

Publications

HIPAA And Assisted Living Facilities

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Owners and operators of assisted living facilities have doubtless heard of "HIPAA." This stands for the federal Health Insurance Portability and Accountability Act of 1996. Congress enacted HIPAA primarily to assist employees who were leaving work to maintain health care coverage until they obtained new employment. In addition, HIPAA set forth Congress' expectations regarding how electronic health information would be handled in the future. It is this part of the law that is presently attracting the most attention.

What HIPAA Does

Acting in accordance with the congressional mandate in HIPAA, the federal Department of Health and Human Services has proposed a series of regulations governing how health care providers and others are to deal with electronic health information. Thus, it has finalized rules prescribing standardized formats for transactions involving electronic health information, such as communications between providers that are furnishing health information to payors and payors that are reimbursing providers. In addition, the Department has proposed "security" rules setting forth minimum requirements for providers to follow in protecting electronic health information from unauthorized access or tampering. The Department also has proposed rules that would establish a national system of identifiers for providers, payors, and employees. However, the HIPAA rules that have attracted most attention are those dealing with the confidentiality of health information. The so-called HIPAA "privacy" rules were published in final form during the last days of the Clinton Administration. After a period of doubt, the Bush Administration announced in April that it would allow the rules to become effective in 2003, although it expected to make certain changes in them before that time. As a result, the health care industry has begun to gear up for a national code of confidentiality that will set forth detailed rules concerning when providers and others can disclose medical information and when they must keep it confidential.

The HIPAA Privacy Rules

Where they apply, the HIPAA privacy rules will require substantial efforts at compliance. The rules themselves extend over 30 pages and set forth in detail how health information is to be used and disclosed. Thus, they require entities covered by them to obtain a general written "consent" before they can use or disclose the information during certain routine health care and administrative operations. Otherwise, information can be disclosed only pursuant to a specific written authorization signed by the individual to whom it pertains. Health information can be released without written permission only in certain specific instances, such as to make mandated reports to governmental agencies or to respond to subpoenas or court orders. Given the complexity of the requirements, it is not surprising that the health care industry has been allowed a two-year head start in order to familiarize itself with the new standards and to create mechanisms for compliance.

Relevance to Assisted Living Facilities

But what is the relevance of the HIPAA privacy rules to the assisted living industry? Do the new rules apply only to skilled nursing facilities licensed, as they are, on the health care model? Or will assisted living owners and operators also have to contend with them? The answer is that the HIPAA privacy rules generally do not apply to traditional assisted living arrangements. However, as assisted living facilities begin to care for residents who age in place and who exhibit a mixture of social and medical problems, the HIPAA privacy rules are likely to come into play. For this reason, the assisted living industry should keep an eye on the HIPAA privacy rules and remain aware of how health care providers are implementing them.

Assisted Living Facilities as Health Care Providers

To understand how they apply to assisted living facilities, it is necessary to analyze the HIPAA privacy rules in some detail. By their own terms, the rules apply to "health plans," "health care clearinghouses," and "health care providers" [42 C.F.R. §§160.102(a)(3) & 160.103]. A "health plan" is a health insurance company or health maintenance organization that reimburses persons and facilities that furnish health care. A "health care clearinghouse" is a business that takes electronic information in nonstandardized format, puts it in a standardized format, and transmits it to recipients. Since assisted living facilities fall under neither definition, they will be subject to the HIPAA privacy rules only if they are considered to be "health care providers."

To be a "health care provider," an entity must be either (1) recognized by Medicare as the type of provider that Medicare will reimburse for services, or (2) any other person or organization that furnishes, bills, or is paid for "health care" in the normal course of business. Assisted living facilities are not included by Medicare among its list of reimbursable providers. The question then is whether assisted living facilities ever furnish, bill, or are paid for "health care" in the normal course of business. "Health care" is defined as "care, services, or supplies related to the health of an individual." These include such services as diagnosis and therapy related to a person's physical or mental condition. In general, assisted living facilities do not furnish this type of care. However, the definition also includes "assessment . . . with respect to the physical or mental condition, or functional status, of an individual." Assisted living facilities often assess residents in order to determine whether they need medical attention. Despite the potential breadth of the definition, it probably makes sense not to read it as including social assessments of an individual's need for medical attention. Accordingly, it is unlikely that all assisted living services are covered by the HIPAA privacy rules.

To be covered by HIPAA, a "health care provider" also must transmit "health information" in electronic form in connection with a "transaction" covered by the privacy rules. "Health information" created by a "health care provider" that relates to the past, present, or future physical or mental

health or condition of an individual, to the provision of health care to an individual, or to the past, present, or future payment for health care. A "transaction" is covered by the regulations only if it involves the transmission of the information in order to carry out financial or administrative activities related to health care, including the making and verifying of health claims. Given the foregoing, it appears that the HIPAA privacy rules apply only to licensed providers of health care that use electronic health information in order to administer their activities and obtain payment for them. In the long-term care context, this would include skilled nursing facilities and home health agencies, but would exclude assisted living facilities.

Health Services at Assisted Living Facilities

There is, however, one catch. Assisted living facilities can be the site where health care services are provided; they may, on occasion, even provide them through their own employees. Thus, in California, a person in a residential care facility for the elderly ("RCFE") may receive "incidental medical services" for an "allowable health condition." Incidental medical services usually are provided by outside caregivers such as home health agencies or registered nurses retained by the resident. In that case, the outside agency or professional is considered a "health care provider" under the HIPAA privacy rules and must follow the rules when handling health information about a resident. However, the RCFE receiving health information from them is not subject to the HIPAA privacy rules. The situation changes dramatically if the RCFE furnishes, bills, or receives payment for the incidental medical services. This will occur where the RCFE employs a nurse or other licensed health professionals to provide the services. If that happens, then any health information received, created, or maintained with respect to the incidental medical services will be subject to the HIPAA privacy rules. As the employer of the health professional, the RCFE will be legally responsible for disclosing the health information only in accordance with those rules.

Assisted living facilities are likely to become increasingly subject to the HIPAA privacy rules as they move into the business of furnishing health care services through their employees. This has happened in a number of states. In New Jersey, for example, so-called "assisted living residences" are required by law to ensure that at least 20% of their residents are individuals with nursing home needs. Assisted living residences must have at least one registered nurse on site at all times to care for these individuals. It is virtually certain that information created in the course of providing these services will be subject to the HIPAA privacy rules. In Michigan, a new statute prohibits a "home for the aged" from transferring residents who otherwise would not qualify because of a health condition if certain conditions are met. As a result, homes for the aged in Michigan may provide full nursing services to certain residents. Again, information created in the course of doing so will be covered by HIPAA. Florida, for its part, now permits assisted living facilities to obtain extended licensure to provide "limited nursing services." Information created in the course of furnishing such services will be covered by the HIPAA privacy rules. California is in the process of applying for a "Medi-Cal waiver" that will permit assisted living facilities to accept residents who previously qualified for care in skilled nursing facilities. Assisted living facilities that participate are likely to enter the business of providing limited nursing services. When they do, they should expect to be subject to the HIPAA privacy rules, at least as regards the nursing services.

Conclusion

In conclusion, assisted living facilities need not rush to comply with the HIPAA privacy rules in the way that health care providers are doing. Those that provide services only on the social model and that require residents who need incidental medical services to access them on their own are unlikely ever to be subject to HIPAA. However, those that go beyond this and involve themselves, through their employees, in providing nursing or other long-term health services will have to obey HIPAA. Given its complexity, facilities that are contemplating providing limited health services should include the added expense of complying with HIPAA in their calculations.