

COBRA Information: Is it PHI Under HIPAA?

By Rich Glass, JD

COBRA administrators access all types of sensitive information: addresses, Social Security numbers (SSNs) and payment records. The need to protect COBRA information is obvious. It is not as obvious whether this is HIPAA protected health information (PHI).

The implications of this issue are important. If routine COBRA information is PHI, then HIPAA's privacy and security rules apply, including the HITECH Act rules on reporting breaches of unsecured PHI. Before providing a practical answer to the above question, it is important to define a few terms.

Under the HIPAA regulations, PHI is defined as individually identifiable health information that is maintained or transmitted either electronically or via any other medium. The regulations specifically exempt this category of information: “[e]mployment records held by a covered entity in its role as employer.”

In turn, individually identifiable health information is a type of health information that is both created by a covered entity (for example, a health care provider or a health plan) or its business associate and relates to the past, present or future health condition, provision of care or payment for care of an individual.

Wax on, Wax off

A good way to view COBRA information is to recall the memorable line from the *Karate Kid* movie: “Wax on, wax off.” COBRA information typically relates to eligibility information. An employer reports a qualifying event to the COBRA administrator (perhaps, they are the same entity). The qualified beneficiary is offered coverage, and elects coverage. These are all “wax on” activities.

Alternatively, the qualified beneficiary might decline COBRA. The qualified beneficiary might elect COBRA and never pay for

it. The qualified beneficiary might ultimately enjoy COBRA coverage and either early terminate or have COBRA expire at the end of the maximum coverage period. These are all “wax off” activities.

Four Reasons Most COBRA Information Is not PHI

A practical answer is that most COBRA information is not PHI. There are four good reasons and two possible exceptions to this answer. First, let's address the four reasons:

- 1) **The employer provides the information.** One can argue that COBRA administration is an employer function. After all, employment information is what is typically needed to process a COBRA qualifying event, things like name, address and benefit coverage levels. The HIPAA regulations specifically exclude employment records.
- 2) **The privacy rule exempts most enrollment-disenrollment information.** The preamble to the HIPAA regulations suggests that enrollment-disenrollment information, when originating from a non-covered entity (for example, the employer, the qualified beneficiary) is not PHI. Specifically, the preamble states: “Plan sponsors that perform enrollment functions are doing so on behalf of the participants and beneficiaries of the group health plan and not on behalf of the group health plan itself.”
- 3) **COBRA duties primarily fall on the employer.** Under ERISA, offering COBRA is a plan sponsor duty. The plan sponsor is typically the employer. Under the Internal Revenue Code, liability for COBRA failures, resulting in excise taxes, falls on the employer. Under the Public Health Service Act, qualified beneficiaries are allowed to



Rich Glass is chief compliance officer for Infnisource, Inc. He is a licensed attorney and brings more than 18 years of legal expertise, specializing in benefits, human resources and related regulatory compliance. He has testified before the IRS and has provided comments on regulations issued by several governmental authorities. He is a member of the Health Plan Advisory Panel at Thompson Publishing Group and Contributing Editor of Thompson's Flex Plan Handbook. He is a frequent speaker and author on various benefits, employment law and compliance issues.

See PHI, p. 10

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sue their governmental employer, seeking equitable relief for COBRA failures. The employer is not the plan. The plan is the covered entity. Therefore, the employer is not a covered entity.

- 4) **COBRA information does not typically include health information.** Recall that most COBRA information relates to eligibility and the payment (or lack of it) for plan coverage. This does not fall within the definition of individually identifiable health information. For example, a qualified beneficiary's family level for dental coverage has nothing to do with a specific health condition, the care for that health condition or the payment for that care.

The case of *Cooney v. Chicago Public Schools*, decided in December 2010, provides a good illustration of the above points. In 2006, the Chicago Board of Education outsourced open enrollment to an entity that sent materials to more than 1,700 qualified beneficiaries. Unfortunately, each benefits packet included a distribution list containing names, addresses, SSNs, marital status and other insurance information.

This resulted in a lawsuit. The trial court dismissed the HIPAA allegation. This ruling was affirmed on appeal. While HIPAA does not provide for a private right of action for PHI failures, it does create a legal standard, from which may spring state privacy and other claims. The court concluded that PHI was not involved. Instead, it viewed the distribution list as “*employment records held by a covered entity in its role as employer.*” (See ¶1900, Case No. 792.)

Two Situations That Raise PHI Issues

There are two possible situations where COBRA information could be considered PHI, and thus subject to HIPAA's privacy and security protections.

- 1) **One of the COBRA terminating events is enrollment in another group health plan that does not apply a pre-existing condition exclusion to the qualified beneficiary's condition.** In some cases, this might require an inquiry by the plan into health conditions of the qualified beneficiary and a determination on whether they are excluded by the new group health plan. Arguably, this exercise would involve PHI because it is health information provided by one covered entity (that is, the new group health plan) to representatives of another covered entity for purposes of plan administration.
- 2) **Incapacity is a judicially recognized excuse for failure to make a timely election and/or premium**

payment. Again, determining whether incapacity is applicable necessitates an inquiry into the qualified beneficiary's medical condition, typically from another covered entity (that is a health care provider like a hospital or doctor's office).

Handle PHI With Care

While most COBRA information is not PHI under HIPAA, those with access to COBRA information should still handle with care. Other laws could come into play, including state privacy laws. HIPAA rules require plan sponsors (that is, employers) to safeguard any information provided by the health plan. A COBRA administrator probably has a contractual obligation to maintain the confidentiality of such information.

In conclusion, a breach of COBRA information is a cause for alarm. You simply do not need to sound the HIPAA alarm, except in rare cases, when it occurs. 🏠

Leave Policy (continued from p. 8)

The court agreed with Madison that this argument had several problems. First, as the insurer noted, there were procedural problems. In the earlier case, Clarcor just sought the full amount it paid for I.K.'s care (over the deductible) — not money it paid while I.K. was on COBRA, as the company was now seeking.

“As this alternative claim, which relies on a different theory for relief, was never properly pled, it would not be appropriate for the court to grant relief to Clarcor based upon it,” the court held.

Second, the court noted that Clarcor continued to ignore the plain language of the plan, which stated that “coverage ends ... the date you are no longer eligible to participate in this plan.” Here, while Clarcor disagreed with the court's earlier ruling that I.K. was ineligible, it offered no explanation on how she regained her eligibility, according to the court. And even if eligibility were not the issue, Exclusion No. 9 pointed to a ruling in Madison's favor. In order for Madison to cover the claim, Clarcor had to offer COBRA coverage in a “timely” manner following the qualifying event. The termination of FMLA leave was the qualifying event because coverage ended under the plan — but COBRA coverage was offered five months later.

“This notion that a five-month delay was not ‘timely’ is consistent with common sense and the Plan terms, which generally afford between 30 and 60 days for a party to make an election or respond to a development that would influence coverage,” the court indicated.

See *Leave Policy*, p. 11