

THE AMERICAN RECOVERY AND REINVESTMENT ACT BROADENS HIPAA LIABILITY & REPORTING REQUIREMENTS

The American Recovery and Reinvestment Act of 2009 (H.R.1), commonly known as the "economic stimulus" bill, included several changes designed to strengthen the security and privacy provisions under the Healthcare Insurance Portability and Accountability Act of 1996 (HIPAA). These changes likely will have a direct and significant impact on tort litigation as well.

Under H.R.1, HIPAA has been expanded to obligate "business associates" of covered entities to comply with the regulations. Physicians' offices, hospitals, and other traditional keepers of protected health information, had previously been the only entities required to preserve the confidentiality of protected health information by establishing appropriate measures to prevent the disclosure of patient medical records. Under H.R.1, a new category of entities is now charged with the same responsibility (and potential liability) for maintaining the privacy of protected health information which they handle as part of their relationship with "covered entities." Business associates who have access to protected health information are now required to take the same measures as covered entities to protect a patient's health information. Business associates impacted by this change include service providers such as accounting firms, third party billing services and attorneys.

Contracts between covered entities and their business associates now require the inclusion of provisions regarding disclosure of protected health information, ensuring that this information will be disclosed only for proper purposes. Employees of covered entities and their business associates are subject to penalties for unauthorized disclosures. Business associates of covered entities must now implement employee policies to demonstrate compliance with these new provisions, as failure to do so may result in significant monetary penalties, as well as increased litigation and liability.

In addition, both covered entities and their business associates must now notify certain parties of a breach of unsecured protected health information. Notices to individuals whose information has been breached are required and, in cases where the protected health information of 500 individuals or more has been breached, the Department of Health and Human Services must also be notified. If the protected health information of 500 or more people in one state has been breached, notification to the local media is also required.

The same civil and criminal penalties set forth under HIPAA now apply equally to covered entities and their business associates. Under H.R.1, a tiered system of civil penalties for HIPAA violations has been established, including fines ranging from \$100 for an "unknowing" violation up to \$50,000 each for violations due to "willful neglect." These penalties are statutory and could be as great as \$1,500,000 in a calendar year. The Act gives authority to the attorney general at the individual state level to bring suit in federal court to enforce these regulations.

Personal injury attorneys also will be significantly impacted by the new provisions restricting disclosure of protected health information at a patient's request. Personal injury litigation has routinely required a plaintiff to disclose a significant portion of his or her protected health information to opposing counsel and insurance carriers. Plaintiffs have always been permitted under HIPAA to place certain restrictions on the disclosure of their protected health information

(such as limitations on dates of services, injuries or conditions treated, or parts of the body involved). Previously, covered entities were not required to comply with these restrictions where the information requested was to be used for treatment, payment, or healthcare operation purposes. Under H.R.1, however, covered entities must comply with these restrictions, except when utilizing protected health information solely for treatment purposes

In addition, a covered entity is now required, under the Act, to disclose only the “*minimum necessary information to accomplish the purpose of the disclosure.*” Although HIPAA had previously required covered entities to comply to that extent, the new standard further limits disclosure to a more restrictive scope of information, including the elimination of names, addresses, dates of birth, social security numbers or other personal identifying information, depending on the nature of the request. The Department of Health and Human Services has been charged by the Act to determine what the “minimum necessary” standards are, and has been given 18 months from the passage of the Act (until February of 2012) to do so. Until then, the definition of the standard will be subject to broad, and likely inconsistent and ambiguous, interpretation.

The strengthening of the privacy provisions will almost certainly have a practical impact on personal injury practitioners. The reasoning in the recent Fourth Department decisions in Bozek v. Derkatz, (55 A.D.3d 1311 [4th Dept. 2008]) and Tabone v. Lee, (59 A.D.3d 1021 [4th Dept. 2009]) in which the appellate court denied access to medical records deemed by the plaintiff (or his/her counsel) to be irrelevant or not at issue, has support in the Act, and may well become more prevalent. Those decisions sanctioned date and treatment limitations on HIPAA compliant authorizations, as well as permitting - if not outright mandating - an *in camera* review by a supervising court to determine whether the medical records sought are relevant and, if so, discoverable. Plaintiffs may now, more than ever, determine exactly what records they wish to disclose to defendants, and may outright prevent the disclosure of certain records.

Even where a plaintiff provides a HIPAA compliant authorization for the disclosure of protected health information from a covered entity, a treating physician or other health care provider must now honor any restrictions on the authorization. This places a tremendous burden on the plaintiff's medical providers, and failure to honor these limitations could result in serious penalties for the provider. Ultimately, this will make procuring records even more challenging for defense counsel, as covered entities likely will err on the side of disclosing less information than may be permitted under a HIPAA compliant authorization, in an attempt to honor the “minimum necessary” standard, as well as comply with the plaintiff's self-imposed restrictions.

Although these rules have not been widely put into effect, they are certain to change the landscape of personal injury litigation. It is likely they will lead to increased litigation, both by states' attorneys enforcing the new restrictions, as well as by private practitioners in hopes of gaining a more favorable interpretation of the standards imposed on disclosure of protected health information.

If you have any questions about how these changes to HIPAA or the American Recovery and Reinvestment Act will impact tort litigation, please contact David G. Brock at 716.843.3811 or dbrock@jaeckle.com or Robert W. Patterson at 716.843.3910 or rpatterson@jaeckle.com.

This Jaeckle Alert, prepared by the attorneys at Jaeckle Fleischmann & Mugel, LLP, is intended for general information purposes only and should not be considered legal advice or an opinion on specific facts. For more information on these issues, contact one of the attorneys listed above or your existing Firm contact. Prior results do not guarantee a similar outcome. The invitation to contact is not a solicitation for legal work in any jurisdiction in which the contacted attorney is not admitted to practice. Any attorney/client relationship must be confirmed in writing.
© 2010. All Rights Reserved.