HAMSTRUNG HEALTH CARE PROVIDERS: THE DANGERS OF OVERLOOKING THE MEDICAL PRIVACY MINEFIELD IN THE DEFENSE OF AGENCY INVESTIGATIONS OF EMPLOYMENT DISCRIMINATION

By Ryan P. Myers and Peter D. Stiteler, Lind, Jensen, Sullivan & Peterson, P.A.

Most employment law practitioners have some awareness of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and the Privacy Rule regulations of 2002 (the "Privacy Rule"), due to the law's impact on employee-benefits issues. Often, HIPAA and the Privacy Rule have little or no significant impact on the day-to-day practice of employment lawyers or the human resources departments of the employers they represent.

But for attorneys representing employers of direct care professionals and other health care service providers, HIPAA and its state analogues present significant challenges. Even basic tasks in employment law, such as defending employers in agency actions before the Equal Employment Opportunity Commission ("EEOC") or Minnesota Department of Human Rights ("MDHR"), become daunting tasks when medical privacy laws interfere with an employer's ability to establish the best factual defenses to an employee's claim.

Consider the following hypothetical situation:

> John Smith, an attorney, received a call from a new client — a relatively small long-term care provider of services to disabled adults called Group Home Inc. — with a problem: A recently terminated employeem, Biff Badactor, had filed an administrative charge of discrimination against the group home with the MDHR, which opened an investigation. Group Home Inc. told John that it terminated Biff due to numerous performance issues, supported by disciplinary records that noted his failure to observe treatment protocols for particular residents. (For purposes of this hypothetical, assume that Biff's performance issues did not trigger Group Home Inc.'s mandatory reporting obligations under Minnesota Statutes Sections 626.557-.5573.) John immediately obtained Biff's personnel file, including the disciplinary record and the treatment protocols for the residents. He also interviewed other employees and Biff's supervisors, gathering further information supporting the decision to terminate. This included information about Biff's care of particular residents at the facility.
>
> John then drafted a response to the charge, which detailed Biff's failure to observe treatment protocols for Group Home Inc.'s residents that supported the decision to terminate his employment. He also submitted a confidential supplement to the response that contained, among other things, copies of the residents' treatment protocols and the disciplinary notices that documented Biff's failure to follow them. The MDHR dismissed Biff's charge of discrimination, determining that Biff's failure to observe residents'

Medical Privacy **continued on page 14**

Ryan Myers is a litigator at Lind, Jensen, Sullivan & Peterson, P.A., where he maintains a practice focused on the defense of employers in employment matters, attorneys and other professionals in malpractice cases, and businesses and their owners in commercial litigation.

Peter Stiteler is an associate at Lind, Jensen, Sullivan & Peterson who works in civil litigation, practicing in areas such as general liability, employment litigation, product liability, insurance coverage, and appeals. He graduated from the University of Minnesota Law School magna cum laude in 2012. After graduation, he clerked for the Honorable Judge Heidi Schellhas on the Minnesota Court of Appeals before joining Lind Jensen. He is a co-chair of the Minnesota Defense Lawyers Association's New Defense Lawyers Committee, and a Co-Vice Chair of the State and Local Defense Organizations Committee for DRI's Young Lawyers Steering Committee.

Medical Privacy **continued from page 13**

treatment protocols was a legitimate, non-discriminatory, and non-pretextual reason for Group Home Inc. to terminate Biff's employment. John received kudos and more business from his new client.

Five months later, Group Home Inc. and John received notice from the U.S. Department of Health and Human Services ("HHS") that it had opened an investigation into John and Group Home Inc.'s potential HIPAA violation. Around the same time, several of Group Home Inc.'s residents sued John and his client for disclosing their private medical information to the MDHR in violation of the Minnesota Health Records Act.

After its investigation into the alleged HIPAA violations, HHS levied significant civil monetary penalties against Group Home Inc. and John. They were also forced to pay damages and attorneys' fees to Group Home Inc.'s residents after they were found liable for violating the Minnesota Health Records Act.

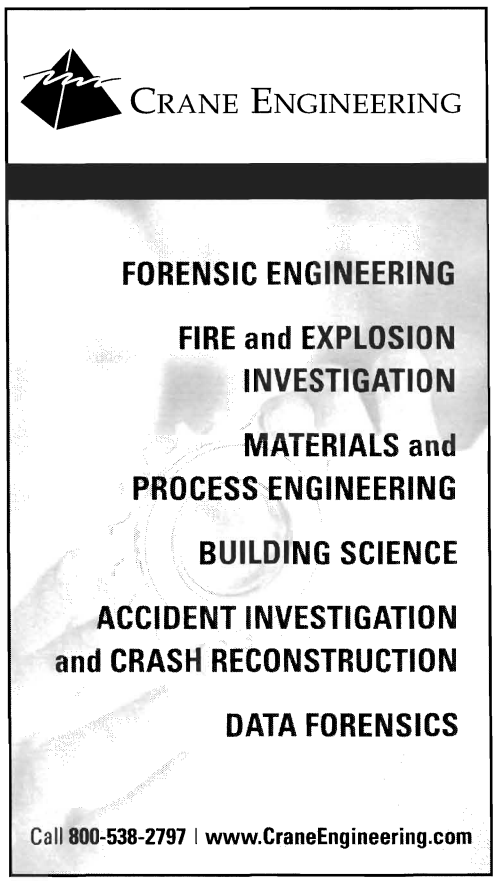
Where did John go wrong? And how can other attorneys avoid John's mistakes?

A PRIMER ON HIPAA AND THE MINNESOTA HEALTH RECORDS ACT

Broadly speaking and with few exceptions, HIPAA and its Privacy Rule prohibit Covered Entities (defined broadly speaking, as a provider of health care-related services, 45 C.F.R. § 160.103) and Business Associates (service providers that are not "Covered Entities" but render services — including legal services — to a Covered Entity that involves disclosure of PHI to the Business Associate, 45 C.F.R. § 160.103) from disclosing Protected Health Information ("PHI")[1] *to anyone* without a proper patient authorization. 45 C.F.R. § 164.502. Violations of the HIPAA Privacy Rule subject both Covered Entities and Business Associates to a range of penalties, from informal non-monetary sanctions to significant civil monetary penalties of $50,000 per violation capped at $1.5 million for "identical violations" within a calendar year. *See* 45 C.F.R. § 164.312 (outlining the Secretary of HHS's authority to sanction non-compliant covered entities); 45 C.F.R. § 164.404 (outlining the amounts of civil money penalties the Secretary of HHS may impose under various circumstances). HIPAA provides no private right of action. *See, e.g., Dodd v. Jones*, 623 F.3d 563, 569 (8th Cir. 2010) [citing *Adams v. Eureka Fire Prot. Dist.*, 352 Fed. Appx. 137, 139 (8th Cir. 2009) (collecting cases)].

***Medical Privacy* continued on page 15**

1 *Covered Entities create or receive "Individually Identifiable Health Information," which the Privacy Rule defines as information about the health or medical care received by an individual that either (i) identifies the individual; or (ii) provides enough information about the individual that could be used to identify the him or her. 45 C.F.R. § 160.103. Individually Identifiable Health Information becomes PHI when a Covered Entity transmits or stores the information. Id. In practice, almost any information regarding a patient that a Covered Entity possesses meets this definition.*



Medical Privacy **continued from page 14**
Like HIPAA, the Minnesota Health Records Act prohibits a health care provider from releasing a patient's health care records without a signed and dated consent from the patient authorizing the release or a "specific authorization in law." Minn. Stat. § 144.293, subd. 2. The Minnesota Health Records Act contains no other exceptions. *See id.* Unlike HIPAA, the Minnesota Health Records Act gives aggrieved patients a private right of action to recover actual damages, attorneys' fees, and potentially punitive damages as well. *See* Minn. Stat. § 144.298.

Essentially, HIPAA and many of its state counterparts protect all patient information that could identify those patients. The smaller and more long-term a provider is, the easier it becomes to identify a patient from medical records or information. This means that almost all medical records for clients like Group Home Inc., even if heavily redacted, contain PHI.

WHERE DID JOHN GO WRONG?

John Did Not Enter Into a Business Associate Contract with Group Home Inc.

The first thing that John did wrong was failing to ensure that Group Home Inc. entered into a Business Associate Contract with him. Because John received PHI from Group Home Inc. in the course of responding to Biff's charge of discrimination, John is a Business Associate. If a covered entity, like Group Home Inc., does business with a Business Associate, they are required to enter into a contract known as a "Business Associate Contract." *See* 45 C.F.R. § 164.502. The regulations require every Business Associate Contract to contain certain language and subject Business Associates to the same obligations under HIPAA as are imposed upon Covered Entities, and subject Business Associates to liability for violations of HIPAA. *See id.* The first thing John should have done once he realized he would need to review PHI, including Biff's disciplinary records[2] that noted his failure to observe treatment protocols for specific residents *and the treatment protocols themselves*, is work with Group Home Inc. to put a Business Associate Contract into place to ensure they complied with HIPAA. (Having a Business Associate Contract in place is only the starting point. Once in place, John must ensure that his law firm is capable of meeting its obligations under the Business Associate Agreement, including all of John's attendant requirements under HIPAA.)

Compliance with HIPAA does not automatically translate into compliance with state medical privacy laws; instead, HIPAA merely sets a floor. *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 48-49 (Minn. App. 2009) (holding that HIPAA does not preempt the Minnesota Health Records Act). Importantly, the Minnesota Health Records Act does not permit medical providers to disclose a patient's treatment records to a Business Associate, even if a Business Associate Contract is in place between the parties. As a result, to ensure compliance with the Minnesota Health Records Act, John also needed to review Group Home Inc.'s authorizations for release of medical records ("Authorization") to ensure that each resident authorized Group Home Inc. to provide medical records to its Business Associates.

John Caused Group Home Inc. to Disclose PHI without Adequate Authorization, Violating Both HIPAA and the Minnesota Health Records Act

A valid Business Associate Contract (and a signed Authorization by each resident that permits disclosure of documents to Business Associates) only ensures that Group Home Inc. is not violating federal and Minnesota medical privacy laws when disclosing PHI to John. A Business Associate Contract *does not* give John the authority to disclose the PHI he received from Group Home Inc., if Group Home Inc. is not itself authorized to disclose it.

Yet, John produced PHI to the MDHR — including (1) a narrative description of Biff's failure to observe residents' treatment protocols in the response to charge; (2) Group Home Inc.'s disciplinary notes and records identifying Biff's failure to observe residents' treatment protocols; and (3) the residents' treatment protocols. Although the MDHR permits parties to submit information for "confidential" review, neither HIPAA nor the Minnesota Health Records Act recognize an exception for submitting documents to an administrative agency "confidentially." As a result, each of these disclosures violated both HIPAA and the Minnesota Health Records Act, and exposed John and Group Home Inc. to civil monetary penalties under HIPAA and private claims for damages under the Minnesota Health Records Act.

At the same time, the information about Biff's performance issues that John included provided the foundation for MDHR's decision to dismiss Biff's charge of discrimination. Without producing those documents to the MDHR, John likely would not have been able to secure the victory for Group Home Inc. that it deserved.

WAS THERE A WAY THAT JOHN AND GROUP HOME INC. COULD HAVE COMPLIED WITH STATE AND FEDERAL MEDICAL PRIVACY LAWS AND PROVIDED THE MDHR WITH INFORMATION TO JUSTIFY GROUP HOME INC.'S EMPLOYMENT DECISION?

Unfortunately for John and Group Home Inc., there is no simple solution to the quandary in which they found

***Medical Privacy* continued on page 16**

2 *There is a question about whether the disciplinary notices in Biff's employment record that address his failure to observe the treatment protocols with regard to specific residents meet the definition of PHI, given that the definition of PHI specifically excludes health information contained in "employment records." 45 C.F.R. § 160.103. That said, the comments to the final rulemaking that carved out the "employment records" exception stated explicitly that HHS declined to define the term. See Standards of Privacy of Individually Identifiable Health Information, 67 FR 53182, 53191-92 (Aug. 14, 2002). The comments to the rulemaking also imply that HHS intended the exception to apply narrowly to health information in the employment record pertaining specifically to the employee, and not to third parties. See id. At least one decision confuses this issue by suggesting that patient information contained in an employee's personnel file is not PHI. See, e.g., Davis v. Deleon, 2014 WL5092897 (E.D. Mich., Oct. 10, 2014) (holding that patient information contained in a disciplinary note in an employee's personnel record was not PHI, citing the "employment records" exception).*

Medical Privacy **continued from page 15**
themselves. Sidestepping the medical privacy issue by not disclosing residents' private medical information justifying Group Home Inc.'s termination of Biff is one possibility. The problem with this approach is the risk that without support for Group Home Inc.'s decision to terminate Biff's employment, the MDHR is more likely to find "probable cause" to believe that Group Home Inc. engaged in unlawful employment discrimination. After finding "probable cause," the MDHR could elect to pursue an administrative action seeking up to three times the employees' actual damages — including front and back pay — as well as damages for emotional distress, attorneys' fees, punitive damages, and civil penalties. *See* Minn. Stat. § 363A.29, subd. 4. If, after a hearing, the ALJ found in favor of Biff, Group Home Inc.'s options to appeal would be limited. *See* Minn. Stat. § 363A.30, subd. 1 (limiting the scope of judicial review as provided in Minn. Stat. § 14.69).

John and Group Home Inc. do not want to risk a "probable cause" finding, simply to ensure their compliance with state and federal medical privacy laws. Given the damages multiplier and attorneys' fees that attach in these circumstances, terminations of employees in even low-wage positions can nevertheless result in hefty damages.

If withholding the information from the MDHR is not palatable, what choices did John have? Under state and federal medical privacy laws, there are three other options, each with advantages and disadvantages:

1. Obtain authorizations from the affected residents to disclose their private medical information to the MDHR;
2. Withhold disclosure of private medical information, invite the MDHR to issue an administrative subpoena, ensure the MDHR properly serves the administrative subpoena on Group Home Inc., and disclose its residents' private medical information to the MDHR subject to a "qualified protective order" that meets the requirements of the Privacy Rule; or
3. Withhold disclosure of private medical information pending the entry of a formal court or administrative order requiring Group Home Inc. to disclose its residents' private medical information to the MDHR.

John Could Have Secured Authorizations Permitting Group Home Inc. to Disclose the Residents' Medical Records to MDHR

First, John might have asked Group Home Inc. to obtain Authorizations from the residents — or their legal guardians — permitting the disclosure of their medical records to the MDHR to support Group Home Inc.'s defense to Biff's charge of discrimination. After all, both HIPAA and the Minnesota Health Records Act would permit Group Home Inc. to disclose medical records in a manner specifically authorized by its residents. While certainly a "clean" solution to the problem, this is often the least palatable solution for medical providers, especially long-term care providers to disabled residents like Group Home Inc.

Employer-employee disputes — especially between personal care attendants and long-term care facilities — are common. Most employers are loathe to involve their paying customers in employment disputes to avoid alienating their source of revenue. Long-term care providers have even more to worry about given that the customers' "involvement" would require them to volunteer their medical privacy in defense of the discrimination charge. In addition, asking patients to give up their medical privacy in these circumstances would require an employer to inform the patients of the reason for the request. Long-term care providers often work directly with the residents' legal guardian, who may have no idea that an employee failed to observe their loved one's treatment protocol. Disclosing this information could open the long-term care facility up to malpractice or negligence claims. Therefore, in the absence of a legal obligation to do so, a long-term care facility would likely prefer not to air its dirty laundry, seeking an authorization as a last resort.

John Could Have Withheld Production of PHI to MDHR, but Invited the MDHR to Issue an Administrative Subpoena

Second, John could have requested that the MDHR issue an administrative subpoena before he disclosed any information regarding Biff's failure to observe treatment protocols. To avoid disclosing PHI in the response to charge, John could have made a general statement that Group Home Inc. terminated John for performance issues and then indicated that Group Home Inc. could not discuss the performance issues in any more detail because doing so would constitute a violation of HIPAA and the Minnesota Health Records Act. In a cover letter to the MDHR, John could have reiterated Group Home Inc.'s desire to provide a full explanation of Biff's performance issues — and the underlying personnel file and resident treatment protocols — in its response to Biff's charge, and invited the MDHR to issue an administrative subpoena so that Group Home Inc. could release the pertinent information and supporting documents.

Both HIPAA and the Minnesota Health Records Act contain exceptions that would support this approach. And John would likely ensure he and his client remained in

Medical Privacy **continued on page 17**

Medical Privacy **continued from page 16**
full compliance with the Minnesota Health Records Act if he conditioned the disclosure of this information on the MDHR's service of an administrative subpoena on Group Homes Inc. *See, e.g., Huber v. Vohnoutka*, 2015 WL 1514193, *5 (Minn. App., Apr. 6, 2015) (holding that a medical provider's disclosure of protected medical records violated the Minnesota Health Records Act only because the subpoena sent to the medical provider was not properly *served*). HIPAA throws a wrench in this otherwise simple solution. Before Group Home Inc. may respond to the MDHR's subpoena, HIPAA requires Group Home Inc. to either:

1. make a reasonable effort to ensure that the residents at issue are notified of the request; or
2. make a reasonable effort to secure a "qualified protective order" from the MDHR that meets the requirements of the Privacy Rule.

45 C.F.R. § 164.512(e).

Although less burdensome than seeking residents' Authorization to release their medical records, Group Home Inc. would not likely wish to volunteer to its residents that it disclosed their private medical information to the MDHR in response to an administrative subpoena. This is especially true, since it might be possible for residents to learn that Group Home Inc. *requested* the administrative subpoena in the first place, and would look like an attempt to end-run the requirement to obtain patient authorization.

The other option would be for John to secure the MDHR's agreement to enter into a "qualified protective order" that would prohibit the MDHR from using the disclosed information for any reason other than the proceeding for which the information was requested and required the MDHR to return or destroy the protected information at the close of the proceeding. 45 C.F.R. § 164.512(e)(v). The problem is that the MDHR may be prohibited from entering into a qualified protective order that meets these requirements, given its obligation to preserve data under the Minnesota Government Data Practices Act (the same outcome would be true had Biff filed his charge with the EEOC, given its obligation to preserve records under the federal Freedom of Information Act.) Assuming the MDHR could agree to such a stipulated order, Group Home Inc. and the MDHR would then have to present the order "to a court or administrative tribunal with jurisdiction over the dispute." 45 C.F.R. § 164.512(e)(iv). As discussed in more detail in the final section below, this is not without challenge.

John Could Have Withheld the Production of Private Medical Information to the MDHR, and Sought the Entry of a Formal Court or Administrative Order

Finally, John could have informed the MDHR that Group Home Inc. could not discuss the specific reasons for Biff's termination in the absence of a court or administrative order compelling Group Home Inc. to disclose the information to the MDHR. John could have informed the MDHR investigator that Group Home Inc. wanted nothing more than to provide the MDHR with information that would justify its termination decision, but that state and federal privacy laws prohibited it from doing so. John might even have suggested that Group Home Inc. would not oppose the entry of an order compelling it to disclose the protected information.

The problem with this approach is both procedural and tactical. At the investigation stage of agency employment discrimination proceedings — either before the MDHR or the EEOC — no administrative law judge is involved to oversee the process or issue orders. As a result, obtaining an order compelling Group Homes Inc. to produce the private medical information would require the MDHR to take a number of extraordinary steps to obtain the information from Group Homes Inc. First, the MDHR would need to open a proceeding in state or federal court for the sole purpose of obtaining such an order. The MDHR would then need to move the court for an order compelling Group Homes Inc. to produce explicitly enumerated information. The reviewing court may then conclude that the residents were necessary parties to the proceeding and permit them an opportunity to object to the MDHR's motion. Only after the court issued an order compelling Group Home Inc. to produce the information, perhaps months after Group Home Inc. notified the MDHR that medical privacy laws prevented its voluntary disclosure for the reasons it terminated Biff's employment, Group Home Inc., would finally be legally authorized to release the relevant and enumerated information.

This process assumes that the MDHR has the willingness to put its investigation into Group Homes Inc.'s alleged discrimination against Biff on hold for an unforeseeable amount of time, and the desire and resources to seek a court order compelling the disclosure of information that benefits Group Homes Inc.'s defense of Biff's claims. Neither of these is a given. Even then, assuming the MDHR went to such an effort, the residents or their legal guardians may still receive notice and expose Group Home Inc. to additional claims.

CONCLUSION

Ultimately, attorneys representing employers in the health care industry have several options they can pursue to avoid exposing themselves and their clients to additional liability under HIPAA or similar state statutes. Unfortunately, there is no "silver bullet" solution for every situation. The situation in which Group Home Inc. found itself in this hypothetical is a growing problem for the long-term care industry, and it highlights a significant conflict between employment discrimination and medical privacy laws that threaten to undermine an employer's ability to defend itself against a charge of discrimination by one of its employees. Given the notable tension between employment antidiscrimination and medical privacy laws, attorneys representing employers in the health care industry must think carefully about how to thread this needle. In doing so, attorneys must weigh the value of disclosing private medical information, the interests of all parties involved, the stage of the proceeding, and the expectations of their clients. While there is no clear right decision, there is a clear wrong decision: not thinking about the issue until it is too late.