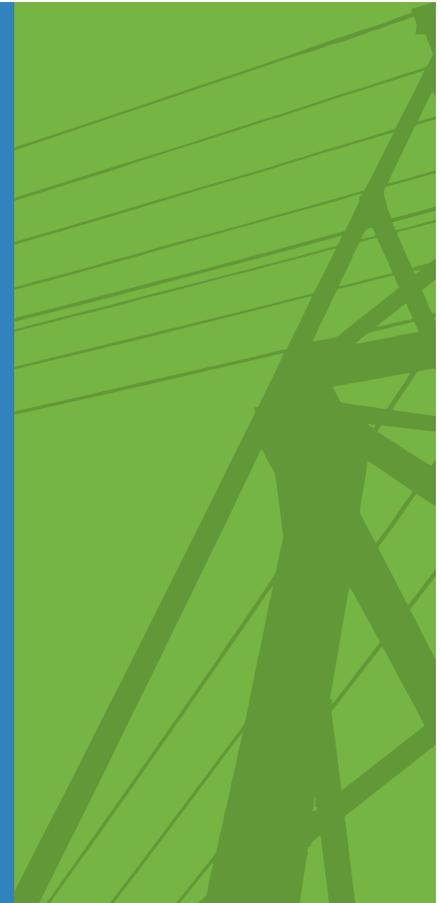


Employer Update:
COVID-19, ADA & HIPAA
Akron Bar Association

Latha M. Srinivasan, Esq.
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Agenda

- **ADA Basics**
- **ADA Reasonable Accommodations and COVID-19**
- **HIPAA Basics**
- **When Does HIPAA Apply to Employers in the Context of COVID-19?**
 - HIPAA and ADA (FMLA will be covered in another webinar)
 - Interplay of Confidentiality Provisions and Employer Obligations
- **Requesting Protected Health Information (PHI) in the Context of COVID-19**
- **Safeguarding PHI**
- **Policy Considerations and Best Practices**

Americans with Disabilities Act (ADA) Basics

ADA review

□ ADA

- “Americans with Disabilities Act”
- prohibits employers from “discriminat[ing] against a qualified individual...”
- “...with a **disability** because of the **disability** of such individual...”
- in regard to job application procedures, and terms, conditions, and privileges of employment.”

□ ADAAA

- “Americans with Disabilities Act Amendments Act”
- Effective as of January 1, 2009
- What did ADAAA change about the ADA?

What changed with the ADAAA

□ **Definition of “disability” under ADA**

- Physical or mental impairment that **substantially limits** one or more of the **major life activities** of such individual; or
- A record of such an impairment; or
- Being regarded as having such an impairment

□ **ADAAA did not change definition of “disability”**

□ **Rather, it broadened what is considered a “major life activity” and broadened meaning of “substantially limits”**

Expanded definition of “major life activity” under ADAAA

- ADA review – “major life activity”: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, working, reproducing (non-exhaustive list)
- “**Major bodily functions**” specifically recognized as major life activities
- The operation of a major bodily function, including functions of the:
 - Immune system
 - Special sense organs and skin
 - Normal cell growth
 - Digestive
 - Genitourinary (cont’d on next slide)

“Major bodily functions” cont’d.

- Bowel
- Bladder
- Neurological
- Brain
- Respiratory
- Circulatory
- Cardiovascular
- Endocrine
- Hemic
- Lymphatic
- Musculoskeletal
- Reproductive functions
- Operation of a major bodily function includes the operation of an individual organ within a body system
- Nonexhaustive list

Practical effect

- Congress has equated major bodily functions to major life activities under ADA
- For example, a person with insulin-dependent diabetes will most likely now be covered because endocrine system function is now definitely considered a major life activity.

“Substantially limits” – liberal application

- Expansive coverage
- Mitigating measures are **IGNORED** under ADAAA
 - EXCEPT using corrective lenses
- No set time frame for impairment
 - The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of the ADAAA

Emphasis on “interactive process”

- Under the ADAAA, the focus has shifted from an employee’s disability to the “interactive process” and reasonable accommodation
- No magic words need to be uttered by employee to trigger interactive process

ADA and COVID-19

ADA and COVID-19

□ **Is an employee covered by the ADA if they have COVID-19?**

- Short answer is probably not since it is a temporary ailment, like any other virus. BUT, the severity of a specific situation may allow an employee to state that they are substantially limited in a major life activity, such as breathing. Case by case analysis.
- ADA coverage could also be triggered by a “regarded as” argument

□ **Can an employer send employees home who exhibit potential symptoms of COVID-19?**

- Yes, sending an employee home who displays symptoms of any contagious illnesses would not violate the ADA. (Be sure to treat all employees consistently though to avoid claims based on other protected characteristics, such as age, sex, or race).

ADA and COVID-19

- **Can an employer ask asymptomatic employees to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to complications?**

- Generally, no – see

- https://www.eeoc.gov/facts/pandemic_flu.html (attached in materials)

- However, if employer had sufficient objective information to reasonably conclude that employees will face a direct threat if they contract COVID-19, they might be able to make disability-related inquiries or require medical examinations of asymptomatic employees to determine which employees are at a higher risk of complications. This carries a high risk of liability though if not implemented well.

(cont'd next slide)

ADA and COVID-19

– EEOC:

“During a pandemic, employers should rely on the latest CDC and state or local public health assessments...[E]mployers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

“Based on guidance of the CDC and public health authorities as of March 2020, **the COVID-19 pandemic meets the direct threat standard.** [emphasis added] The CDC and public health authorities have acknowledged community spread of COVID-19 in the United States...In addition, numerous state and local authorities have issued closure orders for businesses, entertainment and sport venues, and schools in order to avoid bringing people together in close quarters due to the risk of contagion. These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace **at the current time.**” [emphasis added]

ADA and COVID-19

- **Can an employer encourage employees to telework as an infection-control strategy?**
 - Yes. The EEOC’s pandemic guidance states that telework is an effective infection-control strategy.
 - OK to mandate too
 - Employees with disabilities that put them at high risk for complications may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

ADA and COVID-19

- **Can an employer take employees' temperatures in the workplace?**
 - Yes, during this pandemic. Typically, the answer to this question would be an emphatic “NO” because taking a temperature is considered a “medical examination,” and an employer cannot perform medical exams on employees as a matter of course without the exam being job-related and based on business necessity. However, the EEOC has made an exception for pandemics and for COVID-19 specifically:

“Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.”

ADA and COVID-19

- **Can employer collect medical information from employees when taking their temperatures?**
 - No, unless required by law. Collecting or distributing medical information may violate privacy-related laws or standards.

- **What precautions are needed for individuals who are taking the temperatures of employees, applicants, or customers?**
 - Assume the testers are going to be exposed potentially to someone who is infected who may cough or sneeze during their interaction and provide PPE to them, such as masks (cloth masks, unless they are a health care worker), face shields, gloves, etc.

- **Can an employer require a fitness-for-duty exam before returning the employee to work?**
 - No, unless rules for post-offer pre-employment are met.

ADA and COVID-19

- **What should and can an employer do if an employee tests positive for COVID-19 with respect to that employee and other employees?**
 - **Send Confirmed Employees Home**
 - The infected employee should remain at home until released by a physician or public health official. If a medical note releasing the employee is unavailable, follow the CDC guidelines on when an employee may discontinue self-isolation. These guidelines contain specific requirements based on exhibited symptoms. Or, follow the policy the Company/client has developed for COVID-19, ensuring that laws are followed.

ADA and COVID-19

- **What should and can an employer do if an employee tests positive for COVID-19 with respect to that employee and other employees? (cont'd)**
 - **Address and Isolate Employees Working or Who Worked Near An Infected Co-Worker**
 - Ask infected employees to identify all individuals who worked in close proximity with them during the 48-hour period before the onset of symptoms.
 - Send home all employees who worked closely with the infected employee for 14 days under CDC Guidance to ensure the infection does not spread. While quarantined, those employees should self-monitor for symptoms.
 - DO NOT disclose name of infected employee to other employees.
 - FYI: CDC has developed alternative guidelines for critical workers. For essential businesses, asymptomatic employees who have been directly exposed to a confirmed case of COVID-19 can continue to work if certain guidelines are met. Refer to CDC website for info.

ADA and COVID-19

□ Notifying Other Employees

- Notify all employees who work in the location or area where the employee works of the situation.
- **Do not disclose name of the employee, unless employee has signed an authorization permitting it.**
- Inform employees of the actions you have taken:
 - Requiring employees who worked closely to the infected worker to go home.
 - Sanitization and cleaning efforts
- Failure to notify employees of a confirmed case *may* be a violation of OSHA's general duty clause.
- Use same protocol for suspected cases.

ADA and COVID-19

- **Employee Refuses to Physically Return to Workplace after Business Resumes/Stay at Home Order Lifts**
 - Employees are only entitled to refuse to work if they believe they are in imminent danger (OSHA).
 - The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time.
 - Do not unlawfully curtail employees' rights to act together to improve employment terms and conditions under Section 7 of the National Labor Relations Act (NLRA). This applies to non-union settings as well.

ADA and COVID-19

- **Employee claims they have a medical condition that prevents them from wearing a mask or face covering**
 - Engage in the ADA interactive process with this employee. Send a medical questionnaire to the person's treating physician asking about other options or whether their condition precludes the person from wearing any kind of face covering that would achieve the desired goal.

- **Employee refuses to work without a mask after shelter-in-place order lifted**
 - Unless you are required to provide a mask or respirator as PPE to your employees, in most cases, an employee does not have the right to refuse to work without a mask. When a respirator or surgical mask is not necessary to protect the health of an employee, an employer can deny a request to provide one. However, if the employee wants to use a personal mask (like a cloth one), in the workplace, consider allowing them to.

ADA and COVID-19

- **During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, can an employer still request information to determine if the condition is a disability?**
 - Yes, you may ask questions or request medical documentation to determine whether the employee has a “disability” as defined by the ADA, as per employer’s normal interactive process.

- **During the pandemic, can an employer still engage in the interactive process and request information from an employee about why an accommodation is needed?**
 - Yes, you may ask questions or request medical documentation to determine whether the employee’s disability necessitates an accommodation, either the one they requested or any other, per employer’s normal interactive process.

ADA and COVID-19

- **Employer is ready to call employees back to worksite, but an employee has expressed a preference for working from home.**
 - Employer can refuse remote work as long as the employee is not seeking a reasonable accommodation under the ADA. If such an accommodation is being requested, conduct an interactive process with the employee to determine whether an obligation exists to provide such or another accommodation, as per ordinary company procedure.

ADA and COVID-19

- **If an employer engages in infection control practices and requires employees to wear PPE, must requests for accommodation be considered?**
 - YES. Even though PPE is required here, employees may request accommodations based on a disability or religious belief. As with other accommodation requests, the employer must engage in the interactive process to determine if reasonable accommodations can be provided.
 - Check applicable company safety standards or rules
 - Involve HR

ADA and COVID-19 – New Hires

- **Can employers screen job applicants for symptoms of COVID-19?**
 - Yes, after making a conditional job offer AND as long as you are do so for all entering employees in the same type of job.

- **If a job applicant has COVID-19 or symptoms associated with it, can employer delay the start date of an applicant?**
 - Yes. According to current EEOC and CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace. However, remote work can be discussed, if applicable. Be sure to comply with non-discrimination in the hiring process.

ADA and COVID-19 – New Hires (cont'd)

- **Can an employer withdraw a job offer when it needs the applicant to start immediately, but the individual has COVID-19 or symptoms of it?**
 - Based on current EEOC and CDC guidance, this individual cannot safely enter the workplace, and therefore you may withdraw the job offer. However, remote work may be discussed, if applicable.

- **Can an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19 according to the CDC?**
 - NO. However, if appropriate, remote work can be discussed, if applicable.

Requesting PHI, Privacy and Individual Rights – ADA

What is PHI? (HIPAA)

▣ **Protected Health Information (PHI):**

- Health care information that identifies an individual through the use of a name, social security number, date of birth, etc., and includes information about an individual's mental or physical health, condition, or payment for the treatment of the individual's health care
- Applies to electronic, verbal or paper formats
- Most HR personnel have access to PHI

Privacy Responsibilities

- **PHI can only be used or disclosed with consent or for treatment, operations or payment – TOP**
- **Privacy notices must be provided to all employees and retirees**
- **PHI must be protected – kept private and secured**
- **PHI on a “need to know” basis only**

Requesting PHI - ADA

- In the course of interacting with and accommodating employees with disabilities, the employer is likely to acquire health information of the employee.
- The ADA protects the following health information:
 - Results of a medical exam done for an employer at any time – **under EEOC guidance, a temperature check is a “medical exam” and would normally be prohibited. However, the EEOC has made it permissible for COVID-19 concerns;**
 - Results of a drug test administered by the employer;
 - Medical information that the employee shares during the hiring process;
 - Information about a disability that employee gives for affirmative action;
 - Medical information that employee gives in seeking an ADA accommodation;
 - Medical information that an employee gives in conjunction with an employer’s health and wellness program; and,
 - Disability information about an employee that an employer obtains in a manner that might violate the law. See 42 U.S.C. § 12112(d).

Requesting PHI - ADA

- ADA does *not* protect an employee's privacy when it comes to using illegal drugs. If a drug test shows that the employee abuses drugs, the employer does not violate the ADA if it shares this information. (Disclosure might violate other laws, however.)
- EEOC: employer “should take steps to guarantee the security of the medical information,” including keeping the information “in a medical file in a separate, locked cabinet, apart from the location of personnel files,” and restricting access to such files to a specific person or persons. Only a few people who do filing or who have a reason to know should see medical records.
 - The employer needs to take this precaution with both paper and electronic files.

Requesting PHI - ADA

Examples of Records That Must Be Maintained in Separate Medical Files	Examples of Records That May Be Kept in Regular Employee Files (Unless the Record Contains Medical Information)
<ul style="list-style-type: none">• Medical exam;• Written request for disability-related accommodation (including requests for leave of absence);• Medical proof (documentation) supporting accommodation request;• Drug test showing legal drug use;• Fitness-for-duty exam; and• Information on affirmative-action form about disability.	<ul style="list-style-type: none">• Employment application;• Résumé;• Reference letters;• Wage withholding form (W-4);• Personnel evaluations;• Disciplinary warnings;• Employee awards or honors;• Results of pre-employment tests (e.g., typing tests);• Letters of appreciation;• Background investigations; and• Information about leaving the job.

Requesting PHI – Other Concerns

□ State Law/Common Law

- Beware of applicable state laws that relate to privacy (invasion of privacy claims)
- Ohio law

□ Constitutional Claims

- In addition, numerous federal courts have recognized an individual's constitutional right to privacy of his or her medical records.
 - *Lankford v. City of Hobart*, 27 F.3d 477, 479 (10th Cir.1994); *Doe v. City of N.Y.*, 15 F.3d 264, 267 (2d Cir. 1994); *Pesce v. J. Sterling Morton High Sch.*, 830 F.2d 789, 795-98 (7th Cir. 1987); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577-80 (3d Cir. 1980) (all recognizing constitutional right to privacy regarding medical records). Accordingly, these rights could give rise to a civil-rights claim.

HIPAA Basics

Who governs HIPAA? What is HIPAA?

- **Department of Health and Human Services (HHS):**
 - Government agency that publishes HIPAA regulations
 - <http://www.hhs.gov/>
- **Health Insurance Portability and Accountability Act of 1996**
 - Originally passed to keep a person's identifiable health information private and secure
- **The Privacy Rule effective April 14, 2003**
 - Revised to ensure more stringent rules for protecting private health information
- **Health Information Technology for Economic and Clinical Health Act (HITECH) passed 2/17/2009 as part of the American Recovery & Reinvestment Act (ARRA)**
 - Two main components
 1. Security breach changes
 2. Business Associate Agreement updates

Why was HIPAA created?

- Originally began as a way to reduce healthcare costs by utilizing electronic data interchanges between providers and health care carriers
- Improve access to health insurance portability - COBRA
- Ensure the privacy of **Protected Health Information** “PHI”
- Protection of individually identifiable health information
- Provide standardization of processes

What is PHI? (Review)

□ **Protected Health Information (PHI):**

- Health care information that identifies an individual through the use of a name, social security number, date of birth, etc., and includes information about an individual's mental or physical health, condition, or payment for the treatment of the individual's health care
- Applies to electronic, verbal or paper formats
- The 2009 and 2013 changes have even stronger rules around protecting individual's information
- Most HR personnel have access to PHI

Is all health-related information considered PHI under HIPAA?

- **Knowledge of health information of employees does not automatically fall under HIPAA**
 - **ALWAYS** maintain confidentiality of employee health-related information whether it be for return to work or claims assistance
 - Need to know basis only
 - Employees health conditions should not influence employment related decisions
 - Managers/Supervisors do not NEED to know diagnosis; neither do other employees

- **The goal of HIPAA is to ensure protection of PHI**

Do any COVID-19 coronavirus rules change or curtail HIPAA privacy rules?

□ NO.

- Employers must still comply with the protections contained in HIPAA.
- Feb. 3, 2020 - Office for Civil Rights of the U.S. Department of Health and Human Services (HHS) issued a Bulletin containing a reminder of HIPAA privacy rules after the WHO declared a global health emergency:
<https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf> (attached in materials)
 - “[T]he protections of the Privacy Rule are not set aside during an emergency.”
- March 29, 2020 – second Bulletin reminding entities of HIPAA’s nondiscrimination rules (<https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>)(attached in materials)
 - ...(HHS) is providing this bulletin to ensure that entities covered by civil rights authorities keep in mind their obligations under laws and regulations that prohibit discrimination on the basis of race, color, national origin, disability, age, sex, and exercise of conscience and religion in HHS-funded programs.“

Requests by officials for emergency personal health information of employees

- Employers are not “covered entities” (medical providers and employer-sponsored group health plans are), so if you have medical information in your employment records, it is not subject to HIPAA restrictions.
- HOWEVER, disclosures should be made only to authorized personnel, and care should be taken even in disclosures to government personnel or other groups.
- Do not to release information to someone until you have properly identified them.

Medical Information

- Treat all medical information as confidential and give same protections as those granted by HIPAA in connection with your group health plan.
 - Normal HIPAA sharing circumstances apply – ex. sharing PHI with providers to help in treatment, or with emergency relief workers.
 - Sharing information with providers or government officials as necessary to locate, identify, or notify family members, guardians, or anyone else responsible for an individual's care, of the individual's location, general condition, or death.
 - Try to obtain individual's written or verbal permission to disclose the information, if possible. If not, be sure you can defend disclosure as being in person's best interests.
 - Disclosure is necessary to mitigate serious and immediate threat to the health and safety of a person or the public.

Medical Information

- **If an employer collects and maintains information about employees' temperature checks, results of antibody testing, and/or COVID-19 diagnosis, will such collection or disclosure of this information trigger any HIPAA obligations?**
 - The privacy restrictions mandated by HIPAA only apply to “covered entities” such as medical providers or employer-sponsored group health plans, and then only in connection with individually identifiable health information. Employers are not covered entities, so if you have medical information in your employment records, it is not subject to HIPAA restrictions.
 - Nevertheless, disclosures should be made only to authorized personnel, and care should be taken even in disclosures to government personnel or other.
 - Do not to release information to someone until you have properly identified them.

Scenario

- **Two HR employees are in the break room discussing another employee that they know is currently off work with a “serious medical condition”**
 - The conversation is not for business purposes.
 - The employee off work is a mutual friend of both HR employees.
 - One of the HR employees knows why the person is off work (COVID-19) and the other doesn't
 - If the one who knows tells the person who doesn't know, is this a violation of HIPAA?*

*just asking about HIPAA here, not other laws

HIPAA Plan Examples

What plans could be covered under HIPAA?

- ▣ **Plans that are covered under HIPAA include:**

- Medical
- Prescription Drug
- Dental
- Vision
- Employee Assistance Program
- COBRA
- Health Care Flexible Spending Account
- Wellness Program

What plans are excluded from HIPAA?

- **Workers' Compensation**
- **Life Insurance**
- **Sick Pay/Disability (Short Term/Long Term)**
- **Occupational Health**
- **Job-Related Issues**
 - Doctor's notes
 - FMLA
 - Pre-employment Physicals

Company

Not applicable to HIPAA

Workers' Compensation

Life Insurance

Sick Pay/Disability (Short Term / Long Term)

Occupational Health

Job-Related Issues

Doctors Notes

* No authorization typically needed if provided directly from the employee

Family and Medical Leave Act (FMLA) Americans With Disabilities Act (ADA)

* Need employee to authorize provider to release results — can make condition of employment

Pre-employment Physicals

* Need employee to authorize provider to release results — can make a condition of employment

Applicable to HIPAA

Medical Plan

Prescription Drug Plan

Dental Plan

Vision Plan

Employee Assistance Program (EAP)

COBRA

Third Party Administrators (TPA)

Health Care Flexible Spending Account (FSA)

Wellness Program

Policies and Procedures

□ **Claims Assistance**

- Before any claim is discussed with a vendor, an authorization to share PHI must be provided

□ **Must provide all employees/retirees with access to a copy of company privacy notice**

□ **Privacy Notice must be posted conspicuously in common areas within the company such as employee portal web site or boards**

□ **Continued efforts**

- Benefit-eligible new hire orientation packets
- Employee/retiree notifications every x number of years

How should HR employees deal with PHI?

- **Keep all PHI locked up**
 - Should be maintained in a locked cabinet
 - Paper shredders should be used to destroy waste paper with PHI on it
 - Hold discussions involving PHI in a discrete manner
- **Ensure that you do not have employee data on your laptop/computer, cell phone, PDA, iPad, etc.**
- **Do not leave your computer without locking it to ensure that no one can retrieve employee data from your computer**

How should HR employees deal with PHI?

(Continued)

- **Be careful of your and your hiring manager's involvement in employment decisions based on knowledge of PHI**
 - Be aware that once you receive PHI on an employee, you cannot disclose the PHI to others or let the PHI influence any employment decisions regarding the employee, such as hiring/transfer or disciplinary decisions
 - It is recommended that one person in each office be designated to handle employee benefit concerns where PHI could be divulged
 - Minimize liability for both yourself and your company
- **There are special uses and disclosures where PHI can be disclosed without an authorization**

Scenario

- **An employee contacts the HR because they are having an issue with a claim not getting paid through insurance company**
 - Should the employee complete a HIPAA authorization form to work with a member of the Benefits Team to resolve the issue?
 - If the member from the Benefits Team needs to disclose information to an external third party to assist with a claim, then an authorization from the participant must be obtained
 - If the employee provides de-identified information, does this require an authorization form? What is de-identified information?

Scenario, cont'd

□ **First Option**

- Always recommend employees call the carriers directly as a first step
 - Participants have the right to speak on their own behalf
 - Carriers are “resident experts” regarding coverage info, etc.
 - Carriers have access to claims information – best choice for resolution
 - Most efficient route – time sensitivity
 - Educates employees on their benefits

□ **Second Option**

- Direct employees to Human Resources general benefit-related questions and coverage information and follow company procedures for escalation of issues if necessary

HIPAA Security Rules



What is the HIPAA Security Rule?

- **The HIPAA Security Rule establishes national standards to protect individuals' electronic personal health information that is created, received, used, or maintained by a covered entity. The Security Rule requires appropriate administrative, physical and technical safeguards to ensure the confidentiality, integrity, and security of electronic protected health information.**

Employer must follow four basic rules:

- **Ensure the confidentiality, integrity, and viability of all electronic protected health information ("e-PHI") we create, receive, maintain or transmit**
- **Protect against any reasonably anticipated threats or hazards to e-PHI**
- **Protect against any reasonably anticipated uses or disclosures of e-PHI that would violate the HIPAA privacy rule**
- **Ensure that our workforce complies with the HIPAA security rule**

Employer's Security Policies and Procedures Plan Must:

- **Implement "*reasonable and appropriate*" policies and procedures to comply with the security rules**
- **Designate a security officer responsible for developing and implementing the policies and procedures**
- **Complete Business Associate Agreements**
 - Plan must enter into business associate contracts with third parties (*Health & Welfare Companies*) that perform functions for them with e-PHI

How does this affect HR?

- **Keep all PHI (EOB's, invoices, correspondence logs and authorization forms, etc.) in a secure area/locked cabinet**
- **Protect all passwords and change them frequently**
- **Do not allow installation of non-company software on your computer**
- **Do not allow unauthorized access or viewing of screens/files that contain PHI**
- **E-PHI can only be emailed if it is through a secured or encrypted method of exchange (password-protected email)**
- **Report any unauthorized release of electronic PHI to the Security Officer immediately**

Non-Compliance Penalties

□ **Civil Violations**

- Handled by the Office of Civil Rights
- Can be subject to \$100 per violation or up to \$1.5 million for all violations of a single Privacy standard per calendar year (Company could be audited)

□ **Criminal Violations**

- Handled by the Department of Justice
- Monetary fines and terms of imprisonment depending on degree of crime

Scenario

- **As an HR professional when I leave for the day, I do not turn off my computer/laptop. I just allow it to go to sleep. If someone were to gain access to the employee data that I have on my laptop in a spreadsheet that I'm working on, could this be a HIPAA violation?**
 - What do you think?
 - Is it necessary to turn your computer off every night?

Scenario

- ▣ **I was reading an email on my iPhone from a co-worker that included PHI in the body of the email. My husband just so happened to be walking past me and also saw the information. Is this a HIPAA violation?**
 - What do you think?
 - Is it necessary to report this?

Employee Health Info in Employee File

- Records maintained by a covered entity under HIPAA in its role as employer are exempt from HIPAA
- Records that are part of an employment file are not covered by HIPAA
- BUT! They may be protected under the ADA (or other statutes, such as the FMLA, GINA, OSHA regs, OFCCP regs)

Statutory Protections of Employee Health Information Not Covered by HIPAA

- Medical exam results done for employer
- Results of drug test administered by employer
- Medical information employee shares during hiring process
- Self-identifying information employee gives for affirmative action plans
- Medical information that employee gives in seeking an ADA reasonable accommodation
- Medical information that employee gives in conjunction with a wellness program
- Employee medical information that employer sought and received illegally (i.e. inappropriate interview question)

Privacy Requirements of ADA and FMLA

- Any information obtained by an employer regarding the medical condition or history of an applicant or employee must be collected and maintained on separate forms, kept in separate files, and treated in a confidential manner.
- Employers may only disclose such information to
 - (1) supervisors and managers who need to be informed regarding necessary work restrictions and necessary accommodations;
 - (2) first-aid and safety personnel who need to be informed about emergency treatment; and,
 - (3) government officials who are investigating compliance-related issues.
 - (4) Information may also be released for purposes mandated by local, state, or federal law.
- The ADA protects all employees, not just individuals with disabilities, against the inappropriate gathering and disclosure of confidential medical information.

Scenario

- **An employee with cancer is working in the Supply Chain. She bids on a position in another department because she believes that the other job will be less stressful and allow her more flexibility to go to her chemotherapy appointments.**
 - The supervisor of the open position contacts her current supervisor to gain information regarding her skills and her time away from work
 - The employee's current supervisor tells the new supervisor that the employee has cancer and is unable to handle her current position because she has to be away for doctor's appointments
 - The new supervisor decides not to hire the employee with cancer for the position and selects another candidate
 - Is this a violation of HIPAA?
 - Is this a violation of the ADA?

Scenario

- **Deanna is overheard in an elevator talking with a coworker about the complications that another coworker, Beverly, is having as a result of COVID-19. Deanna has learned this as a function of her role as a manager in the office.**
 - Is this a violation of HIPAA?
 - Is this a violation of the ADA?

Scenario

- **Jake applies for a job as a waiter. The employer asks Jake if he is OK with carrying a tray for long periods of time. Jake says it's OK as long as he can sit down every now and then. He explains that he has severe asthma.**
 - How does ADA apply here?
 - The employer must keep the fact that Jake has severe asthma private even if Jake doesn't get the job.
 - ADA protects the medical information of all employees even if they do not have disabilities
 - May be a reasonable accommodation issue

Scenario

- **Spock needs to be suddenly and unexpectedly absent for some medical testing. He tells his supervisor, Kirk, that he will need to be absent that day for medical testing and tells him the reason for the testing. In a team meeting during Spock's absence, Kirk explains that Spock is absent because he is undergoing some tests. When Spock returns, Kirk asks Spock to share the reason for the testing with the team to allay their concerns for his health.**
 - Is this a violation of HIPAA?
 - Is this a violation of the ADA?
 - Well meaning supervisors and concerned co-workers do not create a exception!

Scenario

- **Jeff seeks FMLA leave through Human Resources for a highly personal medical condition. He does not tell his supervisor, John, about his medical condition and does not share it with any coworkers. When Jeff returns from leave, Human Resources tells John only that Jeff is limited to working four hours per day for the next six weeks. As a result, other members of Jeff's team are required to pick up work Jeff is not doing. John approaches Jeff and tells Jeff it would really help if he would tell him and the coworkers the reason he cannot work the full schedule because John is in a difficult spot with coworkers who are resentful about having to do the extra work.**
 - How does the ADA apply here?

Scenario

- **Blanco does not disclose his Attention Deficit Hyperactivity Disorder (ADHD) when he responds to the company's post-offer, pre-hire Medical Surveillance History Questionnaire.**
- **The in-house physician with whom Blanco discussed his post-employment request for a reasonable accommodation accuses Blanco of failing to disclose his ADHD on the medical questionnaire.**
- **The in-house physician discusses Blanco's allegedly false responses to the questionnaire with management in the company's Labor Relations Department.**
- **Blanco claims that the company terminated his employment as a result of the disclosure.**
 - In-house physician violated the ADA because her disclosure of Blanco's medical information was not necessary for managers in company's Labor Relations Department to accommodate Blanco or to address a work restriction
 - Real case: Blanco v. Bath Iron Works Corp. and General Dynamics Corp. (U.S. District Court, Maine, 2011)

Best Practices

Policy Considerations

- When analyzing confidentiality and disclosure issues, HR should also consider:
 - Need to know
 - For what purpose is disclosure being made? By whom and to whom?
 - Employees' health conditions should not influence employment-related decisions
 - Unless analyzing reasonable accommodation requests
 - All applicable statutes (call your attorney and/or HR for guidance)
 - HIPAA, ADA, FMLA, GINA, OSHA regs, OFCCP regs, etc.

Best Practices

- **Compliant hiring policies and practices**
 - Must keep up with changes in laws and regulations
 - Differences in state law for employers with operations in multiple states
- **Compliant individuals with disability employee policies (anti-discrimination, reasonable accommodation, etc.).**
- **Communication of reasonable accommodation procedures to employees (who to contact, how, etc.)**
- **Assurance of confidentiality to employees (HR function)**
 - Proper confidentiality procedures/policies
- **Proper training on ADA and FMLA for HR professionals, supervisors, and managers**
 - Supervisors and managers are on the front line and must be able to recognize when interactive process applies

Ensuring Manager Understanding of Policies

Ensuring Manager Understanding of Policies

- **Train, train, train!**
 - Classroom setting
 - Interactive, online training
 - One on one training (counseling)

- **Effective management training should include:**
 - Policy provisions
 - Call off procedures
 - Proper methods of discipline for employees who fail to follow the policy
 - When is a verbal warning or counseling appropriate vs. formal discipline
 - Relationship with Human Resources in reporting policy violations and enforcing the policy
 - How to spot ADA or FMLA leave requests (no magic words necessary!)
 - When to request temporary help to cover employees on leave (whether internal transfers or using outside temp services)
 - Anti-retaliation provisions (both from management and co-workers)

Questions & Answers