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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

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 health care providers they represent.

For attorneys representing employers in the health care industry, 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 or state equivalent (collectively, "EEO Agencies"), can easily cause attorneys—and their clients—to violate HIPAA.

I. A Primer on Medical Privacy Laws.

Broadly speaking and with few exceptions, HIPAA and the Privacy Rule prohibit Covered Entities and Business Associates from disclosing Protected Health Information ("PHI") *to anyone* without authorization. 45 C.F.R. §§ 164.502, 160.103 (defining these terms). Violations of the Privacy Rule subject both Covered Entities and Business Associates to a range of penalties, from informal non-monetary sanctions to significant civil money 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 agency's authority to sanction non-compliant covered entities); 45 C.F.R. § 164.404 (stating the range of civil money penalties the agency may impose under various circumstances).

Essentially, HIPAA and its state analogues protect all patient information that could identify those patients. The smaller and more long-term a health care provider is, the easier it becomes to identify a patient from medical records or information. In practical terms, this means that all medical records—even if heavily redacted—contain PHI and may not be disclosed *to anyone* absent proper authorization.

II. First step: Business Associate Contracts.

At the outset of the representation, the health care provider and attorney should enter into 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. *See id.* If a Covered Entity discloses PHI to its attorney before such an agreement is in place, the disclosure constitutes a


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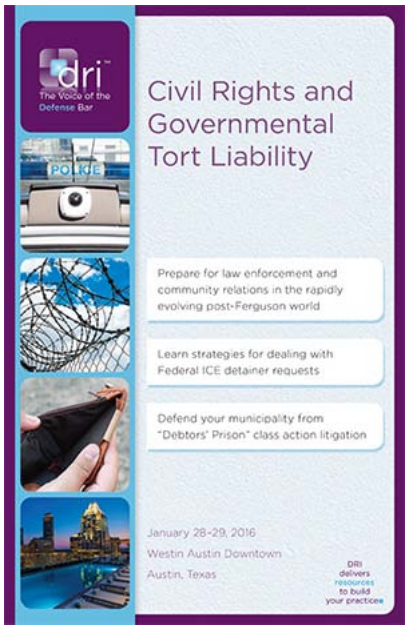

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violation of HIPAA.

Putting a Business Associate Contract in place is a first step, not a solution. A valid Business Associate Contract only protects disclosure of the information to the attorney. Although Business Associate Contracts protect disclosures of PHI by Covered Entities to their lawyers under HIPAA, they do not automatically protect disclosure under state medical privacy laws. Attorneys representing medical providers in employment matters should carefully review all applicable medical privacy laws to ensure full compliance with all requirements. Further, a Business Associate Contract *does not* give an attorney the authority disclose the PHI if the Covered Entity would not be authorized to do so.

III. Next Step: Tread Carefully.

Unfortunately, things become far murkier outside of the straightforward requirement to enter into a Business Associate Contract. The question then becomes: What should an employment lawyer do when defending a health care provider under investigation by an EEO Agency? Under normal circumstances, an employment lawyer would automatically provide the EEO Agency with the employee's complete personnel file and any other information that might be germane to the employer's defense. In the context of an agency investigation of a health care provider, many of these routine disclosures might constitute violations of medical privacy laws. This is especially true if the employee making the claim routinely interacted with patients.

Automatically withholding information from the EEO Agency is not a viable option, since it may significantly increase the odds that the EEO Agency will find probable cause to believe that the employer discriminated against the employee. Yet, automatically disclosing the information could run both the attorney and the client headlong into violating HIPAA and state medical privacy laws.

There are three alternative options, which allow the health care provider to disclose PHI to the EEO Agency without violating its medical privacy obligations. Each have advantages and disadvantages. None provides a "silver bullet" solution.

A. Obtain Authorization to Disclose Medical Records.

HIPAA allows health care providers to disclose PHI to third parties if the patient specifically authorizes the disclosure. While certainly a "clean" solution to the problem, this is often unpalatable for health care providers.

Employer-employee disputes are routine and—in large organizations—occur on a regular basis. Most health care providers are loathe to involve their patients in employment disputes *at all* to avoid alienating their source of revenue, especially when the patient's "involvement" would require them to volunteer their medical privacy to defend the health care provider. In addition, seeking a patient's involvement would require the health care provider to inform the patient of the reason for the request. Disclosing this information could open the health care provider to malpractice or negligence claims if the reason for the employee's termination was related to the care provided to the patient. Therefore, in the absence of a legal obligation to do so, employers in the health care industry prefer not to involve their patients in employment disputes.

B. Withhold Disclosure Until the EEO Agency Subpoenas Them.

The health care provider could also decline to produce the records absent a subpoena from the EEO Agency performing the investigation. Rather than produce the records, the attorney could submit a general response to the EEO Agency stating that his client had not discriminated against the employee and indicating that he will not produce the records absent a subpoena.

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HIPAA provides an exception that would support this approach, with a caveat. Prior to producing the records in response to a subpoena, a health care provider must:

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

45 C.F.R. § 164.512(e).

Although less burdensome than seeking a patient's authorization, most health care providers would likely prefer not to inform its patients that it disclosed their private medical information to respond to an administrative subpoena. This is especially true since it might be possible for patients to learn that the health care provider requested the administrative subpoena in the first place and appear to end-run the health care provider's general obligation to obtain patient authorization for the disclosure.

Another option would be to secure the EEO Agency's agreement to enter into a "qualified protective order" that would prohibit the agency from using the disclosed information for any reason other than the proceeding for which the information was requested and require the agency to return or destroy the protected information at the close of the proceeding. 45 C.F.R. § 164.512(e)(v). While an attractive option, the EEO Agency may claim its obligations under the Freedom of Information Act or state analogue prohibit it from entering into this type of agreement. But assuming that a qualified protective order was possible, the health care provider and the agency could then 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.

C. Withhold Disclosure and Seek a Formal Court or Administrative Order.

Finally, the health care provider could withhold disclosure, inform the EEO Agency that it would love to disclose pertinent PHI but cannot absent a formal court order.

The problem with this approach is both procedural and tactical. At the investigation stage of EEO Agency proceedings, no administrative law judge is involved to oversee the process or issue orders. As a result, obtaining an order compelling the health care provider to produce PHI would require the agency to take a number of extraordinary steps to obtain the information from the health care provider. First, the agency would need to open a proceeding in state or federal court for the sole purpose of obtaining such an order. The agency would then need to move the court for an order compelling the health care provider to produce certain, explicitly enumerated information. The reviewing court may then conclude that the patients were necessary parties to the proceeding and permit them an opportunity to object to the agency's motion. The EEO Agency would then have to wait until the court issued its order before the health care provider would disclose the relevant information.

This process assumes that the EEO Agency is willing to put its investigation on hold, and commit the time and resources to seek a court order. Neither of these is a given. Even then, assuming the agency went to such an effort, the patient may still receive notice and expose the health care provider to additional claims.

IIII. Conclusion

Ultimately, attorneys representing health care providers in the health care industry have several options they can pursue to avoid exposing themselves and

their clients to additional liability under state and federal medical privacy laws. Unfortunately, there is no “silver bullet” solution for every situation. Given the tensions between employment antidiscrimination and medical privacy laws, attorneys representing health care providers 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.

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