

## **ARE YOU COVERED BY HIPAA?**

If a health care provider is covered by HIPAA, it must comply with the HIPAA Privacy Rule, Security Rule, and Breach Notification Rule. If it is not covered by HIPAA, it does not have to do. Consequently, it is useful to briefly state when a health care provider is covered.

### **Who Is a Health Care Provider?**

The first question is whether your organization is a health care provider for purposes of the Privacy Rule.

A “health care provider” means a provider of services for purposes of Medicare, a provider of medical or health services for purposes of Medicaid, and:

“...any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.” 45 CFR §160.103

“Health care” is defined very broadly as care, services, or supplies related to the health of an individual. It includes, but is not limited to, the following:

- “(1) Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and
- (2) Sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.” 45 CFR §160.103

### **When Is a Health Care Provider Covered?**

If your organization is a health care provider, then the next question is whether or not it is covered by the Privacy and Security Rules.

A covered health care provider is one who transmits any health information in electronic form in connection with a HIPAA covered transaction.

“Health information” is defined as:

“... any information whether oral or recorded in any form or medium, that:

- (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearing house; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision for health care to an individual.” 45 CFR §160.103

HIPAA covered transactions are transactions involving:

“...the transmission of information between two parties to carry out financial or administrative activities related to health care. It includes the following types of information transmissions:

- (1) Health claims or equivalent encounter information.
- (2) Health care payment and remittance advice.
- (3) Coordination of benefits.
- (4) Health care claim status.
- (5) Enrollment and disenrollment in a health plan.
- (6) Eligibility for a health plan.
- (7) Health plan premium payments.
- (8) Referral certification and authorization.
- (9) First report of injury.
- (10) Health claims attachments.
- (11) Other transactions that the Secretary may prescribe by regulation.”  
45 CFR §160.103<sup>1</sup>

“Electronic form” is not directly defined by HIPAA. The closest definition is that for “electronic media”:

- (1) Electronic storage material on which data is or may be recorded electronically, including, for example, devices in computers (hard drives) and any removable/transportable digital memory media, such as magnetic tape or disk, optical disk, or digital memory card;
- (2) Transmission media used to exchange information already in electronic storage media. Transmission media include, for example, the internet (wide-open), extranet or intranet (using Internet technology to link a business with information accessible only to collaborating parties), leased lines, dial-up lines, private networks, and the physical movement of removable/transportable

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<sup>1</sup> At the time this is being written, the Secretary has not prescribed any other transactions.

electronic storage media. Certain transmission, including of paper, via facsimile, and of voice, via telephone, are not considered to be transmissions via electronic media if the information being exchanged did not exist in electronic form before the transmission.” 45 CFR §160.103

When the Privacy Rule was first proposed, the government’s comments stated:

“Under this definition, information that is electronically transmitted would include information exchanged with a computer using electronic media, even when the information is physically moved from one location to another using magnetic or optical media (*e.g.*, copying information from one computer to another using a floppy disc). Transmissions over the Internet (*i.e.*, open network), Extranet (*i.e.*, using Internet technology to link a business with information only accessible to collaborating parties), leased lines, dial-up lines, and private networks would all be included. Telephone voice response and faxback (*i.e.*, a request for information from a computer made via voice or telephone keypad input with the requested information returned as a fax) systems would be included because these are computer output devices similar in function to a printer or video screen. The definition would not include paper-to-paper faxes, or person-to-person telephone calls, video teleconferencing, or messages left on voice-mail. A key concept that determines if a transmission meets the definition is whether the source or target of the transmission is a computer. The medium or the machine through which the information is transmitted or rendered is irrelevant.” 64 FR 59937

If you believe your organization may not be covered by the HIPAA Privacy and Security Rules, you should consult an attorney familiar with HIPAA to obtain a legal opinion concerning your organization’s status.

### **Frequently Asked Questions**

- 1. Can a provider avoid being covered by transmitting health information to an outside, unrelated entity, such as a billing company, by paper for that outside entity to then transmit electronically?**

No. The outside entity is acting on behalf of the provider in making the electronic transmission and the electronic transmissions are attributed back to the provider.

- 2. What if a provider does not transmit anything electronically in any of the HIPAA covered transactions? Does that mean it is not covered?**

Yes, the provider would not be subject to the HIPAA Privacy and Security Rules. It should be very, very sure, however, that it does not transmit any health information electronically. As stated above, electronic form includes computer disks, dial up lines, and the Internet.

**3. What if a provider uses paper for all transactions, but faxes health information in connection with a HIPAA covered transaction? Is the agency or hospice covered?**

According to the definition of “electronic media,” faxing health information via plain paper fax machines is not an electronic transmission. Therefore, if a provider submits claims paperwork by faxing the paper claims forms to the payor, the provider is not engaging in an electronic transmission and would not be covered. Note, however, if the forms are faxed directly from a computer, then it would be an electronic transmission and the provider would be covered.

**4. Is a private duty home care agency covered?**

It will depend on the nature of the services the private duty agency is providing and whether those services fall within the definition of “health care” stated earlier.

If the private duty agency simply provides housekeeping and companionship services, the services probably do not constitute “health care” for HIPAA purposes. Still, it can be argued that companionship services are for “service” with respect to the mental condition of the client.

However, it appears that providing Medicaid waiver services or personal assistance services and help with activities of daily living do constitute health care for HIPAA purposes.

Of course, even if its services are health care for HIPAA purposes, the agency is only covered if it transmitted any health information in electronic form in connection with a HIPAA covered transaction.

**5. What is the most common reason a provider is covered?**

In my experience, the most common reason a provider is covered is because it transmits reimbursement claims electronically.

As mentioned earlier, if you believe your organization may not be covered by the HIPAA Privacy and Security Rules, you should consult an attorney familiar with HIPAA to obtain a legal opinion concerning your organization’s status.

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