



EMPLOYER BULLETIN:

WHAT IS HIPAA AND DOES IT APPLY TO OUR COMPANY?

WHAT IS HIPAA?

The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) was enacted by Congress to address the growth of electronic exchange of information in the health care system with respect to certain financial and administrative transactions carried out by health plans, health care clearing houses and health care providers. HIPAA’s policies and mandates are implemented by federal regulations mostly directed toward the privacy and security of “protected health information.” These are known as the Privacy Rule and the Security Rule. The Privacy Rule governs the use and disclosure of protected health information, while the Security Rule governs the standards of integrity for the protection of electronically stored and transmitted protected health information. Because of their complexity and the administrative overhead associated with compliance, it is important to determine, as an initial matter, what and/or who is subject to the regulations and standards.

WHO IS COVERED BY HIPAA?

HIPAA only applies to “covered entities,” which are defined as health plans, health care clearing houses and health care providers. An employer may be a covered entity if it is a health plan, health care clearing house or health care provider. Generally, a self-funded employer health plan will be a covered entity, provided that it meets the definition of a “health plan” under the HIPAA regulations.

Recently, HIPAA was amended and expanded by the Health Information Technology for Economic and Clinical Health Act (“HITECH”), which was passed as part of the American Recovery and Reinvestment Act of 2009. The HITECH amendments to HIPAA expanded the scope of coverage of HIPAA standards in many ways, most significantly by bringing “business associates” of covered entities within the direct purview of the HIPAA Privacy and Security Rules. Accordingly, it is important to now identify whether an individual and/or entity is a “business associate” of a covered entity to determine if HIPAA applies to such an individual or entity.

Finally, the HIPAA regulations have addressed the unique “dual capacity” of an employer as both an employer and a covered entity. HIPAA’s regulations do not apply to employers in their capacity as employers, but only in their capacity as covered entities (and now pursuant to HITECH, their potential capacity as business associates as well).

HOW DO WE COMPLY WITH HIPAA?

The HIPAA privacy rule places limits on the ability of a covered entity to use and disclose protected health information. It requires that covered entities create policies and procedures governing the use and disclosure of protected health information which allow for its use and disclosure by and to those who require it to perform “covered functions” but at the same time implementing reasonable safeguards of protected health information to ensure that it is not used or disclosed in violation of the standards. The approach is flexible enough to account for individual circumstances of each entity, however, entities will be judged on the “reasonableness” of their policies. There are civil penalties associated with violations of the privacy rule by a covered entity or its employees and agents. Recently, HITECH expanded the potential penalties, significantly increasing the maximum potential penalty for HIPAA violations to \$1.5 million per calendar year. HITECH also set forth provisions for enforcement of HIPAA by state attorney generals that include a penalty sharing provision which incentivizes attorney generals to implement enforcement activity. Accordingly, the stakes of compliance with HIPAA have been raised and covered entities will want to carefully analyze and address their compliance activities.

CONCLUSION

Due to the confusion and uncertainty of HIPAA’s reach and the complexity of the law and its implementing regulations, sound legal advice is crucial to determining whether HIPAA applies to an individual and/or entity and further, if it does, to navigating the requirements for compliance. Kotz Sangster has health care law attorneys who are well versed in HIPAA/HITECH compliance ready to assist with compliance questions.

We are experienced, proactive and aggressive legal counsel providing superior service in all areas of employment law. If you would like further information regarding the issues raised in this newsletter or any other employment related issues, please contact Heather G. Ptasznik at (313) 259-8586, John T. Below at (313) 259-8597, or Matthew S. Derby at (313) 259-8653. For more information about Kotz Sangster, please visit us at www.kotzsangster.com. This newsletter is provided as general information service and should not be construed as and does not contain legal advice on any specific matter, nor does this message create an attorney-client relationship.