

## Reminder: Redistribution of HIPAA Privacy Notice

### *Action Required*

A notice deadline is approaching for certain large health plans that provide self-insured benefits. This *Alert* explains which plans must send the notice and provides a sample notice that plans can adapt, and with advice of legal counsel, use to satisfy this notice obligation. This *Alert* also offers an alternative compliance method for all self-funded plans.

### *Background*

The Department of Health and Human Services (HHS) issued the HIPAA privacy rules in final form in late 2000. The compliance date for the privacy rules was April 14, 2003, except that for small plans (those with annual receipts of \$5 million dollars or less), the compliance date was April 14, 2004.

HIPAA's privacy rules set rigorous standards for health plans' use and disclosure of protected health information. Among other requirements, employers were required to distribute a notice of their privacy practices to plan participants as required by the rules, and *redistribute that notice at least once every three years*. For large employers that became subject to the HIPAA privacy rules in 2003, the time is quickly approaching for a redistribution of the required privacy notice. Small plans have until three years after their initial distribution of the notice. Consequently, most small plans will not face this deadline until next year.

The notice requirement applies to large self-insured plans because, if a plan is fully-insured, it is not generally required to distribute a notice of privacy practices or an availability notice. Instead, the insurer is required to do so. (The plan is still required, however, to maintain a notice of privacy practices and provide it upon request if the employer sponsoring a fully-insured plan receives protected health information (PHI) other than enrollment information and certain other limited items.)

*Caution:* HIPAA security obligations went into effect for large plans on April 21, 2005. Small plans will become subject to HIPAA security rules on April 21, 2006. This *Alert* centers only on obligations associated with distribution of the required HIPAA notice of privacy practice. For additional details about HIPAA privacy, please see Chapter ten of the on-line *Willis Compliance Manual*. For additional details about HIPAA security, please see Chapter eleven of the on-line *Willis Compliance Manual*.

### *Recipients*

The privacy rules make it clear that plans are not required to distribute the notice to each individual enrolled in the plan. They allow distribution to the "named insured." Therefore, a health plan can distribute its notice to employees, retirees, individuals receiving coverage pursuant to qualified medical child support orders (QMCSOs), and COBRA qualified beneficiaries, without delivering it separately to spouses or dependent children.

## Notice Content

A health plan must create a notice of privacy practices that meets the requirements of the privacy rules and must provide it to any individual upon request. The plan also must keep its notice of privacy practices up to date. A plan is prohibited from implementing a material change in its policies and procedures that would make the terms of its notice of privacy practices inaccurate until the notice is revised to reflect that change. A copy of a sample notice is shown below. Although there is no mandated format for the notice, employers should consult with their legal counsel before using the sample.

### SAMPLE NOTICE OF AVAILABILITY OF NOTICE OF PRIVACY PRACTICES

#### Notice of Availability

[Name of Plan] Notice of Privacy Practices

**THIS NOTICE DESCRIBES HOW YOU MAY OBTAIN A COPY OF THE PLAN'S NOTICE OF PRIVACY PRACTICES, WHICH DESCRIBES THE WAYS THAT THE PLAN USES AND DISCLOSES YOUR PROTECTED HEALTH INFORMATION.**

[Name of Plan] (the "Plan") provides health benefits to eligible employees of [Name of Employer] (the "Company") and their eligible dependents as described in the summary plan description(s) for the Plan. The Plan creates, receives, uses, maintains and discloses health information about participating employees and dependents in the course of providing these health benefits. The Plan is required by law to provide notice to participants of the Plan's duties and privacy practices with respect to covered individuals' protected health information, and has done so by providing to Plan participants a notice of privacy practices, which describes the ways that the Plan uses and discloses PHI. To receive a copy of the Plan's notice of privacy practices you should contact [Name or Title of Contact Person], who has been designated as the Plan's contact person for all issues regarding the Plan's privacy practices and covered individuals' privacy rights. You can reach this contact person at: [Address and Telephone/Fax Number].

#### *How to Distribute*

As described above, the rules do not require any particular distribution method except to make clear that plans are not required to distribute the notice of privacy practices to each individual enrolled in the plan, allowing distribution to the "named insured." The privacy rules do not specify a particular means of delivery, but it seems reasonable to deliver the notice in the same manner that an ERISA plan delivers a summary plan description. (Generally, that means delivering the notice to individuals at their workstation or mailing it to their homes. In the case of retirees, individuals receiving coverage pursuant to QMCSOs, and COBRA qualified beneficiaries, this probably requires mailing the notice to those individuals.)

Governing rules allow for electronic delivery of the notice of privacy practices to individuals who agree to receive it electronically, so long as the plan commits to send a paper copy of the notice if the electronic delivery fails. Electronic delivery does not take the place of providing a copy of the notice of privacy practices upon request to anyone who asks for it. In addition, any health plan that maintains a website that provides information about the plan must prominently post the plan's notice of privacy practices on that website and make the notice available electronically through the website.

#### *Insured Plans Urged to Use Caution*

Unfortunately, insurance carriers sometimes resist the notice distribution obligation. What happens if an

insurer sends its notice to the employer and tells the employer to copy and distribute the notice to participants? Although HIPAA puts the burden for distributing these notices on the *insurer* (not the employer), it's important to note that in some cases a carrier's contract with the employer makes the employer responsible for distributing any legally-required notices. Such a provision might state that the policy holder is responsible for "distribution to enrollees of any disclosure forms, plan summaries, or material that may be required to be given to plan subscribers by any regulatory authority."

This means that if you work for an organization that is utilizing the "shortcut" approach to complying with the HIPAA Privacy rules, but you encounter a carrier that simply forwards notices for distribution, you should check the contract before responding. If the contract does not have this type of provision, an employer should be able to feel safe in not distributing the notice. On the other hand, in situations where a contract contains this type of provision, an employer who refuses to distribute the notices should realize that it could later face liability under the contract if the carrier incurs penalties or other damages due to the failure to distribute the required notices.

#### *Another Compliance Approach*

As described above, the HIPAA rules technically require that a notice of privacy practice be distributed *at least* every three years. Unfortunately, that unusual notice distribution cycle creates a difficult time frame to remember and may cause some employers to miss the requirement. Another option is to include the notice with the plan's enrollment materials. In that way, the notice is automatically provided at least every three years, and employers will be certain to distribute the notices timely without having to watch the calendar. Small plans can begin to include the new notice in any upcoming enrollments and in that way will not be obligated to send a separate notice when their three-year period expires.

#### *Conclusion*

HIPAA privacy rules impose numerous other requirements that stretch beyond the scope of this article. If you do not have access to the on-line *Willis Compliance Manual*, but would like further information, please contact your Willis advisor.

## U.S. Benefit Office Locations

Anchorage, AK (907) 562-2266	Atlanta, GA (404) 224-5000	Austin, TX (800) 861-9851	Baltimore, MD (410) 527-1200
Birmingham, AL (205) 871-3871	Boise, ID (208) 340-0645	Boston, MA (617) 437-6900	Cary, NC (919) 459-3000
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Washington, DC (301) 530-5050	Wilmington, DE (302) 477-9640		

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