

Akerman Practice Update

HEALTHCARE

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New HIPAA Safe Harbor for Patient Privacy Breaches

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The recently-enacted “Stimulus Bill” requires HIPAA covered entities to notify people – and requires business associates to notify covered entities – whose unencrypted protected health information (PHI) is breached. However, a brand-new HIPAA “safe harbor” lets them avoid sending notices if PHI was encrypted or destroyed.

Here’s how the safe harbor works:

- Encrypt electronic PHI by coding it so there is a low probability of decoding. Make sure the coding process or key has not been breached.
- Shred or destroy paper, film, or other hard copy media.
- Clear, purge or destroy electronic media. If PHI is properly destroyed, no breach notification is required.

The safe harbor will apply 30 days after HHS publishes interim final rules but ought to be implemented now as good risk management and as a best practice.

With the safe harbor, no notices are required. Otherwise, each individual whose PHI has been (or is reasonably believed to have been) breached, must be notified. Also, business associates must notify the covered entity and identify people whose PHI has been (or is reasonably believed to have been) breached. Notifications must be issued without unreasonable delay (subject to delay authorized by law enforcement) but in no case later than 60 days.

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Notice requirements include the following:

- Written notice by first-class mail (or by electronic mail if specified by the individual).
- Posting a notice on a provider's website or publishing it in major print or broadcast media when more than 10 people have insufficient contact information.
- When imminent misuse is suspected, notice can be by telephone or other methods.
- Notice to media and immediate notice to HHS when a breach involves more than 500 people.

Notices are to include a brief description of what happened; the date of the breach and when it was discovered; the types information involved; steps people should take to protect themselves from harm resulting from the breach; a brief description of what is being done to investigate the breach, mitigate losses, and protect against any further breaches; and contact procedures to include a toll free telephone number, an e-mail address, web site, or mailing address.

Even with the new safe harbor, covered entities must still comply with all other federal and state laws and rules governing identity. For example, breach notification laws such as Florida's Statute 817.5681, may still require notice if unsecured information is breached. Otherwise it exempts encrypted personal information from notice requirements.

This new safe harbor provides cost-effective ways to use encryption or destruction to protect PHI while avoiding the cost and other adverse consequences that are virtually certain to follow when security breach notices are sent.

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