



Quarterly

Your Keys to *Compliance*

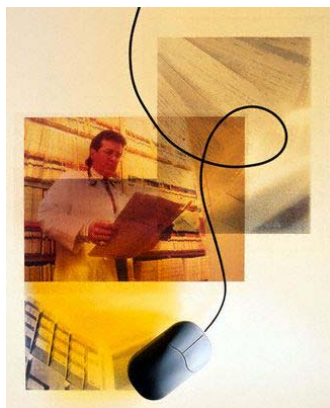


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Just say NO to PHI!

Many employers are concerned about compliance with the privacy aspects of the Health Insurance Portability and Accountability Act (HIPAA). As is often the case with new federal mandates, there is some confusion regarding an employer's actual obligations under HIPAA.



considered to be a covered entity under the privacy guidelines. The primary reason that an employer (other than those involved in the healthcare industry) may be required to comply with HIPAA is because they operate a health plan. It is the health plan that is required to comply with HIPAA.

The first common misconception about HIPAA privacy is that it applies directly to employers. In fact, employers are not

Courts are already expanding the reach of HIPAA.

Recently, a New York-based automobile insurance fraud scheme was prosecuted under HIPAA. This scheme involved staging car accidents and then filing false claims for reimbursement under no-fault automobile insurance policies. In the trial, prosecutors successfully used the HIPAA anti-fraud statutes to convict the guilty parties. Prior to this ruling, many HIPAA experts did not consider a no-fault auto policy to be a health plan. When the case was appealed, the appellate court upheld the trial court's verdict and asserted that the no-fault policy did fall under the definition of a health plan under the HIPAA statutes.

While this case does not have a direct impact on employers, it does demonstrate the salient point that the courts may continue to expand the scope of HIPAA privacy laws.

The greatest burden that HIPAA privacy rules place upon a health plan is the protection of PHI (Protected Health Information). PHI is essentially any information, whether written, electronic or oral, that identifies an individual and their health or health benefits. Some common examples of PHI are health information contained in enrollment forms or applications, Explanation Of Benefit forms (EOB) or claim data.

At this time, information that is directly related to employment is not considered PHI and therefore is not covered under HIPAA privacy rules. Only records which are retained by an employer that relate to the health plan are considered PHI. Other medical records such as those related to the Family and Medical Leave Act (FMLA) or Americans with Disabilities Act (ADA), while not specifically covered by HIPAA, should still be maintained in locked files and vigorously protected.

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New Fair Pay Overtime Rules to take effect!



U.S. Secretary of Labor Elaine L. Chao recently announced the final regulations

governing overtime eligibility for "white-collar" workers under the Fair Labor Standards Act. The regulations had not been substantially updated for over 50 years, creating confusion for workers and employers, generating wasteful class action litigation, and failing to effectively protect workers' pay rights.

The new rules expand the number of workers eligible for overtime by nearly tripling the salary threshold. Under the old regulations, only workers earning less than \$8,060 annually were guaranteed overtime. Under the new rules, workers earning \$23,660 or less are guaranteed overtime. The new rules should help employers classify employees properly and help reduce both complaints to the DOL and employee related lawsuits. The rule is scheduled to go into effect on August 23, 2004.

To provide even stronger overtime protection for workers, the FairPay rules add new sections that clearly state that "blue-collar" workers, police officers, fire fighters, paramedics, emergency medical technicians, and licensed practical nurses are entitled to overtime protection.

The Department of Labor has set up a website to help employers understand these changes. <http://www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm>

"Just Say No to PHI" Continued...

Given the risks associated with non-compliance, employers, particularly those that are fully-insured, may be asking "Why would we even want PHI in the first place?" This perspective leads to a pro-active risk management strategy for HIPAA privacy compliance. "Just say no to PHI".

Typically, in a fully-insured benefit plan, the employer pays a premium to an insurance company which then handles the actual administration of the plan and payment of claims. In such a scenario, the employer typically has no actual need to come into contact with PHI. The primary burden of compliance has essentially been shifted to the insurance company.

It is, however, ultimately the plan sponsor's (employer's) responsibility to ensure compliance. Employers should work with reputable insurance companies that have taken all of the appropriate measures to comply with HIPAA.

Employers also need to evaluate what, if any, PHI they receive. In many cases, the employer may reduce their exposure to HIPAA violations by taking themselves "out of the PHI loop." Some common strategies are:

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- **Send sealed applications directly to the insurance company.** If the insurance company does not provide sealed applications, provide the employee with an envelope in which to place the application, and send the application (in the sealed envelope) directly to the carrier.
- **Do not request or accept PHI from the insurance company.** In most cases, the insurance company will not provide PHI but if they do, you most likely do not need or want it. HIPAA regulations allow plan sponsors to receive Summary Health Information (SHI) which should be sufficient when shopping for replacement coverage.
- **Resist the temptation to assist employees with claims problems.** As part of your "Just say no to PHI" risk management strategy, you should not directly assist employees with claim problems. Any information which you receive while assisting the employee could be PHI. Some employers have provided their employees with a private area where the employee can contact the insurance company directly to resolve the claim problem.

While this is one risk management strategy for HIPAA compliance, it may not be right for every employer. Employers that self-administer any aspect of their insurance program, such as a Flexible Spending Account or those which self-insure, may be unable to avoid PHI. In these circumstances, the employer should consult with legal counsel to determine what steps should be taken to ensure HIPAA compliance for their plan

