Employer Sponsored Group Health Plans and HIPAA

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Employers and HIPAA

- Employers are not covered entities

- HIPAA Privacy Rule does not apply to employers except to the extent they may otherwise be covered entities
Employer Sponsored Group Health Plans

- ERISA Plans, Church, Municipalities
- Self Insured: Sponsor Takes Risk
- Administered by TPA or ASO
- Approximately 155 million workers and their dependents are covered by an Employer Sponsored Group Health Plan
- =52% US Workers
Caught in the Net!

- Employer Sponsored Group Health Plan is a Covered Entity
- Challenges:
  - Identifying Covered Entities
  - Plan Administration
  - Sponsor Role
  - Business Associates
  - Impact and Scope
Company XYZ must create a firewall between its employees who are authorized to use and disclose PHI and those who are not.

**MOST COMPANY XYZ PERSONNEL**

XYZ Company Personnel authorized to use and disclose PHI:

**HUMAN RESOURCES**
- HR Director
- Benefits Manager
- HR Analyst (outside firewall)

**FINANCE**
- Controller
- Accounts Payable
- Payroll (outside firewall)

Arrows indicate Company XYZ personnel perform some plan administration functions using PHI. Company XYZ must amend the GHP and FSA plan documents to permit such activities pursuant to the HIPAA Privacy Rule § 164.504(f)

Company XYZ sponsors group health plan

GROUP HEALTH PLAN

Group Health Plan and FSA are created by plan documents but exist without their own employees

FLEXIBLE SPENDING ACCOUNT

Third Party Administrator

Other Business Entities

Company XYZ contracts with TPA to perform claims administration and may contract with other related entities.
Employer Sponsored Group Health Plans and HIPAA

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Employer Sponsored Group Health Plans and HIPAA

HIPAA-Covered Health Plans

- Employee welfare benefit plans subject to ERISA that provide medical care.
- Any other individual or group plan that provides or pays the cost of medical care (the “catch-all” provision).
- Health insurance issuers.
- HMOs.
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HIPAA Health Plan Exclusions

- Accident or disability coverage.
- Workers’ compensation or similar insurance.
- On-site medical clinics.
- Similar insurance coverage, specified in regulations, under which medical benefits are secondary or incidental to other benefits.
ERISA Employee Welfare Benefit Plans

- What is the ERISA “plan”?
  - Cast of characters – the plan document, the plan sponsor, the plan administrator, the participants and beneficiaries, third-party administrators (“TPA”), insurers and HMOs.

- ERISA “wrap” plans.
  - Single versus multiple plans.
  - Non-medical benefits excluded under the “to the extent” language.

- Exception: Less than 50 participants and self-administered by the employer.
• Includes insured and self-insured benefits.

  • Health plan not responsible for compliance for “insured” benefits –
    • “To the extent” that the benefits are provided through an insurance contract with an insurer or HMO; and
    • Health plan receives no PHI (SHI and enrollment information allowed).

  • Benefits must be underwritten by an insurer licensed in the U.S. or provided by a state-regulated HMO.

  • “Wrap plans” that include self-insured and insured benefits – No BAA required for insurer or HMO.

  • Stop-loss coverage – not a health plan
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Types of Benefits Covered by HIPAA

- Medical and dental benefits.
  - Employees and retirees.
- Vision benefits.
  - Fixed rate does not equal insured.
- Employee assistance programs (“EAP”).
  - Covered under HIPAA as ERISA plan (unless referral-only) or under catch-all provision.
  - Fixed rate does not equal insured.
  - Embedded EAP benefits.
Employer Sponsored Group
Health Plans and HIPAA

Types of Benefits Covered by HIPAA (cont.)

• Health flexible spending accounts (“FSA”).
  - Self-insured requiring compliance by employer.

• Health reimbursement arrangements (“HRA”).

• Health savings accounts (“HSA”).
  - HSA analyzed separate from the HDHP.
  - HSAs not ERISA plans, but may be covered under the catch-all provision.

• Supplemental medical benefits.
  - Cancer policies and hospital indemnity benefits.
  - Typically insured benefits.
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Types of Benefits Covered by HIPAA (cont.)

• Texas nonsubscriber workers’ compensation plans.
  • Covered by ERISA, but should be excepted from HIPAA as “similar” to workers’ compensation.
I have identified my employer’s HIPAA-covered health plans. Now what?
Overview of HIPAA Compliance

- Amend plan documents.
  - What is the plan document?
  - What if there is no plan document?
  - Plan sponsor certification.
- Adopt P&Ps.
  - Business associate agreements.
  - All TPAs and other service providers.
- Notice of privacy practices.
  - Distribution only to named insured / participant.
  - No signature requirement.
Overview of HIPAA Compliance (cont.)

- Appoint privacy official and contact official for complaints.
- Train employees involved in “administration of the health plan.”
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Plan Administration Functions

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Employer Sponsored Group Health Plans and HIPAA

How does HIPAA apply to a single-employer self-funded group health plan?

- The plan sponsor ≠ the plan.
- The plan sponsor has employees; the plan does not have employees.
- Plan activities are conducted on behalf of the plan by the plan sponsor and/or BAs.
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How does HIPAA apply to a single-employer self-funded group health plan (cont.)?

- The plan sponsor is not directly regulated.
- 45 CFR 164.504(f) lists conditions that must be met before a plan is permitted to disclose PHI to a plan sponsor.
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What is a disclosure of PHI by a group health plan to the plan sponsor?

- A disclosure of PHI by a third party administrator (or other BA) to an employee of the plan sponsor is treated as a disclosure on behalf of the plan to the plan sponsor...and is subject to the conditions listed in 45 CFR 164.504(f).
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- Who is permitted to use PHI?
  - One of the conditions imposed on disclosures by a plan to a plan sponsor is that the plan document must identify the employees of the plan sponsor who are permitted to access PHI (the “firewall group”).
Who is permitted to use PHI (cont.)?

- Only the firewall group may access PHI, except...
  - A special rule allows disclosure of enrollment information to employees outside of the firewall group.
  - The implication is that enrollment information may be used by a plan sponsor (outside of the firewall) for, e.g., payroll, QMCSOs and NMSNs, and COBRA.
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How can PHI be used?

- A group health plan may disclose PHI to the firewall group in order for the firewall group to carry out “plan administration functions.”
- The firewall group is permitted to use PHI for plan administration functions...and nothing else.
- Plan administration functions are limited to payment and health care operations activities.
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What plan administration functions are typically performed by the firewall group?

- Participant assistance.
- Financial and administrative oversight.
- Claims and appeals.
- HIPAA compliance.
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- How might a third party administrator assist with HIPAA compliance?
  - Client education.
  - Proactive approach to BAAs.
  - Sample documents (e.g., plan amendment, NPP).
  - Direct administration of HIPAA rights.
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Is a plan sponsor required to be able to send or receive standard transactions?

– No.

• The plan sponsor ≠ the plan.
• The firewall group ≠ the plan. (The firewall group acts on behalf of the plan but that is not the legal equivalent of being the plan.)
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The Privacy Rule’s Scope and Impact

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The Privacy Rule’s Scope

- Individually identifiable health information (IIHI) does not become protected health information until it comes under the control of a covered entity such as a health plan or health care provider.

- Exception -- Employment records containing IIHI such as Drug Tests, Pre-employment Physicals, Absentee Notes, Restricted Duty Notes, Plant Manager’s Log of On-Duty Injuries are not PHI even if held by a covered entity.
# The Privacy Rule’s Scope

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The Privacy Rule’s Scope

- For example, assume that an employee is injured at home, and the employer calls his doctor to find out his condition, which is PHI, for return to work purposes.
- If the provider is a covered entity, she must consider whether, and how, the Privacy Rule – as well as more stringent state laws – permit this disclosure.
- Non-covered entities, such as an employer, generally must present the covered entity with a HIPAA compliant authorization from the individual in order to obtain PHI.
Privacy Rule’s Scope

- If the provider discloses the employee’s condition to the employer, then the employer may redisclose without any Privacy Rule restriction because this exchange occurred outside the group health plan firewall.

- If the employer obtains the PHI from a non-covered entity, such as a family member of the employee, in this example, there are no Privacy Rule implications.

- Of course, other federal and state laws may militate against redisclosure depending on the circumstances.
The Privacy Rule’s Impact

Participant Advocacy

- Employers are often asked to help employees navigate their health plans

HHS Position from 12/28/00 Preamble:
The final rule does nothing to hinder or prohibit plan sponsors from advocating on behalf of group health plan participants or providing assistance in understanding their health plan. Under the privacy rule, however, the plan sponsor could not obtain any information from the group health plan or a covered provider unless authorization was given.
The Privacy Rule’s Impact

- **Other acceptable approaches**
  - Amend plan documents to permit such disclosures consistent with § 164.504(f)
  - Three way telephone or face to face conversations in which employee consents to employer’s participation (§ 164.510(b))
  - A covered entity, in any event, may listen to the employer
    - The restriction, after all, is on disclosure of PHI by the covered entity
The Privacy Rule’s Impact

Obtaining stop loss quotes

- Stop loss insurers require PHI from the group health plan in order to quote coverage.
- The employer’s employees within the firewall created by the plan documents may make this disclosure (health care operations).
- If the employer hires a broker to conduct the bidding process/make the disclosure, the broker must sign an agreement containing representations of compliance with the plan document amendments.
The Privacy Rule’s Impact

Penalties

- HHS stated in its interim enforcement rule that HIPAA’s civil penalties fall only on covered entities.

- However, the U.S. Justice Department has made no similar pronouncement limiting the scope of the criminal penalties.
QUESTIONS?

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