

HITECH and Stimulus Payment Update

David S. Szabo

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Agenda

- HIPAA Breach Notification Rules
- HITECH and Meaningful Use
- Open Question Period

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Data Security Breaches

A total of 245,216,093 records containing sensitive personal information have been involved in security breaches in the U.S. since January 2005.*

*Source: www.privacyrights.org (November 1, 2008).

For more information about recent data security breaches, check out www.breachblog.com.

See also <http://datalosdb.org>

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HIPAA Breach Notification

- Breach notification is required by Section 13402 of HITECH in the event of a data breach of "unsecured" PHI.
- Notice is not needed if the data is Unusable, Unreadable or Indecipherable (i.e. "secured PHI").
- Notice not needed if the data is not PHI.
- Notice is not needed for limited data sets that have had birth dates and zip codes removed.

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What is a Breach?

- Unauthorized acquisition, access, use or disclosure of PHI, which compromises the security or privacy of such information
- Not all violations of either the Privacy Rule or the Security Rule constitute breaches of PHI.

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Exceptions

- An unauthorized acquisition, access or use by an employee or individual acting under authority of a CE or BA, in good faith, without further use or disclosure;
- An inadvertent disclosure by an authorized individual at a CE or BA, to another similarly situated person, so long as the PHI is not further acquired, accessed, used, or disclosed; and
- A disclosure to unauthorized person where the CE or BA has a good faith belief that the person would not reasonably have been able to retain such information.

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Harm Threshold

- The acquiring, access, use or disclosure of PHI is not a breach if it does not pose a significant risk of financial, reputational or other harm to the individual.
- This requires a risk assessment, taking into account a variety of factors
 - Who acquired the information?
 - Was immediate mitigation carried out?
 - Was data recovered, and can you conclude that it was not further disclosed?
 - Directory information alone probably does not carry a risk of harm, unless there are indicia of the services received.

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Risk Assessment

- Burden is on Covered Entity to make a risk assessment
- It must be documented
- A presumption of harm arising from a breach is implied, and burden is on the CE to overcome the presumption before concluding that no notice is required.

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Who is Accountable?

- A Covered Entity is accountable for breaches committed by its agents and its business associates.
- A Covered Entity is not accountable for breaches committed by recipients who are neither business associates nor agents, and who had a right to receive PHI, such as:
 - Other covered entities
 - Independent researchers who receive PHI per an authorization or limited data set agreement
 - Government agencies

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Discovery of a Breach

- A breach is deemed discovered by a covered entity or business associate on the first day the breach is known to the covered entity; or
- The breach is treated as "known" as of the first day that the covered entity would have known of the breach if it has exercised "reasonable diligence"
- Reasonable diligence is the "business care and prudence expect from a person seeking to satisfy a legal requirement under similar circumstances."
- Ignorance is not bliss.

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Timing of Notice

- Notice must be given promptly, and not later than 60 days of the discovery of the breach.
- A CE should give actual notice to the individual
- BA must notify CE, who in turn must notify the individual.
- Substitute notice permitted where contact information is not available
- Urgent notice by telephone is permitted, but does not replace the need for written notice

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Method of Notification

- Actual notice by mail will suffice.
- Electronic notice permitted if the individual has agreed to such notice.
- Notice to representatives and next of kin, as appropriate.
- Substitute notice is used when direct notice is not possible.
- For substitute notice to more than 10 persons:
 - 90 days notice on web site; or
 - Notice in major print or broadcast media
- Must be reasonably calculated to put the individuals on notice

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Alert the Media and the Secretary

- Required if the breach impacts 500 or more individuals
- Must use a "Prominent Media Outlet"
- The media outlet must have appropriate coverage in light of the location of the individuals (citywide, statewide, etc.)
- Immediate notice to the Secretary for large breaches.
- Breach log to aggregate events involving less than 500 persons, with annual submission to the Secretary.

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Content of Notice

- Description of event, date of event and date of discovery
- Types of PHI disclosed (but not actual content)
- Steps individuals should take to mitigate harm
- Steps taken to investigate, mitigate, and prevent future breaches
- Contact information for the individual's use, including a toll free telephone number.
- Plain language at an appropriate reading level
- Comply with other applicable rules, e.g. LEP regulations, disability rules, etc.

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State Data Breach Law

- Chapter 93H of the General Laws, effective since October 1, 2007
- Protects "Personal Information" meaning the name of a Massachusetts resident plus one or more of:
 - Social Security Number
 - Drivers License Number or State ID Number
 - Financial account, credit card or debit card number, with or without a security code or PIN

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State Data Breach Law

- If you know or have reason to know that an unauthorized person has accessed Personal Information that you own or license, and that unauthorized access creates a substantial risk of identity theft or fraud, then you must notify:
 - The Attorney General
 - The Director of Consumer Affairs
 - The Massachusetts Resident

If you merely maintain or store the information, you must notify (and cooperate with) the owner or licensor.

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Points to Ponder

- If both HIPAA and 93H apply, compliance with HIPAA breach notice rules may satisfy 93H as to any Personal Information that has been disclosed.
- Note that only 93H and not federal rules, will apply to non-patient personal information (e.g. employment files)
- If a breach contains both PHI and Personal Information, you can comply with HIPAA rule and be deemed in compliance with state law so long as you also notify the AG and the OCABR.

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Stimulus Funds

- Physicians and Hospitals Can Earn Stimulus Payments for Achieving Meaningful Use of Health Information Technology
- Physicians Can Earn Medicare bonus, or a Medicaid bonus, but not both (one opportunity to switch).
- One definition of Meaningful Use for both programs.

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Stimulus Funds Medicare

- Medicare bonuses can be as much as \$44,000 if meaningful use is started no later than 2012 and fully achieved by 2016.
- Medicare physicians who start in 2013 and 2014 will earn lesser bonuses
- Sliding time frame for implementation.
- Requires progression through Stages of use.
- Penalties will apply to Medicare physicians if meaningful use is not achieved by 2015.

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Stimulus Funds Medicaid

- Medicaid bonuses can be as much as \$63,770 if meaningful use is started no later than 2016 fully achieved by 2021.
- Early adopters who installed EMR bonuses before 2011 can earn up to \$42,500 in total.
- Calculation of bonus payment is complex, and can be offset by availability of other funds.

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Meaningful Use

- The most complex issue and a predicate to earning stimulus funds under HITECH
- Meaningful use has both yardsticks that measure use of the electronic health record in the office, and health information exchange activities.

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Stages

- Meaningful Use Will be Measured in Stages.
- Stage One is the lowest bar
- Stage Three is the highest bar.
- Stage One Rule Released
- Medicaid providers can earn first year incentive payment simply by adopting, implementing or upgrading EMR technology. In subsequent years, they must follow the three stages of Meaningful Use.

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Meaningful Use Stage One

- There are 25 measures for Stage One Meaningful Use!
- Use CPOE for 80% of orders.
- Implement Drug / Drug Interaction and Allergy Checks
- Problem list based on standard vocabularies for 80% of visits
- Use electronic prescribing to generate 75% of scripts

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Meaningful Use Stage One

- Maintain active med list for 80% of patients seen
- Maintain active allergy med list for 80% of patients seen
- Record demographics included race & ethnicity for 80% of patients
- Record vital signs for 80% of patients
- Record smoking status for patients 13 years and over for 80% of patients

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Meaningful Use Stage One

- Incorporate lab tests as structured data for 50% of tests ordered
- Generate a list of patients sorted by conditions for QA or outreach.
- Report ambulatory quality measures (2012 for Medicaid)
- Send reminders to 50% of patients over age 50
- Implement 5 clinical decision support rules

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Meaningful Use Stage One

- Check insurance eligibility electronically 80% of patients seen
- Submit 80% of claims electronically
- Provide patients with electronic copy of their records when requested for 80% who request.
- Provide patients with timely access to electronic PHI within 96 hours for 10% of patients.

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Meaningful Use Stage One

- Provide clinical summaries to 80% of patients after an office visit
- Exchange clinical information via HIE—perform one test of HIE
- Perform med reconciliation for 80% of encounters and transitions
- Provide summary care record for each transition and referral 80% of the time

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Meaningful Use Stage One

- Test capability to communication wit public health agencies that accept electronic data
- Test capability to provide syndromic data to a public health agency
- Conduct a security risk analysis per the HIPAA security rule.

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Stage One Money

- Stage One Meaningful Use Must be Demonstrated for 90 consecutive days during the calendar year.
- Subsequent stages will be measured on a calendar year basis
- Stage One Use for Medicare will be determined by "attestation"
- Attestation "probably not required" for Medicaid in year one if qualifying based on adoption or upgrading only.
- Remember the False Claims Act!

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Final Points

- Both State and Federal Governments Have Embraced HIT
- Big Dollars at Stake for Providers and the Commonwealth
- Great Expectations Regarding Improvements in Quality and Public Health as a Result of HIT
- Seen as "infrastructure" to enable subsequent rounds of payment reform.
- Privacy, Security and Data Breach Notice Rules Seen as Predicates to Public and Government Acceptance of HIT and HIE

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Questions

- Dszabo@eapdlaw.com
- 617-239-0414
