

**T**he privacy regulations under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") establish a definition of the term "business associate" which can be broken down into a checklist to be used by any health care organization that is considered a "covered entity" in order to identify its business associates.

**First: Does the service provided by the person or entity involve the disclosure to them of protected health information ("PHI") by your organization?**

A person or entity will qualify as a business associate only if the provision of such service involves the disclosure of PHI from your organization (or, if your organization participates in an organized "health care arrangement" then from such organized health care arrangement), or from another business associate of your organization (or the arrangement), to the person or entity.

Thus, the threshold question in your analysis of whether a person or entity is a business associate of your organization should be whether PHI is disclosed to the person or entity in the course of providing such service. If not, then the entity is eliminated from consideration as a business associate.

**Second: Is the person a member of your organization's workforce?**

Members of your organization's "workforce" are not considered business associates. So you once you identify who constitutes your organization's workforce, you can eliminate them from consideration as well.

**Third: Does the service provided by the person or entity fit within the definition of a business associate?**

There are two categories of services the performance of which may qualify a person or entity as a business associate of your organization.

(a) Do the services involve the person or entity performing or assisting in the performance of a function or activity on behalf of your organization, or, on behalf of an organized health care arrangement in which your organization participates? Examples may include claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, billing, benefit management, practice management, and repricing. OR

(b) Does the person or entity perform any of the following types of services for your organization or an organized health care arrangement in which your organization participates: legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services?

Don't forget that other covered entities (i.e. providers, health plans or health care clearinghouses) can be business associates of your organization.

However, other members of an organized health care arrangement in which your organization participates do not become business associates of your organization simply through the performance of a qualifying service for or on behalf of the organized health care arrangement.

Also keep in mind that your organization may be the business associate of other covered entities for which it meets the description above (i.e. on behalf of which it performs services, or to or for which it performs any of the other enumerated services). Below are examples of potential business associate relationships that are analyzed using the above

checklist:

**A third party administrator that manages your organization's employee health benefits, or billing:**

- The third party administrator will very likely be dealing with PHI in the regular course of performing either the health benefits or billing service.
- Since the third party administrator is an outside entity performing services under a contract with your organization, it will not be a member of the organization's workforce.
- The services to be performed by the third party administrator, administration of employee health benefits and billing, would both be services performed on behalf of your organization. Therefore, such a relationship would be a business associate relationship under the privacy regulations.

**A health plan processing payment for services provided by a health care provider:**

- The health plan will very likely be dealing with PHI in the regular course of processing payment.
- Since the health plan is an outside entity performing services under a contract with the health care provider, it will not be a member of the provider's workforce.
- The health plan is not processing payment "on behalf of" the provider, but rather on behalf of the patients who are receiving treatment from the provider. Additionally, processing payment is not one of the services enumerated in the list contained in paragraph (b) of the third item of the checklist. Since the health plan fails the third prong of the test, it is not a business associate of the provider. However, if the health plan is performing utilization review on behalf of the provider, the health plan will be considered a business associate of the provider. (In some cases, it may not be clear whether a health plan is performing utilization review on behalf of a provider, or on its own behalf, but if the

provider has requested such utilization review, it qualifies as a business associate.)

**Physicians with admitting privileges at a hospital:**

- The physician will very likely be dealing with PHI in the regular course of providing treatment to patients at the hospital.
- The physician may or may not be a member of the organization's workforce, depending on how the hospital decides to characterize the relationship. (The hospital has the option under the privacy regulations to characterize non-employed medical staff as business associates of the hospital, as members of an organized health care arrangement with the hospital, or, if such medical staff perform a substantial portion of their activities on the hospital's premises, as members of the hospital's workforce. Of course, different obligations and liability issues are imposed on the hospital depending on which characterization it chooses.)
- The physician's treatment of patients would arguably be on behalf of the patient, rather than the hospital. However, an argument can also likely be made to result in the physician being considered a business associate.

Because this important threshold decision may have a variety of implications for your organization, you may wish to discuss the pros and cons of each option with counsel.

---

Linda A. Malek is a partner at Moses & Singer LLP and chair of the healthcare practice group. She can be reached at [lmalek@mosessinger.com](mailto:lmalek@mosessinger.com). Tara Bradley is an associate in the firm.

---

**MOSES & SINGER LLP**

1301 AVENUE OF THE AMERICAS  
NEW YORK, NY 10019-6076  
212.554.7800 FAX: 212.554.7700  
[WWW.MOESSINGER.COM](http://WWW.MOESSINGER.COM)  
[WWW.HEALTHLAWTODAY.COM](http://WWW.HEALTHLAWTODAY.COM)