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MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

DO YOU NEED TO KNOW ABOUT HIPAA?

The Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulates protected health information. The Privacy Rule applies directly to "covered entities" – health plans, health care providers who electronically transmit health information in standard transactions, and health care clearinghouses. The Rule also applies indirectly to "business associates" – any person or organization (other than a member of the covered entity's workforce) who performs or assists a "covered entity" in a function or activity that involves the use or disclosure of individually identifiable health information. Examples of "business associates" include lawyers, accountants, actuaries, consultants, and anyone who provides services to the "covered entity" to help it carry out its health care functions and whose services involve access to protected health information.

SCOPE OF THIS ARTICLE

This article discusses the impact of the Privacy Rule of HIPAA on lawyers who represent clients that are not "covered entities" and gives a brief overview of the impact of HIPAA's Privacy Rule on lawyers who represent "covered entities." A review of how to advise "covered entities" on compliance with HIPAA is outside the scope of this article.

HIPAA AND LAWYERS

The impact of HIPAA on lawyers will vary widely depending on the lawyers' type of practice. HIPAA will have the greatest impact on lawyers who advise "covered entities" on HIPAA compliance. HIPAA will also impact lawyers who advise "business associates" such as accountants, actuaries, consultants, and billing services. HIPAA also impacts lawyers who obtain and use medical records in the course of representing their clients – such as medical records in personal injury, domestic relations, or guardianship cases – because authorizations for release of records and subpoenas must now be HIPAA compliant. In addition, lawyers who provide other legal services involving protected health information, such as malpractice defense or employment advice, are also affected by HIPAA.

EFFECTIVE DATE

Generally, the effective date for compliance with HIPAA's Privacy Rule was April 14, 2003.

PURPOSE OF THE RULE

The primary objective of HIPAA's Privacy Rule is to set a federal floor of safeguards for the confidentiality of protected health information. Insurers, government agencies, and data processing vendors are now able to "speak" with each other electronically in a more uniform and efficient way. This improved access to patient information also created concerns about patient privacy. As a result, Congress directed the Department of Health and Human Services to adopt privacy protections for individually identifiable health information. The final rules were published on August 14, 2001, and most "covered entities" had until April 14, 2003 to comply.

COVERED ENTITIES

The term "covered entity" includes:

DISCLAIMER

THIS NEWSLETTER INCLUDES CLAIM PREVENTION TECHNIQUES THAT ARE DESIGNED TO MINIMIZE THE LIKELIHOOD OF BEING SUED FOR LEGAL MALPRACTICE. THE MATERIAL PRESENTED DOES NOT ESTABLISH, REPORT, OR CREATE THE STANDARD OF CARE FOR ATTORNEYS. THE ARTICLES DO NOT REPRESENT A COMPLETE ANALYSIS OF THE TOPICS PRESENTED AND READERS SHOULD CONDUCT THEIR OWN APPROPRIATE LEGAL RESEARCH.

(1) Health plans (both insured and self-insured);

(2) Health care clearinghouses (includes billing services and community health management information systems); and

(3) Health care providers that conduct certain transactions in electronic form.

Many entities obtain individually identifiable health information; however, many are not "covered entities" under HIPAA. Some examples of entities that are not regulated by HIPAA include:

(1) Workers' compensation carriers;

(2) Schools;

(3) Employers (as distinguished from employer-sponsored health plans);

(4) Labor unions; and

(5) Life insurers.

COVERED INFORMATION

"Protected health information" is "individually identifiable health information" that:

(1) Is transmitted or maintained in any form or medium, including oral and paper;

(2) Is created or received by a covered entity (or employer);

(3) Relates to past, present, or future (i) physical or mental health (ii) provision of care or (iii) payment for care; and

(4) Can be identified with an "individual."

Protected health information does not include educational records covered by the Family Educational Rights and Privacy Act or health records held by a covered entity in its role as an employer.

HIPAA'S IMPACT ON OBTAINING PATIENT MEDICAL RECORDS BY AUTHORIZATION

A patient's written authorization to disclose medical information is required when a covered entity wants to use or disclose the protected health information for purposes other than treatment, payment, or health care operations. The HIPAA regulations specify the terms of the authorization. All authorizations must include:

(1) A specific and meaningful description of the information to be used and/or disclosed;

(2) The name or other specific identification of the person(s) or entity authorized to make the requested use and/or disclosure;

(3) The name or specific identification of the person(s) or entity to whom the use and/or disclosure will be made;

(4) A description of each purpose of the requested use or disclosure ("at the request of the individual" is a sufficient "description of the purpose");

(5) An expiration date, or an event that will trigger expiration of the authorization;

(6) A statement of the individual's right to revoke the authorization in writing, including exceptions to such written revocation, and an explanation of how the individual can exercise his or her revocation rights;

(7) A statement that the information to be used and/or disclosed may be subject to re-disclosure by the recipient of the information, in which case it is no longer subject to the Privacy Standards;

(8) The individual's signature and date; and

(9) If the signature belongs to an individual's legal and/or authorized representative, a description of that person's authority to act on behalf of the individual.

HB 2305 (2003) repeals ORS 192.525 and replaces its statutory form of authorization for release of medical records with one intended to be HIPAA compliant. HB 2305 (2003) is likely to take effect by the end of May, depending on when the Governor signs it.

OBTAINING RECORDS BY COURT ORDER OR PROCESS

A covered entity may disclose protected health information in the course of any judicial or administrative proceeding provided the disclosure is authorized by a court order or in response to a HIPAA-compliant subpoena, discovery request, or other lawful process that provides the covered entity with "satisfactory assurances" from the party seeking the information that the individual who is the subject of the information has been given notice of the request, or that "reasonable efforts" have been made

to secure a "qualified protective order." The requirement of "satisfactory assurances" can be satisfied by written documentation that:

(1) The requesting party has made a "good faith attempt" to provide written notice to the subject of the information;

(2) The notice provided sufficient information about the proceeding to permit the individual to raise an objection; and

(3) No objections were raised or they were resolved in favor of disclosure by the court or tribunal.

A "qualified protective order" is an order from a court or administrative tribunal or a stipulation by the parties that prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding and requires the return or destruction of the information (including all copies) at the end of the litigation or proceeding.

HIPAA requirements for a subpoena go beyond those formerly in ORCP 55. HIPAA-compliant amendments to ORCP 55 become effective with the enactment of HB 2305 (2003). These amendments require documentation demonstrating compliance with HIPAA, including notice to the individual whose records are sought and the fact that the individual does not object. The text of the proposed amendments can be found in the February 3, 2003, Oregon Appellate Courts Advance Sheets, 2003-3, page A-11.

EMPLOYMENT RECORDS NOT SUBJECT TO HIPAA

HIPAA expressly excludes employment records from the definition of protected health information. Thus, medical information *needed for the employer to carry out its obligations* under the ADA, FMLA, and other similar laws is not considered protected health information. These records may include records or files related to occupational injury, disability insurance eligibility, sick leave requests and justification, drug screening results, workplace medical surveillance, and fitness for duty tests.

LAWYERS ADVISING BUSINESS ASSOCIATES

A business associate is a third party (i.e., not a member of the covered entity's "workforce") that provides services or performs functions for a covered entity that involve the creation, use, or disclosure of protected health information. The Privacy Rule specifically mentions the following services: legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, financial services, claims processing, utilization review, quality assurance, billing, benefit management, practice management, and repricing.

Before a business associate obtains protected health information from a covered entity to help that entity carry out its health care functions, the parties must execute a "business associate agreement" to ensure that all protected health information disclosed to the business associate or generated by it will be appropriately safeguarded. The written agreement also establishes the permitted and required uses and disclosures for personal health information. The "business associate agreement" must provide that the business associate will:

(1) Disclose no information other than as permitted or required by contract or law;

(2) Use appropriate safeguards to prevent use or disclosure of the information "other than as provided for by contract";

(3) Report to the covered entity any use or disclosure not permitted by the contract;

(4) Ensure that any agents or subcontractors to whom the business associate provides protected health information agree to the same restrictions and conditions;

(5) Make available protected health information to which an individual has a right of access under the regulations;

(6) Make available protected health information for amendment at the request of an individual as provided under the regulations;

(7) Make available information required for an accounting of disclosures as provided for under the regulations;

(8) Make available to the Secretary of the Department of Health and Human Services "internal practices, books, and records relating to the use and disclosure of protected health information" for the purposes of determining the covered entity's compliance with the regulations; and

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(9) Return or destroy all protected health information (if feasible) and retain no copies at the termination of the contract.

LAWYERS AS BUSINESS ASSOCIATES

Are lawyers who advise covered entities always, sometimes, or never "business associates"? The answer depends on the kind of information the lawyer is given in order to provide the legal services. Some legal services to "covered entities" will ***not*** involve "protected health information." However, if the legal services require the lawyer to have "protected health information," the lawyer will be a "business associate" of the covered entity. Advising a hospital, medical provider, or health plan on malpractice litigation is one example and representing a "covered entity" on collections – if the lawyer receives billing information or information about services performed – is another. If the legal services you provide to a "covered entity" involve receiving protected health information, then you will most likely be asked to sign a "business associate agreement" – or your client may inquire about the issues. If you are a "business associate," you will need to adhere to all of the criteria referred to in the "Lawyers Advising Business Associates" section of this article. In addition you should keep in mind the following:

(1) Be sure that your scope of services is clear. Does the client expect you to provide advice about whether the client needs to enter into a business associate agreement with you? This is especially likely to occur with well-established clients who view you as their attorney for everything. Since you would be on the opposing side of the agreement, you would have to advise your client to get independent legal advice on the issue of whether an agreement is required.

(2) If the "covered entity" asks you to draft the "business associate" agreement (or wants to use one that you have) – be sure to document that you are not representing the covered entity on the agreement and that you advised the covered entity to get legal advice on the document.

(3) If you sign a business associate agreement, carefully review and analyze all indemnification provisions in the agreement. ***You do not have PLF coverage for contractually assumed liability***. (See page 4 – *HIPAA FAQ*.)

(4) If you are using a business associate agreement, be sure that its scope is adequate so that you have the permission you need to properly represent your client. For example, does the business associate agreement allow you to show the protected health information to witnesses, introduce them as exhibits in depositions, and make other disclosures necessary to represent the client?

(5) Consider what file organizing and file retention precautions are required by HIPAA. The HIPAA laws were not written with lawyers in mind and there presently is no explanation about whether lawyers must alter the way they copy or store medical records. The HIPAA rules require return or destruction of the protected health information at the end of the engagement – unless return or destruction is not "feasible." Many lawyers interpret their retention of protected health information as within this "not feasible to return or destroy" exception – and believe that compliance with the ethical rules properly protects the "protected health information." There presently is no rule, case, or other guidance on this issue.

ADDITIONAL RESOURCES

For additional information and resources, check the websites listed in *HIPAA Web Resources*. (See sidebar.)

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