

Guidance from HHS on Same-Sex Marriage and the HIPAA Privacy Rule

Last year's Supreme Court decision in *United States v. Windsor* held, on constitutional grounds, that all federal laws must define the term "spouse" to include a same-sex spouse. Recent guidance from the Department of Health and Human Services (HHS) provides insight on the implications of the *Windsor* decision for the purposes of the HIPAA privacy rule. The term "family member," which is used to define how and with whom information is shared about a person, now includes individuals who are in a legally valid same-sex marriage. This definition applies regardless of whether they currently live or receive services in a state that recognizes their same-sex marriage.

There are two situations under the HIPAA privacy rule where the recognition of same-sex spouses is relevant to covered entities (which could include plan sponsors) and, in some cases, business associates. First, covered entities (including health plans) are permitted to share an individual's personal health information (PHI) with that individual's family members. For the purposes of this provision, legally married same-sex spouses qualify as family members, regardless of where they live. Secondly, the privacy rule prohibits health plans from using or disclosing genetic information about individuals or their family members for underwriting purposes. Again, HHS emphasizes that in this situation, a family member includes an individual's legally wed same-sex spouse, regardless of their state of residence. This means that the results of genetic tests or manifestation of a disease or disorder in the same-sex spouse of an individual may not be used for underwriting purposes.

This is just the first of multiple installments of anticipated guidance from HHS on this issue. In particular, the Employee Benefits Institute of America (EBIA) notes that HHS has yet to address the question of whether a same-sex spouse qualifies as a "personal representative" with the legal authority to make health care decisions on behalf of the other

spouse under HIPAA. Addressing this question on a national level will likely be complicated by the fact that personal representative status is often based solely on state law, which may require something in addition to the spousal relationship to legitimize the legal authority of the personal representative (such as a health care power of attorney).

The current HHS guidance nevertheless has important implications in that, so long as they are in a marriage that is legally valid in the state or country in which it was entered into, a same-sex spouse must be treated as a family member for the purposes of the HIPAA privacy rule, regardless of whether the couple lives or is receiving services in Boston, Massachusetts, or Anytown, USA.

Resources:

HIPAA and Same-sex Marriage: Understanding Spouse, Family Member, and Marriage in the Privacy Rule, *available at* <http://www.hhs.gov/ocr/privacy/hipaa/understanding/special/samesexmarriage/index.html>

45 CFR § 160.103



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