

# HIPAA, Providers and Health Plans: What Does Your Provider Agreement Say?

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# Overview

- Who or What is Covered by HIPAA Administrative Simplification?
- What Must be Done to Comply?
- What Does Not Have to be Done to Comply?
- What to Do if Your Agreement Contains Inappropriate or Unnecessary Language?
- Case Study – Look at What One Plan Has Done!

# Health Plans

- Individual or Group Plan That Pays for the Cost of Medical Care, Includes:
  - Health Insurance Issuer
  - HMO
  - Medicare
  - Medicaid
  - Medicare Supplement Policy

# Health Plans

- Long Term Care Policies (Excluding Nursing Home Fixed Indemnity)
- Employee Welfare Benefit Plan
- Health Care Program for Active Military
- Veteran's Health Program
- CHAMPUS
- Indian Health Service Program

# Health Plans

- Federal Employees Health Benefits Program
- SCHIP
- Medicare+Choice
- High Risk Pool
- Any Other Individual or Group Plan or Combination

# Health Plans

- Excluded From Health Plans:
  - Policy, Plan, or Program to Extent it Provides or Pays for Benefits Excepted Under the PHS Act
  - A Government Funded Program (Other Than Those Listed) Whose Principal Purpose is Other Than Providing or Paying for Health Care or Direct Provision or Grants
  - Workers Compensation, Automobile, Property and Casualty Insurance

# Health Care Provider

- Provider of Services
- Provider of Medical or Health Services
- Provider of Health Care

# Health Care Provider

- Provider of Services
  - Hospital
  - Critical Access Hospital
  - Skilled Nursing Facility
  - Outpatient Rehab Facility
  - Home Health Agency
  - Hospice Program



# Health Care Provider

- Provider of Medical Services
  - Physician Services
  - Hospital Services
  - Diagnostic Services
  - Outpatient PT Services
  - Outpatient OT Services
  - Rural Health Clinic Services
  - Home Dialysis Supplies and Equipment

# Health Care Provider

- Provider of Medical Services Continued:
  - Self-Care Home Dialysis Support Services
  - Physician Assistant Services
  - Nurse Practitioner Services
  - Certified Nurse Midwife Services
  - Psychological Services
  - Clinical Social Worker Services
  - X-Ray Services

# Health Care Provider

- Provider of Medical Services Continued:
  - DME
  - Ambulance Services
  - Prosthetic Devices
  - Certified Nurse Anesthetist Services
  - Other Services, Which if Provided by Physician, Would be Considered Physician Services

# Health Care Provider

- Only Health Care Providers Who Transmit Health Information in Electronic Form in Connection With a Transaction Are Covered
- Electronic Does Not Include Facsimile

# Health Care Provider

- Transaction Means
  - Transmission Between Two Parties to Carry Out Financial or Administrative Activities
  - Includes
    - Health Care Claims
    - Health Care Payment and Remittance Advice
    - Coordination of Benefits
    - Enrollment and Disenrollment
    - Referral Certification

# Relationship of Providers & Plans

- HIPAA Privacy Rule
- What Uses/Disclosures are Permitted Under the Rule
  - Treatment, Payment, and Health Care Operations
  - Requiring an Opportunity to Agree or Object
  - For Specific Public Purposes
  - All Others Only as Authorized by Individual

# Payment Defined

- Utilization Review Including
  - Precertification
  - Concurrent & Retrospective Review
- Review of Services Regarding
  - Medical Necessity
  - Appropriateness of Care
  - Justification of Charges
- Determinations of Coverage

# Health Care Operations Defined

- Certain Quality Assessment and Improvement
- Reviewing Competence of Health Professionals
- Accreditation and Credentialing
- Medical Review
- Fraud and Abuse Detection Programs
- Certain Customer Services



# Business Associates

- Include Contractors & Agents
- Perform on Behalf of Covered Entity Functions Involving Use/Disclosure of Identifiable Health Information
  - E.g., Quality Assurance or Data Analysis
- Perform Services Involving Identifiable Health Information
  - E.g., Accreditation or Consulting

# Identifying Business Associates

- Formal Definition
  - Person Who on Behalf of Covered Entity or OHCA Performs or Assists in Activity Involving Use or Disclosure of PHI
    - Including Claims Processing, Data Analysis or Processing, Billing, Etc.
- Or
  - Who Provides Legal, Actuarial, Accounting, Consulting, or Similar Services Involving Use or Disclosure of PHI
- Not a Workforce Member

# Not Business Associates

- Covered Entities

- May Be Considered a Business Associate of Another Covered Entity
- If Acting as Business Associate, and Makes Mistake, Then DHHS Will Treat as Covered Entity and Not Business Associate

# Business Associate Agreements

- Set Permitted Uses & Disclosures
- Provide the Business Associate Will:
  - Make No Other Uses/Disclosures Unless Required by Law
  - Use Appropriate Safeguards
  - Report to CE Any Other Uses/Disclosures
  - Upon Termination, Return, Destroy or Limit Further Use
  - Other Requirements -- Access, Amendment & Accounting

# Business Associate Agreement Terms

- Make PHI Available for Access
- Make PHI Available for Amendment and Incorporate Amendments
- Make PHI Available to Prepare Accounting
- Compliance with DHHS Investigation
- Return, Destroy, or Safeguard PHI

# Business Associate Agreement

- Covered Entity Must Be Able to Terminate if Violation
- Covered Entity Must Attempt to Mitigate or Cure Breach, and Report to DHHS

# Business Associate Agreement Additions

- Permit BA to Use or Disclose PHI to Provide Data Aggregation Services
  - Combining PHI From One Covered Entity, with PHI of Another to Prepare Data Analysis That Relates to Operations of the Respective Covered Entities

# Business Associate Agreement Additions

- BA May USE PHI
  - Proper Management and Administration
  - Carry Out Legal Responsibilities
- BA May DISCLOSE PHI
  - Proper Management and Administration
  - Carry Out Legal Responsibilities
  - Reasonable Assurances Obtained



# Unnecessary HIPAA Language Found in Provider Agreements

- Business Associate Language
  - Is There a BA Relationship?
- Contractual Language That Goes Beyond Business Associate Requirements
  - Indemnification
  - Specific Procedures That Are Not Required by HIPAA
- Imposition of Policies and Procedures on a Smaller Provider
  - Meant for Another Plan or Larger Provider
  - Goes Against the Grain of HIPAA Being a 'Flexible' Regulation, Not One Size Fits All)
- Requiring More Than 'Minimum Necessary' Disclosures

# Unnecessary HIPAA Language Found in Provider Agreements

- Third Party Beneficiary Language Written After the Proposed Privacy Rule But Not Updated After Final Regs
- Requiring Provider to Pay Penalty if Plan Has to Amend its Records
- More Stringent Language Than What State or HIPAA Requires Because Plan Operates in Several States and Wants to Use One Form Contract
  - E.g., Across the Board Requirements That Minors 12 and Over Must Execute Authorization Before Parents Access the Child's PHI

# Why is Unnecessary Language Showing Up in Provider Agreements

- Plan Includes Additional Clauses as an Extra Layer of Protection
- Plan is Misinformed/Confused About HIPAA's Requirements
- Contract is Old and Has Not Been Updated
- Plans Drafting Contracts Without Checking with HIPAA-Savvy Counsel
- Plan is Using a Form Contract Without Taking Into Account That it Does Not Fit All Providers Equally
  - BA Language Where No BA Relationship
  - Imposing Obligations of a Large Provider on a Small Provider

# Unnecessary Business Associate Language

- Health Plans Including Language Imposing Business Associate Requirements Upon Providers
  - Not Applicable to Traditional Payor-Provider Relationship
  - PHI Exchanged for Payment Purposes
  - Provider Not Conducting Activities on Behalf of Plan
    - Not Plan's Agent or Representative

# Unnecessary Policy and Procedure Language

- Plan Imposing Strict Requirements on Use and Disclosure of PHI
  - HIPAA Not “One Size Fits All”
  - Smaller Providers Not Required to Implement Complex and Expensive Procedures
  - Security Rule Expressly Recognizes Addressability Concerns
    - Overridden by Plan’s Requirements?

# Unnecessary Disclosures

- Minimum Necessary Governs Amount of Information Released for Payment and Health Care Operations
  - Plans Demanding Additional Information
  - Contractually Bypass HIPAA Restrictions on Use or Disclosure?

# Unnecessary Language Based Upon Prior Versions of Rules

- Third Party Beneficiary Language
  - Language That Was Required Under the Proposed Privacy Rule, But Not Included in Final Regulation
  - Plan Included in Early Versions of Agreements and Never Removed

# Unnecessary Language Regarding HIPAA-Imposed Duties on Plan

- Plans Demanding Payment or Penalties if Provider Amends Medical Record as Required Under Privacy Rule
  - Plan Required Under HIPAA to Incorporate Amendments to PHI
  - Cost-Shifting
  - Provider May Not Charge Patient Fee for Amendment – How Can Plan?



# Unnecessary Language Relating to Multi-State Operations

- Plans Imposing Overly Burdensome Requirements Due to Operations in Multiple States
  - E.g., Requiring Minor Authorization Where “Minor” Defined Differently in Other States (Age: 13, 18, 21?)
  - Under HIPAA Each State’s Laws Govern Parental/Personal Representative Access
  - Requiring Parent of Minor to Obtain Minor’s Authorization Prior to Access, etc. Violates HIPAA

# Why You Do Not Want This Language in a Provider Agreement

- You Are Agreeing to Contractual Obligations Beyond What is Required by Law
- Putting Obligation in Contract Creates a Contractual Right
  - Breach of Contract Action
  - Private Right of Action That Did Not Exist
- Increases the Plan's Legal Risks as Well as the Provider Who Needs to Comply
  - Signed Contract with BA Language, Now Plan Obligated Under HIPAA to Enforce HIPAA
  - For Instance to Report Provider Who Violates
- Creates Undue Administrative Burdens on Both Parties
- Unnecessarily Limits the Use and Disclosure of PHI

# Case Study

- What One Plan Has Done – Get a Load of This One!

# What to Do About It

- Use Other Tools if Available
  - For Instance, Plans Cannot Force Physicians to File Claims Electronically if Not Required Under HIPAA
- Try to Work With/Educate Plan
- Go Higher Up the Ladder – Legal Department
  - Explain Not Good for Either Party
- If That Does Not Work, Do Cost/Benefit and Risk Assessment Regarding the Relationship

# Questions?

- Please Feel Free to Ask Now or After the Session

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