

**Davis Wright Tremaine LLP** 

# **Case Study: Small Group Health Plan HIPAA Privacy Compliance for Employers**

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## **Case Study: Happy PT**

- **Happy Physical Therapy Associates**
- **Approximately 100 employees**
- **Operations in two states**
- **Self-insured medical/vision**
- **Insured dental; two insurers**
- **Health Flexible Spending Account**
- **EAP**



# Case Study: Happy PT

## Happy PT Goals:

- **HIPAA Compliance**
- **Limited Budget**
- **Employee-Friendly**



# Approach to HIPAA

- 1. Covered entity analysis – Employer and Plan**
- 2. Information flow analysis – determination of contact with PHI**
- 3. Identification of internal compliance tasks**
- 4. Address Use and Disclosure: business associate and other contractors**



# **Covered Entity Analysis: Employers**

- **What about Employers?**
- **Employers are not Covered Entities simply because of their status as employers**
- **Employers have unique responsibilities**
  - **As the fiduciary of a Group Health Plan**
  - **As a Plan Sponsor under Privacy Rules**



# Covered Entity Analysis: Health Plan

- Includes any individual or group plan, private or governmental, that provides or pays for medical care (including employer-sponsored group health plan)
- Essentially, in employer context, employee welfare benefit plan under ERISA
- Includes self-insured and insured plans
- Except self-administered employee health plans with fewer than 50 participants
- Except for some but not all “excepted benefits”



# Covered Entity Analysis: Health Plan

## Covered Plans

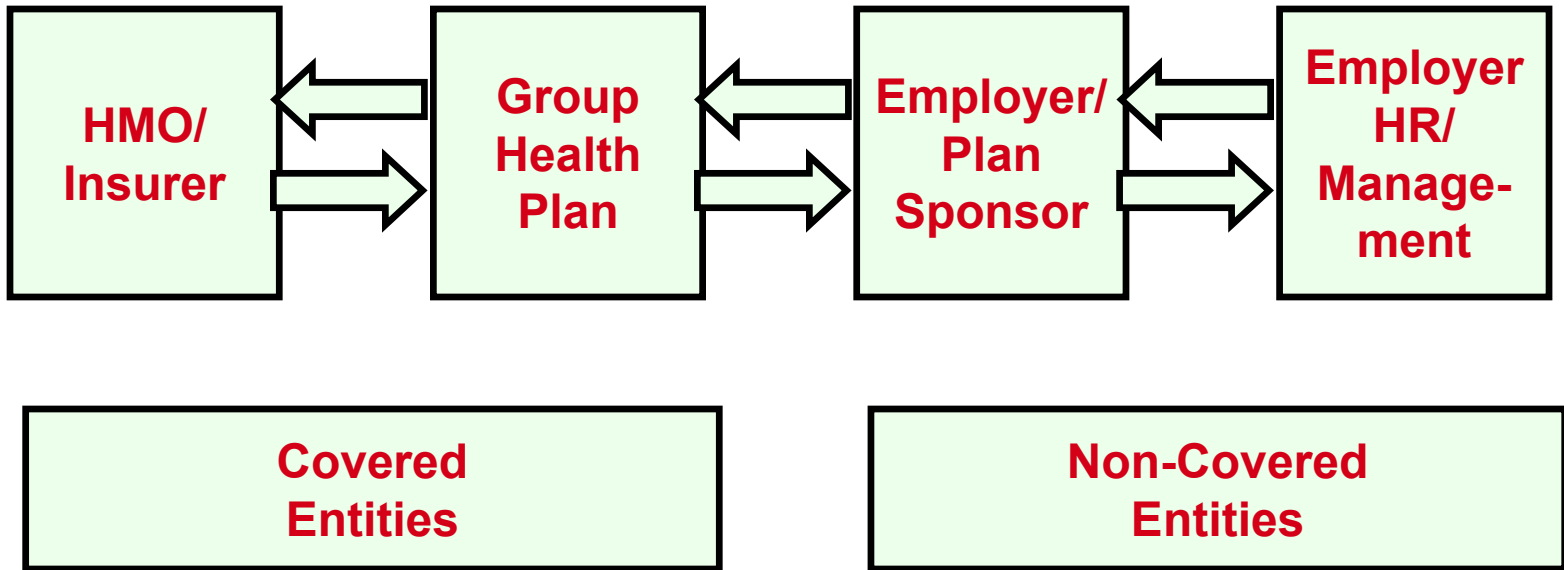
- Medical Benefit Plans
- Long-Term Care
- Dental Plans
- Vision Plans
- Prescription Drug Plans
- Most EAPs
- Health FSAs

## Excluded

- Life Insurance
- AD&D
- STD and LTD
- Worker's Compensation
- Auto Insurance
- Stop Loss/ Reinsurance
- Other Property/ Casualty



# Covered Entity Analysis







# **Covered Entity Analysis: Small Health Plan**

- **Small Health Plan**
  - **Less Than \$5,000,000 in receipts**
    - **Insured Plan = Premiums**
    - **Self-Insured Plan = Benefit Claims Paid Out**
    - **Insured/Self Insured = Blend**
    - **Prior Fiscal Year**
  - **Compliance Date: April 14, 2004**



## **Case Study: Covered Entity Determination**

- **100 Employees**
- **\$900,000 in Receipts**
- **Small Group Health Plan**



# Information Flow

- **Identify where protected health information goes, and why**
- **Determine whether plan sponsor is hands-on or hands-off PHI**
- **Fully Insured Plans that receive no PHI**
  - **No Individual Rights**
  - **No Administrative Procedure**



# **Compliance Tasks: HIPAA Privacy Rule**

- **Creates individual rights with respect to health information**
- **Mandates administrative actions for covered entities**
- **Imposes use, disclosure and receipt requirements for health information**



## **Basic Compliance Tasks**

- **Appoint Privacy Official**
- **Amend Plan Documents (if necessary)**
- **Prepare Notice of Privacy Practices**
- **Business Associate Contracts**
- **Reasonable Policies and Procedures**
- **Varies depending on Information Flow**



# Individual Rights

- **Right to Adequate Notice of Privacy Practices**
  - **How much detail?**
  - **Readability**
- **Right to Access Health Information**
- **Right to Request Amendment of Health Information**
- **Right to an Accounting of Disclosures**
- **Right to Request Restriction of Uses and Disclosures**
- **Right to Request Restrictions Communicating Health Information**



# Administrative Procedures

- **Covered Entities must have policies, procedures and systems in place to protect health information and individual rights.**
- **Designation of a privacy official**
- **Complaint mechanism/contact person**
- **Privacy training for employees**
- **Safeguards to prevent misuses of protected health information**
- **Sanctions for employee violations**



# Use and Disclosure: Plan Sponsor

- **Generally, plan sponsor may only receive PHI from group health plan to carry out plan administrative functions if**
  - **Amends plan documents**
  - **Controls flow of PHI**
  - **Issues a certification to the group health plan about protections for PHI**
- **Amendments and certification must:**
  - **Establish uses and disclosures of PHI by plan sponsor**
  - **Ensure adequate separation between group health plan and plan sponsor**
- **Permitted disclosures to plan sponsor must be described in plan's privacy notice**





# Use and Disclosure: Plan Sponsor

- If plan sponsor does not make required changes to plan document and practices or does not certify that it has done so
  - Plan may only disclose “summary information” to plan sponsor to obtain premium bids for insurance coverage or to modify, amend or terminate the plan



## **Case Study: Amend Plan**

- **One Plan Amendment**
- **Self-Insured Medical Plan**
- **Health FSA**
- **EAP**
- **Insured Dental Plans**

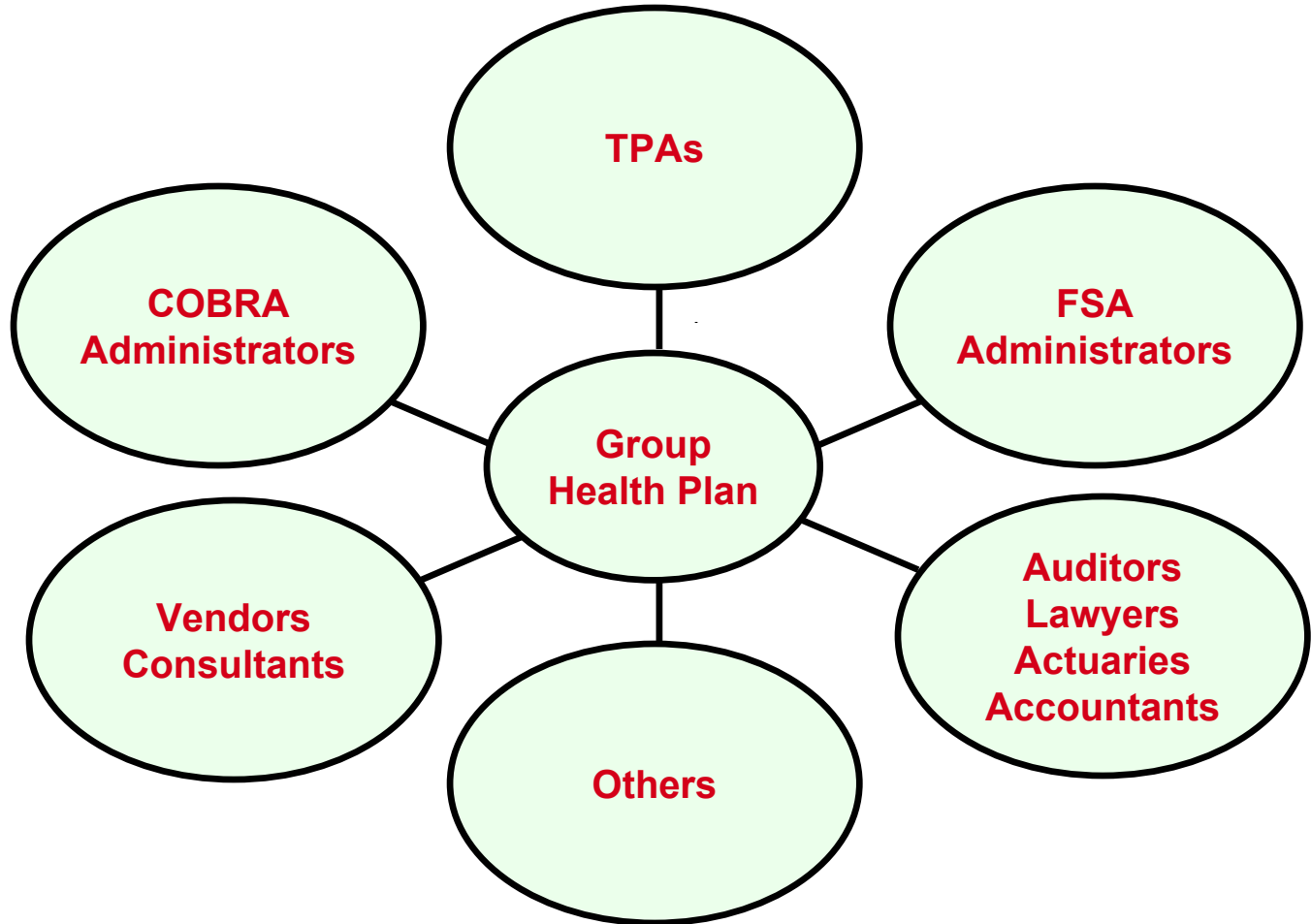


## **Use and Disclosure: Business Associates**

- **May disclose PHI to its business associates if it obtains satisfactory assurances, through written contract, that the business associate will appropriately safeguard the information.**
- **Specific requirements for business associate contract**



# Use and Disclosure: Business Associates





# **Case Study: Business Associate Contracts**

- **Medical Plan TPA**
- **Health FSA TPA**
- **EAP – Health Care Provider**
- **Template for Attorneys, Accountants and Others**
- **Broker?**



# Penalties

- **Civil penalties**
  - **\$100 per violation**
  - **\$25,000 annual cap for violations of “identical” requirement**
- **Criminal penalties**
  - **For profit/with malice: up to \$250,000 and/or 10 yrs in jail**
- **Other “penalties” or liability**
  - **Standard of care**
  - **Reputation**
  - **ERISA**
  - **Breach of fiduciary duties**



## **Don't Forget**

- **Analyze implications of Standard Transactions and Code Set Rules**
  - **Plans must be able to accommodate standard transactions if requested**
  - **Get commitments from insurance carriers/ TPAs**
- **Security Regulations**
  - **Beware mini-security rule in Privacy Regulations**
- **State Law**



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# Questions

