

HIPAA PRIVACY ISSUES: WHO SHOULD HANDLE EMPLOYEE MEDICAL CLAIMS?

By: Rick Firfer

As everyone knows, the federal Health Insurance Portability and Accountability Act (“HIPAA”) creates certain very important privacy rights with respect to individually identifiable health information (otherwise known as “protected health information” or “PHI”). Because of those rights, great care must be taken by an employer in regard to the handling of PHI, lest the employer become subject to stringent penalties for the unlawful dissemination or other use of such information. *It should also be noted that such mishandling or misuse need not be intentional, as the negligent mishandling or misuse of PHI is sufficient to cause the imposition of penalties.*

As if to underscore the importance of this issue, a recent survey revealed that employees, as a class, are concerned that despite HIPAA, employers are more likely than not to misuse PHI to limit their employees’ job opportunities. In that survey, a total of 52 percent of the respondents were reported to be either “very concerned” or “somewhat concerned” that claims information submitted to their employers’ health plan administrators might be misused by the employer, an increase from the 39 percent who were reported to have had similar concerns in a survey conducted in 1999. Thus, the negative perception of abuse seems to be growing.

One obvious way for an employer to combat this negative perception is to better educate its employees in regard to the employer’s policies concerning PHI. If the company’s policy is, as it should be, not to use such information in regard to employment decisions, then such policy should be unambiguously conveyed to the employees. However, as a consequence of the strict liability that can flow from violations of HIPAA, more employers seem to be dealing with the problem by using outside contractors to help them process their employees’ sensitive health information. Because employers are often accused of making employment decisions based on their knowledge of their employees’ PHI, the employers are willing to make such referrals in order to place themselves in a position of not knowing anything at all about their employees’ medical issues. Once positioned outside the flow of protected health information, the employer has eliminated even the most inadvertent mishandling of PHI.

As a recent Illinois case has shown, even if an employer has provided special training to an employee with respect to the employee’s handling of PHI belonging to others *and* the employee has signed a written confidentiality pledge with respect to such information, the employer may still be subjected to vicarious liability when the PHI is nevertheless mishandled. In Bagent v. Blessing Care Corp., which was brought under Illinois law and not HIPAA because HIPAA does not create a private right of action, an employee who was responsible for handling PHI was engaged in a social conversation with a friend away from the employer’s premises when the employee inadvertently disclosed to the friend that a relative of the friend was pregnant. The pregnant relative then sued the disclosing party’s employer over the disclosure because the disclosing party had acquired the sensitive information in the course of her employment with the employer. Although the

disclosing party had been trained not to disclose such information and had pledged not to do so, she still made the kind of mistake that others might have made in a similar circumstance. In court, the employer raised a number of defenses to liability on its part and was able to convince the trial judge to enter summary judgment on its behalf. On appeal, however, the summary judgment was overturned and the case was remanded for further proceedings.

Although the employer in Bagent was a hospital, and thus not able to avoid the handling of PHI, other employers not operating in the healthcare industry could easily avoid coming in contact with such information by outsourcing all claims handling under their benefit plans to independent consultants or information processors. In fact, a savvy employer might want to tout the use of such outside claims assistance as an additional employment benefit, inasmuch as employees would be able to contact the outside claims assistance company directly and be assured that none of their PHI would be filtered through or come to the attention of the employer without the employees' consent.

There are at least two cautions, however, before an employer rushes into such an arrangement with an outside company. First, if the outside company is required to report back to the employer for any reason, any information contained in such a report would have to be tailored to keep it from defeating the purpose for which the outside company was engaged in the first place. And, second, because HIPAA and the rules promulgated under that statute can be confusing on the point, it is conceivable that the outside company could be viewed as a business associate of the employer. If that were to happen, any employer covered by HIPAA would have to obtain satisfactory assurances from its "business associate" that the latter company would adequately protect any PHI that comes to its attention while performing its services for the employer.

On balance, however, the use of an outside claims assistance company, if it would not place an undue economic burden on the employer, would seem to be the way to go in order to reduce the employer's exposure under HIPAA.

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