Employment Law Half-Day Seminar

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Workplace Mysteries:
Employment Law Under the Magnifying Glass
PRIVATE EYES:
ENSURING THE PRIVACY OF EMPLOYEE HEALTH INFORMATION

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I. INTRODUCTION.

Employee health information not protected by the Health Insurance Portability and Accountability Act (“HIPAA”), usually because it is held by a non-healthcare employer, is still subject to privacy protections through the Americans With Disabilities Act (the “ADA”), Family Medical Leave Act (the “FMLA”), Occupational Safety and Health Act (“OSHA”), and state common law.

II. HIPAA OVERVIEW.

A. Background of HIPAA Privacy Rule.

HIPAA is a federal law that requires certain entities to protect health information. HIPAA is divided into two sections: the Privacy Rule and the Security Rule. The Privacy Rule includes requirements on how entities can use or disclose health information, and the Security Rule has requirements on how entities must secure and protect health information.

B. Who must follow HIPAA?

HIPAA only applies to covered entities. A “covered entity” is defined as a health care provider, health plan, or healthcare clearinghouse. The narrow reach of HIPAA is good news to many employers that are concerned about whether they have to follow the HIPAA requirements.

C. Employee health information.

If an employer is not a healthcare provider, health plan, or healthcare clearinghouse, it is not a covered entity that must follow the HIPAA privacy and security requirements for health information. But what if an employer does qualify as a covered entity? Does it have to abide by the HIPAA requirements for the health information of its employees? The answer is no.

Records maintained by a covered entity in its role as employer are exempt from HIPAA. Therefore, records that are part of an employment file are not covered by HIPAA, including employee health information needed for an employer to comply with the FMLA, the ADA, and similar laws, in addition to records related to occupational injury, sick leave, and drug-screening results.

Keep in mind that there is a difference between an “employment record” and a “treatment record.” If a covered entity provides care to an employee in the capacity of a
healthcare provider, the records of that treatment are subject to the HIPAA regulations. HIPAA does not apply, however, if an employer maintains health information solely in its capacity as an employer.

D. Drug-screening results.

Employee drug-screening tests present special HIPAA issues. As stated above, drug-screening results are generally considered employment records that are not subject to HIPAA requirements. In order to conduct a drug screening, however, an employer must enlist the help of a healthcare provider, such as a nurse or phlebotomist (person licensed to draw blood). Healthcare providers such as nurses and phlebotomists are covered entities and prohibited by HIPAA from disclosing healthcare information of their patients (including employees being drug-screened).

So how does an employer obtain the drug-screening results? The answer is to have employees sign valid HIPAA authorization forms. A healthcare provider can disclose health information to anyone, including to the patient’s employer, with the patient’s written consent.

Keep in mind that a valid HIPAA authorization form is subject to a number of requirements, including but not limited to a description of the health information to be disclosed, the name of the person making the disclosure, the name of the person receiving the disclosure, an expiration date of the authorization, and a statement that a patient has the right to revoke the authorization.

III. STATUTORY PROTECTIONS OF EMPLOYEE HEALTH INFORMATION NOT COVERED BY HIPAA.

A. ADA.

The ADA applies to covered employers, which are those that have 15 employees or more. In the course of interacting with and accommodating employees with disabilities, the employer is likely to acquire health information of the employee. The ADA protects the following health information:

- Results of a medical exam done for an employer at any time;
- Results of a drug test administered by the employer;
- Medical information that the employee shares during the hiring process;
- Information about a disability that the employee gives for affirmative action;
- Medical information that an employee gives in seeking an ADA accommodation;
- Medical information that an employee gives in conjunction with an employer’s health and wellness program; and
Disability information about an employee that an employer obtains in a manner that might violate the law. See 42 U.S.C. § 12112(d).

Notably, the ADA does not protect an employee’s privacy when it comes to using illegal drugs. If a drug test shows that the employee abuses drugs, the employer does not violate the ADA if it shares this information. (Disclosure might violate other laws, however.)

The Equal Employment Opportunity Commission (the “EEOC”), the agency charged with enforcing the ADA, has stated that an employer “should take steps to guarantee the security of the medical information,” including keeping the information “in a medical file in a separate, locked cabinet, apart from the location of personnel files,” and restricting access to such files to a specific person or persons. Only a few people who do filing or who have a reason to know should see medical records. The employer needs to take this precaution with both paper and electronic files.

<table>
<thead>
<tr>
<th>Examples of Records That Must Be Maintained in Separate Medical Files</th>
<th>Examples of Records That May Be Kept in Regular Employee Files (Unless the Record Contains Medical Information)</th>
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</thead>
<tbody>
<tr>
<td>• Medical exam;</td>
<td>• Employment application;</td>
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<tr>
<td>• Written request for disability-related accommodation (including requests for leave of absence);</td>
<td>• Résumé;</td>
</tr>
<tr>
<td>• Medical proof (documentation) supporting accommodation request;</td>
<td>• Reference letters;</td>
</tr>
<tr>
<td>• Drug test showing legal drug use;</td>
<td>• Wage withholding form (W-4);</td>
</tr>
<tr>
<td>• Fitness-for-duty exam; and</td>
<td>• Personnel evaluations;</td>
</tr>
<tr>
<td>• Information on affirmative-action form about disability.</td>
<td>• Disciplinary warnings;</td>
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</tbody>
</table>

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Note, however, that if any of the records in the right column contain medical information about the employee’s disability, then that record should be kept in the separate medical files.

The employer has a continuing obligation to keep records private regardless of whether the record is of a job applicant, current employee, or past (former) employee.

Under the ADA, an employer may disclose medical information about current employees only to:

- Supervisors and managers if the disclosure relates to “necessary restrictions on the work or duties of the employee and necessary accommodations”;
- First aid and safety personnel “when appropriate, if the disability might require emergency treatment”; and
- Government officials investigating compliance with the ADA, upon request.

The EEOC has also said that employers may disclose employees’ medical information to:

- Workers’ compensation insurance carriers and state workers’ compensation offices in accordance with workers’ compensation laws, if the medical information is used “for insurance purposes”;
- Employer representatives involved in the hiring process or in implementing an affirmative-action program, to the extent that the representatives “need to know the [medical] information”;
- Government officials investigating compliance with other federal and state laws that prohibit disability discrimination.

Finally, the EEOC permits disclosures of medical information under “other Federal laws and regulations [that] also may require disclosure of relevant medical information.” See EEOC Technical Assistance Manual on the Employment Provisions of the ADA, § 6.5 (Jan. 1992).

Importantly, the ADA does not just protect current employees—it also protects potential employees who simply apply for a job. For example, an employer may offer a potential employee a job on the condition that he or she passes a medical exam. If the person fails the exam, the employer may withdraw the offer, but it may not give out that information, and the employer must keep that information in a separate medical file.

B. FMLA.

The FMLA, 29 U.S.C. § 2601 et seq.; 29 C.F.R. §§ 825.306-.307, protects against disclosure of an employee’s medical information by limiting an employer’s right to request or question such information. These restrictions under the FMLA apply to employers that employ
over 50 employees for each working day for 20 or more calendar workweeks in the current or preceding year.

The FMLA requires that all covered employers give qualified employees 12 weeks of unpaid leave during any 12-month period for: (1) a serious medical condition; (2) birth or adoption of a child; or (3) provision of care to an immediate family member with a serious health condition.

Employers may request an employee to provide medical certification for FMLA eligibility (such as evidence that a family member has a “serious health condition”), but healthcare providers generally may not disclose a patient’s medical information to an employer without the patient’s written authorization. The best way to obtain an employee’s medical information sufficient to support a FMLA request is to use the Department of Labor’s form, available online.

Both the Washington Family Leave Act, RCW 49.78 et seq., and the Oregon Family Leave Act, ORS 659A.150 et seq., have the same substance and apply the same analysis regarding employee medical information as their federal counterpart, the FMLA.

C. OSHA.

OSHA, 29 C.F.R. § 1910, requires employers to provide and report employee medical surveillance and to monitor and report employee workplace injuries. Employee consent is required for release of employee personal health records to union representatives or health professionals, but employers may disclose employee health information to OSHA without employee authorization.

OSHA defines a “medical record” as “a record concerning the health status of an employee which is made or maintained by a physician, nurse or other health care personnel, or technician.” A record is “any item, collection or grouping of information regardless of the form or process by which it is maintained.” Below are examples of medical records, and nonmedical records, under OSHA:

<table>
<thead>
<tr>
<th>Examples of Documents That Are Employee Medical Records</th>
<th>Examples of Documents That Are Not Employee Medical Records</th>
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</thead>
<tbody>
<tr>
<td>• Medical and employment questionnaires or histories;</td>
<td>• Physical specimens that are routinely discarded;</td>
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<tr>
<td>• Results of medical examinations and laboratory tests;</td>
<td>• Records concerning health insurance claims, if maintained separately from the employer’s medical program and its records;</td>
</tr>
<tr>
<td>• Medical opinions, diagnoses, progress notes, and recommendations;</td>
<td>• Records created solely in preparation for litigation; and</td>
</tr>
<tr>
<td>• First-aid records;</td>
<td></td>
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</table>
Examples of Documents That Are Employee Medical Records

- Descriptions of treatments and prescriptions; and
- Employee medical complaints.

Examples of Documents That Are Not Employee Medical Records

- Records concerning voluntary employee assistance programs, if maintained separately from the employer’s medical program and its records.

D. Common law.

In addition to statutory/regulatory protections, the common law also protects the privacy interests of employees. An employee whose medical records were improperly disclosed by an employer could also bring claims against his or her employer under common-law causes of action. See, e.g., Knecht v. Vandalia Med. Ctr., Inc., 470 N.E.2d 230 (Ohio Ct. App. 1984) (holding that unauthorized disclosure of medical records may support a claim for invasion of privacy); but see St. Anthony’s Med. Ctr. v. HSH, 974 S.W.2d 606 (Mo. Ct. App. 1998) (rejecting claim that employer disclosure of medical records constituted “intrusion upon seclusion” or “publication of private fact” because the records were not disclosed through unreasonable methods, and publication was not to “the public in general”).


Washington recognizes the common-law general rule for invasion of privacy: “One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his [sic] privacy, if the matter publicized is of the kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” Reid v. Pierce Cnty., 136 Wn.2d 195, 204-05, 961 P.2d 333 (1998) (citing Restatement (Second) of Torts § 652D (1977)). Washington case law also suggests that an employee may bring a claim for intrusion upon seclusion against an employer that improperly discloses an employee’s private information. See Mark v. King Broad. Co., 27 Wn. App. 344, 354-57, 618 P.2d 512 (1980).

2. Oregon.

Oregon recognizes four separate theories that constitute the tort of invasion of privacy: (a) intrusion upon seclusion; (b) appropriation of another’s name or likeness; (c) false light; and (d) publication of private facts. Mauri v. Smith, 324 Or. 476, 482, 929 P.2d 307 (1996). A recent District of Oregon case recognized an employee’s cause of action for intrusion upon seclusion for improper disclosure of his or her medical information. See Perez-Denison v. Kaiser Found. Health Plan, No. 3:10-CV-00903-HU, 2012 WL 1185995 (D. Or. Apr. 9, 2012) (denying defendant’s motion for summary judgment on plaintiff’s claim of intrusion upon seclusion based on defendant’s accessing coworker plaintiff’s medical records without consent); see also McLain v. Boise Cascade Corp., 271 Or. 549, 554-57, 533 P.2d 343 (1975) (holding that surveillance of an employee’s private life or personal matters would be actionable if conducted in an unreasonable or obtrusive manner).
3. Constitutional right to privacy.

In addition, numerous courts have recognized an individual’s constitutional right to privacy of his or her medical records. Lankford v. City of Hobart, 27 F.3d 477, 479 (10th Cir. 1994); Doe v. City of N.Y., 15 F.3d 264, 267 (2d Cir. 1994); Pesce v. J. Sterling Morton High Sch., 830 F.2d 789, 795-98 (7th Cir. 1987); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577-80 (3d Cir. 1980) (all recognizing constitutional right to privacy regarding medical records). Accordingly, these rights could give rise to a civil-rights claim.

IV. WHAT CAN YOU DO?

Below are some suggestions about how to protect employee medical information to avoid liability under the numerous laws discussed above:

- Establish channels through which disclosure of medical information is made, such as the human resources or legal department.
- Evaluate documents before putting them in a personnel file to be sure that the documents do not contain medical information.
- Keep personnel records in separate files from employee health records.
- Keep group health plan records separate from employee health records.
- Prepare a template HIPAA Authorization form permitting health care providers to disclose health information of employees for certain purposes (i.e. drug screening results).
- Ensure that employees sign a HIPAA Authorization form prior to requesting health information from health care providers.
- Establish rules regarding the maintenance of separate medical records files and access to such files.
- Train employees (particularly supervisors) on the importance of maintaining confidentiality, and about the limits on disclosure of confidential information.
- Monitor state and federal law regarding confidentiality of medical records.