

Impact

An Overview of Current Legal Events of Concern and Interest

Fall 2004

HIPAA Privacy Rule Requirements

By: John G. Parnell



The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) requires healthcare providers to make their privacy policies available to patients to advise them of their confidentiality rights regarding “Protected Health Information” (“PHI”). Under the Act, PHI includes “individually identifiable health information.” More specifically, HIPAA protects the privacy of information related to an individual’s physical or mental health, health care, or payment for such health care, if (a) the individual is identified or (b) there is a reasonable basis to believe the information could be used to identify the individual.

The Privacy Rule of HIPAA applies to “covered entities,” which are health care providers, health plans, employers, and health care clearinghouses. Covered entities are required to provide privacy notices – stating the entity’s privacy policy – to individuals with whom they deal on health care matters. The privacy notice must contain certain information concerning the use of PHI and the individual’s rights with respect thereto.

First, it must include at least one example of the type of use and disclosure of PHI the covered entity is permitted to make for purposes of “treatment, payment and health care operations.” Second, the notice must describe any other purposes for which the covered entity is “permitted or required” to use or disclose PHI without the individual’s written authorization, in “sufficient detail to place the individual on notice of the uses and disclosures that are permitted or required.” Third, it must state that other uses and disclosures will be made only with the individual’s written authorization and that the individual may revoke the authorization. Fourth, it must identify and describe the individual’s rights to:

- (1) Request restrictions on the use and disclosure of PHI, with a statement that the covered entity is not required to agree to such a request;
- (2) Receive “confidential communications” from the covered entity, upon request, using an alternative address or contact procedure;
- (3) Inspect and copy PHI;
- (4) Seek amendment of PHI;
- (5) Receive an accounting of all disclosures made of

PHI for which accountings are required under the regulations; and

- (6) If the notice is provided electronically, to receive a paper copy.

Finally, the covered entity must state that it is required by law to “maintain the privacy” of PHI, to provide notice of its legal duty and privacy practices, and to abide by the terms of those privacy practices.

Right to Request Privacy Protection for PHI

Individuals are entitled to request that the use and disclosure of their PHI be restricted as necessary to carry out treatment, payment, or health care operations. Covered entities must consider such requests, but they are not required to agree to restrictions.

Access Rights

Individuals have the right to inspect or receive a copy of their PHI in a “designated record set,” for as long as the information is maintained in that manner. A “designated record set” means (1) the individual’s medical and billing records, (2) a health plan’s enrollment, payment, claims, or medical management record systems, or (iii) records used to make decisions about the individual.

Amendment of Health Information

An individual may request the amendment of his or her PHI or a specific record as long as the PHI is maintained in the designated record set. However, a covered entity may deny such a request if it determines that the PHI or record (a) was not created by the covered entity, (b) is not part of the designated record set, (c) would not be available for inspection under HIPAA regulations, or (d) is accurate and complete.

Access to Disclosures of PHI

Individuals are generally entitled to an accounting of a covered entity’s disclosures of their PHI in the preceding six-year period, but there are several exceptions.

Complaints

An individual who feels that a covered entity has violated the HIPAA Privacy Rule may file a complaint with the Department of Health and Human Resources. There are substantial civil and criminal penalties for violations.

Mr. Parnell practices in the areas of commercial real estate, corporate law, and health care.

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Employee References

By: Timothy B. Theissen



The issues of how to obtain information about a job applicant's prior performance and whether to provide references for former employees have become more complicated in the past few years. Previously, it was common for a prospective employer to call an applicant's prior employers for references. Information about the applicant's attitude, attendance, performance, and reason for leaving was particularly helpful to the prospective employer. The company being asked for a reference was usually happy to assist, knowing that the information would help the other company make an informed employment decision. Participating in such an informal network of shared information would also benefit the prior employer the next time it needed to find out about a prospective employee. Accordingly, companies participated gratuitously, expecting only to receive the same information when they requested it.

However, as our society has grown more litigious, many employers became concerned about liability in connection with such references. There are potential problems for providing both positive and negative references. A couple of examples demonstrate the basis for this concern. In the first example, assume that John, an employee of ABC Company, is a hard worker, but has a violent temper and has gotten into a few minor scuffles with co-employees. He is considering going to work for XYZ, Ltd., and ABC would love to see him go. To hasten his exit, ABC provides a glowing review, emphasizing his hard work, but omitting any reference to his violent propensities. XYZ jumps at the chance of getting such a hard worker, but John's temper gets the best of him. He punches a venter, causing extensive damage. Word gets around that this is not the first time John has had problems of this type. The venter sues both XYZ and ABC. The claim against ABC is that it provided an incomplete and overly positive reference, since XYZ says it would not have hired John if it had known about his prior problems.

In the second example, ABC is concerned about employee theft and, although it lacks sufficient evidence to prove who is responsible, it fires three employees, including Jane. Jane proclaims her innocence and asserts that she has been wrongfully terminated. She tries to find new work and applies at XYZ. Her interview goes very well, and she is told that she has the job, subject to verification of her prior employment, which should be a mere formality. XYZ calls ABC. Having been burned with John, ABC candidly tells XYZ that Jane was implicated in the theft scandal. XYZ declines to hire Jane, and it she quickly concludes it was because of ABC's negative reference. Since her involvement in the theft was never established, Jane sues ABC, alleging slander and defamation.

In light of such cases, legal counsel for many companies advised their clients to limit the information they provide about current or former employees. Thus, the business environment has evolved to the point that many well-advised employers limit their references to "name, rank, and serial number" — providing only verification of the employee's date of hire, date of termination, positions held, and perhaps some minimal information about the employee's job description, with no qualitative statements or evaluation of the employee's performance.

In an effort to provide protection to employers who are willing to engage in an informal exchange of information to assist other companies in finding good employees, some states have begun to implement statutory reform. The 2004 Kentucky Legislature passed a statute providing immunity from civil liability for an employer who provides information about job performance, professional conduct, or evaluation of a former or current employee to a prospective employer, if given at the request of that employee or prospective employer. In this statute, Kentucky has taken the first step toward a return to the time when an employer could provide an honest evaluation of an employee's job performance, without fear of liability.

The Kentucky statute provides two exceptions. First, the employer is still subject to civil liability if the information it provides is false or if the disclosure is made with the intent to mislead the prospective employer. Second, the disclosure of the information by the employer may not violate unlawful discriminatory practices otherwise prohibited by law.

With these exceptions, Kentucky employers still face some risk of liability in connection with employment references, but only if they provide false information, attempt to mislead the new employer, or their actions are unlawfully discriminatory. Otherwise, the statute provides immunity from civil liability in any action relating to the reference.

Although Kentucky law now provides protection for employers whose references are within the limits of the statute, it does not prohibit suits arising out of such references. In other words, the company can still be sued, but its chances of being held liable are now reduced. Since there is no obligation to provide job references, and it is still possible to face litigation for doing so, many employers, even in Kentucky with the new statute, may choose to maintain current practices limiting job references to "name, rank, and serial number."

To obtain further information on the risks and benefits associated with giving employment references, you should consult with counsel familiar with employment law issues.

Mr. Theissen is a general practitioner, focusing primarily on real estate, litigation, business and estate planning matters.

Record Retention: No Longer Just a Good Idea, It's Now the Law!

By: Jeremy A. Hayden



Introduction

With the recent passage of the USA Patriot Act, the Gramm-Leach-Bliley Act, the Health Insurance Portability and Accessibility Act, and the Sarbanes-Oxley Act, many business owners are now asking their advisors two important questions: 1) What records am I required to keep? and 2) How long do I have to keep them? Unfortunately, the answers to these questions are not the same for every company. Depending on the industry in which a company is engaged, it may

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News of the Firm

Attorneys on the Move



Jim Heldman

Jim Heldman, co-chair of the Lawyers Committee for the 2004 Campaign of the Jewish Federation of Cincinnati, was asked to serve on the Major Gifts Committee for the Federation's 2005 Annual Campaign.



Guy Taft

Guy Taft was recently elected Secretary of the Cincinnati Bar Foundation for the 2004-2005 fiscal year. The Foundation, a charitable organization affiliated with the Cincinnati Bar Association, provides grants to encourage knowledge, understanding of, and respect for the law, improve the quality and administration of justice, support the delivery of legal services for all persons, and foster professionalism and civility in the practice of law.

Mr. Taft has served on the Foundation Board of Directors for the past five years and was recently appointed to a third term as the Chair of the Grant Making Committee. On November 19, the Foundation kicks off its annual 50/50 Fund Raising Campaign; Mr. Taft will serve as a guest bartender in the Netherland Hilton Lounge.



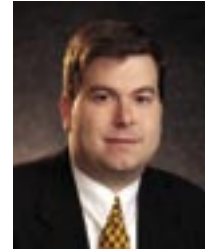
Paul Calico

Paul Calico will speak at a seminar on Construction Lien Law in Ohio on January 5, 2005 in Dayton, Ohio. Mr. Calico's topics will include Home Purchase and Home Construction Contracts, Residential Liens, and Alternative Dispute Resolution.

Joe Braun, Prosecutor for the City of Wyoming, has been named Prosecutor for the City of Loveland, Ohio, effective October 1, 2004.

Northern Kentucky University has asked that Strauss & Troy continue involvement in their Small Business Development Center's "Legal Issues" semi-annual seminars. **Joe Braun, Michael Ruh** and **Jeremy Hayden** will participate in the Fall 2004, NKU Small Business Legal Issues Seminar on November 4, 2004 at the University.

Larry Neuman prepared highly regarded outlines on income, estate and gift taxes for use in his presentation at the 2004 seminar on Estate and Tax Planning for Qualified Retirement Plans and IRAs. The National Business Institute, the sponsor of the seminar, recently used the outlines for its seminars in Phoenix, Arizona and Miami, Florida.



Joe Braun



Michael Ruh



Jeremy Hayden



Larry Neuman

Sponsorships

Fulfilling our commitment to the community in which we work and live, Strauss & Troy is proud to have sponsored and contributed to a number of worthy causes in the past quarter. We are pleased to have supported the following programs and events, continuing the tradition of sharing our gifts and talents with others in the Greater Cincinnati community:

- Beechwood Athletic Boosters
- Covington Rotary Club
- Federal Bar Association – 2004 National Convention
- Friends of the School for Performing and Creative Arts
- Healing Connections Associates, Inc.
- Inner City Youth Opportunities
- Junior Achievement
- National Association of Industrial and Office Parks (NAIOP)
- National MS Society
- Talbert House

Record Retention

continued

be subject to all of the above acts as well as many other local, state, and federal requirements. The purpose of this article is to alert companies of these requirements and provide some general guidelines. Companies should consult their attorney for additional guidance on developing and maintaining a record retention policy that complies with all applicable local, state, and federal guidelines.

Why is Record Retention so Important?

Record retention is a serious matter for business owners. For example, the Sarbanes-Oxley Act provides that anyone who “alters, destroys, mutilates or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding” may face up to ten years in prison if convicted. In other words, record retention policies are no longer just a good idea to have, they now are the law.

Creating or Evaluating a Record Retention Plan

STEP 1

Making It a Team Approach

Companies interested in creating a record retention policy or evaluating an existing one should draw expertise from many areas. For a small business owner, this may mean meeting with the company attorney, CPA, and an outside risk management firm. For larger organizations, it should mean creating a cross-functional team from both inside and outside the organization, including input from the company’s finance, human resources, audit, legal, and information technology departments.

STEP 2

Determining the Requirements

Once a team is formed, the company should develop an approach to make sure the record retention policy meets the strictest standards imposed on the company. The company’s attorney should review local, state, and federal laws and regulations that apply to the company and summarize the various requirements the company must meet. The summary should focus not only on which documents must be kept, but also for how long.

STEP 3

Ensuring Authenticity

Maintaining data and documentation is useless unless it can be proven that the document is what it purports to be. Thus, companies should have policies and procedures in place to track and prove the origination, creation date and time, author, contents, and other important attributes of their documents and records. In legal circles, this is sometimes referred to as approving the “chain of custody,” establishing every step in the handling of a piece of evidence up to the time it is produced at trial. This term has broad application outside the legal field, and its theme should be applied to record retention policies. At the very least, it will ensure that the company is taking reasonable steps to show that its records are not altered.

STEP 4

Ensuring Timely Retrieval

Equally as important as establishing the authenticity of records, is making sure that a company can produce stored records when they are needed. Many companies adopt cataloging practices to ensure that records can easily be retrieved when needed. With the advent of the computer and the digital era, companies may also wish to consider using a computer with appropriate back-ups (as explained below) to help maintain and organize their records.

STEP 5

Ensuring Alternative Sources (Back-ups and Copies)

What happens in the case of a computer crash or a fire to your company’s building? Obviously, these are scenarios that we hope never happen to any of us. But in instances where they do occur, companies should consider implementing both on-site and off-site back-ups of important data. On-site back-ups include making paper copies or, more recently, scanning images of important documents and saving them on a computer hard drive. Off-site back-ups include storing records at off-site document warehouses or on computer networks maintained at a separate location.

There are many commercial record retention companies to choose from in selecting an off-site storage provider. Companies should consider many variables before choosing a commercial record retention company, such as: Is the provider’s storage space temperature controlled? Is it fire-safe? How many years has the provider been in the storage business? Is the provider financially secure? Are the provider’s prices competitive? What certifications do the provider and its employees maintain with regard to record retention? What types of insurance policies and coverage amounts does the provider maintain?

STEP 6

Communicating the Plan to Employees

After a plan has been developed, the company must implement it by communicating it to employees in terms of action steps. These steps must not be overlooked, as the best-formulated plan will fail if it is not effectively and accurately communicated to those responsible for its implementation. To ensure that the plan is well accepted and realistic, it may be advisable to get key employees involved in the plan early to secure their “buy-in.” Companies must also adequately train employees on any new systems and processes.

Conclusion

Record retention plans and policies used to be a good, practical idea for businesses. They now are the law. Business owners should meet with their professional advisors and take appropriate steps to ensure that their company’s record retention policies meet all applicable laws and regulations. Strauss & Troy has experience in helping business owners form record retention policies and would welcome the opportunity to work with your organization on developing an appropriate plan of implementation or to analyze and investigate an existing plan. Please call Jeremy Hayden at (513) 621-2120 if you would like more information on how Strauss & Troy can help your company with record retention.

Mr. Hayden’s practice focuses on counseling small business owners and individuals in the areas of taxation, business law, and estate planning.

Client Spotlight

Coldwell Banker West Shell

"The preferred gateway to exceptional real estate experiences"

The heritage of Coldwell Banker West Shell reflects the "Who's Who" of residential real estate in the Tristate. In 1954, the Parchman & Oyler Company led the real estate market in the Greater Cincinnati area. Implementing an exit strategy, Mr. Parchman and Mr. Oyler sold the company to Coldwell Banker in 1981 and continued to operate as Coldwell Banker Residential Real Estate.

Shortly after, in 1984, Mr. West Shell, founder and owner of West Shell Realtors, implemented his succession plan with the sale of his company to a local businessman. The company passed to the Rippe family in 1990 and was acquired by NRT Incorporated in 1997, creating what is now Coldwell Banker West Shell.

While locally operated, Coldwell Banker West Shell is a member of the NRT family of companies. NRT is the largest residential real estate brokerage company in the nation with over 950 offices and 56,000 sales associates, and is owned by Cendant Corporation (NYSE: CD), one of the foremost providers of travel, real estate and vehicle services in the world. Other Cendant subsidiaries include Coldwell Banker Real Estate Corporation (the franchised segment of Coldwell Banker), Century 21 Real Estate Corporation, and ERA Real Estate Corporation. Cendant also has a long-term strategic alliance with Sotheby's Holdings, Inc., providing for licensing of the Sotheby's International Realty name.

To compliment its real estate division, Cendant also owns Cendant Mortgage (one of the nation's largest mortgage originators), Guardian Title and Cendant Mobility, the latter of which assists over 100,000 employees in over 140 countries with their relocation needs.

Working closely with the Ritz Carlton Learning Centers, NRT carefully crafted its mission and vision statements, which in turn are supported by 14 business principles. With a focus on creating and providing value to the real estate transaction, NRT

has brought an innovative and progressive philosophy to guide its future in assisting in the home sale and purchase experience.

Locally, NRT called upon a veteran of the real estate industry to lead Coldwell Banker West Shell into the future. Bob Stanley carries 35 plus years of residential sales experience and was tutored in his early years by international sales trainer, Joe Klock.

To achieve the culture and results that will stimulate a sustainable competitive advantage in the future, a strong emphasis has been put on supporting the great cadre of the company's 800 sales agents with strong support systems across the Greater Cincinnati area. Focusing first on building a strong branch management team, Coldwell Banker West Shell has succeeded in having the first residential real estate brokerage company in the market to have all managers certified as "coaches" to assist agents in growing their business. Complemented with a superior administrative support staff, the 14 branch offices have an aggressive growth strategy while maintaining a high standard of excellence to its service model.

"Our team stays true to our three decision drivers," said President Bob Stanley, "First and foremost is the decision right for our customers, our team and our service model. Second, how does it fit into our full service model expectation for our clients? A Coldwell Banker West Shell sales agent is expected to bring value to the home sale/purchase process before, during and well beyond the deed transfer. Our final element is making sure the decision is the right decision for the Cendant Corporation."

"We are proud of our heritage, appreciative of our team and grateful for the support of our many clients that have entrusted their real estate needs to us. Above all we are excited about the future," Stanley said.



For more information about Coldwell Banker West Shell and the services we have to offer, please visit cbws.com, or contact us directly:

Bob Stanley, President

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Make A Difference Team Update

Each week, the Strauss & Troy Make a Difference (MAD) Team collects funds from employees and attorneys for the privilege of "dressing down" on Fridays. The Team then uses those funds to contribute generously to various projects throughout the year. The MAD Team's recent projects include:

The Back-to-School Crayons to Computers Campaign. The MAD Team has donated school supplies to this worthy cause for a number of years. This year's donations were higher than in past years.

Lighthouse Youth Services Transitional Living Program. The MAD team provided baskets of baby products including diapers, baby wipes, oil, lotion, powder, soap, Baby Tylenol, clothing, Pedialite, crib sheets, baby monitors,

blankets, and more to eligible Lighthouse parents. Program participants are placed in an apartment for up to 24 months during which they work or attend school, while Lighthouse staff members assist them in locating childcare. After the young parents complete the program, Lighthouse helps them find housing within various communities throughout greater Cincinnati.

The Strauss & Troy "Freedom Writer" Essay Contest. In conjunction with Cincinnati Public Schools (Taft High School), the MAD Team is sponsoring a literacy project in which students in grades 9-12 will write an essay on freedom. Winning students will receive admission to the Freedom Center and recognition at an awards lunch at Strauss & Troy. Additional prizes will be awarded to the top winners.

Super Lawyers are Plentiful at Strauss & Troy

Ten Strauss & Troy attorneys have been selected as Ohio Super Lawyers for 2005. In the selection process, ballots were sent to over 35,000 Ohio attorneys, who were asked to vote for the best lawyers they had personally observed in action. Following the voting, a panel reviewed and ranked the list of nominees in over 50 practice areas. The attorneys in the top 5% were then designated as Ohio Super Lawyers.

We are pleased to announce Strauss & Troy's 2005 Super Lawyers:

Claudia G. Allen
Charles G. Atkins
Paul B. Calico
Ann W. Gerwin
James G. Heldman

Thomas C. Rink
Thomas L. Stachler
William V. Strauss
R. Guy Taft
Richard S. Wayne

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