

Morgan Lewis

webcast

**Health and Welfare
Year-End Webcast**

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Busy Year!

- Many changes in the health and welfare area
- More to come—in the shape of healthcare reform
- Don't fixate on reform to the detriment of current obligations
- Today we will focus on recent, current and future changes that are necessary regardless of the outcome for healthcare reform

Mental Health Parity

- May not impose lower lifetime or annual limits on mental health coverage than medical/surgical
- Effective 1/1/2010, must have parity with medical/surgical for all mental health and substance abuse benefits (if offered)
 - Special date(s) for bargained plans
- Does not apply to small employers/retiree-only plans

CHIP Coverage

- Expands HIPAA Special Enrollment rules for gaining/losing Medicaid or CHIP coverage
- Requires
 - Revised enrollment information re special enrollment rules
 - Plan amendments/SPDs
 - 60-day notice period, not usual 30-day notice period
 - New notice regarding premium assistance in early 2010

GINA Limits Use of HRAs

- GINA defines “genetic information” to include family medical history.
- GINA disallows the use of “genetic information” for “underwriting purposes,” which include:
 - Rules for, or determination of, eligibility, and
 - Computation of premium or contribution amounts
 - *This includes deductibles or other cost-sharing mechanisms, discounts, rebates or other payments in kind, or premium differentials.*
- Result is that, if HRA includes family medical history section, there can be no financial incentive attached to completing it. But, can bifurcate HRAs

Michelle's Law

- Extends employer-provided coverage for up to one year if student loses full-time status due to medically necessary leave of absence
- Outstanding issues:
 - Interaction with COBRA (consecutive or concurrent?)
 - Is a Michelle's Law dependent a tax dependent?
- Effective 1/1/2010 for calendar year plans

HEART Act Withdrawals

- Health FSAs can allow military service personnel to withdraw unspent contributions that may otherwise be forfeited
 - Absence must be for more than 179 days (or for an indefinite period of time)
 - Distribution may be requested whether or not eligible expenses have been incurred (usually give employee a chance to submit eligible expenses first)
 - Amounts distributed are taxable and subject to income tax withholding
 - Plan must have language before making distribution (special rule allowed retroactive amendment for distributions prior to 1/1/2010)

Amended HIPAA Privacy and Security Rules

- HIPAA Amendments are in The Health Information Technology for Economic and Clinical Health Act (HITECH) provisions of The American Recovery & Reinvestment Act of 2009 (ARRA).
- Effective Date: February 17, 2010, except as otherwise noted.

Overview of Amendments to HIPAA Privacy and Security Rules

- Expanded Obligations of Business Associates (BAs)
- Notification of Breach Requirements
- Updated “Minimum Necessary” Standard
- Increased Enforcement and Penalties, including application to BAs
- This does not cover the universe of HIPAA Amendments in HITECH

Expanded Obligations of Business Associates

- HITECH expands obligations of BAs:
 - Many Privacy and Security Rule obligations now apply directly to BAs
 - BA Agreements need to be amended to incorporate expanded Privacy and Security Rule obligations
 - Civil and criminal penalties now apply directly to BAs

Expanded Obligations of Business Associates (cont.)

- BA's Obligations under HITECH:
 - BAs may only use and disclose PHI in accordance with the BA Agreement requirements
 - Majority of Security Rule obligations now apply directly to BAs
 - BAs are directly subject to the additional Privacy and Security Rule requirements included in HITECH
 - If BA knows of material breach by Covered Entity (CE), BA is obligated to (1) take action to cure breach or end violation, or (2) if cure is not possible, terminate the BA Agreement, and (3) if neither cure nor termination is possible, report breach to Secretary of HHS

Notification of Breach Rule

- If security of “***Unsecured PHI***” is “***breached***,” CE must provide notice without unreasonable delay and within 60 days after “***discovery***” of breach to “***impacted individuals***,” media (in certain instances) and HHS
- This standard creates a functional safe harbor – if PHI is “secured,” there is no obligation to notify under HITECH
- **Effective Date:** Notification required for breaches discovered on or after **September 23**, but HHS will not impose sanctions for failure to notify of breaches discovered until **February 24, 2010**

What Is “Unsecured PHI”?

- PHI not secured through the use of a technology or methodology identified by HHS as rendering the information unusable, unreadable, or indecipherable to unauthorized persons
- HHS has identified certain encryption and destruction technologies and methodologies that must be implemented to meet this standard
- The Security Rule requirements may be met without “securing” PHI – encryption is still an “addressable specification”

What Is a “Breach”?

- The unauthorized acquisition, access, use, or disclosure of Unsecured PHI
 - In a manner not permitted under the Privacy Rule
 - That compromises the security or privacy of the information

What Is a “Breach”?

- PHI is “compromised” if the breach poses a SIGNIFICANT RISK OF FINANCIAL REPUTATIONAL OR OTHER HARM.
- To determine if PHI is “compromised,” CE should Conduct and Document a fact specific risk assessment
- There are 3 statutory exceptions to “breach” that focus on (1) whether the individuals involved in the breach were authorized to access PHI and/or (2) whether the PHI is further used or disclosed in a manner not permitted by the Privacy Rule, or whether it cannot be retained by the unauthorized recipient

When Is a Breach “Discovered”?

- A breach is “**discovered**” as of the first day that it is known (or reasonably should have been known) to the CE or BA
- The CE or BA has knowledge of the breach on the day that any employee, officer or other agent has such knowledge (except for the individual who committed the breach)

Who Gets Notification of Breach?

- **Impacted Individual:** Written notice is sent to last known address (with special rules if imminent misuse is possible or individual's address is unknown).
- **The Media:** If breach involves more than 500 individuals in state or jurisdiction, notice through major media outlets.
- **HHS:**
 - *If breach involves more than 500 individuals, CE notifies HHS at same time as Impacted Individuals, and HHS will identify CE on its website.*
 - *If breach involves less than 500 Impacted Individuals, CE logs the breach and provides the log to HHS on an annual basis.*
- If BA discovers breach, must notify CE. But, notification responsibilities may be delegated via BA Agreement
- Manner and Content of Notice are defined in HITECH

Minimum Necessary Standard

- Generally, uses, disclosures and requests by a CE are limited to the information that is the **minimum necessary** to accomplish the intended purpose
- Pre-HITECH, “minimum necessary” was an undefined, flexible standard
- By August 2010, HHS will issue guidance on what constitutes “minimum necessary”
- Starting February 17, 2010 and until guidance issues, CE may only use, disclose, or request **limited data set** information, unless more information is needed in accordance with the minimum necessary standard

Increased Enforcement Mechanisms

- Increased HHS Audits
- “Willful Neglect” Standard (Effective Feb. 2011)
- Enforcement by State Attorneys General (Effective Immediately)
- Mechanism for Individual Compensation (Effective on or after Feb. 2012 regs issue)
- Annual Report to Congress
- HIPAA and HITECH still do not provide for a private right of action

Increased Tiered Penalties

- **Increased Tiered Penalties:**
 - HITECH establishes four tiers of violations that reflect increasing levels of culpability:
 - Did Not Know
 - Reasonable Cause
 - Willful Neglect - Corrected
 - Willful Neglect - Not Corrected
 - **Effective Date:** Increased penalty amounts apply immediately (February 2009)

HIPAA/HITECH Action Items

- Update Privacy and Security Policies and Procedures to ensure HITECH provisions are incorporated and implemented
- Review Privacy Notice to determine whether any revisions are necessary
- Review and revise BA Agreements to incorporate expanded obligations under HITECH
- Train employees with access to PHI regarding HITECH
- Business Associates should adopt and implement HIPAA Privacy and Security Policies and Procedures to reflect their new obligations under HITECH

ARRA 65% COBRA Assistance

- 9 months of 65% COBRA assistance if
 - Involuntary termination
 - Coverage lost and COBRA begins 9/1/2008 through 12/31/2009
 - *Will be extended—but how?*
 - *How, in the interim, to handle December COBRA bills?*
 - *Be certain COBRA coverage does not start 01/01/2010*
 - Not eligible for other coverage (e.g., spouse's plan or Medicare)
 - Subsidy phased out at higher incomes

Form 5500 – Schedule C Reporting

- New Form 5500 Schedule C (Service Provider Information) fee disclosure rules applicable to employee benefit plans. Some of the major changes are:
 - Old Rule: Direct compensation reporting only; no reporting of “indirect compensation”
 - New Rule: Both direct and indirect compensation reporting

 - Old Rule: Disclose fees concerning plan’s 40 highest paid service providers
 - New Rule: Disclose fees for all persons receiving \$5,000 or more in reportable compensation for a particular transaction or service; could be more than 40 providers

 - Old Rule: Discretionary brokerage commissions
 - New Rule: Both discretionary and non-discretionary brokerage commissions

 - New Rule: Identify service providers who fail to provide necessary information

Form 5500 – Schedule C Reporting (cont.)

- For welfare plans that do not utilize a trust, no Schedule C reporting is required
- For fully insured plans, insurance fees and commissions are not reported on Schedule C, but will be reported on Schedule A, Insurance Information
- A range of services which are priced to the plan as a single package rather than on a service-by-service basis can be reported as direct compensation to the “bundled service” provider
- DOL officials have informally remarked that they expect fiduciaries to “make a good faith effort” to complete Schedule C

Medicare Mandatory Reporting

- Adds mandatory reporting requirements for group health plan
- Quarterly reporting by “responsible reporting entity”
- Failure to comply: \$1,000 per day/per person
- Testing now: first reporting period began 7/1/2009

Cafeteria Plans – Proposed Regulations

- Comprehensive proposed regulations issued in August 2007
 - Effective for plan years on or after 2011 (??)
 - Expecting final regulations sometime!
- Proposed retirement plan-like tests addressing:
 - Eligibility
 - Contributions and benefits
 - Concentration test
- Will revolutionize cafeteria plan design and pricing

Selected State Law

- New York
 - Expands dependent coverage through age 29 if unmarried (applies to contracts issued on and after 9.1.2009)
 - Expands COBRA coverage from 18 to 36 months (applies to contracts issued on and after 7.1.2009)

Questions?

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