

Eighth National HIPAA Summit

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PreConference I: HIPAA Boot Camp: The Basics of HIPAA for Providers, Health Plans, Employers and Patients

Employer and Group Health Plan Issues

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HIPAA and Employers

- Only Certain Health Care Providers, Health Plans, and Health Care Clearinghouses Are Covered Entities
- Employers Not Generally Covered Unless Fall Under Above Definitions
- Caveat: Medical Information Provided to Employers and Employer Sponsored Group Health Plans

Employment Records and PHI

- Definition of Protected Health Information (“PHI”) Specifically Excludes:
 - Employment Records Held by a Covered Entity in its Role as Employer
 - 45 C.F.R. § 165.501
- Example: Drug Testing or Fitness for Duty
 - Must be Provided to CE in Capacity as Employer
 - If Conducting Testing, Must Get Authorization to Transmit to HR
- Example: Professional Sports Teams’ Player Information

Employer Issues

- Covered Entity May Disclose to an Employer About an Employee or Workforce Member of Employer, If:
 - Covered Entity is a Covered Health Care Provider Who is a Member of the Employer's Workforce or Who Provides Health Care to Employee or Member At Request of Employer to
 - Conduct Evaluation Relating to Medical Surveillance of Workplace; or
 - Evaluate Whether the Employee or Member Has a Work-Related Illness or Injury
 - 45 C.F.R. § 164.512(b)(v)

Employer Issues

- The PHI Disclosed Concerns a Work-Related Illness or Injury or Work-Related Medical Surveillance; or
- The Employer Needs Findings for OSHA Requirements; and
- Notice is Provided to Employee or Member
 - By Giving a Copy of Notice of Privacy Practices, or
 - Posting of Notice if in Same Worksite
 - 45 C.F.R. § 164.512(b)(v)

Group Health Plan

- Definition of Health Plan Includes:
 - Employee Welfare Benefit Plan or any Other Arrangement that is Established or Maintained for the Purpose of Offering or Providing Health Benefits to the Employees of Two or More Employers
 - 45 C.F.R. § 160.103

Group Health Plan

Group Health Plan

- Means an Employee Welfare Benefit Plan (as Defined Under ERISA), Including Insured and Self-Insured Plans to Extent the Plan Provides Medical Care to Employees or Their Dependents, Directly or Through Insurance, That:
 - Has 50 or More Participants; or
 - Is Administered by a Third Party
 - 45 C.F.R. § 160.103

Third Party Administrators

- Third Party Administrator Not Generally a Covered Entity Under HIPAA
 - Most Likely Considered a Business Associate of Group Health Plan
 - DHHS FAQ No. 365

Group Health Plan

- Plan Sponsor means:
 - The Employer if a Single Employer;
 - The Employee Organization;
 - Where Two or More Employers or Employee Organizations, the Association, Committee, Joint Board, or Other Similar Representatives Who Establish or Maintain the Plan
 - 29 U.S.C. § 1002(16)(B)

Group Health Plan as Small Health Plan

- Many Group Health Plans Fall Under Definition of Small Health Plan
 - Means a Health Plan with Annual Receipts of \$5 Million or Less
- Small Health Plan Compliance Deadline is April 14, 2004
 - 45 C.F.R. § 164.534(b)

Group Health Plan – Flexible Spending Accounts/Cafeteria Plans

- According to DHHS:
 - To the Extent That a Flexible Spending Account or a Cafeteria Plan Meets Definition of an Employee Welfare Benefit Plan Under ERISA and Pays for Medical Care, It Is a Group Health Plan
 - Unless It Has Fewer Than 50 Participants and Is Self-administered
 - DHHS FAQ No. 421

Group Health Plan – Flexible Spending Accounts/Cafeteria Plans

- FSA or Cafeteria Plan Could Be Considered Group Health Plan
 - Fully Insured or Self Insured?
 - Summary Health Information or PHI?
 - To Extent Qualifies, Must Satisfy Group Health Plan Requirements

Group Health Plan

- Business Associate Requirements
 - Generally Covered Entity may Only Disclose to a Business Associate PHI, or Allow Business Associate to Create or Receive PHI, if Agreement
 - Requirement Does Not Apply to Disclosures by a Group Health Plan or Insurer, to the Plan Sponsor if Other Requirements Met
 - 45 C.F.R. § 164.504(f)

Disclosures for Group Health Plan

- To Disclose PHI to Plan Sponsor or
- To Permit Health Insurer or HMO to Disclose PHI to Plan Sponsor
- Must Ensure Plan Documents Restrict Uses and Disclosures
 - 45 C.F.R. § 164.504(f)(1)(i)

Disclosures for Group Health Plan

- Group Health Plan, Insurer, or HMO May Disclose Summary Health Information to Plan Sponsor for
 - Obtaining Premium Bids From Health Plans for Providing Health Insurance under Group Plan
 - Modifying, Amending, or Terminating the Group Health Plan
- Group Health Plan or Insurer or HMO May Disclose Enrollment Information to Plan Sponsor
 - 45 C.F.R. § 164.504(f)(1)(ii), (iii)

Disclosures for Group Health Plan

- Summary Health Information
 - Summarizes Claims History, Claims Expenses, or Types of Claims Experienced by Individuals for Whom the Plan Sponsor Provided Benefits Under the Group Health Plan
 - Must Exclude Most Identifying Features, But Not Truly De-Identified
 - Geographic Information May be Aggregated to 5 digit Zip Code Level
 - 45 C.F.R. § 164.504(a)

Disclosures for Group Health Plan

- Amendment of Plan Documents
 - Permitted and Required Uses and Disclosures
 - Certification by Plan Sponsor:
 - Not Further Use or Disclose PHI
 - Subcontractors Comply
 - NOT Use or Disclose for Employment Decisions
 - Report Any Breach
 - Make PHI Available for Access, Amendment & Accounting
 - Make Records Available for Investigation
 - Return or Destroy PHI
 - 45 C.F.R. § 164.504(f)(2)(i), (ii)

Disclosures for Group Health Plan

- Adequate Separation Between Group Health Plan and Plan Sponsor
 - Plan Sponsor Employees Who Will Access
 - Only for Plan Administration Functions
 - Mechanism for Complaints/Noncompliance
 - 45 C.F.R. § 164.504(f)(2)(iii)

Group Health Plan Uses and Disclosures

- Group Health Plan May:
 - Disclose PHI to Plan Sponsor for Plan Administration Functions Consistent with Above
 - Not Permit an Insurer or HMO to Disclose PHI to Plan Sponsor Except as Provided Above
 - Not Disclose or Permit Insurer or HMO to Disclose PHI to Plan Sponsor Unless in Notice of Privacy Practices
 - Not Disclose PHI to Plan Sponsor for Employment Related Actions
 - 45 C.F.R. § 164.504(f)(3)

Group Health Plan – Other Uses or Disclosures

45 C.F.R. § 164.506(a)

- Use and Disclosure for Treatment, Payment, and Health Care Operations (“TPO”)
 - Covered Entity Generally May Use and Disclose PHI for TPO
 - No Consent – Now Notice of Privacy Practices
 - Treatment
 - Use or Disclose to Any Provider
 - Payment
 - Use or Disclose Minimum Necessary to Any Other

Group Health Plan -- Other Uses or Disclosures

45 C.F.R. § 164.501

- Health Care Operations
 - Quality Assurance Activities
 - Quality Assessment and Guidelines, Case Mgmt.
 - Professional Competency Activities
 - Accreditation, Credentialing, Licensing
 - Insurance Activities
 - Underwriting, Premium Rating
 - Compliance Activities
 - Fraud and Abuse Compliance
 - Business Activities
 - Legal, Auditing, Business Planning, Sale of Practice

Group Health Plan – Other Uses or Disclosures

45 C.F.R. § 164.514

- De-Identified Information
 - Not PHI
 - May Statistically Determine That PHI has Been De-Identified
 - Qualified Individual Offer Professional Conclusion
 - Mathematically Not Identifiable

Group Health Plan – Other Uses or Disclosures

- De-Identified Information Safe Harbor
 - Names
 - Geographic Subdivisions
 - Dates
 - Telephone Numbers
 - Facsimile Numbers
 - Email Address
 - Social Security Numbers
 - Medical Record Numbers
 - Health Plans Numbers

Group Health Plan – Other Uses or Disclosures

- De-Identified Information Safe Harbor
 - Account Numbers
 - License Numbers
 - Vehicle Identifiers
 - Device Identifiers
 - URLs
 - Internet Addresses
 - Biometric – Finger and Voice Prints
 - Facial Photographs
 - Etc.

Authorization

45 C.F.R. § 164.508

- Elements
 - Meaningful Description of PHI
 - Identify Entities or Class Disclosing
 - Identify Entities or Class Receiving
 - Purpose
 - Expiration Date or Event
 - Individual's Rights – Revocation
 - Marketing = Remuneration
 - Dated and Signed

Authorization

- Typically Cannot Condition Treatment Upon Execution
- Allowed to Condition if for Third Party – Fitness for Duty, etc.
- Health Plan May Condition for Underwriting or Risk Rating
- Provider May Condition for Research

Authorization

- Psychotherapy Notes Require
- Marketing Requires
- Research Typically Requires
- Any Use or Disclosure Not Addressed by the Rule

Other Uses or Disclosures Requiring Opportunity to Object

45 C.F.R. § 510

- Covered Entity may Use or Disclose PHI in Limited Situations Based Upon Informal Permission
- Disclose to Family Members, Relatives, Individuals Identified Who Are Involved in Care or Treatment
- Use or Disclose for Facility Directory to Anyone Asking for by Name, Clergy

Opportunity to Object

- Permission in Advance
- No Documentation Required
- If Emergency, May Disclose to Those Involved in Care, if Professional Judgment Exercised
- Covered Entity May Release X-Rays, Rxs, Supplies to Person Acting on Individual's Behalf, if Professional Judgment

Other Uses or Disclosures Without Opportunity to Object

45 C.F.R. § 164.512

- Covered Entity Must Verify Identity of Requester and Authority
- Where Required by Law
- Public Health Activities
 - Reporting Disease
 - Reporting Vital Statistics
 - Reporting to FDA
 - Reporting to Employer
 - Reporting Communicable Diseases

Disclosures Without Objection

- Victims of Abuse, Neglect, or Domestic Violence
 - Reasonably Believes and Required/Allowed by Law
 - No Consent or Notification From/to Individual if Danger
 - Notice to Personal Representative Unless Harm

Disclosures Without Objection

- Health Oversight Activities
 - Audits
 - Civil or Criminal Investigations
 - Not Where Individual's Health is at Issue

Disclosures Without Objection

- Law Enforcement
 - Where Required by Law
 - Information Must be Relevant
 - Minimum Necessary Disclosed

Disclosures Without Objection

- Decedents
 - Disclose to Coroners, Medical Examiners, and Funeral Directors to Carry out Duties
- Organ, Eye, or Tissue Donation
 - Use or Disclose PHI to Procurement Organizations

Disclosures Without Objection

- Research Purposes
 - Must Satisfy Conditions With Respect to IRB Waiver
- To Avert Serious Threat to Public
- Certain Specialized Governmental Functions: National Security, VA, Military, Secret Service
- Workers Compensation Act

Disclosures to Attorneys

- Subpoenas
 - Notice and Opportunity to Object or Move for Qualified Protective Order (“QPO”)
 - QPO Not a Good Choice
 - Would Appear to Require Return or Destruction
 - No “Not Feasible” Language in the Order

Subpoenas

- Proposed Procedure
 - Notice Letter to Patient/Patient's Attorney
 - Allow for Reasonable Time (14 Days) to File Objection
 - Dispute Over Notice to Attorney Only?
 - Upon Conclusion of Time Period Send Subpoena, Copy of Notice Letter, and Cover Letter to Covered Entity
 - One Package, Not Waiting on Objections

Group Health Plan Notice of Privacy Practices

- Individual Enrolled in a Group Health Plan Has Right to Notice:
 - From Group Health Plan if no Insurer of HMO, i.e., Self Insured
 - From Insurer or HMO if Fully Insured
 - 45 C.F.R. § 164.520(a)(2)

Group Health Plan Notice of Privacy Practices

- Group Health Plan Which is Fully Insured and Creates or Receives PHI Above and Beyond Summary Health Information and/or Enrollment/Disenrollment, Must:
 - Maintain Notice of Privacy Practices
 - Provide Notice Upon Request
- If Group Health Plan is Fully Insured and Only Summary Health Information, Then No Notice Required
 - 45 C.F.R. § 164.520(a)(2)

Group Health Plan Administrative Requirements

- Group Health Plan Which is Fully Insured and Creates or Receives Only Summary Health Information and/or Enrollment/Disenrollment Has Only Limited Administrative Obligations
 - 45 C.F.R. § 164.530(k)(1)

Group Health Plan Administrative Requirements

- Fully Insured Group Health Plan Not Required to:
 - Designate Privacy Officer
 - Train Workforce
 - Implement Safeguards
 - Complaint Process
 - Sanctions for Workforce
 - Mitigate Violations
 - Implement Policies and Procedures
 - Only Maintain Documentation of Amended Plan Documents
 - 45 C.F.R. § 164.530(k)(1),(2)

Group Health Plan Personal Rights

- Privacy Rule Does Not Explicitly Exclude Group Health Plans Which Are Fully Insured and Receive Only Summary Health Information From Personal Rights Obligations
 - Access, Amendment, Accounting, Restrictions, Confidential Communications
 - Guidance States Are Excluded
 - 65 Fed. Reg. 82645 (December 28, 2000)

Access to PHI

45 C.F.R. § 164.524

- Individual Has Right of Access and Inspection
- No Right to Psychotherapy Notes, Information Compiled for Legal Proceeding, or Exempt Under CLIA
- May Deny Without Review if For Above, if For Inmate, if During Research, if Under Privacy Act, or if Obtained From Another Party

Right of Access

- Must Provide Review if Refused Due to Endangerment, Due to Mention Another Person, or if Access by Personal Representative a Danger
- Response to Request Within 30 Days + 30 Day Extension
- If Reasonable, Must be in Requested Format or Summary if Acceptable; Cost-based Fee

Denial of Access

- Provide Access to Non-Objectionable PHI
- Written Denial, in Plain Language, of Basis and Complaint Process
- Notify Individual of Location if Not With Covered Entity

Right to Amendment

45 C.F.R. § 164.526

- Individual May Request Amendment to PHI
- Covered Entity May Deny if Not Its Record, Not Available for Access, or if Accurate
- Covered Entity May Require That in Writing and Provide Reason
- 60 Day Time Limit + 30 Day Extension

Acceptance of Amendment

- Covered Entity Must Amend/Append Record
- Covered Entity Must Notify Individual
- Covered Entity Must Notify Third Parties and Business Associates of Amendment

Denial of Amendment

- Must Provide Individual With Written Denial
- Provide Individual to Submit Statement in Disagreement
- Copies Sent Out to Third Parties
- Covered Entity May Submit Rebuttal Statement

Accounting of Disclosures

45 C.F.R. § 164.528

- Right to Listing of Disclosures During Prior 6 Years, or Less if Specified
- Excluded
 - For TPO
 - To Individuals
 - Incidental Disclosures
 - If Authorization
 - For Facility Directory or Care or Notification
 - National Security or Law Enforcement
 - Prior to April 14, 2003

Providing the Accounting

- Date of Disclosure
- Name of Party Receiving
- Description of PHI
- Brief Statement of Purpose for Disclosure or Copy of the Request
- 60 Day Time Limit + 30 Day Extension

Request for Restriction on Use or Disclosure of PHI

45 C.F.R. § 164.522(a)

- Request for Restrictions on Any Aspect
- Covered Entity Need Not Comply with Request
- If Agree, Then may Not Disclose Except in Emergency
 - Must Obtain Assurance from Recipient That Will Not Further Disclose
 - Not a Bar to Disclosures for Facility Directory
- May Terminate Orally if Documented and Post-PHI Only

Confidential Communications

45 C.F.R. § 164.522(b)

- Individual May Request Alternate or Confidential Communications
 - Binding Upon Covered Entity if Reasonable
- Providers May Not Request Reason
- Health Plans May Request Reason and Only Comply if Endanger Individual
- May Require Payment Arrangements

Conclusion

- Non-Health Care Employers Still May Be Caught Up in HIPAA
 - Obtaining Health Information from Covered Entities
 - Group Health Plans
- Necessary for All Interested Parties to Learn of the Promise and Pitfalls of the Privacy Rule

Conclusion/Questions

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