

Tech Flex

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TEXAS ENACTS PRIVACY LAW

Texas Governor Rick Perry has signed into law Texas House Bill 300 (HB 300) enacting a new health information privacy law pertaining to electronic health records that becomes **effective on September 1, 2012**. It is important to note that HB 300 provides for privacy rights that extend beyond those afforded under the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH).

EXPANDED DEFINITION OF TERM “COVERED ENTITY”

HB 300 stipulates that a “covered entity, as that term is defined by Section 181.001” of the Texas Health & Safety Code must meet the requirements of the privacy rights legislation. Under Section 181.001, a covered entity is defined as any organization that handles electronic records and includes any person who assembles, collects, analyzes uses, evaluates, stores, transmits, or comes into possession of protected health information (PHI), and any employee or agent of such entities. **The term also includes a “business associate.”**

Tex. Health & Safety Code § 181.001 states:

(2) "Covered entity" means any person who:

(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site;

(B) comes into possession of protected health information;

(C) obtains or stores protected health information under this chapter; or

(D) is an employee, agent, or contractor of a person described by Paragraph (A), (B), or (C) insofar as the employee, agent, or contractor creates, receives, obtains, maintains, uses, or transmits protected health information.

EXPANDED EMPLOYEE TRAINING REQUIREMENTS

The Texas privacy law requires that “each covered entity shall provide a training program to employees of the covered entity regarding the state and federal law concerning protected health information as it relates to (1) the covered entity’s particular course of business; and (2) each employee’s scope of employment.”

This training must (1) be provided to the employee no later than the 60th day after the date the employee is hired by the covered entity, and (2) must be provided to all employees at least once every two years.

In addition, a covered entity is required to have each employee who attends the training sign, electronically or in writing, a statement verifying the employee’s attendance at the training. The covered entity must retain the employee’s signed statement.

EXPANDED BREACH NOTIFICATION REQUIREMENTS

HB 300 amends Section 521.053 of the Texas Business & Commerce Code to provide that any “person who conducts business in this state and owns or licenses computerized data that includes sensitive personal information” must disclose “as quickly as possible” after discovering or receiving notification of the breach” notification of the breach to any individual whose sensitive personal information was, or is reasonable believed to have been, acquired by an unauthorized person.

It is important to note that HB 300 states: “the requirements...apply only if the individual whose sensitive information was or is reasonably believed to have been acquired by an unauthorized person is a resident of this state or another state that does not require a person...to notify the individual of a breach of system security. If the individual is a resident of a state that requires a person...to provide notice of breach of system security, the notice of the breach of system security...satisfies the requirements...”

TIME FRAMES FOR ACCESS TO ELECTRONIC RECORDS

Under the Texas Privacy provisions, if a health care provider is using an electronic health records system that is capable of fulfilling the request for access, the health care provider, not later than the 15th business day after the date the health care provider receives a written request from a person for the person’s electronic health record, shall provide the requested record to the person in electronic form unless the person agrees to accept the record in another form. A health care provider is not required to provide access to a person’s PHI where access to the PHI may be denied because:

- the information requested is psychotherapy notes;
- the information requested is compiled in anticipation of or for use in a legal proceeding;
- the information is subject to or specifically exempt from the Clinical Laboratory Improvements Amendment (CLIA) and such information is not accessible to the individual under CLIA;
- the request is made by an inmate and certain other requirements are met;
- the information is created or obtained in the course of research and the individual has agreed to the denial of access;
- the information involves ongoing research and the individual agreed to the denial of access while research was in progress;
- disclosure would violate the federal Privacy Act; and
- the information was obtained by someone other than the health care provider under a promise of confidentiality and access would be reasonably likely to reveal the source of the information.

NOTICE REQUIRED FOR ELECTRONIC DISCLOSURE OF PHI

HB 300 requires that a covered entity provide notice to an individual for whom the covered entity creates or receives PHI if the individual's PHI is subject to electronic disclosure. A covered entity may provide the notice by:

- posting notice in the covered entity's place of business;
- posting a notice on the covered entity's Internet website; or
- posting a notice in any other place where individuals whose PHI is subject to electronic disclosure are "likely to see the notice."

AUTHORIZATION REQUIRED FOR ELECTRONIC DISCLOSURE OF PHI

The Texas Privacy provision prohibits a covered entity from electronically disclosing an individuals' PHI to any person "without a separate authorization from the individual of the individual's legally authorized representative **for each disclosure.**"

The authorization may be provided "in written or electronic form or in oral form if it is documented in writing by the covered entity."

Authorization is NOT required for electronic disclosure of PHI if disclosure is made to another covered entity for the purpose of:

- treatment;

- payment;
- health care operations;
- performing an insurance or health insurance or health maintenance organization as these functions are defined under Texas Insurance Code Section 602.053; or
- as otherwise authorized or required by state or federal law.

PROHIBITION AGAINST SALE OF PHI

Under the Texas provisions, a covered entity may not disclose an individual's PHI to any other person "in exchange for direct or indirect compensation." However, a covered entity may disclose PHI to another covered entity for the purpose of:

- treatment;
- payment;
- health care operations;
- performing an insurance or health insurance or health maintenance organization as these functions are defined under Texas Insurance Code Section 602.053; or
- as otherwise authorized or required by state or federal law.

When disclosing PHI as allowed, "the direct or indirect remuneration a covered entity receives for making a disclosure of PHI...may not exceed the covered entity's reasonable costs of preparing or transmitting the PHI. "

PENALTIES UNDER TEXAS PRIVACY LAW

HB 300 provides that the "attorney general may institute an action for civil penalties against a covered entities for a violation."

A civil penalty assessed may not exceed:

- \$5,000 for each violation committed negligently that occurs in one year, regardless of how long the violation continues during that year;
- \$25,000 for each violation committed knowingly or intentionally that occurs in one year, regardless of how long the violation occurs; or
- \$250,000 for each violation in which the covered entity knowingly or intentionally used PHI for financial gain.

The total amount of the penalty may not exceed \$250,000 annually if the court finds that:

- the PHI disclosed was encrypted or transmitted using encryption technology designed to protect against improper disclosure; and
- at the time of the disclosure of PHI, the covered entity had security policies and procedures in place and had trained its employees as required.

However, if the court finds that the “violations have occurred with a frequency as to constitute a pattern or practice,” the court may assess a civil penalty not to exceed \$1.5 million annually. Also, a covered entity could have its license to do business in the state of Texas revoked. In addition to the aforementioned penalties, “the attorney general may institute an action for injunctive relief to restrain a violation of this chapter.”

For a copy of Texas House Bill 300, please click on the link provided below.

<http://www.legis.state.tx.us/tlodocs/82R/billtext/pdf/HB00300F.pdf#navpanes=0>

CONNECTICUT MODIFIES CHILD COVERAGE LAW

As a result of the enactment of Connecticut Public Act Number 11-58 (Act) group health insurance policies issued in Connecticut must extend coverage for employee’s children to the end of the policy year the child either turns 26 or obtains coverage through their own employment, whichever occurs first.

The Act extends the coverage period for children beyond what is required under federal law which requires that coverage must be provided until the child obtains the age of 26. However, the federal law applies to self-insured and insured group health plans while the state law does NOT apply to self-insured plan. In addition, the Connecticut mandate, effective July 1, 2011, does not apply to policies or contracts issued in other states, unless the majority of covered employees work in Connecticut.

Finally, it is important to note that the Connecticut law conflicts with the federal law in that under the state law a policy may be written to end coverage prior to the age mandate based on the child obtaining coverage from his or her employer. Currently, under federal law, only a grandfathered plan may decline coverage based on the child’s eligibility for coverage under the plan of someone other than his or her parent. As of January 1, 2014, all plans (including grandfathered plans) must disregard the fact that a child is eligible for coverage under the plan of someone other than his or her parent.

For a copy of the Act, please click on the following link:

<http://www.cga.ct.gov/2011/ACT/Pa/pdf/2011PA-00058-R00HB-06308-PA.pdf>

ADDITIONAL CUT TO SOCIAL SECURITY TAX PROPOSED

President Barack Obama on September 8, 2011 proposed the American Jobs Act of 2011 (S. 1549). This proposal, which has now been sent to the United States Congress, if enacted as now written, would impact payroll processes in a number of ways, including the following.

Social Security Tax Rate Reduction

Under the Obama proposal, the social security tax rate would be decreased for both employees and employers to 3.1% for 2012. Currently, the rate is 4.2% for employees (decreased for 2011 from 6.2%) and is 6.2% for employers. The employer reduction would apply to the first \$5 million of wages paid by an employer, with certain exceptions. Federal, state and local government employers (other than state colleges and universities) would be ineligible for the reduced payroll tax credit, as would wages paid to household employees.

Tax Credit for Increased Payroll

The proposed legislation would provide employers with a “payroll credit increase” in relation to the employer share of social security tax paid on increases in wages paid in the last quarter (October – December) of 2011 and for all of calendar year 2012. The amount of credit available to employers is up to \$12.5 million of an employer’s increased wages paid in the fourth quarter of 2011 and up to \$50 million of an employer’s increased wages paid in calendar year 2012.

Government Contractor Withholding Further Delayed

S. 1549 would again delay the requirement that governmental entities withhold 3% from payments to contractors providing property or services. The effective date would be pushed back to payments made after December 31, 2013.

Hiring Veterans Tax Credits

The current tax credit for hiring veterans who have been unemployed for at least 6 months and have a service-connected disability is \$4,800. The proposed bill would increase that amount to \$9,600.

In addition, two new tax credits would be available in relation to hiring veterans without service-connected disabilities. Specifically, \$2,400 for hiring veterans who have been unemployed for at least 4 weeks and \$5,600 for hiring of veterans who have been unemployed for at least 6 months.

Tax Credit for Hiring Long-Term Unemployed

Under the President's proposal, employers would get a tax credit of \$4,000 for hiring individuals (who are not veterans) who have been unemployed at least 6 months.

Discrimination Against Unemployed Prohibited

An employer would be considered in violation of the law should the employer refuse to hire an individual because he or she is currently unemployed. In addition, job advertisements stating that unemployed individuals will not be considered for a job will be prohibited.

For a copy of S. 1549, please click on the link provided below.

<http://www.gpo.gov/fdsys/pkg/BILLS-112s1549pcs/pdf/BILLS-112s1549pcs.pdf>

IRS ISSUES CELL PHONE TAXATION GUIDANCE

On September 14, 2011, the Internal Revenue Service (IRS) released Notice 2011-72 providing "guidance on the tax treatment of cellular telephones or other similar telecommunications equipment (hereinafter collectively "cell phones") that employers provide to their employees primarily for noncompensatory business purposes."

The IRS found in Notice 2011-72 that when an employer provides an employee with a cell phone primarily for "noncompensatory business reasons", an employee's use of an employer provided cell phone for reasons related to the employer's business is a working condition fringe benefit. As such, the value of the cell phone is excludable from the employee's income.

Under 2011-72, "an employer will be considered to have provided an employee with a cell phone primarily for noncompensatory business purposes if there are substantial reasons relating to the employer's business, other than providing compensation to the employee..." Examples provided by the IRS as possible noncompensatory reasons include the employer's need to contact the employee at all times for work-related emergencies or the employer's requirement that the employee be available to speak with clients at times when the employee is away from the office.

However, the IRS stipulated that a "cell phone provided to promote the morale or good will of an employee, to attract a prospective employee or as a means of furnishing additional compensation to an employee is not provided primarily for noncompensatory business purposes."

It is important to note that the IRS stated in Notice 2011-72 that “the rules of this notice apply to any use of employer provided cell phones occurring after December 31, 2009.

For a copy of Notice 2011-72 please click on the following link:

<http://www.irs.gov/pub/irs-drop/n-11-72.pdf>

NEW YORK ISSUES GUIDANCE ON SAME SEX MARRIAGE TAXATION

In the July 2011 Tech Flex, it was reported that on June 24, 2011, New York Governor Andrew Cuomo signed into law the “Marriage Equality Act” (Act) permitting the marriage of same-sex partners.

The Act provides that same-sex couples may obtain a marriage license in New York, and that parties to a same-sex marriage shall be treated equally to opposite-sex marriage “in all respects under the law.” Consequently, same-sex spouses are governed under the same rules as opposite-sex spouses in relation to insured health and other welfare benefits provided by an employer (under an insurance policy controlled by New York law) and state taxation.

The New York State Department of Tax and Finance (Department) has now issued guidance regarding personal income tax withholding and metropolitan commuter transportation mobility tax (MCTMT) issues affecting same-sex married individuals and their employers. Some of the highlights of this guidance are as follows

Personal Income Tax Withholding

- Same-sex married employees were advised “they may want” to file a new Form IT - 2104 (Employee’s Withholding Allowances Certificate), “with your employer because you’ll file a New York return using a married status beginning in tax year 2011.”
- Same-sex married employees should provide proof to their employers that the employee is legally married under New York law to have them stop withholding New York tax on the value of certain benefits (e.g. health benefits that are treated as domestic partner health benefits for federal tax purposes).
- Employers were instructed not to withhold New York tax on certain benefits provided to a same-sex married employee. For example, an employer need not withhold tax for New York State, New York City, or Yonkers income tax purposes on the value of

certain benefits (e.g. health benefits that are treated as domestic partner health benefits for federal tax purposes), even though it's subject to federal withholding.

MCTMT

- Employers must reduce their payroll expense by the value of certain benefits (e.g., domestic partner health benefits) provided to a same-sex married employee who is a covered employee. This action should take place in relation to payrolls paid on or after July 24, 2011.
- For tax years 2011 and after, in order for same-sex married employees to compute your net-earnings from self-employment allocated to the metropolitan commuter transportation district MCTD, such employee must recompute his or her federal income tax return as if he or she had been able to use a married filing status (federal as-if-married return), including the employees' net earnings from self-employment. The employee must apply all the federal rules for married taxpayers.

For a link to the Department guidance, please click on the link provided below.

http://www.tax.ny.gov/pit/marriage_equality_act.htm

For more information on the Marriage Equality Act, please see the July 2011 Tech Flex by clicking on the link below.

http://westnsc.adp.com/fsa%5Fcobra/tf/Tech_Flex_Newsletter_July_2011.pdf

GEORGIA COURT APPROVES GARNISHMENT ADVISORY OPINION

On June 4, 2010, the Georgia Bar Association Standing Committee on the Unlicensed Practice of Law issued Unlicensed Practice of Law Opinion Number 2010-1 (UPL Opinion No. 2010-1).

The question presented in the opinion was as follows:

“Assuming that no traverse has been filed by any party in a garnishment action, is the completion, execution and filing of an answer in the garnishment action by a non-attorney employee of the garnishee considered the unlicensed practice of law?”

UPL Opinion No. 2010-1 stipulated in its summary answer to the question presented above was that a “nonlawyer who answers for a garnishee other than himself in a legal

proceeding pending with a Georgia court of record is engaged in the unlicensed practice of law.”

On September 12, 2011 the Supreme Court of the State of Georgia after review of UPL Opinion No. 2010-1 approved the Georgia Bar Association findings on the question.

Justice David Nahmias writing for the Court stated “we must approve UPL Advisory Opinion No. 2010-1, which concludes that a nonlawyer, such as a clerical employee of a corporation, who answers for a garnishee other than himself in a legal proceeding pending with a Georgia court of record is engaged in the unlicensed practice of law.”

For a copy of UPL Opinion No. 2010-1 and the Court’s approval, please click on the links provided below:

Georgia Bar Association UPL Opinion No. 2010-1

http://www.gabar.org/programs/unlicensed_practice_of_law/upl_advisory_opinions/#2010-1

Georgia Supreme Court Approval of UPL Opinion No. 2010-1

<http://statecasefiles.justia.com/documents/georgia/supreme-court/s11u0028.pdf?1315944375>

KENTUCKY UPDATES EMPLOYER WITHHOLDING INSTRUCTIONS

On August 15, 2011, the Kentucky Department of Revenue released a revised version of the “Withholding Kentucky Income Tax Instructions for Employers.” Changes to the publication include the following:

- Added instructions for the new Form K-4M, “Nonresident Military Spouse Exemption Certificate.”
- Form 42A801 (D), Amended K-1 and Form 42A803 (D), Amended K-3 were added to the list of available forms.
- Removed option to make tax filings via diskette.

For a copy of the revised publication, please click on the link provided below.

<http://revenue.ky.gov/NR/rdonlyres/07644FF8-0204-48F2-B781-4720C38006C4/0/42A003811rev9211.pdf>

TEXAS MODIFIES NEW HIRE REPORTING REQUIREMENTS

Effective September 7, 2011, Texas Administrative Code, specifically 1 TAC §55.303, has been amended to provide that an employee's date of hire is a required data element that must be reported as part of the new hire reporting process. Previously, the date of hire was an optional item to be reported.

There are now seven mandatory elements employers are required to report.

1. Company name
2. Company mailing address – if different from payroll address, provide payroll address
3. Company Federal Employer Identification Number (FEIN)
4. Employee name
5. Employee address
6. Employee social security number
7. Date of hire

The optional items to report are as follows:

1. Employee's date of birth
2. Salary/wages
3. Pay frequency
4. State of hire
5. Employer's phone and fax number
6. SEIN – State Employer Identification Number
7. DBA – Doing Business As

Please find below a link to the Texas New Hire Reporting Website.

<https://portal.cs.oag.state.tx.us/wps/portal/NewHiresDataToBeReported>

*Please contact ADP National Account Services for further information at:
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