

## OCR clarifies limits on PHI use to defend lawsuits and audit claims in informal discussion with ABA

The U.S. Department of Health and Human Services (HHS) recently clarified the restrictions HIPAA's privacy rules impose on employers' use of protected health information (PHI) to defend against employee lawsuits or audit claims. The informal discussion occurred between HHS' Office for Civil Rights (OCR) and representatives of the American Bar Association's Joint Committee on Employee Benefits (JCEB).

### Defending Against a Discrimination Claim

JCEB asked how an employer's group health plan could disclose PHI to help defend against a discrimination claim, for example, by gathering statistics based on the treatment of other pregnant employees in order to counter an allegation. OCR said the information could be subpoenaed from the group health plan, but that the group health plan could not provide the information on a voluntary basis.

### Claims Audits

In general, health plans may not condition benefits on an authorization to release information, but employers may condition employment based on a disclosure of job-related health information since they are not covered entities. However, the authorization could not be worded to require that an employee have health coverage under the plan to remain employed. The employer would have to agree not to use PHI for employment decisions in order to obtain it from the group health plan, even with an authorization to obtain the PHI. If an employer detected fraud during an audit, OCR indicated that it would be difficult to use PHI to terminate an employee without violating privacy rules.

### Health Savings Accounts

Health savings accounts are not "health plans" and are therefore exempt from the HIPAA privacy rule. HHS may issue further guidance on this issue in the future. In the meeting, OCR said if an insured group health plan is exempt from most HIPAA privacy requirements because it receives only enrollment information and summary health information, it does not lose the exemption by administering COBRA continuation coverage.

### Conclusion

Although these were informal comments, OCR officials provided some much needed clarification. Policies may have to be revisited to ensure that employment actions are clearly separate from plan administration.

For more information, contact CTSI at 303-861-0507.