

# **HIPAA Privacy:**

## **Key Challenges For Privacy Officers**

**Kirk J. Nahra**  
**Wiley Rein & Fielding LLP**  
**Washington, D.C.**  
**202.719.7335**  
**KNahra@WRF.com**

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# Key Issues

- HIPAA 301
- For covered entities, employers and business associates
- Key remaining issues
- Advice/issues to watch out for



# State of the Play

- Compliance is all over the map
- Major health insurers are generally in reasonable shape – “the leader of the behinds”
- Physicians are way behind
- Hospitals in reasonably good shape
- Groups/employers are way behind
- Many vendors/business associates are way behind



# NCVHS Letter/Comments

NCVHS/ (National Committee on Vital and Health Statistics) is an advisory body for HHS on HIPAA. Their recent comments:

- “Surprised and disturbed” at the generally low level of implementation activities and the high levels of confusion and frustration
- Many providers have never heard of HIPAA and do not think it applies to them
- Likelihood of “widespread disruption” of the health care system as we approach April 14, 2003



# NCVHS Letter/Comments

- Large employers with self-funded employee benefit plans have received no guidance on when their benefits-related activities are subject to the Privacy Rule
- “Nobody” seems to know whether HIPAA or state law applies in the numerous instances in which the laws conflict
- HHS HIPAA implementation assistance efforts need to be increased by several orders of magnitude – and quickly



# Member Rights

- Complicated
- Mainly for people with complaints
- Compliance and risk management
- Confidential communications



# Spouses

- Normal course of business
- Low percentage of problems
- High risk where problems occur



# Enforcement Issues -- Privacy Rules

- Complicated
- Extensive
- Ambiguous?
- Consistent?
- Relevant to real world?





# Privacy Enforcement

- Less government?
  - Civil
  - Criminal/a real risk?
- Patients/individuals
- Class Actions



# Enforcement

- Understanding where challenges will be
- Making smart decisions
- Keeping a good perspective
- Compliance vs. business vs. risk management



# Litigation Basics

- No HIPAA private right of action
- What could happen?
- Gramm-Leach-Bliley?
- Insurance practices/deceptive trade practices?
- Common law?
- State privacy laws



# Litigation – Next Steps

- Standard in the industry
- State deceptive trade practices
- Common law invasion of privacy
- Creativity



# Key Issues

- What is the claim?
- Who is it by?
- What are the damages?



# ***Smith v. Chase Manhattan Bank***

- Financial institution gave list to third party, received payments on sales
- Said it didn't do these things in privacy notice
- No damages alleged/no cause of action
- Only unwanted telemarketing



# Key Risk Areas

- Employment
- Marketing
- Spouses
- Individual rights
- Broadly applicable issues  
(code word – class action)



# Conclusions

- Government has fewer and weaker tools in privacy
- Government will be creative in pushing the envelope
- Private litigation will be substantial and creative





# Conclusions

- Private litigation probably more important
- Monetary implications are very unclear
- Pressure and adverse publicity are very important
- Some rule for whistleblowers/complaints



# Relations with Employers

- Very complicated
- At least confusing/perhaps inconsistent
- Major client relations issues
- Opportunities and challenges
  - Shift to fully insured?
  - Will customers abandon group health care?
  - New client opportunities?
  - Keep an eye on this



# Employer/Group Issues

- Rules make little sense
- Mass confusion
- Likelihood of mistakes
- Customer relations
- Will require significant changes



# *What Is The Issue?*

Avoid having PHI used by employers for employment-related purposes

- HHS' fix:
  - HHS does not directly regulate employers or other plan sponsors
  - Instead, HHS places restrictions on the flow of information from covered entities to non-covered entities, including plan sponsors



# *The Role of the Employer*

## Plan Sponsor

- Is the employer a plan sponsor of a group health plan (GHP)?
- Rule restricts flow of PHI between GHP and plan sponsor
- Minimal impact of rule on plan sponsor that receives summary health information for premium bid purposes or enrollment information



## Plan Sponsor (cont'd)

- Substantial impact of rule on plan sponsor that receives PHI
- Sponsor must amend and certify plan documents before receiving PHI – otherwise violation of HIPAA
- Amendments must spell out permitted uses and disclosures of PHI by sponsor



# Compliance Obligations For Health Plans

- If fully insured and receive only Summary Health Information (SHI) or enrollment information, very limited effects
- If (1) self-insured or (2) fully insured and get PHI, substantial obligations – full covered entity



# *Security*

- New Rule
- Relevant Dates
- Tie to Privacy – What are “appropriate safeguards?”





# Contract Types

- Business associate (privacy)
- Chain of trust (security)
- Trading partner (standard transactions)

Focus on understanding/analyzing overlaps



# Business Associates

- Who are they?
- When?
- What will you require of them?  
(requirements + options)
- Links to standard transactions



# Additional Issues

- Enforcement rules on business associates
- Potential responsibility beyond enforcement rule
- Customer/public relations aspects?
- Risks on timing (wolf in sheep's clothing)



# Preemption

- More stringent state law
- Other federal law
- No one understands this
- Strategy
- Multi-state issues
- How many states are you worried about?



# Misconceptions – Minimum Necessary

- Misunderstood
- Hard
- Extensive
- Mainly a documentation project
- Will it require changes?



# Misconceptions

## Consent and authorizations

- Who must sign
- Underwriting
- Convenience
- Customer issues



# *Getting Started on HIPAA*

- Audit of information use/practices
- Work HIPAA into contract negotiations/  
renegotiations
- Educate employees
- Educate business associates
- Educate providers



# Conclusions

- Still lots to do
- Very difficult balancing act
- Keep an eye on the lawsuits
- Be conscious of where people can complain – and where they may not
- Expect confusion
- An ongoing issue that will not be going away





# *Top HIPAA Reminders*

- HIPAA requires significant change by all segments of the health care industry – and all at once.
- HIPAA changes all aspects of the way covered entities do business
- The general public will scrutinize the health care industry more stringently because of HIPAA
- Need to educate customers on requirements/non-requirements

