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EAP Referrals Trigger HIPAA Issues

By Rich Glass, J.D.

Most human resources (HR) bookshelves probably contain at least one book focused on handling problem employees. In extreme cases, the average textbook may recommend a mandatory referral to the employer's employee assistance program (EAP).

Be careful. EAPs raise HIPAA privacy issues that can tie an unsuspecting employer in knots.

This HIPAA-EAP tension occurs because the employer is often giving employees a second chance and may even be trying to help individuals who cannot help themselves. EAP referrals typically occur in three situations:

- onsite alcohol use or drunkenness;
- onsite use of illegal drugs or a positive drug test; or
- severe emotional and psychological issues.

The crux of the HIPAA issue lies in the EAP. The U.S. Department of Labor (DOL) has issued three separate advisory opinions on what will make an EAP an employee welfare benefit plan subject to ERISA (and therefore HIPAA):

- If the EAP offers counseling, then it is an ERISA plan (DOL Advisory Opinion 83-35A).
- If the EAP offers treatment for drug and alcohol abuse, stress, anxiety, depression and similar health problems, it is an ERISA plan (DOL Advisory Opinion 88-04A).
- However, if the EAP merely offers referrals for treatment and no other benefits, it is not an ERISA plan (DOL Advisory Opinion 91-26A).

This comes as a surprise to some who handle employment-related matters. It is tempting to view the EAP as just another HR program, perhaps taking up a few pages in the employee handbook, akin to other workplace benefits like the company picnic and the employee holiday party. Very often, that thinking is wrong.

If an EAP is an ERISA welfare benefit plan, then it is a health plan for HIPAA purposes, subject to all of the law's privacy and security rules because it is a covered entity (see ¶134 of the *Guide*). This includes the limitations on using and disclosing protected health information (PHI). The EAP vendor is likely a business associate of the EAP, and therefore subject to many of the HIPAA rules based on the Health Information Technology for Economic and Clinical Health Act (see ¶140).

The HR professional involved in making the mandatory EAP referral is essentially wearing two hats:

- an employment hat, making decisions that involve adverse employment actions (up to, and including, termination of employment); and
- a HIPAA hat, accessing information regarding the EAP as a member of the covered health plan's workforce.

While HIPAA allows a group health plan to disclose PHI to an employer in its role as plan sponsor, the plan documents must clearly allow it. These disclosures must also be limited to plan administrative functions.

Can you feel the HIPAA-EAP tension getting tighter? Let's tighten it a little more.

The foundation of an EAP is confidentiality of information. Employees will not use the EAP if they think the employer will find out the reason or even the fact that they went at all. In a way, EAP participation is viewed as a scarlet letter, indicating that the employee does not have it all together, which in this day and age we all do our best to deny.

However, an employer that makes a mandatory EAP referral will naturally want to track the employee's participation and progress.

At this point, it might appear that the HIPAA-EAP knot is pulled so tight that there is no way to untie it. Maybe simply cutting the cord, so to speak (that is, termination

See *EAP Referrals*, p. 5

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EAP Referrals (continued from page 4)

of employment) is the simplest solution. However, cutting the cord may not be an option where a collective bargaining agreement is involved or if the position has certain drug and alcohol testing protections under rules issued by the U.S. Department of Transportation, Department of Defense or other agencies. Fortunately, another solution exists: the written authorization.

The employer should set up a procedure that, at a minimum, encompasses these four steps:

Step 1: Notice the notices. It is important that the employer put its workforce on notice as to when a mandatory EAP referral will occur. This can be documented in any number of places: the employee handbook, EAP-related materials or other employment-related policies. The documentation should describe what will trigger the referral, include what type of follow-up will be required and make it clear that a failure to follow the prescribed path of rehabilitation could result in disciplinary action up to and including termination of employment.

Step 2: Get it in writing. When making a mandatory EAP referral, the employer should receive written authorization from the employee that the employer can have access to EAP-related information.

The authorization, at a minimum, should allow the employer to track attendance and discuss generally with the care provider the employee's progress and likely completion date. What if the employee refuses to sign? You cannot fire or discipline an employee for refusing to provide PHI. However, you can make the signing of the authorization a condition of continued employment (see ¶413).

Step 3: Secure the security. Designate one individual to receive and maintain the information, which interestingly changes complexion from PHI in the hands of the EAP vendor to non-PHI employment records in the employer's hands (see ¶201). Create a firewall to ensure that anyone who accesses the information has a true need to know. General privacy protections should still apply to this very sensitive information.

Step 4: Look before you leap. Before taking an adverse employment action, consider all the facts and circumstances. Review any prior precedents that may have been set. HIPAA does not provide a private right to sue for privacy and security violations, but other laws might in a given circumstance, like the Family and Medical Leave Act or Americans With Disabilities Act. And note that many cases have been brought under state privacy laws or as a negligence action alleging that HIPAA set a legal standard of care (see ¶630).

A North Carolina case, recently affirmed on appeal in the employer's favor, provides a good primer. In *Pressley v. CaroMont Health Inc.*, 2010 WL 4625965 (W.D.N.C., Nov. 3, 2010), the employer had one of those problem employees. Her problem was that she showed up for work when she was *not* scheduled and without prior approval. The employer had a clear policy on this. Her actions caused friction and conflict, and several co-workers complained. Per the employer's policy, termination was an appropriate sanction for these repeated incidents.

The employer offered a second chance: suspension and a mandatory referral to the EAP. The employee had to sign a release for the EAP to provide certain information. When she refused, the employer terminated employment.

In the ensuing lawsuit, the employee argued that the employer's business as a hospital prohibited it from receiving information from the EAP. She also alleged that the true motivation was age discrimination. The federal district court disagreed and upheld the employer's actions, and a federal appeals court affirmed this decision without elaborating (2011 WL 755519).

In conclusion, you don't need to be a Boy Scout to untie the HIPAA-EAP knot. All you need is some simple and careful planning. 🏠

HITECH Rules (continued from page 3)

The existing right to an accounting of disclosures would remain in effect, with certain modifications. The two requirements "would be distinct but complementary," according to OCR's preamble to the proposed rules. "Our proposal attempts to shift the accounting provision from a manual process that generates limited information to a more automated process that produces more comprehensive information."

The HITECH Act entitles individuals to an accounting of disclosures for treatment, payment and health care operations, which were exempt from the prior HIPAA rules, if such a disclosure is made from an electronic health record (EHR). (See ¶435.) The proposed rules would require an access report, on request, for any disclosures or internal uses from an electronic "designated record set" (not just an EHR). However, the required content of an access report would be narrower than the content of an accounting of disclosures.

Comments on the proposed rules are due Aug. 1. (The July newsletter will feature a detailed discussion of the rules and their implications for plan sponsors.)

For More Information

Materials from the OCR/NIST conference are available on NIST's website at http://csrc.nist.gov/news_events/HIPAA-May2011_workshop. 🏠