

By Nick Littlefield and Colin Zick

# HIPAA: New Federal Privacy Rules and Their Implications

In April 2003, a fundamental change will occur in the way that health information is regulated, as the first comprehensive federal rules in that area take effect. Whether or not you are a health care provider, these rules will impact you and your clients.



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**T**he Health Insurance Portability and Accountability Act of 1996 ("HIPAA") will fundamentally change the way personal health information is used and disclosed. These changes will impact every health care provider and health insurer in the United States, as well as a substantial number of employers.

## HIPAA: Portability and Privacy

When HIPAA was first enacted, its initial impact was through its "portability" provisions, which make it easier for employees to continue their health insurance coverage when they lose their jobs or change employers. HIPAA's new national standards regarding health information and privacy are found in another section of the statute, labeled "administrative simplification." Before HIPAA, there were few federal standards regarding the privacy of health information. Instead, patient privacy is provided in varying degrees by a patchwork of state laws. HIPAA's privacy rules, which are scheduled to go into effect in April 2003, will pre-empt state laws that are less protective than HIPAA; however, they will leave in place those state laws that provide greater privacy protections than HIPAA. (The Boston Bar Association's HIPAA Task Force is currently preparing a comprehensive analysis of HIPAA's pre-emptive effects on Massachusetts law.)

## Who is governed by HIPAA?

As might be expected, HIPAA's privacy regulations apply to hospitals and physicians. There are, however, other "covered entities" that

must comply with HIPAA, including health insurers, HMOs, and processors of health information (commonly referred to as "health care clearinghouses").

Although HIPAA's privacy regulations do not apply directly to most employers, some of its provisions do impact employers, especially employers that provide health benefits to their employees. In particular, if an employer "sponsors" a group health plan that is a covered entity under HIPAA, the employer is required to set up a "firewall" between it and the health plan it sponsors, and the health plan's governing documents must restrict the disclosure of certain types of information by the plan. 45 C.F.R. § 164.504(f). HIPAA also will impact the way employers can obtain health information about their employees. For example, HIPAA will require a covered health care provider to have an individual's written authorization before disclosing the results of a pre-employment physical to that individual's employer.

## What type of information is governed by HIPAA?

HIPAA's privacy protections apply to a broadly defined set of health information called "protected health information" or "PHI." PHI is defined as "individually identifiable health information" that is: (1) transmitted by electronic media; (2) maintained in electronic media; or (3) transmitted or maintained in any other form or medium. In other words, HIPAA's protections apply to nearly all "individually identifiable health information." In turn,

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“individually identifiable health information” is broadly defined to include information that relates to: (1) the physical or mental health or condition of an individual; (2) the provision of health care services; or (3) payment for the provision of health care services. 45 C.F.R. § 164.501.

### What privacy protections does HIPAA impose?

Under HIPAA, PHI generally can be used or disclosed for treatment, payment or health care operations without some form of written patient consent or authorization. However, for many other uses of health information, a specific form of HIPAA consent or authorization will now be required. The final rules that govern HIPAA's consent and authorization

requirements were just recently issued by the Bush Administration and will likely take effect before April 2003. 67 Fed. Reg. 53181-53273 (August 14, 2002). Information on this and other HIPAA developments can be found at the Department of Health and Human Services' Administrative Simplification website, <http://aspe.hhs.gov/admsimp/Index.htm>.

From time to time, functions of a covered entity that involve PHI might be assigned or contracted out to a third party, such as a consulting firm or a patient billing service. However, this does not relieve a covered entity of its obligations under HIPAA. Instead, the third party performing these functions is deemed a “business associate” under HIPAA and must enter into a contract with the covered entity in which it agrees to comply with the requirements of HIPAA and to protect PHI received from the covered entity just as if that third party was itself a covered entity under HIPAA.

HIPAA will be enforced by the Office for Civil Rights of the Department

of Health and Human Services. Violations of HIPAA can result in civil and criminal penalties, including fines of up to \$250,000 and up to ten years in prison. 42 U.S.C. §§ 1320d-5, 1320d-6. There is no private right of action under HIPAA.

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