

Reproduced with permission from BNA's Health Care Fraud Report, 18 HFRA 523, 6/11/14. Copyright © 2014 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Workforce Whistleblowing at the Intersection of HIPAA and the False Claims Act



BY R. SCOTT OSWALD AND DAVID L. SCHER

The Health Insurance Portability and Accountability Act (HIPAA) is an ever-present concern for health-care providers and their workforce members. Health-care providers, health plans, and health-care clearinghouses train their staff ad nauseam about the Privacy Rule and what it means to the entity.

In fact, HIPAA regulations require them to do so. 45 C.F.R. § 164.530(b)(1). But the goal of protecting patient information and rooting out fraud can come at cross purposes when an entity is defrauding government programs like Medicare and Medicaid. Most entity-administered trainings gloss—or skip—over the instances where workforce members *can* disclose patient information.

First, a primer on the Privacy Rule, which states, “A covered entity may not use or disclose protected health information, except as permitted or required by this subpart.” 45 C.F.R. § 164.502(a).

Further, federal regulations define “protected health information” to include “individually identifiable health information” that is “[t]ransmitted or maintained in any . . . form or medium.” 45 C.F.R. § 160.103. Another related class of information, “individually identifiable health information,” meanwhile, “[i]s created or received by a health care provider . . .; and . . . [r]elates to

the past, present, or future physical or mental health or condition of an individual . . . and . . . identifies the individual.” *Id.*

So what does this rule mean to the individual workforce member? Perhaps the most striking pronouncement of the Privacy Rule omitted in entity-furnished trainings is that “HIPAA legislation only applies to covered entities, *not their workforces.*” 65 Fed. Reg. 82462, 82501-02.

Many workforce members misunderstand HIPAA and believe that it regulates their individual actions; that is wrong. The Privacy Rule applies to “covered entities,” which are defined as (1) health care providers, (2) health plans, and (3) health care clearinghouses. See *United States v. Boston Scientific Neuromodulation Corp.*, 2:11-CV-1210 SDW MCA, 2013 BL 142423 (D.N.J. May 31, 2013). It does not apply to individuals in their personal capacities; it is applicable only in their actions on behalf of the entities that employ them.

HHS Clarifies HIPAA's Reach

The Department of Health and Human Services has made this clear: “[I]t is beyond the scope of this rule to directly regulate whistleblower actions of members of a covered entity’s workforce.” 65 Fed. Reg. 82462, 82501-02; see also *U.S. ex rel. Palmieri v. Alpharma, Inc.*, CIV.A. ELH-10-1601, 2014 BL 79552 (D. Md. Mar. 21, 2014).

In practical terms, this means that a covered entity may be liable for a workforce member’s breach of the Privacy Rule, but the individual will not have liability for any such breach. Instead, the practical effect is that covered entities routinely terminate the employment of workforce members who breach the Privacy Rule.

For many, this may be cold comfort. But, in the implementing regulations for HIPAA, HHS wanted to

Oswald is managing principal of The Employment Law Group, PC, in Washington. He can be reached at (SOswald@employmentlawgroup.com). Scher is principal. He can be reached at (dscher@employmentlawgroup.com). Their law firm is at <http://www.employmentlawgroup.net/>.

send a clear signal to covered entities and whistleblowers to encourage rooting out unlawful, unprofessional, and unsafe behavior.

Specifically, the regulation refers to information a whistleblower “believes in good faith . . . is unlawful or otherwise violates professional or clinical standards, or that the care, services, or conditions provided by the covered entity potentially endangers one or more patients, workers, or the public,” the covered entity will not be considered to have violated the Privacy Rule when disclosed to particular receivers. 45 C.F.R. § 164.502(j)(1)(i). Indeed, many workforce members—such as doctors and nurses—often have an affirmative duty by their licensing or professional organization to report this kind of wrongdoing.

**The trouble is that covered entities often do
retaliate against workforce members for
whistleblowing. HIPAA does not provide its own
protections for whistleblowing. The most obvious
candidate for such protections is the False Claims
Act.**

The rule describes where a disclosure may occur without a violation of the Privacy Rule. A covered entity will not be liable when a whistleblower makes a disclosure to “[a]n attorney retained by or on behalf of the workforce member . . . for the purpose of determining the legal options of the workforce member.” *Id.* at (j)(1)(ii)(B).

The same applies when the whistleblower discloses to “[a] health oversight agency or public health authority authorized by law to investigate or otherwise oversee the relevant conduct or conditions of the covered entity or to an appropriate health care accreditation organization for the purpose of reporting the allegation of failure to meet professional standards or misconduct by the covered entity.” 45 CFR § 164.502(j)(1)(ii)(A).

Other than the obvious agencies and authorities—like a state health board—courts have interpreted this provision to include the Department of Justice, where it is acting in its capacity as a health oversight agency because of its enforcement jurisdiction. *Cleveland Clinic Foundation v. U.S.*, 2011 BL 60630 (N.D. Ohio 2011).

HHS was keen on this regulation to quell concerns from regulated entities that they would be liable not

only for the underlying violations identified and disclosed by whistleblowers but also for the breach of the Privacy Rule by the workforce member.

This regulation is the perfect palliative. On the other hand, HHS reassures that “we are not erecting a new barrier to whistleblowing, and that covered entities may not use this rule as a mechanism for sanctioning workforce members . . . for whistleblowing activity.” 65 Fed Reg 82462, 82636 (Dec. 28, 2000).

The trouble, of course, is that covered entities often do retaliate against workforce members for whistleblowing. HIPAA does not provide its own protections for whistleblowing, so we must look elsewhere. The most obvious candidate for such protections is the False Claims Act at 31 U.S.C. § 3730(h). This seems a good fit, especially as noted above that these carve-outs are available when a workforce member believes in good faith that he or she is disclosing unlawful, unprofessional, or unsafe conduct.

The False Claims Act offers its protection when an employee engages in lawful acts “in furtherance of an action under [the False Claims Act] or other efforts to stop 1 or more violations of [the False Claims Act].” 31 U.S.C. § 3730(h)(1).

Companies Facing Possible Liability

The disclosures most likely to fit this bill are those pertaining to Medicare and Medicaid fraud, although it does include others. Companies and providers place themselves in peril of liability when they terminate workforce members for disclosures made to an attorney, a health oversight agency, or public health authority.

This is especially true when the disclosures are made to the carved out oversight agencies, public health authorities, and retained attorneys. When a workforce member makes such a disclosure, it is strong evidence that he/she is taking lawful acts “in furtherance of” or engaging in other “efforts to stop” a False Claims Act violation.

The company cannot simply state that it is terminating an employee because he/she disclosed protected health information and then wipe its hands. The regulations have specifically authorized these types of disclosures to encourage whistleblowers to come forward. Acting in direct opposition to that regulation is further evidence of the company’s bad faith.

Workforce members who identify or witness Medicare or Medicaid fraud should be heartened by HHS’s aggressive posture in favor of whistleblowers and should make appropriate disclosures to root out unlawful, unprofessional, and unsafe conduct.