

## HITECH Act Broadens the Scope of HIPAA

The stimulus bill passed in February 2009 includes the Health Information Technology for Economic and Clinical Health Act, or "HITECH." The purpose of HITECH is to promote the adoption of health information technology. But HITECH also substantially broadens the scope of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), including the direct regulation of business associates, and strengthens the standards and sanctions for HIPAA violations.

If your clients include HIPAA "covered entities" – that is, healthcare providers, health insurers, and billing clearinghouses – and they provide you with medical records, patient billings, or other health-related information, then you are almost certainly a "business associate" under HIPAA. These clients have had an obligation for years to have a written "business associate agreement" with you, obligating you to protect their health information. This contract requirement has generally been observed only in the breach, particularly with lawyers. As of February 17, 2010, however, that obligation is also the business associate's; that is, it is your obligation under federal law. Civil penalties for noncompliance are substantial and will become mandatory in February 2011 in cases of "willful neglect."

Business associates may use and disclose protected health information only in compliance with their business associate agreements. Thus, you may use or disclose health information provided by covered-entity clients only in accordance with that agreement. If you are one of the few attorneys with such agreements already in place, those agreements are more than likely stale and must be updated to include new requirements imposed by HITECH. If you do not have business associate agreements in place where required, you have until February 17, 2010, to do so.

New HITECH obligations include the provision of notice to clients of security breaches involving protected health information. If the breach involves more than 500 individuals, then the client must also notify local media outlets. Business associates must also implement and document administrative, physical, and technical safeguards to protect health information, including information in electronic form. Business associates are subject to enforcement actions by state attorneys general, who are authorized to seek damages for individuals harmed by unauthorized disclosures.

To be clear: Most of the health information lawyers receive is not protected. If the client is not a HIPAA-covered entity, then the attorney is not a business associate and health

## ABA Techshow 2010

On March 25-27, 2010, the ABA will sponsor its annual legal technology conference and expo. The ABA Techshow includes over 60 educational and training sessions in 15 different tracks and a 2-day expo of more than 100 technology companies. For more information, go to [www.abanet.org/techshow](http://www.abanet.org/techshow). Register using the PLF's program promoter code EP1008 and receive a \$150 discount.



information in the attorney's hands is not HIPAA-protected. When a client obtains health information in its role as an employer (e.g., an injured employee's return-to-work letter), the information is not HIPAA-protected. When you obtain discovery of health information from a healthcare provider in the course of litigation, it is not HIPAA-protected. In short, only health information received from a client that is a HIPAA-covered entity is protected in the lawyer's hands.

The Office for Civil Rights ("OCR") at the Department of Health and Human Services is the agency responsible for the enforcement of HIPAA's privacy and security rules, and this agency will have direct enforcement powers over HIPAA business associates as of February 17, 2010. Take a look at the OCR's Web site: <http://www.hhs.gov/ocr/privacy>. You will find it an interesting read.

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