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Data Breaches in ERISA Benefit Plans: Prevention and Response

Navigating Regulations Governing Self and Fully Insured Plans;
Complying with Notice Requirements

THURSDAY, APRIL 23, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Data Breaches in ERISA Benefit Plans: Prevention and Response

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Overview

- The Background: Who, what, when, and how?
- The Legal Framework
- Assessing the Anthem Breach
- Key Take-Aways

The Anthem Data Breach: A Case Study

The Breach

- February 5, 2015: Anthem Blue Cross/Blue Shield announces that its servers were accessed by an unauthorized party
  - Breach began on December 10, 2014
  - Discovered on January 29, 2015
- Approximately 80 million Anthem customers were affected
  - All insurance lines were affected – not just health

What Happened?

- Breach was apparently a purposeful attack
- Attacker was able to gain entry to internal database using valid administrator credentials
- Anthem response:
  - Involve law enforcement, including the FBI
  - Retain forensic IT consultant to assess scope of breach
  - Communicate with state/federal regulators, other Blue Cross Blue Shield insurers, members, employers
  - Credit monitoring services

What Information Was Included?

- Information at issue included:
  - Names
  - Member ID numbers
  - Dates of birth
  - Social Security numbers
  - Addresses, phone numbers
  - Email addresses
  - Employment information, including income data
- Anthem reported that no financial or health information was compromised
  - How is HIPAA implicated then?

Initial Responses

- State regulators sent a letter demanding action February 10, 2015
- Class action litigation filed almost immediately after announcement
- Phishing attempts on many affected individuals
- Many questions from employers with current or former relationship with Anthem
- Spotlight on data security with Executive Order issued on February 13, 2015

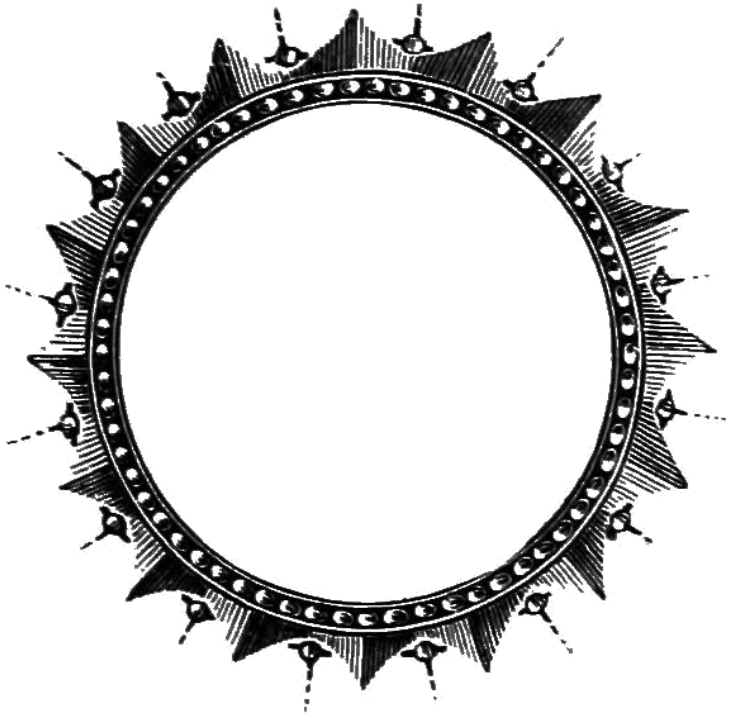
Notices Issued

- Notices to individuals sent over several weeks, starting the week of February 23rd
  - Sending approximately 2.5 million notices per day
  - Complaints continue about the speed of Anthem's response
- Some employers receiving census information
  - Data often more detailed than the notice sent to covered individuals
  - Includes granular information about data at issue

Premera: Another Shoe Drops

- March 17, 2015: Premera Blue Cross announced another major breach in the health insurance industry
  - Breach began on May 5, 2014
  - Discovered on January 29, 2015
- Approximately 11 million affected individuals
- Data includes identifying information, like Anthem breach, but also
  - Bank account information
  - Claims information, including clinical information

Responding to Data Breaches: *The Legal Framework*



What Laws Are Implicated?

- The security of personally-identifiable information is regulated at the Federal and state level
  - Our focus today is on HIPAA/HITECH and state breach notification requirements
  - An array of Federal financial privacy rules may be implicated in other breach situations
- HIPAA/HITECH breach notification requirements apply to protected health information
- State-level breach requirements generally apply to personally-identifiable financial, medical, and similar information
  - An identifier + account number, SSN, etc.
  - Focus is on information that facilitates ID theft

HIPAA & HITECH

- HIPAA regulates the use/disclosure of PHI
  - Individually-identifiable information involving medical care, medical condition, or payment for medical care
  - Broadly construed by DHHS
- HIPAA applies to covered entities—
  - Employer group health plans
  - Health insurance issuers
  - Many healthcare providers
  - Healthcare clearinghouses
- HIPAA also applies to business associates hired by covered entities
  - Vendors hired to provide support services with the use/disclosure of PHI
  - TPAs, brokers, consultants, etc.

HIPAA & HITECH (cont.)

- Employers (plan sponsors) are not directly subject to HIPAA but are effectively responsible for compliance on behalf of their health plans – which are covered
- Extent of employer responsibilities depends on plan design:
  - Fully-insured plan: limited employer responsibilities
  - Self-funded plan: significant employer responsibilities
- Under HITECH amendments (2009), vendors are regulated directly by many HIPAA requirements
  - Data security requirements apply
  - Privacy requirements apply by contract
- HITECH also created data breach rules

HIPAA Data Breach Rules

- Created HITECH Amendments in 2009
  - Final regulations issued in 2013
  - Supplements state breach notice requirements
- Any use/disclosure of PHI that is not permitted by HIPAA is presumptively a breach
  - Low probably of compromise?
  - Risk of harm standard no longer applies
  - Some limited exceptions apply
- A data breach triggers notice obligations and requires appropriate mitigation

HIPAA Data Breach Rules (cont.)

- The covered entity is responsible by default for assessing the situation and determining whether or not a breach as occurred
  - The relevant covered entity may be the group health plan or the insurer
  - Employer's role will depend on the type of plan at issue
- For insured plans, the insurer will typically be responsible for breach assessment and notification
- For self-funded plans, breach assessment and notification responsibilities can be – and often are – delegated to the business associate involved

HIPAA Data Breach Rules (cont.)

- Under HIPAA, notices to be provided without unreasonable delay and in no event more than 60 days after discovery of a breach
- If breach at BA level, BA to report to covered entity without unreasonable delay and within 60 days of discovery, subject to terms of BA agreement
  - Is the BA an “agent” of the plan?

HIPAA Data Breach Rules (cont.)

- Notification must be provided to—
  - Affected individuals
  - DHHS (immediately or annually)
  - Media outlets (large breaches)
- HIPAA and state notices can be consolidated
  - Watch for idiosyncratic state requirements

HIPAA Data Breach Rules (cont.)

- Notification must include:
  - Date of discovery
  - Date of breach (if known)
  - A description of the breach (but avoid too much detail)
  - Information about how the individual can protect him/herself
  - A description of any mitigation or corrective action being taken
  - Contact information
- Deliver notices by first class mail

State Data Breach Laws

- Forty-seven states have adopted some form of breach notification requirement
- Laws focus on unauthorized use or disclosure of personally-identifiable information
  - Medical information is usually included, but laws are broader
- A breach may trigger—
  - Notice obligations to affected individuals
  - Notice obligation to designated state officials (AG, Insurance Commissioner)
  - Reporting to consumer credit agencies
  - Mitigation (e.g., credit monitoring services)
- State laws that are stricter than HIPAA will control if there is overlap

ERISA

- ERISA regulates operation of private-sector employee benefit plans
  - Group health plans are HIPAA covered entities
- Plan fiduciaries are obligated to:
  - Act prudently
  - Follow the plan terms
- HIPAA provisions may be incorporated into group health plans
  - Fully-insured: Less likely, but possible
  - Self-funded: Very likely to include HIPAA provisions
- A data breach could trigger fiduciary conduct concerns

Assessing a Third Party Breach

First Steps

- What is your relationship to the company with the breach?
  - Policyholder – insured health plan
  - Business partner – self-funded health plan
  - Policyholder – insured non-health plan (e.g., life/AD&D)
- Assess responsibilities based on company's role
  - Insured health plan – Insurer is primary
  - Self-funded health plan – Plan is primary; check the contract
  - Insured non-health plan – Insurer is primary; HIPAA not implicated

Insured Plans – Action Items

- Insurer bears primary responsibility for breach response, state and Federal
  - Anthem proceeded on this basis
- Communicate early and often
  - Confirm who was affected
  - Ensure employees are receiving “official” communications
  - Consider supplementing communications
- Seek input on notification
- Supplement mitigation (e.g., additional identity theft protections)

Self-Funded Plans – Action Items

- Plan has primary responsibility by default
  - Assess ASO, BA, and other agreements with the company who experienced the breach to determine whether breach notice responsibility has been assumed by the other party
  - Consult plan's HIPAA policies and procedures
- If company has more limited role:
  - Document breach assessment per HIPAA policies
  - Determine who was affected
  - Determine appropriate mitigation
  - Prepare and distribute required notices
  - Consult service agreements to determine responsibilities

All Plans – Action Items

- Be proactive in communications with third parties to ensure access to latest information
  - Much remains to be learned about the breach
- Coordinate response to ensure both Federal and state notice requirements are satisfied in a timely and accurate manner
- Communicate with affected employees to satisfy ERISA responsibilities and to avoid misinformation
- Pursue information from the company about corrective actions – avoid a repeat

Employee Communications

- Communications from a third party may be official, but are not tailored to your workforce
  - Employers may wish to supplement official communications, even if they are not mainly responsible for breach response
- Things to consider:
  - Avoid hasty, ad hoc communications
  - Avoid conflicts with other communications
  - Direct employees to official communications as available
- Monitor communications and anticipate problems before they arise

So, What Now?

An Ounce of Prevention…

- Employers and their plans are poorly positioned to actively monitor security measures of insurers and other third parties that work with their plans
- Carefully review security provisions in contracts, insurance policies
- Ask questions now about the precautions insurers and service providers are taking to address the risks
- Assess your own policies and procedures and fill the gaps you identify in your own security efforts

…Is Worth a Pound of Cure

- Anthem and Premera have been the victims recently, but expect more breaches
- Determine your relationship with any company that announces a breach
- Assess HIPAA policies regarding data breach response
- Assess contractual responsibilities for breach analysis and response

A Pound of Cure (cont.)

- Consider state breach notification responsibilities and ERISA fiduciary conduct standards
- Communicate with your employees and the insurer or third party
- Explore additional protections for employees, depending on the company's mitigation proposals

Questions?

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