

PENNSYLVANIA WORKERS' COMPENSATION AND THE HIPAA
"PRIVACY RULE"

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I. Introduction

The Pennsylvania Workers' Compensation Act is a humanitarian statute designed to provide expedited wage reimbursement and medical coverage to employees injured in the course of their employment². By its very nature, the Act contemplates employer responsibility for a wide variety of work-related ailments, ranging from occupational diseases such as asbestosis to repetitive trauma conditions such as carpal tunnel syndrome to psychiatric conditions such as post-traumatic stress disorder.

Careful scrutiny of employee medical records is often necessary to resolve fundamental questions of compensability. Moreover, review of medical information by vocational counselors, independent examining physicians, and personnel designated by the Bureau of Workers' Compensation is often mandated by the Act in order to process medical bills, to administer Utilization Review, or to implement Impairment Ratings and Labor Market Surveys³.

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² See *LTV Steel Company, Inc. v. Workers' Compensation Appeal Board (Mozena)*, 562 Pa. 205, 754 A.2d 666 (2000); *Tarpacki v. Workmen's Compensation Appeal Board (Diversified Contracting, Inc.)*, 164 Pa. Cmwlth. 390, 641 A.2d 639 (1994).

³ See Generally Sections 306(a.2)(1), 306(f.1)(2); See also Medical Cost Containment Regulations, 34 Pa. Code §§ 127.101 et. seq.

It would not be inaccurate to conclude that access to personal health information is a *sine non qua* of the Pennsylvania Act.

In 1996 the U. S. Congress enacted the Health Insurance Portability and Accountability Act ("HIPAA") in order to address a number of health-related issues⁴, including improving the efficiency and effectiveness of the health care system through the implementation of national standards for electronic health care transactions.

Recognizing that the expansion of electronic communication in the health care setting raised the prospect of instant worldwide dissemination of private health information, HIPAA called for the adoption of standards for maintaining the privacy of "Individually Identifiable Health Information."⁵

When Congress failed to adopt subsequent privacy legislation⁶, the Department of Health and Human Services issued its *Standards for Privacy of Individually Identifiable Health Information* (the "Privacy Rule") four years later on December 28, 2000⁷. Following an extensive rulemaking process that bridged the Clinton and Bush Administrations, the Privacy Rule was issued in final form on August 14, 2002⁸ and became effective for most "covered entities" on April 13, 2003⁹.

The most significant change brought about by the rulemaking process was the **elimination** from the December 2000 Rule of what might have been the Rule's most provocative requirement - that health care providers in direct treatment relationships with individuals **obtain consent** from those individuals before using or disclosing protected health information ("PHI")¹⁰ for treatment, payment and health care operations ("TPO")¹¹.

Aside from the issue of patient consent, much of the rulemaking process addressed concerns over the effect that HIPAA might have upon the administration of workers' compensation claims. Although the final version of the Rule seems to have allayed those fears, the effective date of the Privacy Rule brought renewed anxiety as employers, administrators and attorneys contemplated how workers' compensation practice would be impacted by implementation of the Rule¹².

⁴ Such as portability of health benefits, treatment of pre-existing conditions and prevention of health care fraud and abuse.

⁵ See 45 CFR §160.103.

⁶ HIPAA required Congress to eventually adopt privacy legislation. The legislation provided that if Congress failed to do so within a specified time period, the Department of Health and Human Services would be required to issue privacy regulations. That is what happened. Congress failed to act - HHS issued the Privacy Rule.

⁷ See 65 Fed. Reg. 82462.

⁸ See 67 Fed. Reg. 53182.

⁹ See 45 CFR Parts 160 and 164.

¹⁰ "Protected Health Information" means "individually health information ("IIHI") that is transmitted by or maintained in an electronic medium, or transmitted or maintained in any other form or medium." See 45 CFR §164.501.

¹¹ See "HHS Final Modifications to Privacy Regulation" *The Health Lawyer*, Vol. 14, No. 5, August, 2002, ABA Health Law Section, Dan S. Brandenburg, Esquire, Lincoln Weed Sanders, Schnabel & Brandenburg, P.C.

¹² Personal injury lawyers have experienced similar anxiety. See "Litigation After HIPAA's Patient Privacy Regulations", *The ABA Health Lawyer*, Volume 15, No. 5, August, 2003, Merideth C. Nagel, Esquire.

In an effort to address such concerns, this presentation seeks to answer the most commonly asked questions about HIPAA and the Act.

II. The Questions

1. **Is the goal of protecting “Individually Identifiable Health Information¹³” a new concept in Pennsylvania?**

ANSWER: No.

The Privacy Rule establishes, for the first time, a **floor of federal protection** for the privacy of PHI, but **does not preempt existing state rules** that provide greater levels of health care privacy protection. The Rule provides, however, that a provision of the Privacy Rule that is “contrary to a provision of State law preempts the provision of State law¹⁴.”

In Pennsylvania there is no general comprehensive statute protecting the privacy of protected health information. There are, however, a series of pre-HIPAA statutes and regulations that guarantee patient access to records and that protect certain individually identifiable health information in various contexts: (a) Patient Access – Pennsylvania state law provides that a patient or his designee, including his attorney, has the right to access and copy his medical charts and records maintained by a health care provider without the use of a *subpoena duces tecum*¹⁵; (To the extent a managed care plan including an HMO maintains medical records, the plan is similarly required to adopt and maintain procedures to ensure that enrollees have timely access to their medical records unless otherwise prohibited by federal or state law or regulation)¹⁶; (b) Restrictions on Disclosures – Pennsylvania state law requires managed care plans, including HMOs and utilization review entities to adopt and maintain procedures for ensuring that all individually identifiable information regarding enrollee health, diagnosis and treatment, is adequately protected and remains confidential¹⁷; (c) Privileges – Pennsylvania recognizes a series of client privileges that prohibit mental health care professional from disclosing confidential information acquired from the patient in the course of professional services, in the context of any civil or criminal matter¹⁸; (d) Condition-Specific Requirements on Disclosures - Cancer – Hospitals and laboratories are required to report cases

¹³ “Individually Identifiable Health Information” (“IIHI”) is a term defined under Section 160.103 of the Rule. It contemplates information, whether oral or recorded in any form or medium, that is created or received by covered entities relating to the past, present or future physical or mental health condition of the individual, which identifies the individual or could reasonably be expected to identify the individual. See “Preemption: A Practical Analytic Method” Beth L. Rubin, Esquire, Fall HIPAA Round-Up, Pennsylvania Bar Institute. The Rule contemplates at least eighteen (18) individual “identifiers” including telephone numbers, photographs, e-mail addresses and biometric identifiers including finger and voice prints. See 45 CFR §164.514(b)(2).

¹⁴ See 45 CFR § 160.203.

¹⁵ See 42 Pa. Cons. Stat. Ann. § 6152, §6155, §6152.1.

¹⁶ See 40 Pa. Stat. Ann. §991.2102, §991.2131(b), and §991.2131(c).

¹⁷ See 40 Pa. Stat. Ann. § 991.202, §991.2131.

¹⁸ See 42 Pa. Cons. Stat. Ann. §5944 (psychiatrist/psychologist – client); §5945 (guidance counselor, school nurse, home and school visitor, and school psychologist – student) §5929 (traditional physician – patient privilege that prohibits physician from disclosing information acquired while attending patient in professional capacity that would tend to blacken the character of the patient in context of civil proceeding – See Moses v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950 (1988)).

of cancer to the Department of Health, but the reports are confidential and are not subject to public inspection or dissemination¹⁹; (e) Communicable Diseases – Physicians are obligated to report persons who have or who are suspected of having a communicable disease to the local Board of Health or Department of Health²⁰. By regulation, clinical laboratories, health care practitioners, health care facilities, orphanages, child care group settings, and institutions maintaining dormitories and living rooms must also promptly report a case of disease or infection to the Health Department.²¹ But, state and local health authorities are prohibited from disclosing reports of communicable diseases or any records maintained as a result of any action taken in response to the report of a communicable disease to anyone outside the department except where necessary to control or prevent communicable disease²². The records and reports may be used, however, by researchers subject to strict supervision²³; (f) HIV/AIDS – Pennsylvania’s Confidentiality of HIV-Related Information Act generally provides that no person who obtains confidential HIV-related information in the course of providing health care or social service or pursuant to the patient’s authorization, may disclose or be compelled to disclose that information without the patient’s written authorization²⁴; (g) Mental Health – Pennsylvania state law requires that all documents concerning an individual’s receipt of in-patient mental health treatment or involuntary out-patient treatment remain confidential and prohibits such information from being released without the patient’s written authorization except in very limited circumstances²⁵; (h) Substance Abuse – The Pennsylvania Drug and Alcohol Abuse Control Act requires that all patient records prepared or obtained pursuant to any state or local program for the treatment of drug and alcohol abuse are confidential and may not be disclosed without the patient’s authorization²⁶; and (i) Restrictions on Hospitals – By regulation, all hospital records shall be treated as confidential²⁷. Only authorized personnel shall have access to such records and the written authorization of the patient shall be presented and then maintained in the original record as authority for the release of medical information outside the hospital.

2. What are the basic elements of the Privacy Rule?

ANSWER: The Privacy Rule applies to three types of “covered entities”: (a) health plans; (b) health care clearinghouses²⁸; and (c) health care providers who transmit any health

¹⁹ See 35 Pa. Stat. Ann. § 5636.

²⁰ See 35 Pa. Stat. Ann. § 521.4.

²¹ See 28 Pa. Code. § 27.21(a); §27.22; §27.23.

²² See 35 Pa. Stat. Ann. § 521.15.

²³ Id.

²⁴ See 35 Pa. Stat. Ann. § 7607.

²⁵ See 50 Pa. Cons. Stat. Ann. §7103; §7111.

²⁶ See 71 Pa. Stat. Ann. § 1690.108.

²⁷ See 28 Pa. Code §115.27.

²⁸ A “health care clearinghouse” is essentially a facility that collects, processes and distributes health insurance claims submitted by health care providers. The clearinghouse makes certain, for example, that the health care provider’s insurance claim is properly formatted and that codes submitted by the provider to the insurer are typo-free.

information in electronic form in connection with a standard transaction,²⁹ e.g. health care payment and remittance advice or enrollment and disenrollment in a health plan³⁰.

The Rule generally prohibits the use or disclosure of PHI or “individually identifiable health information” (“IIHI”) created or received by a health care provider/health plan/employer/healthcare clearinghouse, that relates to an individual’s present, past or future physical or mental condition or the provision of treatment for such conditions, that is transmitted by or maintained in an electronic media, or transmitted or maintained in any other form or medium - without individual authorization³¹.

The Rule provides, however, that a covered entity may use or disclose PHI **without consent**: (a) where the subject individual requests the information; (b) for the purpose of providing treatment, or obtaining payment, or conducting other health care operations (“TPO”); and (c) pursuant to and in compliance with a patient authorization.

Under such circumstances, the covered entity must make reasonable efforts to limit the use or disclosure of PHI to the **minimum necessary** to accomplish the intended purpose, except where: (a) the disclosure to a health care provider, or request by a health care provider is made for treatment; (b) the use or disclosure is made to the individual patient; (c) the use or disclosure is made pursuant to a written patient authorization; or (d) the use or disclosure is required by law.

The Privacy Rule also requires that the covered entity develop a privacy policy; that the entity issue a “Notice of Privacy Practices”; that the patient receive a copy of the Notice; that the covered entity designate a privacy official and contact person and that safeguards and training be implemented in order to effectuate the Rule.

On February 20, 2003 HHS published its Final Rule for Security Standards, the “Security Rule,” which adopts standards for the security of electronic protection for PHI, to be implemented by covered entities under the Privacy Rule³².

The Security Rule becomes effective for most covered entities on April 25, 2005.

²⁹ As noted above, despite its reference to electronic processing and submission of health information, the Rule applies to all forms of PHI, including verbal PHI. See 45 CFR §164.501. The compliance date for the HIPAA Transaction Standards is October 16, 2003

³⁰ See 45 CFR § 160.103 which defines “transaction” as involving “the transmission of information between two parties to carryout financial or administrative activities related to health care.”

³¹ 45 CFR § 160.103. “Health information” is broadly defined by the Rule as is “health care” which means “care, services, or supplies related to the health of an individual” including “counseling,” “service” and “assessment” with respect to both physical and mental conditions.

³² See 45 CFR Parts 160, 162 and 164. Although the proposed Security Rule called for both the establishment of a minimum standard for security of electronic health information and a standard for electronic signatures, the final Rule adopted only the security standard.

3. Is a workers' compensation carrier a "Health Plan" and therefore a "Covered Entity" under the Privacy Rule?

ANSWER: No.

Section 160.103 of the Rule defines "health plan" as "an individual or group plan that provides, pays the cost of, medical care" and includes "a health insurance insurer as defined in this section."

While the foregoing provision does not **specifically** exclude workers' compensation programs from the definition of "health plan", it does exclude any "policy, plan, or program to the extent that it provides, or pays for the cost of" benefits that are accepted from coverage under the Public Health Services Act³³.

The Public Health Services Act specifically **excepts** or excludes benefits under "workers' compensation or similar insurance."³⁴ Since workers' compensation insurance is **excepted** from coverage under the Public Health Services Act, it is necessarily **excluded** from coverage under the Privacy Rule.

Accordingly, a workers' compensation program is **not** a "covered entity" under the Privacy Rule.

4. Is an employer a "Covered Entity" for purposes of the HIPAA Privacy Rule?

ANSWER: No.

Although by definition, PHI includes "individually identifiable health information" created or received **by employers**³⁵, thereby including employers in the discussion, an "employer" is not a covered entity under the Rule. Of course, an employer group health plan, which constitutes a separate legal entity, is a covered entity.

The Rule recognizes that certain single legal entities exist as so-called "hybrid entities"³⁶ whose business activities include both covered and non-covered functions, e.g. a hospital that administers its own workers' compensation program for its employees. When the Privacy Rule was first proposed, "hybrid entities" were required to "designate" their healthcare components from non-covered functions. Acknowledging that mandatory designation would be costly and overly time-consuming, since it would require the construction of intra-organization "firewalls," which would relieve non-covered functions from the privacy standards, the HHS

³³ See 45 CFR §160.103(2)(i).

³⁴ See 42 U.S.C. 300 gg - 91 (c)(1)(D).

³⁵ See 45 CFR §160.103.

³⁶ See 45 CFR §164.504 provides that a hybrid entity is a "covered entity" "whose business activities include both covered and non-covered functions" that "designates health care components in accordance with paragraph (c)(3)(iii) of [Section 164.504]." In other words, the definition of "hybrid entity" refers to an organization that has both covered and non-covered functions and that designates the covered functions under the Rule

eliminated the requirement from the final Rule. Now, organizations that have both covered and non-covered functions may designate the covered function on a voluntary basis ³⁷

Generally, business operations with covered and non-covered functions have not designated under the Rule. When no such designation is made, the entire business entity is subject to the Privacy Rule i.e. the privacy standards will restrict how PHI may be used on an intra-organizational basis³⁸.

The question of whether an employer is a “covered entity” becomes more difficult where the employer maintains an on-site medical facility dedicated to the treatment of employees injured while working or taken ill during the course of the work day. Because such entities do not engage in those standardized electronic transactions contemplated by the Rule, they would not rise to the level of a “covered” function under the Privacy Rule.

5. Does the Privacy Rule apply to workers’ compensation practice?

ANSWER: In the strictest sense, the answer is no – the HIPAA Privacy Rule does not apply to the administration of workers’ compensation claims.

Section 164.512(l) of the Rule provides that “a covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers’ compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.”

Despite the foregoing, there will be circumstances where the Privacy Rule impacts the administration of a workers’ compensation claim.

Clearly, the most significant impact will arise in those instances where the concerned health care provider refuses to disclose PHI to claims representatives, rehabilitation nurses, attorneys or vocational rehabilitation specialists.

6. What steps can be taken to assure the disclosure of PHI by the reluctant health care provider in the context of a workers’ compensation claim?

ANSWER: The simplest means of procuring PHI from a health care provider is to submit an appropriate Authorization executed by the injured worker.³⁹ Authorization forms are addressed further below.

If, for whatever reason, an Authorization cannot be obtained, the health care provider should be advised that in accordance with Section 164.512(l) of the Privacy Rule disclosure of PHI is **permitted** in order to comply with workers’ compensation laws and regulations.

³⁷ See “More Hot Spots: De-identification and Hybrid Entities, PBI Fall HIPAA Round-Up, Andrea M. Kahn-Kothmann, Esquire, Reed Smith, LLP

³⁸ Id.

³⁹ See 45 CFR § 164.508.

In addition, the provider should be advised that Section 164.512(a)(1) of the Rule **permits** a covered entity to use or disclose PHI without the written authorization of the individual or without first permitting the individual to agree or to object to the disclosure, if the use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of the law⁴⁰.

Furthermore, Section 164.512(e) **permits** a covered entity to disclose PHI in the course of any judicial or **administrative proceeding**, which, of course, would include a workers' compensation proceeding, which the Supreme Court of Pennsylvania has recently held to be distinct and separate from a "civil" proceeding⁴¹.

It is important to remember that the authority of a covered entity under the Rule to disclose PHI is couched in "may" language, not "shall" language.⁴² In other words, except for certain situations, a covered entity cannot be required or compelled to disclose PHI, even, apparently, in response to a court order.⁴³

The permitted disclosures for judicial and administrative proceedings incorporate detailed instructions for how litigants are to seek PHI from health care providers under this subsection of the Rule.

The Rule contemplates two mechanisms by which disclosure may be sought in the course of any judicial or administrative proceeding: (a) by order of a court or administrative tribunal, provided only PHI expressly authorized by the order is disclosed⁴⁴ and (b) by subpoena, discovery request or other lawful process, **not accompanied by an order** of a court or administrative tribunal, provided that the covered entity receives "satisfactory assurance" from the requesting party that reasonable efforts have been made to give notice of the PHI request to the subject individual or that reasonable efforts have been made to secure a "qualified protective order."⁴⁵

The Rule provides that "reasonable efforts" have been made to give notice of the PHI request to the subject individual, where the requesting party provides the covered entity a written statement, with accompanying documentation, demonstrating that: (a) it has made a good faith effort to provide written notice to the individual; (b) the notice identifies the litigation at issue in sufficient detail to permit the individual to raise an objection with the court or administrative tribunal; and (c) that the time for raising an objection has either lapsed with no objections filed or that all filed objections have been resolved by the presiding tribunal permitting disclosure.⁴⁶

⁴⁰ See 45 CFR §164.512(a)(1).

⁴¹ See East v. Workers' Compensation Appeal Board (USX Corp./Clairton), ___ Pa. ___, 828 A.2d 1016 (2003) (Pennsylvania Supreme Court rules that "workers' compensation proceedings are distinct and separate from civil actions").

⁴² See "Litigation After HIPAA's Patient Privacy Regulations," *The ABA Health Lawyer*, Volume 15, No. 5, August, 2003, Merideth C. Nagel, Esquire.

⁴³ *Id.* Citing 65 Fed. Reg. 82677.

⁴⁴ See 45 CFR § 164.512 (e)(1)(i).

⁴⁵ See 45 CFR § 164.512 (e)(1)(ii).

⁴⁶ See 45 CFR § 164.512 (e)(1)(iii).

A device provided for by the Rule that will over time perhaps more effectively allay the fears of the reluctant health care provider and better facilitate the disclosure of PHI, is the “qualified protective order” referenced in Section 164.512 (e)(1)(ii)(B).

A qualified protective order refers to a court/administrative order or stipulation prepared by the parties and approved by the presiding tribunal, that includes the following PHI protection: (a) it prohibits the parties from using or disclosing the PHI for any purpose other than the litigation or proceeding for which the information is requested; and (b) it requires that the PHI – including all copies made – be returned to the covered entity or be destroyed at the conclusion of the litigation or proceeding.⁴⁷

As noted, if the requesting party chooses to seek disclosure by way of qualified protective order, but has to yet to perfect the order, the covered entity will, nevertheless, be deemed to have received “satisfactory assurance” from the requesting party provided it receives a written statement and accompanying documentation demonstrating that: (a) the parties to the dispute have agreed to a qualified protective order and have presented the order to the presiding court or administrative tribunal or (b) in the absence of such an agreement, the party seeking the PHI has requested a qualified protective order from the presiding court or administrative tribunal.⁴⁸

In sum, a covered entity has the right to disclose PHI in response to lawful process described in Section 164.512(e)(1)(ii)(A) or (B) if the requesting party makes reasonable efforts to provide notice to the individual of the request or provides reasonable assurance to the provider that reasonable efforts have been made to secure a qualified protective order.

Provided that it incorporates the protection contemplated by the Section 164.512(e), it would appear that a WCJ order or WCJ subpoena constitutes a sufficient means of sanctioning the disclosure of PHI to an attorney in the absence of a written authorization executed by the claimant.

7. What should be included in a HIPAA-compliant Authorization Form?

ANSWER: In accordance with Section 164.508(c)(1) of the Privacy Rule, the core elements of a valid authorization include the following: (a) a description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion; (b) the name or specific identification of the person or persons or class of persons authorized to make the requested use or disclosure; (c) the name or other specific identification of the person or persons or class of persons to whom the covered entity may make the requested use or disclosure; (d) a description of each purpose of the requested use or disclosure – the Rule provides that the statement “at the request of the individual” is a sufficient description of the purpose of the use or disclosure when the individual initiates the authorization and does not provide a statement of purpose; (e) an expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure; (f) the signature of the individual and the

⁴⁷ See 45 CFR § 164.512 (e)(1)(v)

⁴⁸ See 45 CFR § 164.512 (e)(1)(iv)

date of the authorization; (g) a statements adequate to place the individual on notice of his or her right to revoke the authorization in writing, the ability or inability of the health care provider to condition treatment, payment, enrollment or eligibility for benefits upon the individual's execution of the authorization, depending upon the covered entity's right to do so;⁴⁹ and (h) a statement indicating **the potential for re-disclosure** of the information disclosed pursuant to the authorization, by the recipient, without further protection afforded by the Privacy Rule.

In addition to the foregoing, the Authorization Form must be written in plain language and a copy of the signed authorization must be provided to the individual by the health care provider.

Finally, it should be noted that the Privacy Rule instructs that generally speaking, a covered entity must obtain an authorization for any use or disclosure of **psychotherapy** notes⁵⁰.

8. What restrictions apply to a claims administrator who is provided Protected Health Information by a covered entity?

ANSWER: Under the Privacy Rule, there does not appear to be any specific restriction applicable to a claims administrator who receives PHI from a covered entity with or without an authorization form, unless, perhaps, the PHI has been obtained by way of qualified protective order.

As noted, Section 164.508(c)(2)(iii) acknowledges the possibility that PHI obtained by authorization, may be subject to **redisclosure not protected by the Privacy Rule**. For that reason, the Authorization Form must include a statement adequate to place the individual on notice of "the potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer be protected by this subpart."

Of course, Rules of Conduct or Codes of Professional Conduct for claims practitioners typically include confidentiality provisions that require the specialist to respect the privacy of the claimant and that either prohibit the disclosure of private information or place certain limitations upon the disclosure of such information.⁵¹

Counsel litigating a workers' compensation case should always be mindful of the Pennsylvania Rules of Professional Conduct, which prohibit the attorney from re-disclosing confidential information provided by the client, except as provided for by law or the Rules of Professional Conduct.

⁴⁹ The Rule generally prohibits the covered entity from conditioning the provision of treatment or enrollment in a health plan or eligibility for benefits upon the individual's execution of an authorization form. There are exceptions to the foregoing proscription. Section 164.508(b)(4) (i) provides, for example, that the covered entity may condition research-related treatment upon the individual's execution of an authorization form.

⁵⁰ See 45 CFR 164.508(a)(2).

⁵¹ See the Code of Professional Conduct for Case Managers, Rules G11 and G12 and the Code of Professional Ethics for Rehabilitation Counselors, Rule B.1.

Specifically, Rule 1.6(a) of the Rules instructs that “a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . .”

Accordingly, a claims administrator or counsel representing the injured worker or representing the employer or insurer, has the right to access PHI through the use of a HIPAA-approved Authorization Form, but is not prohibited by the Privacy Rule itself from re-disclosing PHI obtained in that manner.

9. Is a lawyer litigating a workers’ compensation claim a “Business Associate” of a hybrid entity such as a hospital?

ANSWER: Probably not.

By definition, a “business associate” is generally a person who, on behalf of a covered entity - not as an employee of the covered entity - performs or assists in the function of or activity involving the use or disclosure of PHI or any other activity or function regulated by the Privacy Rule.⁵²

The Privacy Rule only applies to the health care component of a hybrid entity and permits the hybrid entity to “designate” its health care component from its employer component.⁵³ Because in the context of a litigated workers’ compensation claim, the hybrid entity/employer is not a covered entity, the attorney representing the employer in that context, would not be considered a business associate subject to the Privacy Rule.

10. Does an individual have the right under the HIPAA Privacy Rule to restrict the PHI his or her health care provider discloses for workers’ compensation purposes?

ANSWER: No.

Individuals do not have the right under the Privacy Rule to instruct a covered entity not to disclose PHI for workers’ compensation purposes when such disclosure is required by law or authorized by, and necessary to comply with, the workers’ compensation law.⁵⁴ In fact, any such restriction agreed to by the covered entity will not be deemed effective where it restricts the use or disclosure of PHI permitted or required by law⁵⁵.

Moreover, the Privacy Rule’s “minimum necessary”⁵⁶ standard, which generally requires covered entities to make reasonable efforts to limit requests for PHI or the use and disclosure of PHI to the minimum necessary to accomplish the intended purpose, does not prohibit workers’ compensation insurers, state administrative agencies, and employers from

⁵² See 45 CFR §160.103.

⁵³ See 45 CFR §164.504(a).

⁵⁴ See 45 CFR §164.522(a) and §164.512(a) and (l).

⁵⁵ See 45 CFR §164.522(a)(1)(v).

⁵⁶ Section 164.502(b) requires that when disclosing or using PHI, or when requesting PHI from another covered entity, the subject covered entity must “make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure or request.”

obtaining PHI in order to process, administer or litigate benefit payments to injured workers guaranteed under the particular state workers' compensation system.

For example, the "minimum necessary" standard does not preclude covered entities from disclosing PHI to the fullest extent authorized by the law under Section 164.512(a)(1), provided the use or disclosure "complies with and is limited to the relevant requirements of such law."⁵⁷

In fact, the Rule assures that where PHI is requested by a state workers' compensation or other public official for such purposes, the covered entity from which the information has been sought may reasonably rely upon the official's representations that the information requested is the "minimum necessary" for the intended purpose.⁵⁸

V. Conclusion

During the six months that have followed the effective date of the Privacy Rule, Pennsylvania workers' compensation practice has perhaps felt some isolated impact, but has not faced the kind of upheaval that some envisioned not too long ago. For employers and workers' compensation administrators, the best advice is to monitor developments as participants in the provision of health care services in Pennsylvania become more acclimated to the demands of the Rule, while maintaining a sensitivity for the concerns and responsibilities of those directly affected by HIPAA. With patience and diligence, it appears that implementation of the HIPAA Privacy Rule will not impede the efforts of human resource personnel, claims administrators, and defense counsel from effectively administering Pennsylvania workers' compensation claims.

⁵⁷ See 45 CFR §164.502(b)(2)(v).

⁵⁸ See 45 CFR §164.514(d)(3)(iii)(A).