
Privacy Takes A Backseat To Whistleblowing Under HIPAA

By **Steve Sozio and Katie Miler Schilling**

The Health Insurance Portability and Accountability Act allows whistleblowers, who are usually employees or business associates of a covered entity, to take the very information HIPAA aims to protect and disclose it to private lawyers, without first exhausting internal reporting options, and often with the intention to bring highly lucrative qui tam lawsuits. This exception conflicts with HIPAA's stated goals of protecting patients and presents a serious risk to patient privacy. HIPAA should be amended to require that employees and others first exhaust all internal reporting options

There is no dispute about the importance of protecting patient information and health care providers are spending significant portions of their precious resources to comply with the rigorous requirements of HIPAA. But there is one group that has received a pass when it comes to protecting patient privacy — employees of covered entities who believe that their employer has engaged in unlawful conduct and want to give patient information to private lawyers. The lack of limitations on the use of patient information in this context creates far more harm than it is worth.

Remind Me Again: HIPAA Basics

HIPAA establishes federal standards to protect the privacy of patients' protected health information (PHI) maintained by covered entities. It establishes standards for the security of electronic PHI, including administrative, technical and physical security safeguards for covered entities and their business associates to assure the integrity, availability and confidentiality of electronic PHI.

The disclosure of PHI in violation of HIPAA can result in significant penalties for the responsible party, whether that party is a covered entity (e.g., a hospital) or a business associate (e.g., a vendor). In recent years, the government has doubled down on its efforts to enforce HIPAA, bringing over 25,000 actions by requiring changes in privacy practices and corrective actions by, or providing technical assistance to HIPAA-covered entities and their business associates. The Office for Civil Rights (the agency with jurisdiction to enforce HIPAA) has investigated complaints against national pharmacy chains, major medical centers, group health plans, hospital systems and doctors' offices, with settlements totaling \$72,929,182. See, "Enforcement Highlights."

The Exception

HIPAA contains an exception, however, that effectively allows an employee of a covered entity or business associate to take PHI from his or her employer and disclose the PHI to a lawyer who can then use that information to bring a potentially lucrative qui tam lawsuit.

Section 164.502(j)(1) of HIPAA permits a member of a covered entity's workforce or a business associate to disclose PHI, provided that:



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(i) The workforce member or business associate believes in good faith that the covered entity has engaged in conduct that is unlawful or otherwise violates professional or clinical standards, or that the care, services or conditions provided by the covered entity potentially endangers one or more patients, workers or the public; and

(ii) The disclosure is to:

* * *

(B) An attorney retained by or on behalf of the workforce member or business associate for the purpose of determining the legal options of the workforce member or business associate with regard to the conduct described in paragraph (j)(1)(i) of this section.

Despite the seriousness with which the government takes patient privacy, this exception is drafted broadly and allows an employee of the health care provider or vendor to take PHI to his or her lawyer without first attempting to resolve the problem with the employer itself. The only check on an employee's ability to take PHI is the requirement that the employee have a good-faith belief that his or her employer is participating in unlawful conduct.

The Inconsistency and Potential Solutions

The logic used to defend this exception follows the logic justifying other protections for whistleblowers — employees have access to and knowledge of information that the government simply does not have and therefore, are best suited to discover and report violations of the law. However, the public interest in reporting suspected activity to private lawyers should be weighed against the need to protect PHI. HIPAA codifies the sanctity of the privacy we place on patient information. Allowing employees to take PHI and give it to private lawyers flies in the face of that value and the efforts made by covered entities and business associates to protect patient privacy. Moreover, the patient has no say in the disclosure, and is not even informed of it. Even if the patient requests an accounting of disclosures of his or her PHI, a covered entity will be unable to fully comply with this HIPAA requirement because it will have no way of knowing if and when an employee disclosed the individual's PHI to a private lawyer.

In order to reconcile these two important public policy interests, the exception should be revised to require a more measured approach by employees. First, the exception should not apply unless an employee first took reasonable steps to report and resolve the issue within the organization. Health care providers have extensive compliance structures and procedures; they should first have the chance to work internally through the issues. If that fails, the exception should include strict limitations on the type and scope of PHI that can be taken by an employee, including a mechanism to ensure compliance with the HIPAA requirement limiting the use or disclosure of PHI to only the "minimum necessary" to accomplish the intended purpose of the use or disclosure. And there is no need to allow employees to disclose PHI to private lawyers whose interest is to pursue claims to benefit the employee and the lawyer, but not the patient. The exception should be limited to disclosure to the government or sanctioned regulators.

These revisions would still allow employees to address potentially unlawful conduct without giving them a broad pass to use and disclose PHI for their own purposes.

Three Key Takeaways

1. Under HIPAA, an employee of a covered entity or business associate can take PHI from his or her employer and disclose it to a private attorney, who can then potentially use the information to bring a qui tam lawsuit.
2. This exception is drafted broadly and simply requires that an employee have a good-faith belief that his or her employer is participating in unlawful conduct.
3. This exception, in our view, is too broad and does not properly protect PHI. We would recommend amending this exception to limit the ability of employees to disclose PHI.

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