

SEPTEMBER 2014

ERISA Alert

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September 22 Deadline – Have Your Business Associate Agreements Been Revised? John C. Hughes, Esq.



Most plans providing medical benefits would be considered “Covered Entities” under “HIPAA” (the Health Insurance Portability and Accountability Act of 1996, as amended). Under HIPAA, in general, Covered Entities are required to enter into “Business Associate Agreements” with their “Business Associates.” Business Associates are those persons or entities who: (1) create, receive, maintain, or transmit “protected health information” (“PHI”) on behalf of a Covered Entity or (2) provide services (such as legal, actuarial, accounting, consulting, management, administrative, etc.) to a Covered Entity which involve the disclosure of PHI to the service provider.

The regulations identify some entities that will not be considered Business Associates.¹ Business Associate Agreements detail how PHI will be handled and safeguarded in the course of those relationships.

Business Associate Agreements are required by HIPAA in many circumstances (mostly circumstances where PHI will change hands). The HIPAA regulations specify the required content of Business Associate Agreements. The parties to a Business Associate Agreement may also include in it other permissible provisions that make sense in the context of the particular relationship.

New regulations were issued in 2013 which, in part, have the effect of requiring revision to existing Business Associate Agreements. Primarily, the new regulations implement the Health Information Technology for Economic and Clinical Health (“HITECH”) Act.² The deadline for getting new Business Associate Agreements in place that incorporate the regulatory changes is **September 22, 2014**. There were earlier deadlines for agreements that were modified or were first entered into after specified dates in early 2013. There is a government issued sample Business Associate Agreement that must be customized and

¹ There are, of course, many other exceptions, for example as to what may constitute PHI, which are beyond the scope of this *Alert*.

² HITECH also affects other compliance areas beyond Business Associate Agreements.

tailored to the particular relationship. The sample was issued by the U.S. Department of Health & Human Services and may be found at – <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/contractprov.html> (or it may be located by Googling “business associate agreement”).

The new regulations generally place stricter requirements on Covered Entities and Business Associates relative to their handling of PHI. The new Business Associate Agreements must address these issues. For example, subcontractors of a Business Associate are now subject to the same rules and restrictions as Business Associates (in fact, the regulations specify that subcontractors are themselves Business Associates). As an additional example, there are now more stringent requirements associated with reporting security breaches.

The new regulations may require Business Associate Agreements be in place where none was previously required. Notably, despite the requirement to update Business Associate Agreements, Covered Entities and Business Associates have been required to comply operationally with the new legal requirements since September 23, 2013.

In summary, it is important to be aware of the **September 22 deadline** and take the appropriate action. This includes inventorying and identifying those entities that might be considered Business Associates, to the extent such has not already been accomplished.

Please contact John C. Hughes (john@erisalawgroup.com) or Jeffery Mandell (jeff@erisalawgroup.com) at 208-342-5522 or 866-ERISALAW if you wish to discuss your plan specifics.

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