

Federal and State Governments Team Up To Provide HIPAA Education

By: *Dorothy M. Cociu, RHU, REBC*

Who said the government doesn't care about the little guy? On July 10, 2001, several fortunate employers, brokers, TPA's and other health insurance industry personnel had the privilege of attending a special presentation of "HIPAA and Other Health Benefits Laws: Compliance Assistance Seminar" in Los Angeles, as part of a national Health Benefits Education Campaign funded by Congress and put on jointly by the United States Department of Labor and the State of California's Department of Insurance and Office of Managed Care. This was one of four such joint federal and state seminars funded by our federal government, with previous venues of Baton Rouge, Louisiana and Albany, New York. One future presentation is scheduled on September 11 in Columbus, Ohio.

The general sense of the audience was appreciation, and for some agents and TPA's, a more urgent attempt to gather much needed information on this extensive law for their employer clients. HIPAA should be second nature by now, shouldn't it? This vast piece of legislation, signed into law by former President Clinton in August of 1996, is finally becoming known, but unfortunately, is somewhat notorious due to employer audits from the DOL or the IRS. The Health Insurance Portability and Accountability Act is now a reality. To many, it means simply issuing Certificates of Coverage to terminated employees and covered beneficiaries, and pre-existing conditions portability. Most employers and industry personnel have erroneously believed that this is all there is to this law. The reality is, it is much bigger than that.

HIPAA BACKGROUND

In general, HIPAA contains new rules for restricting the use of pre-existing conditions, group-to-group and group-to-individual portability, provides for MSA's, contains civil and criminal penalties for health care fraud, and authorizes federal standards for electronic data interchange. Since its enactment, many sets of new regulations, technical bulletins and additional legislation have gone into effect. EDI regulations were released last year, non-discrimination rules were released over the winter, and HIPAA medical records privacy is the next important phase, with implementation scheduled to be completed by April, 2003.

Under Title One, HIPAA provisions include limitations on pre-existing condition exclusions, portability of health coverage, certifications of creditable coverage, non-discrimination based on health status, and guaranteed availability in the small group marketplace. Title Two provisions include federal anti-fraud and abuse prevention programs, the development of a health information system, and coordination and anti-duplication provisions for Medicare-related plans with other health benefit coverage. Title Three includes tax-favored medical savings accounts (MSA's), increases in health insurance deductions for the self-employed, and medical deductions for payment of qualified Long Term Care premiums and expenses. HIPAA also brought about significant ERISA and COBRA modifications.

Special rules apply for non-federal government plans which fall under the Public Health Service Act (PHSA). Plans subject to PHSA that are self-insured may opt out of many of the aspects of HIPAA except the Certificate of Coverage requirements. To opt out, however, such employers must file with HCFA their election prior to the beginning of each plan year. Public sector employers who have elected to opt out must notify the plan participants of the specific federal requirements, as well as which have been opted out.

To review the HIPAA requirements for employers, most of us are aware of the Certificates of Coverage requirements, which are used to lessen pre-existing conditions exclusions waiting periods as well as to assist in gaining guarantee issue for a HIPAA individual policy. Upon the receipt of a HIPAA certificate, plans are required to make a determination as to the individual's creditable coverage and notify the individual of such determination within a "reasonable period of time."¹ Facts in circumstances will determine what is reasonable. Plans are not required to collect certificates at a stated time, but many law firms have suggested collection at the time of enrollment, due to the expediency rules included in HIPAA.

¹ HIPAA Interim Regulations, 1997

HIPAA standardized the definition of pre-existing conditions nationally, including a maximum of a 12-month waiting period for regular and special enrollees (state rules vary) and a maximum of an 18-month waiting period for late enrollees. Waiting periods will not be considered toward breaks in service. In addition, HIPAA defined the six-month look-back rule for pre-existing conditions as the date of enrollment. Pregnancies are no longer considered pre-existing conditions. In addition, HIPAA amended COBRA and gave newborn and adopted children qualified beneficiary status and COBRA rights.

A myriad of notices and forms are required by HIPAA, in addition to the certificates of creditable coverage we are all familiar with. Initial notifications to eligible participants, renewal notifications, amendments to plan language, plan change notification procedures, HIPAA updates to enrollment forms and other administrative forms, are among the HIPAA requirements.

THE IMPORTANCE OF EDUCATING EMPLOYERS

It's nice to know that someone in the government cares about the little guys – the average small or mid-size employer who really doesn't have the wherewithal to gather details on such a complex law, as they are in the business of making widgets, not deciphering health care laws. No one left the room on July 10th without feeling they had received valuable information. Attendees felt it was a great opportunity to meet with regulators on one of the most important issues facing us today, and it was perceived as valuable and well worth the time spent. Los Angeles Association of Health Underwriters member and health insurance broker Jeffrey Miles energetically commented: "The presentation was outstanding. The opportunity to have all our regulators, both state and federal, in one room taking questions on specific matters is something no benefits professional should miss. I hope they bring their road show back to town again!"

Deborah Milne, the Health Benefits Education Campaign Coordinator, U.S. Department of Labor, Pension and Welfare Benefits Administration, Washington, DC, was happy to discuss the program with me. I shared with Deborah my thoughts and observations of the audience, including the comments I'd received from attendees about the program's worth. "We thought it would be valuable as well, and we were hoping people would feel that way."

I asked Deborah about the difficulty of setting up such a program with the state regulators. "It was not difficult at all. We have an ongoing relationship with the NAIC and the PWBA office attends their monthly meetings. We had been talking about doing something like this for a long time. It began as an informal discussion, and then the light bulbs went on in people's heads and they said 'let's try doing something like that.' When it came to the point where Congress had given us some money for a campaign... we were coming out with a compliance assistance booklet, and I said 'why don't we do seminars with the state?,' and it just started rolling, and now it's gotten to critical mass."

I was curious why only four meetings were initially scheduled, since the program seems to be well received. "Last year's budget wasn't approved until the end of December," Ms. Milne advised, "and our fiscal year goes from October 1 to October 1, so we didn't know, as the campaign had never received any actual funding from Congress before, whether we were going to have funds until the end of December. By that time the first quarter was already over, so we said let's do as many as we can in the time we have left. Four was all I could do personally."

The program was kicked off in Baton Rouge. "It was very successful. The insurance department there is extremely active in educating consumers and employers and TPA's and so on; they do a lot. We started with them because we knew they were already active and wanted to get our feet wet with someone who was really going to be great, and they were. It was just a joy working with them." Another success in Albany, followed by their highest attendance to date in Los Angeles, thanks in part to the National Association of Health Underwriters (NAHU), means this campaign will continue throughout the nation.

NAHU provided the DOL with a list of possible attendees from their local chapters in each of the areas chosen. Other attendees were invited from the National Business Coalition on Health, with an emphasis on small employers, along with the Pacific Business Group on Health, the national Blue Cross and Blue Shield

Association and other organizations the DOL has worked with. All in all, the DOL has approximately 70 partners in their educational program. “We’d like to get more employers there, but as you saw in California, when you start mixing those two groups [employers and brokers and other industry personnel], you end up with quite a spread of knowledge,” stated Ms. Milne. It was obvious in the Los Angeles meeting that the level of expertise and knowledge was likely higher than what the DOL had anticipated, as the presenters quickly moved off the scheduled presentation to handle more effectively the technical questions of agent attendees. “We were really pleased. Our mandate is to help employers, TPA’s and anyone who is involved, and I have to invite all groups – the law is that it is open to anybody who wishes to attend – it’s hard to take just one day like that to try talk basics and high tech stuff, like we were talking in California. Because NAHU gives us their mailing list, that’s primarily who comes.” A combination of small and mid-size employers were also targeted. “The large employers pretty much have their own compliance people, although those people like to come also. The people that were there presenting were the regulators who *wrote the regs.*”

The Columbus meeting in September will have on the panel someone from DHHS, talking additionally about administrative simplification and privacy.

The attendee feedback is important to the DOL. An analysis of evaluation forms was conducted by Deborah. “It’s overwhelmingly positive. Two thirds of the people ranked the seminar with 4’s and 5’s [on a scale of one to five] for all of the seminars. Secretary [of Labor Elaine] Chao, when she came by our exhibit at the Labor Summit that she put on at the MCI Center said to me, when I showed her the brochure for the California conference, ‘It is confusing, isn’t it?’ And I said to her, ‘Yes, and I think it’s wonderful that we have this opportunity to go out there and actually help clear it up.’ She was really pleased that we were doing this.”

What’s sad, I mentioned to Deborah, is that the employer community still doesn’t understand and realize that there’s a lot more to HIPAA than certificates of coverage. “They don’t. That is the gap we’re addressing, even in getting people to attend. You know that gap, with your background. It’s hard to convince them that they need to know this information, until it’s too late. What I would recommend is that they go on the PWBA website and spend just five minutes per week looking at press releases and other data. It’s updated regularly.” Employers don’t generally get compliant, unfortunately, until they’ve been audited, or their friends and neighbors have been audited, unless their broker is very active in compliance. “I do feel that when we reach one broker or one TPA, we are reaching several employers. Hopefully, they will pass the message on.” The agents, however, are somewhat afraid for their own liability, to discuss topics as complex as HIPAA with their employer clients. They would much rather bring their clients to a seminar or provide other resources, than to directly implicate themselves with liability. I encouraged the department to provide more easily understood information to help employers comply. “There is nothing to understand the very basic pieces, and the employer doesn’t know much more either, unless they have been proactive in looking for this information. They’ve got their business to run. They don’t have time to sit and read the health laws. It is my hope to bring things to a more user friendly, plain English level. I’d like to keep this piece of the campaign going, moving forward and active and dynamic. John Greene [NAHU staff] has been very helpful. An educated consumer and employer is best for all of us.”

Attendee Bruce Benton, a Los Angeles AHU member and broker, commented, “It appears to me that these agencies are looking to the brokers/consultants to help educate the consumer. They even have a budget to do so, and seem to be reaching out to us. What a great opportunity to encourage our input at the AHU level and hopefully persuade the voice of broker value at the legislative level. Without our help, consumers will more than likely never get into compliance, or for that matter, ever effectively administer their own plans correctly.”

NAHU itself has created and is currently promoting a nationwide HIPAA educational program for agents and their employer clients. It was kicked off in January of this year in California, and is now spreading throughout the nation, complete with power point presentations, instructor training, outlines for CE filing in each state, and a variety of supporting educational materials. This program was created at the request of the DOL and HCFA, who jointly discussed with NAHU staff the need for employer education. NAHU became a coalition partner in assisting the government efforts on HIPAA education.

The funding for the DOL educational seminars is expected to continue, along with the enforcement budget. "I would like to do one of these per month. We certainly have enough money now budgeted to do that. That is my goal."

When asked what the most important thing is that employers need to know about HIPAA and related laws, Deborah Milne thought about it for a moment then replied, "That's a tough one. From going to these seminars it's like swiss cheese, and you really have to fill all those holes at once. We need to keep doing this over and over again. Employers really need to keep up to date somehow. The liability is there. People don't understand that. That is the most important thing. *They are liable.*"

ENFORCEMENT

Without enforcement, HIPAA would not be such an important issue. HIPAA, along with the Newborns' and Mothers' Health Protection Act, Women's Health and Cancer Rights Act and Mental Health Parity Acts are enforced under ERISA. Amy Turner, from the Office of Health Plan Standards and Compliance Assistance, stated "Outside of the Mental Health Parity Act, when it comes to the other laws, we don't have any new penalties for HIPAA. We just have our traditional ERISA remedies, which for the most part are equitable relief. The Internal Revenue Code does have excise taxes."

ERISA (the Employee Retirement Income Security Act of 1974) gives sectors of government enforcement authority. The Secretary of Labor enforces the health care portability requirements under both HIPAA and ERISA. HIPAA amended ERISA and allowed participants and beneficiaries to file suit to enforce their rights under ERISA. Taxpayers (i.e. employers) which fail to comply may be subject to excise taxes or other penalties. States have general enforcement authority and responsibility for group and individual requirements placed on health insurance issuers, including sanctions under state law. Should a state fail to fulfill its areas of responsibility, the Secretary of Health and Human Services may make a determination that the state has failed to "substantially enforce" the law, and may assert federal authority to enforce it. They may impose sanctions on insurers, which include civil and monetary penalties. Employers failing to comply with HIPAA and other related federal laws may be subjected to monetary penalties and lawsuits.²

There are three areas of government enforcement: the IRS, the DOL and DHHS through HCFA (Health Care Financing Administration). The DOL, IRS and DHHS (Department of Health and Human Services) communicate with each other and refer violations to each other.

IRS penalties may be assessed at \$100 per day³ for failure to provide certificates of coverage or other requirements of HIPAA contained in the Internal Revenue Code. The IRS may also impose penalties for the Mental Health Parity Act and Newborns' and Mothers' Health Protection Act.⁴ The minimum tax for non-compliance discovered after a notice of examination is generally \$2,500. This minimum is increased to \$15,000 where violations are "more than diminimus."⁵ The maximum tax for "unintentional failures" for a single-employer plan is the lesser of 10% of the amount paid during the preceding tax year by the employer for group health plans, or \$500,000.⁶

The DOL is given the authority to audit plans under its National Investigative Priority. They are responsible for protecting the plan's actions and promise of plan benefits to plan participants. The DOL

² Questions and Answers: Recent Changes in Health Care Law, U.S. Department of Labor, Pension and Welfare Benefits Administration, June, 1999

³ IRS Code Section 4989D

⁴ The ABC's of HIPAA Compliance; An Employer's Simplified Administrative Guide to HIPAA Compliance, Dorothy M. Cociu, RHU, REBC, Advanced Benefit Consulting & Insurance Services, October, 2000

⁵ IRS Code Section 4980D(b)3

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may bring civil penalties for HIPAA enforcement under ERISA Section 502(a). Civil penalties may also apply for failure to provide them with the documentation requested.⁷

HCFA steps in when states are not substantially enforcing HIPAA or related laws. HCFA may impose penalties of up to \$100 per day for each individual with respect to each violation.⁸ The entity's previous record of compliance as well as the gravity of the violation will be taken into consideration. Corrective actions will also be taken into consideration, and may reduce the penalties assessed.⁹ In addition, violations which indicate widespread occurrences, significant financial impact or lack of proof showing the actions were corrected may adversely affect the penalties.¹⁰

According to Sharon Morressey, DOL Public Affairs office, no lawsuits have been brought forward on HIPAA violations so far, as to date all groups have voluntarily complied upon investigation or audit.

Small employers may be exempt from certain portions of HIPAA, if insured and if they properly perform ERISA's fiduciary monitoring requirements. "My understanding," commented Ms. Turner, "is that there are special considerations and provisions that go into the excise tax process, and one piece of that is the size of the plan, especially if it is a small employer, that may figure into the equation... Lots of times, small employers are insured, and if that's the case, if it's the insurance company that's really committing the violation, not the small employer, I think we try to focus on who is committing the violation, and who can fix the violation. So it may be as a practical matter, if a lot of the smaller plans are insured, it may be that the insurance company who has written the policy and who is in the position to change the policy." That does not mean, however, that small employers aren't being audited. They are - frequently. Unfortunately, most small employers don't understand their liability and aren't aware of fiduciary monitoring requirements.

Title One of ERISA sets forth standards and rules governing the conduct of plan fiduciaries. In general, people who exercise discretionary authority or manage a plan or have authority to dispose of its assets are "fiduciaries." Fiduciaries are required to discharge their duties solely in the interest of plan participants and beneficiaries, and must act in a prudent manner.¹¹ PWBA enforces ERISA by conducting investigations through its ten regional offices and five district offices located in major cities around the country. These field offices conduct investigations to gather information and evaluate compliance with ERISA's civil law requirements as well as criminal law provisions relating to employee benefit plans. Except in those cases involving national priorities, projects, enforcement policy, or other designated matters, the field offices generally exercise broad discretion in determining when investigations are opened and which entities or individuals are to be investigated. The field offices conduct their investigations in accordance with established enforcement procedures.¹² PWBA's Office of Enforcement (OE), located in Washington, DC, communicates national enforcement policies, priorities, and procedures to PWBA field offices.

PWBA seeks to deter illegal conduct through the continuing effectiveness of its civil and criminal enforcement efforts. PWBA actively publicizes its litigation, which has proven useful in encouraging voluntary compliance by others.¹³

⁷ The ABC's of HIPAA Compliance; An Employer's Simplified Administrative Guide to HIPAA Compliance, Dorothy M. Cociu, RHU, REBC, Advanced Benefit Consulting & Insurance Services, October, 2000

⁸ PHSA Section 2761(a)2

⁹ 45 CFR Section 150.319

¹⁰ 45 CFR Section 150.321

¹¹ Pension and Welfare Benefits Administration; Strategic Enforcement Plan, 04/06/2000, Volume 65, Number 67, United States Department of Labor

¹² Pension and Welfare Benefits Administration; Strategic Enforcement Plan, 04/06/2000, Volume 65, Number 67, United States Department of Labor

¹³ Pension and Welfare Benefits Administration; Strategic Enforcement Plan, 04/06/2000, Volume 65, Number 67, United States Department of Labor

It has been my experience, from researching HIPAA audits, that groups of all sizes are targeted. Some are random audits, others come from complaint calls, and some are audited due to failure to comply in other areas. I've also seen situations where multiple employer group clients of a single brokerage agency are audited, after the first is found to be non-compliant.

HIPAA is a reality, like it or not. The best defense, in this case, is a good offense, and to protect your clients, your best offensive move is to help them get compliant. The law is not going to go away. Think about it. Since the passage of HIPAA, three other federal health laws have been passed (Newborns & Mothers, Mental Health Parity and Women's Cancer Rights), and HIPAA continues to expand. Within the past year alone, the HIPAA EDI regulations were released, as were the non-discrimination rules, and although delayed by the Bush Administration for a short time, medical records privacy is now a reality.

The good news is that there is hope. Educational programs such as the DOL Health Benefits Education Campaign and the NAHU HIPAA Education Program are now readily available. So, join the fight to help the little guys. In this case, the little guys are your clients, and they pay your bills.

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Author's Note: I'd like to personally thank Deborah Milne for her efforts in bringing such a valuable program to consumers nationwide. For more information on her Health Benefits Education Campaign, contact her at: Deborah A. Milne, Coordinator Health Benefits Education Campaign, 200 Constitution Ave. NW, Room N5625, Washington, DC 20210, (202) 219-7222, or by fax at (202) 219-8141.

Editor's Note: Dorothy M. Cociu, RHU, REBC is the NAHU Region 6 Legislative Chair and the Immediate Past President of the California AHU. She has performed HIPAA seminars educating brokers, consultants, employers and health insurance industry personnel since 1997. She is the author of The ABC's of HIPAA Compliance: An Employer's Simplified Administrative Guide to HIPAA Compliance and the creator and instructor trainer of the NAHU employer educational program on HIPAA. She can be reached at (714) 870-8651, Ext. 3#. For information on the NAHU Employer HIPAA Educational Program, contact Farren Ross, NAHU Education Manager, at (703) 276-3825.

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