
Office of Civil Rights Clarifies Business Associates Role in Operations Plans' Liability

The provisions of HIPAA's privacy rules that govern business associates' role in group health plan operations, as well as how plans must respond to business associates' HIPAA violations, were clarified by U.S. Department of Health and Human Services (HHS) officials in informal remarks to benefits attorneys.

Staff of HHS' Office for Civil Rights (OCR) told representatives of the American Bar Association's Joint Committee on Employee Benefits (JCEB) that serious violations of the business associate contract may force the plan to terminate the contract unless truly infeasible. OCR staff also addressed wellness programs, privacy notice reminders, fraud audits and the status of civil and criminal enforcement.

JCEB gave the example of a self-insured plan whose third-party administrator (TPA), a HIPAA-contracted business associate, sent out 200 explanation-of-benefits (EOB) notices to the wrong participants. "OCR has not seen a unique pattern in terms of the types of complaints lodged against group health plans" the OCR stated. "A misdirected [EOB] is an example of a type of complaint OCR has received concerning a group health plan."

In general, the most frequent violations alleged are (in order), improper protected health information (PHI) use, inadequate safeguards, access obstacles such as high fees, exceeding minimum necessary and failing to obtain a required authorization. OCR has referred more than 300 potential criminal cases to the U.S. Department of Justice (DOJ), but "DOJ has

chosen not to investigate most of these cases," OCR staff noted.

What This Means For Counties

Counties should focus on two issues that OCR officials addressed:

(1) *When a business associate violates a privacy standard, an employer's group health plan may have to terminate the business associate's contract.* This may be required if a business associate refuses to mitigate damages or take other appropriate actions after a breach, according to OCR staff. Although the privacy rules include a qualifier only requiring termination where feasible, OCR will have a strict standard regarding whether a termination is feasible. Mere administrative inconvenience probably would not be enough to avoid having to terminate a business associate.

(2) *PHI can generally be disclosed in order to identify candidates for wellness programs.* The wellness program question involved a typical well-baby wellness program administered by a business associate, which used claim information from the plan to identify pregnant mothers. OCR stated that it was an appropriate "health care operation" for a business associate to review information for this purpose (assuming a business associate agreement is in place).

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