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News for School Clients

**HIPAA PRIVACY RULE
COMPLIANCE**

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740 Regent Street
P.O. Box 1507
Madison, Wisconsin
(608) 257-7766

Joanne H. Curry care of info@lathropclark.com

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HIPAA PRIVACY RULE COMPLIANCE

When Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) last year, it created a Privacy Rule that requires certain employers to implement new practices to protect the privacy of employee health information. Not all employers are covered by the new law. A review of a school district's health-related employee benefits is required to determine whether the school district is obligated to comply with the new Privacy Rule.

School districts that sponsor a fully insured health plan for their employees, but do not administer or self-fund any other health plan, are not subject to the Privacy Rule. In these cases, the district does nothing more than enroll employees and pay premiums to a health care insurer. Additionally, districts with health plans that they are responsible for administering and that have fewer than 50 participants do not have to comply with the Privacy Rule. This would apply, for instance, to a school district with 100 employees, but no more than 49 participants in any health plan.

Nevertheless, many districts offer health care benefits, such as dental care, vision care, prescription drug services, or flexible spending health care accounts, through

separate health care plans and have 50 or more participants in a plan. If the district is responsible for the administration of the plans, including those in which the district relies on third party administrators, and the plans are self-funded, the district is obligated to comply with the Privacy Rule. Although the law became effective April 14, 2003, for most covered employers, it created an exemption that allowed "small health plans" to comply by April 14, 2004. Small health plans are defined as those with annual receipts of \$5,000,000 or less. Employers with small health plans must be in compliance with the Privacy Rule by April 14, 2004.

Compliance with the Privacy Rule requires the district, or its third party administrator, to protect the individually identifiable health information it maintains about employees. Generally, this means that the district may not use or disclose protected health information (PHI) except as permitted or required by the Privacy Rule. (PHI does not, however, include employment records of the district.) The District is responsible for compliance with the rule even if it contracts with a third party to assist with the administration of the health plan. A person who performs a function or activity on behalf of, or provides services to, a school district that

involves PHI is called a “Business Associate” under the Privacy Rule. However, persons or organizations, such as custodians, electricians, or copy machine repair persons, who do not need access to PHI in order to do their job, are not Business Associates under the rule.

If a district has a Business Associate, it must enter into a contract or agreement with it to obtain satisfactory assurance that it will appropriately safeguard employees’ PHI. If the district becomes aware that the Business Associate violated the requirements of the Privacy Rule, it must require the Business Associate to cure the violation or it must terminate the contract for services. On the other hand, the district will not be liable for violations of the Business Associate about which it has no knowledge.

The school district and the Business Associate must (1) comply with the rules governing the use and disclosure of PHI; (2) use appropriate safeguards to prevent improper disclosure or use, including training and the designation of a privacy officer; (3) develop privacy policies and procedures; and (4) mitigate harmful effects of improper disclosures of PHI. Importantly, participating employees must receive a privacy notice that informs them of their individual rights.

Some of the rights employees have under

the Privacy Rule include the right to obtain access to PHI about them, including a right to inspect and obtain a copy of the information. They may request amendment or correction of their PHI if it is inaccurate or incomplete. They may also receive an accounting of disclosures of their PHI if for purposes other than treatment, payment, or health care operations.

School districts that are subject to the HIPAA Privacy Rule are considered “hybrid” entities under the rule, which means that they perform both covered and non-covered functions. It is important to designate the district as a hybrid entity in the related written policies by designating the health care components that must comply with the rule. This will restrict the application of the Privacy Rule to only certain parts of the district’s operation.

The federal regulations governing HIPAA and the Privacy Rule are complex and extensive. School districts are encouraged to conduct an audit of their health plans to determine their compliance requirements, if any. Civil money penalties and criminal penalties may be imposed for failure to comply with the Privacy Rule, although the U.S. Department of Health and Human Services has indicated it will seek voluntary compliance and cooperation.

If you have any questions regarding this topic, please call Joanne Harmon Curry of Lathrop & Clark LLP at 608-286-7248. Attorney Curry provides counsel in the areas of general school law, student discipline, special education law, disability and discrimination law, federal and tribal Indian law, and litigation, among other areas.

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