

HIPAA & Colorado Workers' Compensation

May 2003

The privacy rules implementing the federal Health Insurance Portability and Accountability Act ("HIPAA") took effect April 14, 2003. *Although the federal HIPAA privacy rule does not apply to workers' compensation insurers, workers' compensation administrative agencies or employers (unless covered in some other capacity), it does affect these groups.* These groups, and others, need access to health information to administer the states' workers' compensation systems and provide the benefits guaranteed to injured workers under those systems. Much of this information must come from health care providers and others who are covered by the federal privacy rule. The complexity of the new privacy rule, and ambiguous language in the rule, both contribute to general confusion regarding its boundaries.

In an attempt to clarify confusion on the basic issues, the following questions and answers regarding the federal HIPAA privacy regulations and Colorado workers' compensation are presented. The answers have been created by the Colorado Division of Workers' Compensation, without approval or endorsement by any federal agency. The DOWC suggests that you consult your own legal counsel regarding these answers or any area of concern that you may have regarding HIPAA and Colorado workers' compensation.

1) Are workers' compensation insurers or self-insurers covered under HIPAA?

No, the definition of 'covered entity' includes health plans, but this definition (found in section 160.103 of the Privacy Rule) excludes any plan that provides the excepted benefits listed in the Public Health Service Act, section 2791(c)(1). The excepted benefits include workers' compensation ("WC"). Of course, WC insurers or self-insurers could be engaged in other business that would make them covered entities.

2) Can health care providers (who are covered entities under HIPAA) disclose information to non-covered entities?

Yes. From the Preamble to the Privacy Rule, "even though workers' compensation insurers are not covered entities under HIPAA, providers who are covered entities may disclose protected health information to them for payment purposes", assuming the providers have listed such insurers on their Notice of Privacy Practices. (Federal Register, December 28, 2000, page 82495)

3) Does this relationship between health care providers and workers' compensation payers create a "business associate" relationship?

No. The term "business associate" basically refers to a vendor or contractor. It is not meant to refer to a WC insurer. "The business associate relationship does not

describe all relationships between covered entities and other persons or organizations....For example, when a health care provider discloses protected health information to health plans for payment purposes, no business associate relationship is established.” (Federal Register, December 28, 2000, page 82476) This is important, because it obviates the requirement for a business associate contract between providers and WC payers.

4) Can health care providers disclose protected health information for workers’ compensation purposes?

Yes. Section 164.512 (l) of the Privacy Rule specifically allows covered entities to disclose protected health information (“PHI”) “as authorized by and to the extent necessary to comply with” state workers’ compensation law or regulations. A possible exception to this is with regard to psychotherapy notes, which require a specific authorization under HIPAA (164.508 (a) (2)).

5) What does “authorized by law” mean?

According to the recently released “HIPAA Privacy Rule and Public Health Guidance from CDC and the U.S. Department of Health and Human Services”: “Although it is not a defined term, DHHS interpreted the phrase “authorized by law” to mean that a legal basis exists for the activity. Further, DHHS called the phrase “a term of art,” including both actions that are permitted and actions that are required by law [64 FR 59929, November 3, 1999]. This does not mean a public health authority at the federal, tribal, state, or local level must have multiple disease or condition specific laws that authorize each collection of information. Public health authorities operate under broad mandates to protect the health of their constituent populations.”

This definition is relevant to WC, because 164.512 (l) allows health providers to use and disclose PHI “as authorized by and to the extent necessary to comply with” state WC laws. Workers’ compensation traditionally has relied on claimant medical information to resolve a WC case. This information is still required under HIPAA. In Colorado, the filing of a WC claim is deemed to be a limited waiver, although as a practical matter, obtaining a release is a useful practice.

6) What does Colorado workers’ compensation law say about releasing medical information?

See sections 8-43-404 (2) & (4), and 8-47-203 (1); also Rules 5-4(A)(5); 16-7(E)(4); 18-6(G). Additionally, the Director of the Division of Workers' Compensation has issued an Interpretive Bulletin regarding Release of Medical Information. All of these may be found on the DOWC web site at www.coworkforce.com/DWC.

These are summarized in part below:

8-47-203 (1) "...the filing of a claim for compensation is deemed to be a limited waiver of the doctor-patient privilege to persons who are necessary to resolve the claim."

8-43-404 (2) Both employer and employee are entitled to medical reports regarding treatment of the work-related injury.

8-43-404 (4) "A physician...will not be required to disclose confidential communications imparted...for the purpose of treatment and which are unnecessary to a proper understanding of the case."

DOWC Rule 5-4(A)(5) "A copy of every medical report not filed with the Division shall be exchanged with all parties within fifteen working days of receipt."

DOWC Rule 16-7(E)(4) "Providers...shall provide the payer with all supporting documentation at the time of submission of the bill...This shall include copies of the examination, surgical, and/or treatment records."

DOWC Rule 18-6(G)(1) "Completion of routine reports or records are incorporated in all fees for service and include...Diagnostic Testing, Procedure Reports, Progress notes, Office notes, Operative reports"

DOWC Rule 18-6(G)(2) Form WC164 medical reports are required for initial and closing appointments. WC164 reports may be requested for progress reporting.

Interpretive Bulletin #9: Release of Medical Records. This bulletin discusses the distinction between "medical report" and "medical record". A record may include PHI that is not directly related to the WC claim, but is necessary to justify the payment charged. A report should only discuss medical issues regarding the WC injury. The WC payer has the right to receive all the information necessary to determine payment for appropriate medical services. The employer has the right to reports regarding the WC injuries, but not a clear right to records containing irrelevant PHI. Given that privacy laws are in the limelight and are changing, the payer and employer should be cautious when sharing PHI.

7) What is necessary for the release of medical information?

It depends on the purpose for which the release is needed. For example, HIPAA only requires patients be given a "Notice of Privacy Practices" to release PHI for payment, treatment or health care operations. Other releases may be made pursuant to state workers' compensation law (e.g., WC164 Forms, IME reports). Finally, some releases will probably require an Authorization, such as releases of medical records by non-WC physicians for medical treatment prior to the WC injury.

8) Is it necessary to have an authorization signed by the injured workers to release medical information for payment purposes in workers' compensation?

Not usually. HIPAA requires health care providers to give patients a “Notice of Privacy Practices”. This document should include workers’ compensation as a possible recipient of medical information. Health care providers are allowed to engage in a broad range of treatment, payment and healthcare operations activities without a written consent so long as the required Notice has been given to the patient. (164.506 (c)(1))

Current Colorado workers’ compensation law has not *required* a release for payment purposes. Colorado law has been crafted in an environment where health care providers were obtaining signed releases prior to any payment activities. Under HIPAA, the Notice will replace this release, and there is nothing specific in Colorado WC law to require an additional release for payment purposes.

The only apparent exception to this general assessment of release of PHI for payment is that HIPAA requires an explicit authorization to release psychotherapy notes. For payment purposes, HIPAA apparently allows release without authorization of defined summary statements regarding mental health treatment. (164.508 (a) (2) and definition of ‘psychotherapy notes’ in 164.501)

9) What falls under “payment”?

The HIPAA definition of “payment” includes (but is not limited to) such activities as billing, determinations of eligibility or coverage, and review of health care services with respect to medical necessity, appropriateness of care, or justification of charges (164.501). Payment activities also include those necessary for preauthorization of services.

10) Do “payment activities” cover the release of medical information to an employer who is not acting as its own claims administrator?

No. According to the Preamble, HIPAA does “... not interpret the definition of ‘payment’ to include activities that involve the disclosure of protected health information by a covered entity...to a plan sponsor for the purpose of obtaining payment under a group health plan maintained by such plan sponsor, or for the purpose of obtaining payment from a health insurance issuer or HMO with respect to a group health plan maintained by such plan sponsor, unless the plan sponsor is performing plan administration pursuant to 164.504 (f).” (Federal Register, December 28, 2000, page 82495) Although this statement does not refer to workers’ compensation benefit plans, it suggests the intent of HIPAA with regard to information being provided to employers under the definition of ‘payment’. Thus, for release of WC case information to non-self-administered employers for workers’ compensation purposes it is best to rely on 164.512 (l), and on Colorado workers’ compensation law.

11) Can a provider send work restrictions to an employer without a specific authorization from the patient?

Under HIPAA's Privacy Rule section 164.512 (l), health care providers may disclose information as authorized by state workers' compensation law. Under Colorado's Workers' Compensation Act at 8-47-203 (1), the filing of a claim for compensation is a 'limited waiver of the doctor-patient privilege to persons who are necessary to resolve the claim' and at 8-43-404 (2), the employer is entitled to any reports related to the injury given to the injured worker by either an employer- or employee-selected physician or chiropractor. Further, the Division of Workers' Compensation's (DOWC) "Physician's Report of Workers' Compensation Injury" (Form WC164) includes information regarding work restrictions. The WC164 form is required documentation by DOWC Rule 16-7(E). for the initial and final physician visits, and may be requested by the payer for intervening visits.

Given these facts, it is the Division's assessment that state workers' compensation law authorizes reporting work restrictions to the employer of a workers' compensation claimant. This should be accompanied by providing the same information to the claimant, of course.

12) What about an insurer sending work restrictions to an employer without a specific authorization from the patient?

As noted in response to question 1, a workers' compensation insurer is not a covered entity under HIPAA. Non-covered entities are not subject to any of HIPAA's requirements. Therefore, once medical information has been properly disclosed to a non-covered entity, HIPAA is not applicable.

13) Does a provider have to account for disclosures made for workers' compensation, even when Colorado law requires them?

Yes, disclosures made as permitted or required by workers' compensation law must be included if the patient requests an accounting of disclosures under HIPAA. However, disclosures made for treatment, payment, or health care operations do not have to be accounted for, whether they were made for workers' compensation or for covered entity health plans. Similarly, any disclosures made with the authorization of the patient, if made according to that authorization, do not have to be included in the accounting record. (164.528 (a)(1))

14) HIPAA allows patients the right to request restrictions on confidential communications. Will this keep a provider from being able to send the PHI to workers' compensation entities?

No, HIPAA recognizes that this request is not allowed for 164.512 uses and disclosures (see 164.522 (a)(1)(v)). Workers' compensation would fall under the 164.512 exemptions, and therefore, there is no apparent conflict between Colorado WC and HIPAA on this point.

15) HIPAA gives patients the right to request an amendment of their medical records. Is there any law regarding amending records in workers' compensation?

There is nothing in Colorado workers' compensation law about amending a record. For many WC cases, the WC payer may already have the original record, and may question any changes. If not, however, amending the record may impact the WC outcome in ways that the provider could not predict. For this reason, the Division strongly urges providers not to amend their records when WC cases are involved. Instead, link the suggested amendments to the original record as allowed by HIPAA.

16) Is the Division of Workers' Compensation a covered entity or a business associate?

No. The DOWC does not qualify as a health care provider, a health plan, or a health care clearinghouse. Additionally, the DOWC does not act 'on behalf of' any covered entities in providing those functions that make them covered entities.

Further, the DOWC is a "health oversight agency", which exempts our laws and rules from HIPAA mandates, under the protection found in sections 160.203 (c) or (d). It follows that a covered entity may release all information requested by the DOWC without concern for 'minimum necessary'. (see 164.514 (d)(3)(iii)(A))

17) Do health care providers have to use a HIPAA-compliant authorization for WC cases?

When a health care provider who uses electronic transactions, and is thus subject to HIPAA is required to get an authorization, it must be HIPAA compliant to be valid under federal law. Nothing in Colorado's WC law defines the elements of a valid authorization, so while state WC law may impact the decision regarding whether an authorization is required for a specific release, it does not change the necessity for a covered entity to rely on a valid authorization.

There are a number of common disclosures in WC that do not require an authorization, for example:

For Payment, Treatment, or Health Care Operations: See prior FAQ.

For work restrictions report to employers: See prior FAQ.

Other web sites you may find helpful on this topic are:

- U.S. Dept. of Health & Human Services
<http://aspe.os.dhhs.gov/admsimp>
- Office of Civil Rights
<http://www.hhs.gov/ocr/hipaa/privacy.html>
- Workgroup for Electronic Data Interchange
www.wedi.org
- Colorado Strategic National Implementation Process
www.cosnip.com
- Accredited Standards Committee X12

www.x12.org

Last updated: May 19, 2003

Revised Feb 2006 for conforming changes to Division rule references