



# WORKERS' COMPENSATION COMMENTARY



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## "WHAT THE HECK IS A HIPPA?" ...AND WHY DO I NEED TO KNOW?

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**T**hose two questions were posed to us last year because of the emerging concern about potential liability on the part of a TPA or insurance company for divulging medical information concerning injured employees.

One or our more astute clients had become aware of the passage and imminent establishment of some medical information privacy provisions to HIPAA, the "Health Insurance Portability and Accountability Act".

As you will recall, this was federal legislation in which employers of a certain size were required to provide to employees the ability to continue to be covered by their employer sponsored health insurance policy even after they leave their employment. You may have noticed, however, that the Federal government, in enacting legislation, never is content to leave well enough alone or pass anything that remotely resembles simple legislation. Congress along with its hordes of bureaucrats always load up their bills with multiple other provisions depending upon the interests sought to be satisfied in the passage of the legislation. This bill was, of course, no exception.

One of the things that the legislation did was impose restrictions on information that health providers can provide to insurance carriers. A "Privacy Rule" was developed by the Department of Health and Human Services to implement that aspect of the legislation. The formal title of that "Rule" is "the Standards for Privacy of Individually Identifiable Health Information."

The Standards go into effect no later than

April of this year.

Now, the Privacy Rule is primarily aimed at governing the information furnished by health care providers directly treating individuals to insurers paying for the services. The Rule puts into place a requirement that authorization be secured from the patient for the disclosure of medical information under any circumstance where exceptions to the requirement do not exist.

The Privacy Rule does recognize that there is a legitimate need for insurers and third party administrators to have access to individual's health information as authorized by the workers' compensation laws in order to provide benefits under that law. Thus, a major exception to the Rule resulted. An insurer or third party administrator or a claims department of a self-administered self-insured employer may obtain health information directly from a health provider without the specific authorization of the injured worker. The purpose for such disclosure, of course, is multifaceted. The disclosure may be to comply with the requirements of the workers' compensation law in various respects and/or to provide evidence necessary to prove up payment entitlement for services rendered by health providers.

Over and above the information that can therefore be provided without an individual release or authorization, further information may be disclosed by the health provider to the insurer or the workers' compensation administrator either in-house or independent with the execution of an individual authorization by the injured employee. The legislation lists the specific elements that must appear in the authorization in order to make the authorization valid. Those elements and requirements are in-

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cluded in exhaustive detail at Title 45, Code of Federal Regulations §164.508. If it becomes necessary to prepare an authorization, basic elements can be found in a template located on the internet at: [www.gilliland.com/Authorization.pdf](http://www.gilliland.com/Authorization.pdf).

Suffice it to say that unless medical information is being provided to an insurer or self-insurance administrator by means of an individually executed authorization, HIPAA provides that any covered entities should limit the amount of protected health information to the minimum necessary to accomplish the workers' compensation purpose. Well, what does that mean? We can only respond to that question with a lawyer like "It depends...." This is a very subjective standard.

We would suggest that as long as a covered entity is being reasonably prudent and they are using reasonable discretion in selection of the information that they send, that it is highly unlikely that any negative action will be taken against them under these provisions. The legislation encourages covered entities to establish guidelines and protocols to follow in the provision of medical information.

This is extremely useful since those guidelines would then provide guidance to employees charged with the provision of information and would serve as prima facie evidence of a reasonable effort to comply with the "privacy rule". It also must be noted that the regulations pertain to both parties. While the covered entity, the health provider, will furnish information in accordance with its guidelines, likewise, the requesting party, the insurer or workers' compensation administrator, will be representing to the health provider that the information being sought is the minimum needed to carry out their obligations. The health providers may rely on those representations.

In fact, when a health provider is furnishing information in accordance with State or other law (such as in response to a Subpoena Duces Tecum or a Motion to Produce) or if furnishing information pursuant to a individual authorization executed by the recipient of the services, the health care provider is entirely exonerated from any obli-

gation to make the "minimum necessary" determination when providing medical information.

Finally, in promulgating these standards, the federal HHS Department intends to monitor developments and is open to a modification of any of the standards if it is established that any of them interfere with the workers' compensation process.

The implementation of this act significantly affects employers with regard to the health and accident insurance coverage being provided but it would appear that at least at the present time, even after the implementation of the standards in April 2003, that workers' compensation professionals and their counsel will probably see little change in the acquisition of medical information. As time goes by, however, a basic familiarity with these rules and with any changes that are implemented in the future would be very prudent.

**Look for  
Lister, Martin & Thompson's  
Workers' Compensation Tour Guide  
2003  
Coming in March**

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