

What Every Cafeteria Plan Administrator Should Know About HIPAA

By Debra Davis, Esq.

Many TPAs believe that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) does not apply to them. However, TPAs who administer cafeteria plans must comply with HIPAA's requirements. In fact, administrators who ignore HIPAA do so at their peril—HIPAA imposes criminal penalties up to \$50,000 in fines and a year in prison for knowingly disclosing protected health information (known as PHI). The penalties are even more severe for disclosing PHI under false pretenses or for commercial advantage, personal gain or malicious harm.

Following are key facts every TPA who administers cafeteria plans should know about HIPAA:

• HIPAA Applies Indirectly to TPAs Who Administer Cafeteria Plans.

HIPAA requires every cafeteria plan to enter into a written "business associate agreement" with a company that provides services to the plan (e.g., a TPA) that involves *individually identifiable health information*. Thus, in order to provide administrative services to cafeteria plans, TPAs must comply with HIPAA in accordance with the business associate agreements.

As the term implies, *individually identifiable health information* ("Health Information") is information that is: (1) created or received by a health care provider (e.g., a doctor, pharmacist, nurse, etc.), health plan (such as a cafeteria plan), employer or health care clearinghouse that (2) relates to the past, present or future health of an individual, including the providing and payment of health care, that (3) identifies the individual. For example, a claim for reimbursement filed by a participant under a cafeteria plan that includes his name and information regarding his payment for health care is Health Information.

TPAs should help their clients to comply with HIPAA by making sure they have entered into business associate agreements. The deadline

for entering into these agreements for plans with \$5 million or more in claims has already passed. Plans with less than \$5 million in claims have until April 14, 2004 to execute their business associate agreements. Some companies are not aware that their cafeteria plans need to enter into business associate agreements with their TPAs. Since insurance companies typically handle HIPAA's requirements for fully insured plans, many companies fail to realize that they are responsible for ensuring compliance with HIPAA for their cafeteria plans. TPAs should encourage clients to retain ERISA counsel to draft business associate agreements for their cafeteria plans.

• What Must TPAs Do To Comply With HIPAA?

TPAs must comply with HIPAA in accordance with the business associate agreement. HIPAA requires that business associate agreements provide that TPAs will:

- Only use or disclose Health Information in accordance with the agreement or as required by law. This is also required in order to avoid criminal penalties. In general, HIPAA provides that Health Information should not be obtained, used or disclosed for any reasons other than for business purposes.
- Use appropriate safeguards to prevent the improper use or disclosure of Health Information. The safeguards should reasonably protect Health Information from any intentional or unintentional use or disclosure.
- Report to the plan any impermissible uses or disclosures of that plan's Health Information.
- Ensure that any agents or subcontractors agree to the same restrictions and conditions that apply to the TPA. Agents or subcontractors should sign an agreement with the TPA that is identical to the business associate agreement.
- Make the Health Information available upon request to the

individuals the Health Information pertains to and allow amendments to be made to the Health Information, when necessary.

- Make information available to the plan regarding disclosures of PHI made by the TPA, so that the plan may inform participants as to the disclosures of their PHI that have been made. PHI includes all Health Information, except education and employment records.
- Make internal practices, book and records relating to the use and disclosure of PHI available to the Secretary of Health and Human Services.
- Return the Health Information to the plan or destroy it when the contract terminates. TPAs may want to include any anticipated expenses for returning or destroying the Health Information in the terms of its contract with the company that sponsors the plan.
- Agree to terminate the agreement if the plan determines that the TPA has violated a material provision of the agreement.

• What Can Happen If a TPA Violates HIPAA?

If a TPA violates HIPAA, it may lose its relationship with the client and face criminal penalties. HIPAA provides that a plan must take the following steps if it knows of a pattern of activity or practice of the TPA that constitutes a material breach or violation of the business associate agreement:

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I put together an all-day practice management seminar by talking Cheryl Morgan into co-hosting it with me. Cheryl and I proceeded to travel to Phoenix, Arizona, and after the end of the day convinced the local leaders to begin our second Chapter. From there, things moved quickly with a new Chapter in Fresno, California (thanks to

Pat Farzaroli), and shortly thereafter, a new Chapter in Sacramento, California (again thanks to Pat Farzaroli).

I then took a trip to the east coast at the request of NIPA member Neil Tullis. Neil arranged for several meetings with pension leaders in several cities in order to introduce NIPA to the east coast. We

were ultimately successful in establishing new Chapters in Connecticut and Massachusetts. Today, we have fourteen successful Chapters, which makes up a large part of our membership. I not only enjoyed the experience but also, upon reflection, am very proud that I had something to do with our growth in the early years. *

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- **Correct the Violation.** The plan must take reasonable steps to cause the TPA to cure the breach or end the violation.
- **Terminate the Relationship with the TPA.** If the plan cannot convince the TPA to cure the breach or end the violation, it must terminate its relationship with the TPA.
- **Notification of the Secretary of Health and Human Services.** If a plan is unable to terminate its relationship with the TPA, it is required to notify the Secretary of Health and Human Services.

Regardless of any other actions taken, any persons who knowingly obtain, use or disclose Health Information in violation of HIPAA may be fined up to \$50,000 and imprisoned for up to 1 year. If the offense is committed under false pretenses, they can be fined up to \$100,000 and imprisoned up to 5 years. If the offense is committed with intent to sell, transfer or use Health Information for commercial advantage, personal gain or malicious harm, they may be fined

up to \$250,000 and imprisoned up to 10 years.

TPAs should ensure that their procedures comply with HIPAA in order to adhere to their business associate agreements and to avoid criminal penalties. The most challenging element of compliance is understanding the requirements of HIPAA. Once armed with the knowledge of HIPAA's requirements, the implementation of them should not be overly onerous. *

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