

Employment Law Digest

An Update from Thornton, Summers, Biechlin, Dunham & Brown, L.C. Employment Law Department

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STAYING IN BOUNDS

HIPAA Privacy Rule Compliance

The Privacy Rule (“the Rule”) component of HIPAA is something that employers with health benefits plans should already know about, and should be in compliance with since the April 14, 2003 deadline for most health plans has come and gone (small health plans with annual receipts under \$5 million have until April 14, 2004 to achieve compliance). The following Q & A’s provide general information about the Rule, however, since the law is complex, each employer should work directly with the resources available through Department of Health and Human Services (HHS) which are listed below and/or legal counsel to assure compliance.

A. BRIEF OVERVIEW

What is the Privacy Rule and why do employers need to be concerned?

It is included in the Health Insurance Portability and Accountability Act¹ (“HIPAA”) and its goal is to assure that protected health information (“PHI”) is handled and maintained properly. Although HHS does not have the authority to directly regulate employers, most employers that offer health benefit plans are indirectly required to comply with the Rule. Although the benefit plan is technically considered its own legal entity, it is entangled with the employer in many situations, particularly with self-funded plans. For example, if the employer’s HR department creates the enrollment forms, such information must be amended per the Rule. Although technically only the health plan (not the employer) would be non-compliant if the forms are not updated, in this example the responsibility likely falls on the employer’s personnel to actually amend the forms in many circumstances.

What type of health plans are covered under the Rule?

Group health plans sponsored by employers are “covered entities” unless the plan has fewer than 50 participants and is “administered solely by the employer that established and maintains the plan.” However, the entire burden of compliance is not necessarily on the employer just because the benefit plan is a “covered entity.” The employer’s responsibility varies depending on the type of plan funding and the information received from the plan. The following categories provide a general guideline for the level of compliance required by the plan sponsor:



Self Insured Health Plans:

If the employer does not receive any PHI or “individually identifiable health information”² (only receives summary health information) the employer may not be subject to the majority of the Rule’s requirements, but further assurances are warranted.

If the employer receives PHI, the employer is required to comply with all of the administrative provisions of the Rule. This type of benefit plan in combination with receiving the type of information from the plan results in the greatest burden on the employer to assure that his or her benefit plan is compliant.

Fully Insured Health Plans:

If the employer does not receive any PHI and has no more than enrollment data and summary health information its administrative obligations are generally limited to (1) allowing participants to exercise their rights under the Rule, and (2) modification of plan documents and any additional documentation as required.³

If the employer receives PHI, the sponsor must certify to the health plan that the plan documents have been amended and that “reasonable safeguards” are in place to protect the information pursuant to the Rule prior to receiving the PHI.

Regardless of Funding:

Summary health information (not PHI) may be released to an employer-sponsor for purposes of ‘shopping’ the plan for premium bids, etc.

B. GENERAL ELEMENTS OF COMPLIANCE

What are the administrative requirements for compliance?⁴

According to HHS (Office of Civil Rights Division), the following elements are required for compliance. Keep in mind that these are requirements for the health plan as an entity, not the employer. However, these requirements often fall at least in part on the employer. For example, often the employer communicates with plan participants about the plan benefits, therefore, those communications must be compliant with the Rule.

- Develop written policies and procedures that comply with the Rule;

- Designate a ‘privacy official’ that is responsible for compliance;
- Train employees on the privacy policies and procedures, and, identify and use appropriate sanctions for violations;
- Mitigate to the extent practicable the damage caused by use or disclosure of PHI;
- Maintain “reasonable and appropriate administrative, technical, and physical safeguards to prevent intentional or unintentional use or disclosure of” PHI. For example, shredding documents containing PHI prior to disposal and securing PHI records under lock and key;
- Provide a process for individuals to complain about the entity’s compliance with the Rule that is included in the notice of the policies and procedures;
- May not require an employee to waive his or her rights to the privacy protections, and
- Maintain privacy policies, complaints, notices, etc. until six years after the last created or effective date of such.

C. OTHER IMPORTANT THINGS TO REMEMBER

What are the employee’s rights under the Rule?

According to HHS, individuals have the following rights in most circumstances:

- Access to review and obtain a copy of most types of their PHI from the health plan;
- Right to have covered entities amend their PHI when the information is “inaccurate or incomplete”;
- Accounting of disclosures of their individual PHI limited to the previous 6-years to the accounting request. There are exceptions to the rights to accounting;



- Request restrictions to PHI access, but the entity is under no obligation to comply with the request, and
- Receive information regarding an individual's PHI at an alternate location or by alternate means other than those typically used by the entity. Health plans "must accommodate reasonable requests if the individual indicates that disclosure could endanger" him or herself.

What information can be disclosed to plan sponsors from group health plans?⁵

- "Enrollment or dis-enrollment information with respect to the group health plan or a health insurer or HMO offered by the plan."
- Summary health information to "obtain premium bids for providing health insurance coverage through the group health plan, or to modify, amend, or terminate the group health plan.
- PHI necessary "for the plan sponsor to perform plan administration functions" after certification from the sponsor is received that restricts the use and disclosure of the information.

How does the Rule effect Workers' Comp?

HHS made an effort in the Rule to divide access to PHI into two categories: PHI that is related to health care functions and information that is related to employment functions. Workers Comp is specifically excluded from the Rule, therefore, state law still governs this area.

What are the penalties for non-compliance?

- Civil penalties, in general, are \$100 per failure to comply not to exceed \$25,000 per year for multiple violations of the same compliance requirement per calendar year. Some violations will not be penalized if due to "reasonable cause".
- Criminal penalties include between one and 10-years imprisonment and a fine from \$50,000 - \$250,000.

Better safe than sorry.

The penalties are extremely rigid for Privacy Rule violations. All Employers that offer employer-sponsored health benefit plans should already know to what extent, if at all, they are required to comply with the Rule. However, if an employer still is unsure about what is required, how to achieve compliance, or has questions which have come up during the implementation process, they should consult the following for further information:

- Consult with an attorney;
- Visit the HHS website at <http://www.hhs.gov/ocr/hipaa>;
- Visit the Center for Medicare & Medicaid services (administrator of the Rule) on-line at <http://cms.hhs.gov/hipaa> online or;
- Call the "HIPAA Hotline" at 1-866-282-0659 for free information; and/or
- Subscribe to the HIPAA regulations update list serve by visiting <http://aspe.hhs.gov/adminsimp/lnotify.htm>. This service is free of charge and will notify the recipient of regulatory changes and updates. Note that this service communicates updates for all of HIPAA, not just the Privacy Rule.

Please Note:

This review is not a comprehensive analysis of Title II of HIPAA or the Privacy Rule and should not be relied upon exclusively to determine if an employer-sponsored health plan is a "covered entity" OR to create policies and procedures in an effort to achieve and/or maintain compliance with the Privacy Rule.

¹ Public Law 104-191.


² 45 C.F.R. '160.103 defines Individually identifiable health information as - information that is a subset of health information, including demographic information collected from an individual, and:(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (2) Relates to the past, present, or future physical or mental health or condition



of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) That identifies the individual; or (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

³ Department of Health and Human Services OCR Privacy Brief, Summary of the Privacy Rule, HIPAA Compliance Assistance, <http://www.hhs.gov/ocr/privacysummary.pdf> (last revised May, 2003). at 15 as summarizes 45 C.F.R. 164.530(k).

⁴ *Id.* at 14,15 (all bullets following refer to this cite).

⁵ *Id.* at 16, as summarizes 45 C.F.R. 164.504(f). The bullets following this citation are direct quotes from the HHS material referenced in footnote 3. 

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THINKING TWICE ABOUT COUNTERCLAIMS

A. COUNTERCLAIMS ARE NOT NECESSARILY RETALIATION

Two recent cases shed some new light on counterclaims. It is a normal reaction to want to challenge an employee that sues his employer after termination or resignation, however, that decision should be carefully considered.

For example, in one recent case, a 61-year old manual laborer was terminated after 24-years of employment for incorrectly cutting a roll of carpet and failing to report the error. (*Hernandez v. Crawford Building Material Co.*, 91 FEP Cases 97, 5th Cir., February 21, 2003.) The employee sued claiming that his termination was a violation of Title VII of the Civil Rights Act of 1964, as amended in 1991, the Age Discrimination in Employment Act and 42 U.S.C. §1981. The employer responded with a counterclaim for theft based on information learned after the employee was terminated. The counterclaim addressed allegedly stolen building materials that the employee had absconded with and then resold or used as barter materials during the previous 7-years.

In response to the counterclaim, the employee amended his claim to add “retaliation” to the list of charges. The employee believed that the counterclaim amounted to a retaliatory effort by the employer to punish or deter the former employee from maintaining his cause of action. However, the 5th Circuit did not see it the same way. The court held that merely responding with a counterclaim after the employee had already been terminated could not be the “ultimate employment decision” necessary to prove a finding of retaliation under the law because the employee no longer worked for the employer, therefore, there was no adverse employment decision possible. To support this finding, the 5th Circuit articulated a three prong test that the employee-Plaintiff must satisfy to prove retaliation: “(1) the employee has engaged in activity protected by Title VII; (2) they employer took adverse employment action against the employee; and (3) a causal connection exists between that protected activity and the adverse employment action”.


B. BUT DON'T PLAN TO COUNTERCLAIM JUST BECAUSE THEY MAY NOT BE CONSIDERED RETALIATION

Although a counterclaim filed against a former employee in the 5th Circuit is not retaliation, an employer should think twice before taking such action because juries may view the counterclaim as bullying. Once such case involved an employee (a physician) who sued his employer (the administrator of a medical practice) for a breach of good faith and fair dealing by not collecting accounts receivable which directly impacted the employee's compensation. (*Laredo Medical Group v. Lightner*, 2003 WL 45689, ___ S.W.3d ___ (Tex. App. BSan Antonio, January 8, 2003.) The employee resigned after filing the suit.

The employer responded with a counterclaim for breach of a non-compete agreement and to recover the resulting damages. The jury awarded the employee \$3.1 million, of which \$2.7 million were punitive damages. The Court of Appeals later reversed finding that the employer owed no duty of good-faith and fair dealing to the employee, but the lesson is in what the jury awarded in punitive damages after hearing all of the evidence. Although the jury's deliberation is obviously not in the court record, it is very likely that at least a portion of the verdict was a negative jury reaction to the counterclaim.



C. BOTTOM LINE

When an employee sues, the employer should think carefully before deciding to counterclaim. Although counterclaims against employees who no longer work for the employer may not be retaliatory measures in and of themselves, they can be disfavored by juries and may result in a higher verdict for the plaintiff to send a message to employers. 

LEGISLATIVE UPDATE: Possible Changes For Texas Employers

H.R. 1119 - Amendment to the Fair Labor Standards Act of 1938 (“FLSA”)

On March 6, 2003, an amendment to the Fair Labor Standards Act of 1938 (“FLSA”) referred to as the “Family Time Flexibility Act” was introduced in the U.S. House of Representatives to provide compensatory time for private sector employees.

The Family Time Flexibility Act (“the Act”) would amend the rule laid out in the FLSA that prohibits private sector employees from choosing to receive paid time off in lieu of overtime pay. Congress amended FLSA in 1985 to allow for the same flexibility that the Act proposes, but the option was only extended to public sector employees.

The Act allows employees covered under the FLSA to opt in writing (or through agreement with their local union) to receive compensatory time off at the same rate which overtime is accrued, 1 1/2 : 1, so if an employee works 48-hours in one week, he or she can receive either 8-hours of overtime pay or 12-hours of paid time off instead. An employee cannot accrue more than 160-hours of compensatory time off in a calendar year, therefore, any additional overtime worked will always be compensated with pay. The employee is not obligated to take this option under the amendment, it is only offered as a choice that each employee can make. An employee can also change his or her mind with 30-days notice to the employer and can return to overtime pay. Employees that have worked for 1000 hours (25-weeks or 6-months at 40-hours/week) of continuous employment with the employer would be eligible for

the option. Under the Act, any compensatory time that remains unused at the end of the calendar year is paid out to the employee at the same rate as overtime pay.

The employee is permitted use the time off during the course of employment at any point that is “reasonable” and would not “unduly disrupt” the business operations and is allowed to ‘cash in’ his or her compensatory time off upon termination or resignation.

This bill has not passed Congress to become law; the bill was placed on the Union Calendar for further consideration on May 22, 2003 and is still awaiting review. Since this proposed legislation has not passed, and may not pass at all, private employers need to remember that comp time cannot legally be used instead of overtime pay.

HB 328

House Bill 328 would amend the Texas Labor Code in several important ways effective September 1, 2003. First, it would permit employers to require applicants “to provide information regarding any injury, disability, or other medical condition” that “directly relates to a bona fide occupational qualification”. There is currently no such provision in the Labor Code. Further, if the employee does not answer truthfully, he forfeits the benefits “if the medical condition for which the claim of benefits is made is related to a medical condition, disability or injury that was not disclosed.”

Second, the bill adds a provision which determines that the Code does not “prohibit an employer from asking an employee about the existence of any workers= compensation claim for which the employee was paid benefits” previously. Further, an employee that is asked such questions “must answer truthfully.”

Third, under the proposed bill, the employer may obtain the “release date and description of each injury” from the Texas Workers= Compensation Commission resulting from a claim within the previous five years. The current law, comparatively, requires such information to be released only when the prospective employee has “made two or more general injury claims” within the same period of time. The bill would also repeal the definition of “general injury.”




Finally, employers are protected by the bill since an employer “is not liable in a suit for damages solely because the prospective employer relied on the information [report of prior injury] in deciding not to hire the applicant” under the proposed law.

HB 570

House Bill 570 would limit certain employers’ liability that do not carry workers’ compensation insurance to \$250,000. The limited liability offered by the bill would apply only to certain employers. Namely, the bill would only apply to those employers that do not have workers’ compensation coverage “if the employer provides benefits for personal injuries or death sustained by an employee in the course and scope of employment in at least the following amounts”:

- \$ 300,000 for medical expenses (for a minimum of 104-weeks after date of injury);
- \$ 100,000 in accidental death benefits (for fatal injuries); and
- \$ Weekly income benefits (of a minimum of 75% of pre-injury income) after the date of injury for a minimum of 104-weeks (not to exceed \$600).


Such employers that are sued for additional damages would not be liable for more than \$250,000 for all “damages, costs, interest and attorneys’ fees, including any benefits paid by the employer as medical expenses and wage replacement.” However, the \$250,000 liability limit would not apply to intentional acts, acts of omission or gross negligence by the employer. There is currently no such provision in the Labor Code. This bill does not apply to claims of retaliation for filing a workers’ compensation claim in violation of Chapter 451 of the Texas Labor Code. 

DISCRIMINATION CLAIMS ON THE RISE

In fiscal year 2002, total discrimination claims in the private sector rose 4.5% (an increase of approximately 84,400 claims) while the average time for the commission to process such charges decreased by 6%, according to EEOC Chair Cari Dominguez in a February 6 press release. According to the Chair, the increased efficiency in resolving claims is in part due to prioritizing

expanded outreach and mediation programs. According to the report, all types of discrimination with the exception of disability increased in FY02 with claims based on religion, age and national origin leading the increase. Race discrimination continues to lead the pack in terms of total number of claims followed by gender/sex and retaliation discrimination.

In other news, the EEOC reports that it resolved a record 75,222 employment discrimination charges in fiscal year 2002. Unfortunately the Commission not surprisingly also reports that it recovered a whopping \$301 million for alleged victims of discrimination.

Employers should take all EEOC charges seriously no matter how frivolous or even silly they may seem at first blush. Also, unless management has experience in handling such charges, it should seriously consider seeking outside help in presenting its position to the Commission. 

The contents of this newsletter are presented as general information only and are not intended as legal advice. The reader is invited and advised to consult with an attorney for more specific information regarding the matters and materials addressed herein, or for advice based on the individual circumstances of his or her specific situation.



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our website at:
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for the most recent
significant changes
in the law
that affect you.

The employment law section of Thornton & Summers represents management in a wide variety of employment law matters. Because we have offices located in Austin, Corpus Christi and McAllen, Texas, we can offer exclusive and timely insight into handling particular employment matters in diversified areas of the state. Of course, our focus is still on claim avoidance through timely advice and counsel before events occur which can lead to lawsuits; however, our firm has extensive jury trial experience in a wide variety of employment law matters. Our expertise includes the following areas:

- management counseling;
- review and preparation of personnel policy and procedures including employee handbooks;
- representation in administrative matters before the Equal Employment Opportunity Commission, Texas Commission on Human Rights and Texas Workforce Commission;
- representation of management in state and federal court for employment related claims involving Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Polygraph Protection Act, Consolidated Omnibus Budget Reconciliation Act, Worker's Compensation Retaliation, Family Medical Leave Act, Fair Labor Standards Act, Texas Commission on Human Rights Act and a variety of state court claims such as intentional infliction of emotional distress, invasion of privacy, defamation and negligence;
- preparation of arbitration agreements and non-subscriber programs;
- Training and preventative seminars to comply with recent U.S. Supreme Court decisions; and
- Wage/hour audits; FLSA claims.

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