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Health Care Privacy: Real Risks for all Employers Providing Health Care Benefits

By Kirk J. Nahra¹

This year's headlines on health care costs hardly seemed surprising. Higher premiums, rising costs, decreasing benefits, more rules.

So, efforts at reasonable cost control have to be a critical concern for any employer paying for health care benefits. And isn't the best way to control costs to focus on "health improvement" for all employees tailored to their own specific health care situation?

Despite this obvious focus, employers need to be aware that new federal privacy rules make these cost control efforts more difficult. And, employers need to recognize that these rules create substantial compliance obligations for any employer that provides health benefits – as well as risks from lawsuits and other employment-related problems.

What are the rules?

The new medical privacy rule (called the HIPAA Privacy Rule – from the Health Insurance Portability and Accountability Act) is the culmination of several years of efforts to achieve "administrative simplification" in the health care system. With a required movement towards standardized electronic health care claim processing, concerns about the privacy of personal health information led to mandate for a federal privacy standard for health information.

How does this affect Employers?

Unfortunately, the HIPAA Privacy Rule (issued by the Department of Health and Human Services ("HHS")) has created enormous confusion for employers that provide health care benefits. The key points for employers:

- One of HHS' primary concerns in structuring the rule was to ensure as much as possible that personal health information is not used by employers for employment-related decisions or used against an employee in connection with their employment.
- HHS had no authority to regulate employers directly. If so, perhaps a single rule that said "no employee health information can be used for employment-related purposes" would have been sufficient.

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- Instead, HHS regulated “group health plans”, which are the benefit plans that provide health care benefits to employees. For the most part, these group health plans must comply with the Privacy Rule to the same extent that a health insurer or large hospital must.
- HHS also placed stringent conditions on the flow of employee health information *from* the group health plan or the health insurer *to* the “plan sponsor,” creating an entire regulatory structure that is based on the non-existent practical distinction between the health plan itself and the employer that sponsors that health plan.

And therein lies the problem. The group health plan is a piece of paper, a formal contract required by statute, but typically nothing more. So, HHS has created a complicated set of rules based on this fiction that there is an actual separation between a plan sponsor and a group health plan. And, it developed an “all or nothing” approach that mandates full Privacy Rule compliance if essentially any employee health information flows to the plan or plan sponsor (with minor exceptions), even where an insurer handles virtually all of the work of operating a plan.

What should Employers be doing?

So, what is an employer to do?

- Understand your health plan

Employers must analyze what kinds of health care benefits are provided to employees. In general, the rule creates more obligations for employers that “self-fund” or “self-insure” their employee health care benefits. This is because HHS has assumed (for the most part correctly) that employers that “self-insure” have in their possession more health care information about their employees. Will this rule have the perverse result of discouraging employers from self-insuring their benefits?

- Be Reasonable

Employers should try to make some sense of the confusion created by the Privacy rule. Determine who represents your “group health plan,” and have those people – and only those people - engage in the “day-to-day” operations of the health plan.

- Recognize Health Information “Touchpoints”

Employers much review carefully all “touchpoints” for employee health information – meaning any point in your company where there is contact with employee health information. Does your company assist employees with questions about their health care coverage? Do you receive any reports from your insurer? What information do you collect on applications? Remember - from a privacy perspective, less information about employee health claims is always better. If employers can get by with no or limited health information about individual employees, privacy compliance obligations -- and risks -- decrease dramatically.

- Protect any employee health information you receive

Employers should remember that compliance with these rules is not the only consideration. “You violated my privacy” is going to be an increasingly loud refrain in employee litigation across the country, and there is a virtual certainty that most employers will not have been as thorough as they ought, in ensuring that all of HIPAA’s legal requirements have been met.

- Keep the Final Goal in Mind

The aim of all employers should be to understand these rules as best they can, and to structure their own benefit plans so that they can achieve as much compliance and protection as is realistically feasible. In every area where an employer receives health information, consider whether there is another way to obtain the information, without creating obligations or risks.

But employers also should not give up on cost control efforts and other means of having a company - and the employees – benefit from health information. The Privacy Rule is not intended to prevent use of health information – just to structure this use so that employees are not mis-treated based on this information. Smart, creative and open-minded efforts at improving employee health are still viable under the Privacy Rule – as long as employers can make reasonable sense about these rules and appropriately protect the health information of their employees.