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Enforcement Deadline Looms for HITECH Security Breach Notification

Joshua J. Freemire
410-347-7676
jjfreemire@ober.com

Recent changes enacted as part of the Health Information Technology for Economic and Clinical Health Act (HITECH) and its implementing regulations require Covered Entities (CEs) and their Business Associates (BAs) to implement Security Breach Notification procedures and may require revisions to existing Business Associate Agreements (BAAs). HITECH was passed as a part of the vast economic stimulus bill known as the American Recovery and Reinvestment Act of 2009 (ARRA). The new requirements became effective September 23, 2009, following the publication of the Department of Health and Human Services (DHHS) Security Breach Notification Interim Final Rule (the Interim Rule) in August of 2009. Their enforcement, however, begins on February 23, 2010. If you have not already reviewed your existing BAAs, or instituted compliant Breach Notification policies and procedures, now is an excellent time to start.

The Interim Rule is complex, but, in sum, it:

- Requires that CEs report to the affected patient, and in some cases to the Centers for Medicare and Medicaid Services(CMS) and/or the local media, any breach to the security of "unsecure" protected health information (PHI).
- Applies the Act's core security requirements (and penalties) to BAs as well as CEs, i.e., BAs are subject to direct enforcement by the government, just like CEs. Note that these security requirements only apply to PHI in electronic form (ePHI).
- Requires that CMS publicly post details of breaches involving more than 500 individuals.

In addition, HITECH requires that Security Breach Notification provisions be made a part of all BAAs. HITECH could also be read to require that CEs revise all existing BAAs to incorporate such provisions. It is not yet clear whether DHHS will be reviewing BAAs that predate HITECH as part of its enforcement procedures this February.

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Payment Group

The Payment Group is a work group within Ober|Kaler's Health Law Group.

Principals

Thomas W. Coons

Leslie Demaree Goldsmith

Carel T. Hedlund

S. Craig Holden

Julie E. Kass

Paul W. Kim

Robert E. Mazer

Christine M. Morse

Laurence B. Russell

Donna J. Senft

Susan A. Turner

Associates

Kristin Cilento Carter

Joshua J. Freemire

Mark A. Stanley

Lisa D. Stevenson

For more details on the provisions of the Interim Rule, please see our original article on the topic here.