

## Why Employers Have to Pay Attention to the HIPAA Privacy Rule

By David Rabinowitz & Linda Abdel-Malek

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The **HIPAA (Health Insurance Portability and Accountability Act of 1995) Privacy Rule**, creating a whole new set of rules for the protection of individuals' health information, contains a definition of the term "covered entities." "**Covered entities**" includes health care providers, health plans and health care clearinghouses. It does not include employers. So why does this article, about why **employers have to pay attention** to the HIPAA Privacy Rule, continue beyond this first paragraph?

It is because even though only "covered entities" are legally covered by the HIPAA Privacy Rule, as a practical matter, entities that are not "covered entities" are also going to be affected by the Rule and many, if not most, employers will be among them. If you are an employer with a **group health plan** for your employees, and that group health plan either has more than 50 participants or someone besides you administers it, that group health plan is a "covered entity," with **important implications** for you.

Generally, employers can be affected, as employers, by the HIPAA Privacy Rule if they act as "**plan sponsors**" of the group health plan. (Employers can also be affected by the HIPAA Rule if they provide services to "covered entities" in such a way as to become "**business associates**" under the Rule, but this article only considers employers in their role as employers.)

Employers with group health plans for their employees can handle them in two ways: they can take part in **managing them**, or they can farm the whole job out to an **insurer or HMO**. Many will take part in managing their group health plan and thereby must be aware of their obligations as plan sponsors if they receive **protected health information** from the group health plan under HIPAA.

The group health plan can only disclose information to the employer for certain special reasons. Those reasons are called "**plan administration**" functions. These functions include quality assurance, claims processing, auditing, monitoring, and management of carve-out plans, like vision and dental care. They specifically exclude, however, employment-related functions.

Thus, putting aside other **legal considerations**, such as laws against disability discrimination in employment, HIPAA **forbids** an employer from obtaining **employee health information** from its health plan unit and using it in deciding work assignments, promotions, firings or lay-offs, employee discipline, or for any other employment-related purpose whatsoever. In fact, the HIPAA Privacy Rule requires that an employer establish **firewalls** to ensure that individually identifiable information being handled by the group health plan and the plan sponsor is segregated from the rest of the employer's operations.

Perhaps, having read the above, an employer would see yet another reason to farm out all aspects of administering its employees' health plan. Does that free the employer from worrying about HIPAA? Not quite.

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As long as the employer receives no individually identifiable health information from the plan, it has **no worries** under HIPAA. However, "**individually identifiable health information**" is broadly defined under HIPAA. "Health information" is information, written or oral, received by an employer that relates to an individual's health or condition, receipt of health care, or payment for health care. It is readily apparent that an employer will commonly have at least some health information about individual employees; the mere fact of **their enrollment in the plan is protected health information.**

Employers who sponsor group health plans and who conduct plan administration activities may not receive individually identifiable health information from group health plans, with one exception (i.e. information disclosed for the purposes of getting bids or modifying or terminating the health plan), unless the health plan documents have been amended to include the **following provisions**: (1) a description of permitted uses and disclosures of information under the Privacy Rule, namely, plan administration functions unless otherwise authorized; (2) the sponsor's agreement (a) to establish firewalls to keep the information away from the employer or anyone else except for the employer's health care purposes and (b) **not to use the information** for employment related purposes; (3) the sponsor's agreement to **report** any prohibited uses or disclosures; (4) the sponsor's agreement to give employees **access** to their own information, including the rights to request amendments and to received accountings of disclosures; (5) the sponsor's agreement to open its records to the **Secretary of Health and Human Services** for compliance purposes; (6) the sponsor's agreement to return or destroy the information when no longer needed; and (7) a statement that disclosure to the employer is permitted only on condition that the plan include the foregoing terms.

Thus, even though **employers as a class** are not subject to the HIPAA Privacy Rule, all employers that provide group health plans for their employees **must prepare to conform** to those parts of the Rule to which they are subject by its effective date, which currently is April 2003 (and April 2004 for small health plans, i.e. those with five million dollars or less in annual receipts).

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