

Akerman Practice Update

HEALTHCARE

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Notice Now Required to Patients of Privacy Breaches

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New HIPAA Regulations Impacting Covered Entities

On August 19, 2009, the Secretary of Health and Human Services published interim final regulations which require health care providers and other HIPAA covered entities to notify affected individuals following a breach of unsecured protected health information ("PHI"). These regulations were required to be issued by the Health Information Technology for Economic and Clinical Health (HITECH) Act, part of the American Recovery and Reinvestment Act of 2009 passed last February.

Covered Entities Must Notify Patients of Breaches

The regulations require covered entities to promptly notify affected individuals, and in some cases, the Secretary of HHS and the media, of a breach. In short, notifications must be made within 60 calendar days after discovery of a breach, and the notifications must contain certain information listed in the regulations in order to comply. Note that, in some cases, Florida law requires notification within 45 days. Please consult your health care counsel to determine which time frame is applicable and the content of the notice in the event of a breach.

Business Associates

The regulations also require business associates of covered entities to notify the covered entity of a breach by the business associate within the same time period.

What is a Breach?

A "breach" under the regulations is defined as disclosure of PHI (with some exceptions) in a manner which compromises the security or privacy of the PHI and poses as significant risk of financial, reputation or other harm to the individual.

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“These regulations, and the obligations imposed by them, become effective on Friday, September 18, 2009.”

Inadvertent Breaches

A breach specifically excludes an unintentional breach by a workforce member or person acting under the authority of the covered entity or business associate, if that disclosure was made in good faith and within the scope of authority and does not result in further use or discovery not allowed by the Privacy Rule. A breach also excludes inadvertent disclosures made between persons at a covered entity or business associate who are both authorized to access the PHI, as well as a disclosure of PHI where the covered entity has a good faith belief that the unauthorized person to whom the disclosure was made would not reasonably have been able to retain the information.

Proactive Measures to Avoid these Requirements

In addition to the exclusions from the definition of “breach”, another important exclusion in the regulations is in the definition of “unsecured protected health information”. The definition cross references exclusions already published last April in a Guidance and Request for Information by HHS. In that guidance, HHS identified encryption and destruction of PHI as two methods which render PHI unusable, unreadable or indecipherable to unauthorized individuals. Therefore, PHI which has been encrypted or destroyed is not “unsecured”, and security breaches of this information does not require notification to the individual.

Effective Dates

These regulations, and the obligations imposed by them, become effective on Friday, September 18, 2009. HHS has said, however, that they will not impose any sanctions for failure to notify individuals of breaches for 180 days.

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