



170 South Main Street, Suite 900  
Salt Lake City, Utah 84101  
(801) 363-5678  
Facsimile: (801) 364-5678  
www.mc2b.com  
Tyson B. Snow  
tsnow@mc2b.com

## HIPAA AND FLU SHOTS

**Summary.** A frequent question employers face is whether administering flu shots to employees implicates or violates the HIPAA privacy protection requirements. For example, the employer may post a sign-up sheet in a public place so that its employees can sign up for a flu shot. Because it is publicly available, other employees can easily determine who is getting a flu shot and who isn't. Or, an employer may hire a healthcare professional to come onsite in order to administer flu shots. The interested employees line up, in a group, to receive the shot. Again, in this circumstance, it is easy to determine who is and who is not getting the shot. So, does this violate HIPAA's privacy protections? As discussed in more detail below, the answer is no.

**Privacy Rules.** Effective April 17, 2003, the Department of Health and Human Services issued regulations aimed at preserving the privacy of individual health care information. HIPAA's privacy rules apply only to "Covered Entities," which are defined as health plans, health care clearinghouses and health care providers. 45 C.F.R. § 160.102(a). For employers, whether they are subject to HIPAA's privacy regulations will depend on the answer to two questions:

- Is the employer a "health plan"?
- Does the employer regularly receive Protected Health Information ("PHI") other than Summary Health Information?

Generally speaking, the greater the employer's involvement in administration of a sponsored plan, the more likely the employer is to be deemed subject to the HIPAA privacy regulations. That said, most employers are not "Covered Entities" under HIPAA.

**Is the Employer a Health Plan?** An employer who meets the definition of a "Health Plan" will be deemed a Covered Entity. A "health plan is an individual or group plan that provides or pays the cost of medical care." 45 C.F.R. § 160.103.

## Are You a Health Plan?

1. Fully Insured Employer: If the employer's health plan is fully insured the employer is not a Covered Entity.
2. Employer with Small Self-Insured Plan (Self-Administered): If the employer is self-insured, has less than fifty (50) participants in its plan, and administers its own plan, the plan is entirely exempt from the HIPAA privacy regulations.
3. Employer with Large Self Insured Plan (Self-Administered): If the employer is self-insured but has more than fifty (50) participants and administers its own plan, the employer is a Covered Entity.
4. Employer with Large Self Insured Plan (with Third Party Administrator): If the employer is self-insured, has more than fifty (50) participants and a third party administrator administers the plan, the employer is not a Covered Entity.

45 C.F.R. § 160.103.

## Major Exclusions or Permitted Disclosures.

1. Employment Records: Employment records are not PHI, and are not subject to HIPAA's privacy requirements. 45 C.F.R. § 164.501.
2. Information Disclosed to the Employee: PHI may be disclosed to the subject of the PHI or his or her personal representative. 45 C.F.R. §§ 164.502(a)(1)(i), (g).
3. Information Received from the Employee: The HIPAA privacy regulations only apply to health information disclosed to or by a Covered Entity. Disclosures of health information between parties who are not Covered Entities are not governed by the regulations. As a result, the regulations do not apply to health information received by an employer who is not a Covered Entity if the information is received directly from the employee. For example, if an employee calls in sick, the employer does not need an authorization to convey this information to other employees, to send a get-well card to the employee or contact a temp agency to arrange coverage for the employee. As a matter of good practice,

however, the employer should take steps to keep health information received from an employee confidential.

4. Enrollment or Disenrollment Information: A plan may disclose employee enrollment and disenrollment PHI to the employer who sponsors the plan. 45 C.F.R. § 164.504(f).
5. Summary Health Information: An employer who sponsors a health plan may receive Summary Health Information, but only for the purposes of bidding out insurance premiums, modifying or amending the terms of a health plan or terminating a health plan. 45 C.F.R. § 164.504(f).

**Additional Considerations.** If the employer routinely receives PHI other than Summary Health Information to administer its own plan or is involved in making or reviewing benefits decisions, the employer will be subject to the HIPAA privacy regulations even if it is not otherwise a Covered Entity..

---

**Tyson B. Snow** is an associate with the firm of Manning Curtis Bradshaw & Bednar LLC. His practice involves all areas of federal court litigation with an emphasis in employment litigation, intellectual property litigation, commercial litigation, and human resources counseling.

<http://www.mc2b.com>

[tsnow@mc2b.com](mailto:tsnow@mc2b.com)

@tysonsnow