HIPAA Employer Audits Cause Panic and Frustration

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HIPAA, a vast federal law signed by President Clinton in August of 1996 and effective for most employers shortly thereafter, has suddenly become important to a few folks. At least those who have experienced the not so pleasant effects of a Department of Labor audit. To quote my friend Karli Dunkelberger, who says this frequently when speaking about COBRA, "*what's the big deal?*" Allow me to answer that question. The DOL has been auditing like crazy, and you know what they've determined so far? The majority of employers are non-compliant. But it's worse than that. Now that they know that most employers are non-compliant, what are they doing about it? Two things. One, they've increased their audit budget, and two, they've increased their audit personnel. And why not? With IRS penalties of $100 per day in excise taxes (maximum tax for "unintentional failures" for a single-employer plan the lessor of 10% of the amount paid during the preceding tax year by the employer's group health plans, or $500,000),[1] HCFA penalties of $100 per day for each individual with respect to each violation[2] (yes, that could be in addition to the IRS excise taxes), as well as possible civil penalties by the DOL as determined in the courts, the government could conceivably make a bundle on HIPAA audits. So why not go after non-compliant employers? It makes financial sense. So I guess that makes it a *big deal*.

Let's back up a moment, now that I have your attention. Just what is HIPAA? The Health Insurance Portability and Accountability Act of 1996 (HIPAA). In general, HIPAA contains new rules for restricting the use of pre-existing conditions, group-to-group and group-to-individual portability, provides for MSA's, contains civil and criminal penalties for health care fraud, and authorizes federal standards for electronic data interchange. Just a few minor provisions…

Under Title One, HIPAA provisions include limitations on pre-existing condition exclusions, portability of health coverage, certifications of creditable coverage, non-discrimination based on health status, and guaranteed availability in the small group marketplace. Title Two provisions include federal anti-fraud and abuse prevention programs, the development of a health information system, and coordination and anti-duplication provisions for Medicare-related plans with other health benefit coverage. Title Three includes tax-favored medical savings accounts (MSA's), increases in health insurance deductions for the self employed, and medical deductions for payment of qualified Long Term Care premiums and expenses. Lastly, HIPAA also brought about ERISA and COBRA modifications.

Special rules apply for non-federal government plans which fall under the Public Health Service Act (PHSA). Plans subject to PHSA that are self-insured may opt out of many of the aspects of HIPAA except the Certificate of Coverage requirements. To opt out, however, such employers must file with HCFA their election prior to the beginning of each plan year. Public sector employers who have elected to opt out must notify the plan participants of the specific federal requirements, as well as which have been opted out.

To review the HIPAA requirements for employers, most of us are aware of the Certificates of Coverage requirements, which are used to lessen pre-existing conditions exclusions waiting periods as well as to assist in gaining guarantee issue for a HIPAA individual policy. Upon the receipt of a HIPAA certificate, plans are required to make a determination as to the individual's creditable coverage and notify the individual of such determination within a "reasonable period of time."[3] Facts in circumstances will determine what is reasonable. Plans are not required to collect certificates at a stated time, but many law firms have suggested collection at the time of enrollment, due to the expediency rules included in HIPAA.

HIPAA standardized the definition of pre-existing conditions nationally, including a maximum of a 12-month waiting period for regular and special enrollees (state rules vary) and a maximum of an 18-month waiting period for late enrollees. Waiting periods will not be considered toward breaks in service. In

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[1] IRS Code Section 4980D(b)3

[2] PHSA Section 2761 (a)2

[3] HIPAA Interim Regulations, 1997

addition, HIPAA defined the six-month look-back rule for pre-existing conditions as the date of enrollment. Pregnancies are no longer considered pre-existing conditions. In addition, HIPAA amended COBRA and gave newborn and adopted children qualified beneficiary status and COBRA rights.

So what are some of the ways employers are non-compliant? There are several areas that can be considered such, including: the failure to provide an initial pre-existing conditions notice (according to HIPAA, if there is no notice, there is no pre-ex clause!), the failure to properly issue HIPAA certificates, failure to distribute federal notices, or the failure to issue initial notices to participants advising them of the rights under HIPAA. These are just a few areas which auditors are finding employers non-compliant. Yes, there are even more.

How do auditors find the areas of non-compliance? How is HIPAA enforced? Those are questions common now to employers. Especially those who have been audited or are awaiting an audit.

ERISA (the Employee Retirement Income Security Act of 1974) gives sectors of government enforcement authority. The Secretary of Labor enforces the health care portability requirements under both HIPAA and ERISA. HIPAA amended ERISA and allowed participants and beneficiaries to file suit to enforce their rights under ERISA. Taxpayers (i.e. employers) which fail to comply may be subject to excise taxes or other penalties. States have general enforcement authority and responsibility for group and individual requirements placed on health insurance issuers, including sanctions under state law. Should a state fail to fulfill its areas of responsibility, the Secretary of Health and Human Services may make a determination that the state has failed to "substantially enforce" the law, and may assert federal authority to enforce it. They may impose sanctions on insurers, which include civil and monetary penalties. Employers failing to comply with HIPAA and other related federal laws may be subjected to monetary penalties and lawsuits[4].

There are three areas of government enforcement: the IRS, the DOL and DHHS through HCFA (Health Care Financing Administration). The DOL, IRS and DHHS (Department of Health and Human Services) communicate with each other and refer violations to each other.

Again, IRS penalties may be assessed at $100 per day[5] for failure to provide certificates of coverage or other requirements of HIPAA contained in the Internal Revenue Code. The IRS may also impose penalties for the Mental Health Parity Act and Newborns' and Mothers Health Protection Act.[6] The minimum tax for non-compliance discovered after a notice of examination is generally $2,500. This minimum is increased to $15,000 where violations are "more than diminimus."[7] The maximum tax for "unintentional failures" for a single-employer plan is the lessor of 10% of the amount paid during the preceding tax year by the employer for group health plans, or $500,000.[8]

The DOL is given the authority to audit plans under its National Investigative Priority. They are responsible for protecting the plan's actions and promise of plan benefits to plan participants. The DOL may bring civil penalties for HIPAA enforcement under ERISA Section 502(a). Civil penalties may also apply for failure to provide them with the documentation requested[9].

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[4] Questions and Answers: Recent Changes in Health Care Law, U.S. Department of Labor, Pension and Welfare Benefits Administration, June, 1999

[5] IRS Code Section 4989D

[6] The ABC's of HIPAA Compliance; An Employer's Simplified Administrative Guide to HIPAA Compliance, Dorothy M. Cociu, RHU, REBC, Published by Advanced Benefit Consulting & Insurance Services

[7] IRS Code Section 4980D(b)3

[8] IRS Code Section 4980D(b)3

[9] The ABC's of HIPAA Compliance; An Employer's Simplified Administrative Guide to HIPAA Compliance, Dorothy M. Cociu, RHU, REBC, Published by Advanced Benefit Consulting & Insurance Services

HCFA steps in when states are not substantially enforcing HIPAA or related laws. HCFA may impose penalties of up to $100 per day for each individual with respect to each violation[10]. The entity's previous record of compliance as well as the gravity of the violation will be taken into consideration. Corrective actions will also be taken into consideration, and may reduce the penalties assessed.[11] In addition, violations which indicate widespread occurrences, significant financial impact or lack of proof showing the actions were corrected may adversely affect the penalties[12].

What are they looking for in audits? Everything. The DOL will usually send a letter requesting information needed for the audit, including all plan documents, amendments, summary plan descriptions, all eligibility records, certificates of coverage, plan correspondence, and a number of other items. What advice can I give employers who are audited? First, be polite and cooperative with the auditors. Cranky employers will most likely make even crankier auditors, who are under pressure to get their jobs done. Second, give them everything they ask for, following the time frames they request. Make every effort to get compliant, as soon as possible, as corrective actions will be considered by most auditors.

Most importantly, don't panic. Take a deep breath, step back and just dig in. Gather what is needed, give them what they ask for, and most importantly, get compliant.

Now, I ask you, *what's the big deal*?

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Editor's Note: Dorothy M. Cociu, RHU, REBC, is the author of "The ABC's of HIPAA Compliance: An Employer's Simplified Administrative Guide to HIPAA Compliance", and has 16+ years experience in federal compliance issues. She is a frequent industry writer, and has published over 40 articles on HIPAA, ERISA, COBRA, health care reform and other important topics. She is a national speaker on this and other health care topics. She can be reached at (714) 870-8651, Ext. 3#.

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[10] PHSA Section 2761(a)2
[11] 45 CFR Section 150.319
[12] 45 CFR Section 150.321