

SEPTEMBER 22 IS THE DEADLINE FOR ALL “BUSINESS ASSOCIATE AGREEMENTS” TO COMPLY WITH HEALTH INFORMATION LAW

By Frances P. Quarles, Esq.



Medical offices have only until September 22 to make sure that all of their third-party agreements regarding “Protected Health Information” (“PHI”) comply with a federal law designed to safeguard the data.

The Health Information Technology for Economic and Clinical Health Act (“HITECH”) went into effect last year, but many agreements that already existed were

“grandfathered” in—that is, they were permitted to remain in place without change during a grace period. By September 22, though, those existing contracts also must be replaced or amended to satisfy all of HITECH’s new requirements.

BACKGROUND

HITECH amended the federal Health Insurance Portability and Access Act (“HIPAA”). Under the law, “PHI” refers to health information that can be linked to a particular person. PHI that is created, stored, transmitted or received electronically is called “ePHI.”

To ensure the confidentiality of PHI, the law imposes requirements on health care providers that electronically furnish, bill or receive payment for healthcare services. Such providers include doctors, dentists, hospitals, clinics, pharmacies, labs, and insurance companies. In HIPAA terms, they are “Covered Entities” (“CEs”).

HITECH’S EXTENDED REACH

But HITECH reaches beyond CEs themselves. The law also applies to a CE’s “Business Associate” (“BA”), which is a person or entity that performs certain functions or provides services for a CE involving the use or disclosure of PHI. HITECH significantly expanded HIPAA’s definition of BAs to

include some third-party contractors who previously did not fall into that category.

A BA now refers to any person or entity that is not part of a CE’s workforce and that creates, receives, maintains or transmits PHI on behalf of a CE. Examples include claims processors, accountants, malpractice attorneys, IT technicians and data storage vendors.¹

Even a “cloud” storage provider is a BA. Regulations issued under HITECH clarify that companies which maintain or store PHI for a CA are BAs even if those companies do not actually view or access the PHI. This change is significant as cloud-based storage becomes more pervasive with health care providers.

It is also important to note that the BA designation is based on the *service* that the contractor provides. For example, an attorney who only negotiates an office space lease for a physician is not considered a BA, because he or she would not receive PHI from the doctor for that transaction. However, an attorney who represents a physician in a malpractice suit *is* a BA, because that attorney would need to receive the patient’s PHI from the physician in the course of the lawsuit.

SUBCONTRACTORS, TOO

And, HITECH goes even farther. Some of a BA’s subcontractors are now subject to the law as well.

HITECH’s definition of “Business Associate” includes the term “*Subcontractor*,” defined as a person or entity to which a BA delegates a function, activity or service in a capacity other than as a member of the BA’s workforce. For example, if a BA hires a company to shred its documents, that company will also be a BA if (i) the BA has taken on responsibility for the shredding under its contract with the CE, and (ii) the documents to be shredded contain PHI.

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CEs should be aware that the term “Subcontractor” also includes other downstream service providers – that is, all persons or entities that provide services on behalf of a Subcontractor. The HIPAA/HITECH requirements apply all the way downstream *as far as the PHI goes*.

WHAT DOES A “BUSINESS ASSOCIATE AGREEMENT” NEED TO SAY?

The new definitions and requirements affect the contracts that physicians have with their third-party service providers. Such contracts are called Business Associate Agreements (“BAAs”). A third-party service provider, or BA, is required to sign an agreement, or BAA, limiting the use of the PHI received from a CE.

Before the Department of Health and Human Services issued its final regulations last year implementing HITECH, a BA could comply with HIPAA by entering into a BAA that merely promised to protect PHI. Now, however, BAs must enter into a BAA which ensures that they, and their subcontractors, comply with all of the law’s security requirements and most of the privacy requirements. The BAs and their subcontractors also must agree to report any breach of unsecured PHI.

BAAs that existed on or before January 25, 2013, complied with HIPAA’s previous regulations, and were not modified or renewed between March 26, 2013 (the effective date) and September 22, 2013 (the compliance date) (except for automatic renewals), were permitted to remain in place until September 22, 2014. With the end of that grandfather period quickly approaching, physicians should take care that any BAAs they had in place before January 25, 2013, have been reviewed and updated as needed to comply with HITECH. If a medical practice would like to preserve as much of an existing BAA as possible, then the practice and BA may wish merely to amend that BAA to include all of the new HITECH requirements.

A new or amended BAA should include the following provisions:

1. Establish the permitted and required uses and disclosures of PHI by the BA.
2. Provide that the BA will not use or further disclose PHI other than as permitted or required by the BAA or as required by law.
3. Require the BA to implement appropriate safeguards to prevent unauthorized use or disclosure of PHI, including compliance with the HIPAA Security Rule for EPHI. BAs must create and implement administrative, physical and technical safeguards for EPHI. A BA must have a building security policy, computer security policy (including encryption, security monitoring and password safety), safety and password protection for EPHI that is stored on company computers, training for staff and professionals, a designated security officer in charge of HIPAA compliance, and a periodic review of all of the above.

4. Require reporting to the CE of any improper use or disclosure of PHI, including breaches. Remember to require a relatively short reporting time for the BA, because the CE only has 60 days, at most, to report a breach under the federal law.
5. Require the BA to make PHI available to the patient for access and amendment, and require information for accounting. Require the BA to account for all disclosures for the 3 years immediately preceding the request, if the BA maintains records in electronic form. It was 6 years under the original HIPAA requirement.
6. Require the BA to comply with the HIPAA Privacy Rule, to the extent applicable.
7. Require the BA to make books and records available to the U.S. Department of Health and Human Services (“HHS”).
8. Require the BA to return or destroy the PHI at termination of the BAA, if feasible.
9. Require the BA to ensure that its subcontractors agree to the same restrictions and conditions regarding PHI that apply to the BA under the BAA.
10. Authorize the termination of the BAA by the CE if the BA violates a material term.

Sample BAA provisions can be found on HHS’ website at: <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/contractprov.html> (last viewed June 16, 2014).

CONCLUSION

With the September 22 deadline fast approaching for any necessary changes to grandfathered BAAs, physicians need to double-check and make sure that everything is -- or soon will be -- in compliance. HITECH’s security requirements are quite involved, and it could take some time for an uninformed BA or one of its subcontractors to satisfy them.

If a BA resists entering into a HITECH-compliant BAA, the BA should be reminded that it is subject to the same hefty fines -- up to \$1.5 million -- that a CE can face for HIPAA/HITECH violations. BAs also may be liable for violations that are the fault of one or more of its subcontractors.

And, even more importantly, CEs should remember that *they* may be liable for violations resulting from the acts or omissions of a BA that is acting as the CE’s agent.

The above is provided for general informational purposes only. You should consult your legal or tax professional for advice specific to your situation.

Ms. Quarles practices in the fields of business law, civil litigation and domestic relations from her office in Mountain Brook.

¹ The full definition of “Business Associate,” is found at 45 CFR § 106.103.

Strategic Space

By: Jeffrey R. Albright, Trident Real Estate, LLC., tridentrealestatellc@gmail.com



Your place of business impacts your income and the stability of your practice. It's not just an office. You can enhance your practice revenue. You can improve the appeal of your practice

to the patient population you depend on to grow your business.

Healthcare has been driven by reimbursement for decades. The government and insurance have significant control over your pay. Reimbursement has shaped the healthcare industry and it has shaped real estate decision making for hospitals and doctors. Physicians are in a competitive business with downward pressure on their income as they fight to hang on to a slice of the shrinking reimbursement pie. As a result, you need to be aware of how all the components of your business can increase revenue and decrease your costs. In today's world, strategic real estate decisions can impact the success of a practice.

Now more than ever, *healthcare providers must serve patient needs in appropriate care settings at lower costs and with better outcomes*. Your office is more than space now. It is a care setting that has to be defined in terms of strategic location, efficiency, capital employment, work environment and better outcomes.

Location

"Location" is more than where your practice is located and what kind of office space you have. Your physical location is **very important** depending on your type of practice and admitting patterns to area hospital(s). It is still the most important component of location but there are other factors to take into account today. Let's think in terms of marketing-something physicians generally are not trained to think about, and often do not have time to think about.

A retail developer creates tenant mixes in shopping centers that cross pollinate each other's businesses. Physician practices need to think the same way. Are you located where you have access to a complementary mix of referral practices and diagnostic services to serve your practice? Is proximity to the hospital worth the premium costs of that location? Is your office space attractive and accessible for your patients?

Efficiency

Real estate typically costs a practice 10% of its revenue-that is a big number. Today's reimbursement model means more delivery of care in out-patient settings such as your office. Physicians must design their spaces to be more efficient and more utilitarian. A great office space plan can be efficient without compromising the quality of the workplace. A good architect who understands delivery of care concerns can create a more effective work environment in less space. More is not necessarily better.

How large do my exam rooms need to be? Can I share waiting room and front desk facilities with other practices? What equipment is necessary in my space? How does work flow through my office?

And best of all . . . an efficient office space plan should result lower real estate expenses.

Capital

Your real estate is an expense but it can also be an investment. You have an investment in your office, your equipment and your practice. In the case of your office, either you are paying for the building owner's property through your lease payments or you are paying for your own. The question you must ask is how much does this capital cost my practice and is my capital efficiently deployed.

If you are leasing, you should consider whether to relocate, redesign your space, reduce your space or negotiate for better terms at lease time. If you own your own building, you have capital in-

vested that has a cost associated with it. Equity is tied up in the property. Can that capital be better deployed by selling the property as an investment and leasing it back from an investor? Are you in business of healing the sick or investing in real estate?

Could you redeploy that capital to provide a better return to you or your group by investing it back into the "business" to add more doctors, staff and necessary equipment or to update your space to be more appealing and efficient? Can you provide additional service lines to grow your revenue stream? Would that money be better serving you and your family in an investment account?

These analyses are a necessary part of improving your business model in an environment of shrinking revenues. A real estate professional can help you do this analysis with you and your partners.

Work Environment

What does your office say about your practice? Again, your real estate can impact your revenue. When your patients visit your office, they are seeing a reflection of you. You are branding your business in their mind by the quality care environment you create. Are the surroundings warm and inviting to patients seeking calm? When they think of your business, does your space tell them that they are in a place where the doctors are concerned about their comfort and well being?

Your office impacts the internal work culture of your practice. Your employees want to be in an environment that makes them more productive and efficient. They spend their entire work life serving patients in your office. Does it assist you in attracting and retaining associates that are an asset to your practice? You are competing for patients and employees. Your space can be a competitive advantage in attaining this objective.

Better Outcomes

All of the above factors can help to con-

tribute to the better patient outcomes being demanded in today's reimbursement model. A work space that enhances your delivery of care can contribute to your success as a physician. Your skill as a doctor is what provides those outcomes-- not your real estate. But your

office needs to be a place where you create effective synergies of location, efficiency, and environment to attract and serve your patients and your bottom line. These synergies' can contribute to the successful growth and stability of your practice.

A real estate professional can help you and practice make good decisions regarding this important part of your business.

Introducing B.U.R.N. The Blazer Undergraduate Research Network

UAB has created a new student organization, the Blazer Undergraduate Research Network (B.U.R.N.), with the primary objectives being to promote shadowing of healthcare professionals by undergraduates and to expose the latter to various healthcare careers. This will be accomplished by matching the students to a physician based on the student's area of interest. Due to UAB's prime location in the midst of several major hospitals and clinics, B.U.R.N. would be able to offer students a unique opportunity to shadow professionals in a large variety of fields. This would better

prepare students for a future in a health-related career by giving them a realistic idea of what this type of career entails.

This shadowing program will foster the intellectual development of these students and better prepare them for a future in a health-related field. Additionally, this will make students more competitive when applying to a professional school. Furthermore, you, as a health care professional, will help facilitate a brighter future for the healthcare profession by sharing your knowledge and experience with aspiring

health care providers. Shadowing experiences would eliminate any pre-existing misconceptions about the health care field, and more students will enter into professional school with meaningful experiences in clinical settings, have a better perception of the fields they are pursuing, and have an expanded threshold of career options.

If you would like to find out more information or would like to volunteer as a healthcare professional to shadow, please contact Jennifer Denzine at jen1den@uab.edu or (719) 685-6297.

Announcing a New JCMS Member Benefit

Credit Card Program - The JCMS is pleased to announce a new member benefit being offered through ServisFirst Bank-a JCMS credit card. Members can apply for either a no annual fee card or a reward card that offers 1% cash back on all purchases up to \$60,000 on the consumer card and \$100,000 on the business card, annually. In addition, members receive 0% APR on purchases or balance transfers for the first seven billing cycles on the personal card. After that there is a variable APR which currently is currently 11.25% and 13.25% depending on whether you select a cash back or a no annual fee card. ServisFirst offers 24/7 online

access to help manage your account, view transactions real time, make payments and set alerts on your account. Their local staff members are also available to assist as necessary.

ServisFirst has agreed to contribute a portion of the income generated from these accounts to the JCMS. The JCMS Board has decided that the funds generated from the card program will be donated to the JCMS Medical School Scholarship at UAB. You can apply for a card on the JCMS website, www.jcmsalabama.org, under the Member Services tab.

Electronic Device Repair - Does your phone, iPad® or laptop have a broken screen? Water damage? Problems charging? Cell Phone Repair in Homewood can handle it! Owner/operator Jim O'Brien will give JCMS members and their employees a discount of 10% off their prices (up to a \$20 maximum)-just ask for your JCMS discount! They are located at 231 State Farm Pkwy, Ste. 109 (between Starbucks and Moe's) in Homewood. They are open M-F from 10-7 and Saturday from 10-5. Their phone number is 490-6227 and website is www.cpr-homewood.com.

Upcoming Events

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| Sept. 15 | Foundation Trust Meeting – 5:00 p.m.
Executive Committee Meeting – 5:30 p.m.
Board of Directors Meeting – 6:30 p.m. |
| Sept. 16 | The Wayne Finley 811 Breakfast Meeting – The speaker will speak at 8:30 a.m. in the JCMS Board Room |
| Oct. 20 | Executive Committee Meeting – 5:30 p.m. |
| Oct. 21 | The Wayne Finley 811 Breakfast Meeting – The Speaker will speak at 8:30 a.m. in the JCMS Board Room |
| Nov. 6 | Annual JCMS Meeting at The Club. More details to follow |

Contact Juanita Pruitt at 933-8601 or jpruitt@jcmsalabama.org for more information regarding any of the above events.

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