity and purchase of services
  - A complex, evolving relationship

Introduction

- IT Outsourcing
  - Assets/staff/management of IT operations
- Business Process Outsourcing
  - Traditional: food service, janitorial, security
  - More recently: supply chain management, billing, coding, IT

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Reasons for Outsourcing

- Financial

- Labor

- Strategic/operational

- HIPAA compliance does not usually make the list!

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Risks in Outsourcing

- Traditional:
  - Loss of control
  - Managing costs
  - Labor and employment issues
  - Dependence on vendor and difficulty of reassuming responsibility
  - Financial stability of vendor
- HIPAA compliance?

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The "Offshoring" Controversy

- New term
- Refers to outsourced jobs/services, particularly skilled/high tech labor, to foreign countries
  - E.g., India, China, Philippines, Ireland
- Red Hot Political Issue
  - 2/9/04 statement of Gregory Mankiw, the chairman of the White House Council of Economic Advisers
  - Lou Dobbs Report "Exporting America"

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The "Offshoring" Controversy

- Also a real concern under HIPAA
  - "Your patient records are out in the open... so you better track that person and make him pay my dues."
    - SF Chronicle articles re: situation at UCSF with transcriptionist in Pakistan during summer 2003
  - Has generated…
    - Harsh editorials
    - Proposed CA law
    - Change in covered entities' approach?

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New HIPAA Wrinkles on Traditional Legal Issues

Labor and Employment Issues

- ## Traditional Issues:
  - Morale/culture shock issues
  - WARN Act
  - Unionized employees
    - Collective bargaining agreement issues/"Successor employer" issues
  - Employee benefits
  - Lay-off planning – potential for discrimination claims

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Labor and Employment Issues

- The HIPAA Wrinkle? "Workforce"
  - Choose to treat as workforce even if employed by the vendor (if onsite)?
  - Discipline for privacy/security violations?

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Assets

- Traditional Issues:
  - Assets to be transferred to vendor
    - Valuation of assets
    - Tax-exempt bond issues
    - Location of assets
  - Form of asset transfer
  - Asset refresh
  - Return of assets upon termination of relationship

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Assets

- The HIPAA Wrinkle?
  - Now: What representations and warranties is the vendor going to require you to give about hardware and software that you're transferring?

  - Later: What representations and warranties is the vendor willing to give about hardware and software that you're getting back?

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Third-Party Vendor Issues

- ## Traditional Issues:
  - Leased assets
  - Third party vendor consents
  - Continuing relationship

- ## The HIPAA Wrinkle?
  - Business associate subcontracting
  - Disclaimer of responsibility for anything provided by a third party

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Service Level Agreements

- Traditional Issues:
    - What can provider manage?
    - How are they related to cost structure?
    - What to measure? (availability/uptime; response time; accuracy; customer satisfaction)
    - When to measure? (daily, weekly, monthly; ramp up)
    - Who measures?
    - How to measure?

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Service Level Agreements

- The HIPAA Wrinkle?
  - Should you measure HIPAA compliance?
  - If so, how to measure HIPAA compliance?

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Term and Termination

- Traditional Issues:
  - How long? (often 5 to 10 years, trend towards shorter terms)
  - Termination for convenience?
  - "Step-in" rights
- The HIPAA Wrinkle?
  - The Business Associate "terminate or report" provision

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HIPAA-Specific Issues

HIPAA-Specific Issues

- Responsibility for Compliance
  - Particularly re: the Security Regulations and the TCS Regulations
  - Vendors often reluctant to take this on
  - If they don't, can you?
  - Complaints, lawsuits, and HIPAA penalties

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HIPAA-Specific Issues

- Security Compliance
  - Foundation of the Security Regulations is risk analysis and risk management
    - Is this part of your agreement?
    - If not, can you look to a change of law provision?

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HIPAA-Specific Issues

- Security Compliance
  - Policy & procedure development and implementation
  - Physical safeguards
  - Technical safeguards

  - What about addressable items?

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HIPAA-Specific Issues

- Other HIPAA Security Issues
  - Even if the vendor can and will do it, all of your ePHI may not be covered
  - Disaster Recovery
    - May be separated out but a critical HIPAA Security component

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HIPAA-Specific Issues

- Business Associate Agreements
  - Can be straightforward
  - Typical issues:
    - "Battle of the Forms"
    - Termination
    - Indemnification
    - Need for greater specificity on Security or TCS compliance?

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HIPAA-Specific Issues

- Trading Partner Agreements
  - Is the vendor your clearinghouse?
    - If so, need appropriate limitations on their ability to modify transaction formats and date code sets (per the Electronic Transactions & Code Sets (TCS) Regulations)
  - If not, what's the vendor's role in TCS?

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HIPAA-Specific Issues

- Other Related Concerns
  - Use of subcontractors
    - See discussion of "offshoring above"
    - An issue even if done within the US – how to ensure privacy and security are protected?

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HIPAA-Specific Issues

- Other Related Concerns
  - Evolving Federal and State law
    - E.g., CA S.B. 1386
    - What state law governs? What laws apply?
    - Remember "Change of Law"
  - Other Laws can accelerate obligations
    - DoD Requirements

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Summary

- Impact of HIPAA on Outsourcing
  - New wrinkles on traditional issues
  - New HIPAA-specific issues
  - Non-HIPAA privacy and security concerns on the rise
- Cannot consider HIPAA in a vacuum, but leave HIPAA out of the equation
- Need to carefully consider, and make appropriate allocation of, responsibility between covered entity and vacuum

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Q&A

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