

HIPAA

Portability, Privacy & Security



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Aline G. Haffner, Esq., Contributing Author and Editor
Andrew Ky Haynes, Esq., Contributing Author
Cheryl Musselman-Brown, Esq., Contributing Author
Rebecca L. Williams, Esq., Contributing Author
John L. Barlament, Esq., Contributing Author
Howard D. Bye-Torre, Esq., Contributing Author
John R. Hickman, Esq., Contributor

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What's New in the 4th Qtr. 2011 Edition

This What's New section highlights the changes made in the last quarter to *HIPAA Portability, Privacy & Security*—the authoritative HIPAA resource for employers, administrators, and advisors.

Also see the 4th Qtr. 2011 *Current Developments* newsletter, which can be accessed under the Bookmarks tab. The *Current Developments* newsletter summarizes important legal developments that occurred during the quarter.

Below are some highlights of the substantive changes that we made to the Outline and Appendix.

- **Section V—*How Are HIPAA's Portability Requirements Enforced?***
 - V.C—*IRS Excise Taxes for HIPAA Violations.* We've updated this discussion to note the IRS's release of a revised Form 8928 (Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code), the form used to report excise taxes for various compliance failures under the Code, including violations of HIPAA's portability requirements. The form and instructions were updated to reference violations of Michelle's Law and certain health care reform requirements.
- **Section VI—*What Plans Are Subject to HIPAA's Portability Requirements?*** A reorganized structure better reflects the treatment of employee assistance programs (EAPs) under HIPAA's portability requirements. The EAP discussion is in subsection L.
- **Section VII—*HIPAA's Restrictions on Preexisting Condition Exclusions.*** We've revamped and reorganized this entire Section in light of health care reform's prohibition on applying preexisting condition exclusions (PCEs) to individuals under age 19, which is now in effect for all plans. In addition, subsection K offers plan design strategies for plans contemplating the fate of their PCE provisions between now and the complete prohibition on PCEs in 2014.
- **Section VIII—*HIPAA Certificate of Creditable Coverage: Obligation to Furnish.***
 - VIII.E—*Content of the HIPAA Certificate.* The discussion of the required "educational statement" for HIPAA Certificates, which must include an explanation of the restrictions on the ability of a plan or issuer to impose a PCE, now reflects the prohibition on applying PCEs to individuals under age 19. (This coordinates with the changes to our sample HIPAA Certificates described below.)
- **Section XI—*Nondiscrimination Rules for Group Health Plans.***
 - XI.I—*Wellness Programs Must Meet Specific Requirements.* We've added a new discussion exploring several special issues (e.g., midyear changes, treatment of HRAs and HSAs) that may arise when determining the "cost of coverage" for purposes of calculating the 20% limit on permissible rewards under a health standard-based wellness program under the HIPAA regulations (and, starting in 2014, the 30% limit under health care reform).
- **Section XXI—*Privacy, Security, and EDI: Sources of Law and Enforcement.***
 - XXI.D—*Enforcement.* We've updated the enforcement discussion to include a full description of HHS's just-announced pilot program for privacy and security compliance audits. Compliance audits of covered entities begin in November 2011.

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- **Section XXII—Privacy, Security, and EDI: What Information Is Protected and What Entities Must Comply?**
 - XXII.A—*What Information Is Protected?* Two new text boxes enhance this subsection, highlighting the breadth of the terms “health information” (which, for example, need not include diagnosis information) and “individually identifiable” (including a discussion of de-identification).
- **Section XXIII—How the Privacy and Security Rules Affect Group Health Plans and Plan Sponsors.**
 - XXIII.H—*HIPAA and ERISA Claims Procedures.* Our discussion of providing a spouse’s or child’s PHI in a benefit claim notice sent to a participant has been updated to reflect the amended claims and appeals regulations under health care reform, which changed the requirement to include diagnosis and treatment codes in denial notices.
- **Section XXVII—Core Privacy Requirement #2: Individual Rights & Privacy Notice.**
 - XXVII.G—*Right to Receive Privacy Notice.* We expanded the explanation of the “plain language” requirement for a covered entity’s notice of privacy practices to offer additional plain language resources and a reference to the analogous model privacy notice for personal health record entities, recently developed by HHS.
- **Section XXXIV—Other Privacy Laws.**
 - XXXIV.C—*Americans with Disabilities Act (ADA).* This discussion now highlights a recent EEOC informal discussion letter cautioning employers about compliance with their confidentiality obligations under both the ADA and the Genetic Information Nondiscrimination Act of 2008 (GINA).
- **Appendix Tab 10. Certificate of Creditable Coverage.** The sample HIPAA Certificate and filled-in hypothetical HIPAA Certificates, and their Guides, were updated to reflect the prohibition on applying preexisting condition exclusions to individuals under age 19—which should now be included in a HIPAA Certificate’s “educational statement.”

Substantive Changes to the Appendix:

- **Tab 10—Sample Documents**
 - Updated TOC
 - Updated sample Certificates of Creditable Coverage

Lots More to Come! From the feedback we’ve received, we know that our manuals are the premier group health plans resources in the country. But here at EBIA we’re not satisfied. We are constantly striving to make the manual even better. In upcoming editions, look forward to complete coverage of all legal developments affecting HIPAA, and to our further analysis of existing law, with more examples and Q/As, etc.

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