GARVEY SCHUBERT BARER

HEALTHCARE PRACTICE

Breach Notification Requirements Under HIPAA/HITECH Act and Washington Data Breach Notification Act

WASHINGTON

AUGUST 2013

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HIPAA/HITECH/OMNIBUS RULE BACKGROUND

In 2003, compliance with the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Regulations became mandatory. The purpose of HIPAA is to provide baseline federal protections for protected health information ('PHI") held by healthcare providers (termed "covered entities") and give patients an array of rights with respect to that information.

- In 2009, HIPAA was supplemented and enhanced by the Health Information Technology for Economic and Clinical Health Act ("HITECH"). HITECH imposes more severe enforcement penalties and details notification requirements to patients should their health information be improperly disclosed. In 2013, HIPAA/HITECH was supplemented by what is now called the HIPAA Omnibus Rules, 78 Fed. Reg. 5566 (January 25, 2013). In short, the HIPAA/HITECH/ Omnibus Rules affect a very wide range of healthcare providersfrom hospitals, doctors, chiropractors, and nursing homes, to pharmacies and health plan providers, as well as business associates of those healthcare providers.

ENFORCEMENT - WHAT COVERED ENTITIES NEED TO KNOW

The Office for Civil Rights ("OCR") is charged with responsibility for enforcing HIPAA. OCR seeks voluntary compliance but has power to impose significant civil money penalties for noncompliance. OCR may conduct compliance reviews and audits and investigate complaints alleging HIPAA violations. If OCR determines that a violation has occurred, OCR may impose a civil money penalty of up to $50,000 per violation up to a maximum of $1.5 million per year. OCR also works in conjunction with the Department of Justice (DOJ) to refer possible criminal violations of HIPAA.

- The Omnibus Rule provides OCR with significant enhancements of its enforcement capabilities. It is anticipated that the number and intensity of OCR investigations of alleged HIPAA violations will greatly expand with the implementation of the Omnibus Rule provisions.

FOLLOWING FEDERAL AND STATE LAW

The HITECH Act imposes breach notification requirements should protected health information be improperly disclosed. In many instances a breach requiring patient notification under federal law will also trigger notification requirements under state law.

- The following chart is intended to compare the similarities and differences between the HIPAA/HITECH/Omnibus Rule and the Washington Data Breach Notification Act ("DBNA"), and outlines the definitions and notification requirements under both federal and state law.

Comparison of the HIPAA/HITECH Act and the Washington Data Breach Notification Act ("DBNA")

Topic	HIPAA/HITECH	Washington DBNA
Effective Date for Rule Implementation (Omnibus Rule)	March 26, 2013	2005
Compliance Date (Omnibus Rule)	HHS will not impose sanctions for failure to comply with the HIPAA Omnibus Rule, 78 Fed. Reg. 5566 (January 23, 2013), until September 23, 2013.*	2005
Type of Information Covered	Unsecured protected health information ("PHI").[1]	Computerized data containing unencrypted[2] personal information.[3]
Breach Notification Activator	Discovery of a breach of unsecured PHI.[4]	Discovery or notification of a breach.[5]
Breach Definition	The acquisition, access, use, or disclosure of PHI in a manner not permitted under HIPAA which compromises the security or privacy of the PHI.[6]	Unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information.[7]

1. "Unsecured protected health information" means "protected health information that is not rendered unusable, unreadable, or indecipherable to unauthorized persons through the use of a technology or methodology specified by the Secretary [of Health and Human Services] in guidance." § 164.402(2). This guidance was issued on April 17, 2009 and is published in the Federal Register at 74 Fed. Reg. 19006.
2. The statute does not define what constitutes "encryption," or encrypted data."
3. "Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted: (a) social security number; (b) driver's license number or Washington identification card number; or (c) account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account. RCW 19.255.010(5).
4. A breach is treated as "discovered" as of the first day on which the breach is known to the covered entity or, by exercising reasonable diligence, would have been known to the covered entity. § 164.404(a)(2).
5. RCW 19.255.010(1).
6. The acquisition, access, use, or disclosure of PHI in a manner not permitted under HIPAA is presumed to be a breach unless the incident fits into one of the three Exceptions to Breach Definition or the covered entity or business associate demonstrates that there is a low probability that the PHI has been compromised based on a risk assessment. § 164.402.
7. RCW 19.255.010(4).

* NOTE: A separate enforcement date applies to Business Associate Agreements.

Comparison of the HIPAA/HITECH Act and the Washington Data Breach Notification Act ("DBNA")

Topic	HIPAA/HITECH	Washington DBNA
Exceptions to Breach Definition	1. Unintentional acquisition, access, or use of PHI by a workforce member or person acting under the authority of the covered entity or business associate if done in good faith and within the scope of authority granted and does not result in further use or disclosure in a manner not permitted under HIPAA.[8] 2. Inadvertent disclosure between persons authorized to have access by the same covered entity or business associate or organized health care arrangement and the information received as a result of such disclosure is not further used or disclosed in a manner not permitted under HIPAA.[9] 3. Disclosure of PHI where the covered entity or business associate has a good faith belief that the unauthorized person to whom the disclosure was made would not reasonably have been able to retain the PHI.[10]	Good faith acquisition of personal information by an employee or agent of the person or business for the purposes of the person or business is not a breach of the security of the system when the personal information is not used or subject to further unauthorized disclosure.[11]
Direct Notification	Written notice by first class mail to the individual at the last known address of the individual or, if the individual agreed to electronic notice, by electronic mail.[12]	May be provided by one of the following methods: 1. Written notice;[13] or 2. Electronic notice, if the notice provided is consistent with the provisions regarding electronic records and signatures set forth in 15 U.S.C. § 7001.[14]

8. § 164.402(1)(i).
9. § 164.402(1)(ii).
10. § 164.402(1)(iii).
11. RCW 19.255.010(4).
12. § 164.404(d)(1).
13. The statute does not define the term "written notice."
14. RCW 19.255.010(7)(a)-(b).

Comparison of the HIPAA/HITECH Act and the Washington Data Breach Notification Act ("DBNA")

Topic	HIPAA/HITECH	Washington DBNA
Substitute Notification When Allowed	Allowed when there is insufficient or out-of-date contact information that precludes written notification.[15]	Allowed when there is not sufficient contact information to provide notice or if the cost of providing notice would exceed $250,000 or if the number of affected individuals exceeds 500,000.[16]
Substitute Notification Method of Delivery	1. If fewer than 10 individuals are to be notified, substitute notice may be provided by an alternative form of written notice, telephone, or other means.[17] 2. If 10 or more individuals are to be notified, substitute notice shall be in the form of either a conspicuous posting for a period of 90 days on the home page of the website of the covered entity, or conspicuous notice in major print or broadcast media in geographic areas where the individuals affected by the breach likely reside.[18]	Substitute notice is to be: 1. Sent by email if the affected person's email address is known; and 2. Conspicuously posted on the company website; and 3. Provided to major statewide media.[19]
Notification Deadlines	Notification is to be provided "without unreasonable delay and in no case later than 60 calendar days after discovery of the breach."[20]	Notification is to be "made in the most expedient time possible and without unreasonable delay."[21]
Delay in Notification Allowed?	Allowed for 30 days if a law enforcement official states to the covered entity or business associate that notification would impede a criminal investigation or cause damage to national security. Delays of more than 30 days allowed only if law enforcement official makes a written request.[22]	Allowed if a law enforcement agency determines that the notification will impede a criminal investigation.[23]

15. § 164.404(d)(2).
16. RCW 19.255.010(7)(c).
17. § 164.404(d)(2)(i).
18. For this substitute notice the covered entity must also establish a toll free phone number that remains active for at least 90 days where an individual can learn whether the individual's unsecured PHI may be included in the breach. § 164.404(d)(2)(ii)(B).
19. RCW 19.255.010(7)(c)(i)-(iii).
20. § 164.404(b).
21. RCW 19.255.010(1).
22. § 164.412.
23. RCW 19.255.010(3).

Comparison of the HIPAA/HITECH Act and the Washington Data Breach Notification Act ("DBNA")

Topic	HIPAA/HITECH	Washington DBNA
Notification Information	1. A brief description of what happened, including the date of the breach and the date of the discovery of the breach, if known; 2. A description of the types of unsecured PHI involved in the breach; 3. Steps individuals should take to protect themselves from potential harm resulting from the breach; 4. A brief description of what the covered entity is doing to investigate, mitigate, and protect against any further breaches; and 5. Contact procedures for individuals to ask questions or learn additional information which shall include a toll free telephone number, an email address, website, or postal address.[24]	Not specified in the statute.
Notification to Media, Government and/or Third Parties	**Media**: If breach affects more than 500 residents of a state or jurisdiction.[25] **Government - 500 or More Affected**: If breach affects 500 or more individuals, notice must be given to HHS contemporaneously with the notice being given to the affected individual.[26] **Government - Fewer Than 500 Affected**: If breach affects fewer than 500 individuals, covered entity shall maintain a log or other documentation of breaches and provide that information to HHS within 60 days after the end of each calendar year.[27]	**Media**: If cost of breach notification would exceed $250,000 or if 500,000 state residents are affected.[28]

24. § 164.404(c).
25. § 164.406(a).
26. § 164.408(b).
27. § 164.408(c).
28. RCW 19.255.010(7)(c)(iii).

Healthcare Practice

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