

Workers' Compensation and HIPAA

I. BWC and MCOs are not covered entities under HIPAA

The final Health Insurance Portability and Accountability Act (HIPAA) privacy and electronic transactions regulations do not directly apply to BWC or to managed care organizations (MCOs). BWC and MCOs (and self-insuring employers' workers' compensation programs) do not qualify as "covered entities" under the HIPAA regulations since they do not meet the definitions of a "health plan," "health care clearinghouse" or "health care provider" as defined in the rules.

See 45 Code of Federal Regulations (CFR) 160.102; 45 CFR 160.103.

Workers' compensation programs are excluded specifically from the definition of a health plan under the HIPAA regulations.

See 45 CFR 160.103; 42 United States Code 300 gg-91(c)(1)(D).

II. BWC and MCOs are not business associates of providers under HIPAA

Under the final HIPAA privacy and electronic transactions regulations, covered entities, including providers, may have "business associates" who perform tasks or functions for or on behalf of the covered entity (e.g., legal, accounting, etc.) that involve the use or disclosure of health information. In general, covered entities must enter into "business associate agreements" with these business associates in which the business associate agrees to safeguard the privacy of the information.

See 45 CFR 164.502(e); 45 CFR 160.103; 45 CFR 164.504(e).

BWC and its MCOs are not business associates of providers, since BWC and the MCOs generally do not perform any functions "for or on behalf of" providers. This applies to treating providers and to BWC's Disability Evaluators' Panel (DEP) providers.

However, if a DEP provider has an administrative agent, the agent might be considered a business associate of the DEP provider but not of BWC. It is the DEP providers' responsibility to ensure their contract with the administrative agent contains the necessary HIPAA privacy safeguards. Therefore, DEP providers should consult their legal counsel and/or HIPAA consultants as to whether their administrative agent contracts are (or need to be) HIPAA compliant.

III. BWC and MCOs are not required to comply with the HIPAA electronic transaction standards

In general, the HIPAA electronic transaction regulations apply to the transmission of data in a transaction between covered entities, or within the same covered entity, when there is a HIPAA standard for that type of transaction.

See 45 CFR 162.923(a). Since BWC and its MCOs do not qualify as covered entities under the HIPAA regulations, transactions between BWC and an MCO, or between an MCO (or BWC) and a provider, do not have to be conducted in compliance with the HIPAA electronic transaction standards.

IV. Release of medical information in Ohio workers' compensation claims under HIPAA

Under HIPAA, providers may release protected health information in a workers' compensation claim:

- For treatment, payment or health-care operations purposes;
- Under a HIPAA exemption to comply with state workers' compensation laws;
- Under a valid HIPAA authorization;
- Under a valid administrative or judicial order, subpoena, discovery or other lawful process that meets HIPAA requirements.

A. Release for treatment, payment or health-care operations purposes

Under the final HIPAA privacy regulations, covered entities may use and disclose protected health information for treatment, payment and health-care operations purposes. **See 45 CFR 164.506.** "Payment" and "treatment" are defined fairly broadly under HIPAA. **See 45 CFR 164.501.**

Therefore, to the extent that a provider is treating a workers' compensation claimant, and the provider is:

- Requesting authorization for treatment;
- Requesting payment for treatment already rendered;
- Providing information with regard to the allowance of a workers' compensation claim or the allowance of an additional condition in an existing claim.

The provider should be able to release information to BWC, an MCO, a self-insuring employer or a Qualified Health Plan (QHP) in a self-insured claim, pursuant to **45 CFR 164.506.**

B. Release under HIPAA workers' compensation exception

In addition to the release of information for treatment, payment or health-care operations purposes, the final HIPAA privacy regulations specifically allow covered entities to disclose protected health information "as authorized by and to the extent necessary to comply with [state] laws relating to" workers' compensation programs.

See 45 CFR 164.512(l).

There is no Ohio workers' compensation statute that directly addresses a provider's obligation to submit protected health information to BWC or to MCOs. However, there are two relevant BWC administrative rules:

- **Ohio Administrative Code (OAC) 4123-6-02.8** requires providers to report an injured worker's injury to either the worker's MCO or to BWC via www.bwc.ohio.gov within one working day of the initial treatment or initial visit.
- **OAC 4123-6-20(E)** states:

In accepting a workers' compensation case, a provider assumes the obligation to provide to the bureau, claimant, employer, or their representatives, MCO, QHP, or self-insuring employer, upon written request or facsimile thereof and within five business days, all medical, psychological, psychiatric or vocational documentation relating causally or historically to physical or mental injuries relevant to the claim required by the bureau, MCO, QHP or self-insuring employer, and necessary for the claimant to obtain medical services, benefits or compensation.

If a treating provider is asked to disclose protected health information to any of the parties listed in **OAC 4123-6-20(E)** for a purpose other than for treatment, payment or health-care operations (e.g., the initial investigation of a claim, the completion of a *Physician's Report of Work Ability* (MEDCO-14), and the provider is persuaded the requested documentation "**relate[s] causally or historically to physical or mental injuries relevant to the claim,**" is "**required by the bureau, MCO, QHP, or self-insuring employer**" and is "**necessary for the claimant to obtain medical services, benefits or compensation,**" the provider may disclose the information pursuant to **45 CFR 164.512(I)**.

Note that this HIPAA workers' compensation exemption, when read in combination with the Ohio rules cited above, may in many cases provide additional support for the release of health information under the other circumstances discussed here (e.g., release of information to BWC or an MCO for treatment or payment purposes, etc.).

C. Release under a valid HIPAA authorization

Under the HIPAA privacy regulations, covered entities may disclose protected health information under a valid authorization (release) from the individual that complies with HIPAA requirements. **See 45 CFR 164.508.**

Ohio Revised Code (ORC) 4123.651(B) and (C) specifically provide that employers are entitled to a signed medical release from their injured workers for "**medical information, records, and reports relative to the issues necessary for the administration of [the injured worker's] claim,**" and that injured workers' right to compensation and benefits may be suspended if they do not provide such a release to the employer.

Therefore, if the employer is having difficulty obtaining protected health information from a provider, the employer may obtain a signed medical release from the injured worker pursuant to **ORC 4123.651**. Providers should honor the signed release if it complies with the requirements for a valid HIPAA authorization.

BWC has revised its *Authorization to Release Medical Information* (C-101) so the form constitutes a valid, HIPAA-compliant authorization. **Note:** The medical release statement on the *First Report of an Injury, Occupational Disease or Death (FROI-1)* is not, and in all likelihood cannot be, modified sufficiently to constitute a valid, HIPAA-compliant authorization.

Also, in general, psychotherapy notes may not be disclosed, even for most treatment, payment, or health-care operations purposes without a separate authorization specifically for the notes. **See 45 CFR 164.508(a)(2).**

D. Release under a valid administrative or judicial order, subpoena, discovery or other lawful process

Under the HIPAA privacy regulations, a covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

- In response to a court or administrative order (but must disclose only the protected health information expressly authorized by such order);
- In response to a subpoena, discovery request or other lawful process that is not accompanied by a court or administrative order, if the covered entity receives satisfactory assurances from the party seeking the information that:
 - (a) It has made reasonable efforts to ensure the individual whose information is being requested has been given notice of the request; or
 - (b) It has made reasonable efforts to secure a qualified protective order that meets HIPAA requirements.

However, a covered entity may disclose protected health information in response to lawful process without receiving the satisfactory assurances specified above if the covered entity makes reasonable efforts to provide notice to the individual or to seek a qualified protective order. **See generally 45 CFR 164.512(e)**. "Satisfactory assurances" and "qualified protective order" are defined more fully in the HIPAA regulations. **See 45 CFR 164.512(e)(1)(iii), (iv) and (v).**

Therefore, providers could also release protected health information in a workers' compensation claim under a court or Industrial Commission of Ohio (IC) order; or under a court, IC or BWC subpoena; or during discovery proceedings in court, if the HIPAA requirements set forth above are met.

For more information about HIPAA, access <https://www.hhs.gov/hipaa/index.html>.

Disclaimer: The information and documents contained on www.bwc.ohio.gov and in this fact sheet were developed to assist BWC in understanding the obligations imposed by HIPAA. The State of Ohio and BWC provide no guarantee of accuracy or warranties of any kind. Utilization of this information is at the sole risk of the user. As with any matter of law, independent legal counsel should be consulted regarding compliance with HIPAA requirements.