

JOB Law

WHAT EVERY EMPLOYER SHOULD KNOW ABOUT THE HIPPA PRIVACY RULE

The Health Insurance Portability and Accountability Act (“HIPAA” or “Act”) was enacted in August 1996. The Department of Health and Human Services (“HHS”) issued a proposed version of the Standards for Privacy of Individually Identifiable Health Information, known as the Privacy Rule, in 1999. On August 14, 2002, HHS issued the final version of the Privacy Rule. Starting April 14, 2003, any entity that is subject to HIPAA, with the exception of small health plans, must comply with the Privacy Rule.

What is the Privacy Rule?

The Privacy Rule is a series of regulations that limit the release of “protected health information” (“PHI”) by “covered entities,” including health plans, health care clearinghouses, and some health care providers. PHI, with some exceptions, includes any information that is individually identifiable and that relates to an individual’s physical or mental condition, the provision of health care, or payment for the provision of health care.

Before a covered entity may use or disclose PHI, the entity must notify individuals of the uses and disclosures the covered entity may make regarding the individuals’ PHI; the individuals’ rights; and the legal duties of the covered entity. A covered entity is not allowed to disclose or use an individual’s PHI in a way that contradicts or is inconsistent with the notice. In certain circumstances, a covered entity must obtain

authorization or provide an opportunity to orally object to the use or disclosure of PHI before the disclosure can be made. For example, a covered entity must obtain an individual’s authorization before it may use or disclose PHI for marketing purposes. In addition, the consensus among HIPAA experts seems to be that generally an individual must also authorize a covered entity’s use or disclosure of PHI when such PHI is used or disclosed for purposes other than treatment, payment, or health care operations.

The Privacy Rule also affords individuals the opportunity to dispute or request changes to their PHI. For example, an individual could request that factual inaccuracies be changed in his or her health records. Although requested changes are not mandatory, this provision gives individuals significantly more control over their health information.

Who must comply with the Privacy Rule?

The Privacy Rule applies to all health plans, health care clearinghouses, and qualifying health care providers. The Rule applies to employers that sponsor self-administered group health plans with at least 50 participants.

Even companies that are not technically “covered entities” may be affected by the Privacy Rule. For example, any employer who sponsors but does not self-administer its group

health plan and who seeks PHI from the group health plan must amend its plan documents to comply with the rule. Necessary amendments to the plan documents include the establishment of permissible and required uses and disclosures of PHI and a certification that the plan documents have been amended to incorporate a list of requirements outlined in the Privacy Rule.

Some analysts believe that the Privacy Rule will be deemed to apply to employers who seek medical information about their employees in response to FMLA and ADA requests, as well as to those employers who require employee drug testing, pre-employment physicals, or return to work duty examinations. While employment records held by an employer in *its role as an employer* are not properly considered PHI, employers should be aware that seeking medical information as it pertains to FMLA requests, ADA requests, drug tests, etc. *from its group health plan* is likely to trigger the Privacy Rule. Employers ought to receive their employees’ authorizations to obtain medical information before seeking that information. Additionally, employers should establish protocols for safeguarding any medical information they receive about their employees. For example, employers ought to keep any medical information regarding an employee separate from employee personnel files.

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What are the penalties for non-compliance with the Privacy Rule?

At the recently held Sixth National HIPAA Summit in Washington, D.C., representatives from the Office for Civil Rights, which is the entity responsible for enforcement of the Privacy Rule, indicated that imposition of penalties for noncompliance of the Rule will be complaint driven. Thus, failure to comply is not likely to automatically result in the imposition of penalties. In fact, even if a covered entity is not in complete compliance with the Privacy Rule, the Office for Civil Rights has indicated that it

intends to provide those who have failed to comply with the Rule with technical assistance in order to achieve compliance. While covered entities should have been compliant with the Rule on April 14, the imposition of civil monetary penalties, at least initially, is questionable.

However, the implementation of the Privacy Rule gives rise to a strong possibility that private citizens will become more aware of their privacy rights and more sensitive to violations of those rights. While there is no private cause of action for

violations of HIPAA, many states have privacy laws which do allow private lawsuits.

Conclusion

The Privacy Rule is an extremely complicated set of regulations with many nuances. The consensus among the experts at the Sixth National HIPAA Summit held on March 27 and 28, 2003 was that there is no consensus on the full reach and scope of the Privacy Rule. Nevertheless, Summit attendees agreed that HIPAA is here to stay.

LGN EMPLOYMENT LAW DEPARTMENT NEWS



Susan Ellingstad recently completed certified mediation training and has begun mediating cases in addition to advising and defending employers in litigation. Please call Susan if you

need a mediator to assist you with a workplace dispute or in resolving litigation.

Upcoming Seminars

On May 29, 2003, **Susan Ellingstad and Patricia Bloodgood** will once again serve as faculty at the Upper Midwest Regional Employment Law Institute, the largest employment law conference in the country.

Their topic?
The Tougher Requests for Accommodation.

The good news for our clients with questions about HIPAA is that LGN associate, **Rachel Delich**, recently attended the HIPAA "boot camp" which preceded the Sixth National HIPAA Summit in Washington, D.C. Rachel also attended the two day HIPAA Summit. If you have any questions about HIPAA or the Privacy Rule, feel free to contact Rachel at (612) 339-6900 or by e-mail at rcdelich@locklaw.com



Rachel C. Delich

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If you would like to receive this newsletter via e-mail or you have questions or comments, please contact Rachel Delich at rcdelich@locklaw.com.

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