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**Common Mistakes in Seeking and Disclosing
Medical Information**

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A. Introduction

In the employment context, multiple laws govern the use and disclosure of personal medical information. This creates complexity and confusion regarding when and how employers may seek and disclose the personal medical information of their employees. One of the laws that is a subject of much confusion is the Health Insurance Portability and Accountability Act of 1996 (“**HIPAA**”). The purpose of this paper is to discuss when HIPAA applies, what uses and disclosures of personal health information may be made under HIPAA and the consequences of violating HIPAA’s requirements.

B. HIPAA: Who is Covered and When

HIPAA applies to “covered entities,” which include health care providers (e.g., doctors and hospitals), health plans and health care clearing houses.¹ Notably, HIPAA does not directly apply to an employer (unless the employer is also a health care provider); however, an employer may indirectly become subject to HIPAA if it sponsors a group health plan (“**GHP**”). A GHP includes medical, dental and vision plans, health flexible spending arrangements, long-term care insurance policies, employee assistance plans and Texas occupational injury benefit plans.

HIPAA regulates the use and disclosure of “protected health information” (“**PHI**”) of employees and their family members by covered entities. PHI is (a) information that relates to (i) a physical or mental health condition of an individual, (ii) the provision of health care to an individual or (iii) the past, present, or future payment for health care to an individual and (b) is individually identifiable.² Thus, PHI is much broader than an individual’s specific medical condition and encompasses the manner in which health care is provided and paid for.

HIPAA consists of two primary rules that govern the use and disclosure of PHI. The privacy rules govern how a GHP may use and disclose PHI.³ The security rules specify how a GHP must protect PHI when it is in electronic form.⁴ In other words, the privacy rules advise how PHI may be used and the security rules discuss how to accomplish that objective when electronic PHI (“**ePHI**”) is involved.

Under HIPAA, the GHP and the employer are separate legal entities. The ability to use and disclose PHI depends on whether the employer is acting on behalf of the GHP with respect to the activity at issue. Only PHI that is created by, maintained by or used by the GHP is subject to HIPAA. Employment records, such as Family Medical and Leave Act files, are not subject to HIPAA. Thus, in order to determine the applicability of HIPAA in the work place it is imperative to understand the role of the employer and the GHP.

¹ See 45 CFR §160.102.

² Id.

³ See 45 CFR §§ 164.500 –534.

⁴ See 45 CFR §§ 164.302 -318.

C. Uses and Disclosures of PHI Permitted by GHPs under HIPAA

1. *Treatment, Payment and Health Care Operations (“TPO”)*

Under HIPAA a GHP may use and disclose PHI as follows:

- **For treatment.** A GHP may receive, use and disclose PHI about to provide an individual with or help him obtain health treatment or services. For example, A GHP may request and receive from an employee’s doctor information about the health condition for which the employee is seeking treatment in order to determine if the treatment he is are seeking is covered by the GHP. A GHP may also contact an employee to provide information about treatment alternatives or other health-related benefits that may be of interest to him.
- **For payment.** A GHP may receive, use and disclose PHI about an employee so that the bills for health treatment and services the employee has received may be paid by the GHP. For example, a GHP may need to have information about a surgery which an employee received to determine payment for services. Similarly, a GHP may receive use and disclose PHI to the plan fiduciary in order to provide it with information necessary to process a benefit claim appeal that the employee filed.
- **For health care operations.** A GHP may receive, use and disclose PHI about an employee for purposes of the GHP’s operations such as underwriting, premium rating or other activities relating to the creation, renewal or replacement of a contract of health insurance, for legal or auditing functions or for general management and administrative activities. For instance, the GHP or an outside auditing firm on behalf of the GHP may perform a claims audit. A GHP, except one that provides long-term care insurance, is prohibited from using or disclosing an employee’s or dependent’s genetic information for underwriting purposes.

Uses and disclosures for treatment, payment or health care operations are frequently referred to as “**TPO**” and may be conducted by a GHP without the need for an authorization by the individual who is the subject of the PHI.⁵

2. *Special Circumstances*

A GHP may also use and disclose PHI under the following special circumstances:

- To the individual who is the subject of the PHI on request.
- To others pursuant to an authorization of the individual who is subject of the PHI.

⁵ See 45 CFR§164.506.

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