

# HCG Services, LLC

Insurance solutions that work.

HCG Services, LLC  
Farmington Valley Corporate Park  
40 Corporate Avenue  
Plainville, CT 06062  
Tel: 860-351-0100  
Fax: 860-351-0139

## • Swine Flu EEOC Issues New Guidance

It's definitely here – The Swine Flu. While the buzz travels on who's got it, how rampant it will be, and to or to-not get vaccinated, employees will look to employers to find out what H1N1 means in terms of employment policies, individual decisions concerning employees, and, in particular, whether the employer can force employees to either not report to work or to go home when flu is suspected.

The Equal Employment Opportunity Commission (EEOC) has published new technical guidance: Pandemic Preparedness in the Workplace and the Americans with Disabilities Act. The ADA covers employers with 15 or more employees. The guidance is in question and answer format and in part provides:

### Q: Can we ask employees about their condition or require employees to have medical exams?

A: The Americans with Disabilities Act (ADA) generally prohibits disability-related inquiries or medical exams unless it is job-related and consistent with business necessity. An inquiry is “**disability-related**” if it is likely to elicit information about a disability.

Generally, the inquiry or medical exam will be job related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that: an employee's ability to perform essential job function will be impaired by a medical condition; or, employee will pose a direct threat due to a medical condition.

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Swine Flu is here!  
Q: Can we send employees home?

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## • HITECH Act New Notification Requirements for Breaches of Unsecured Protected Health Information Now In Effect Under HITECH Act Amendments to HIPAA Rules

Certain provisions of the HITECH Act, signed into law on February 17, 2009, have recently become effective, with more substantial compliance penalties to be effective in 2010.

The HITECH Act was signed into law on February 17, 2009, as part of the American Reinvestment and Recovery Act (ARRA). The HITECH Act dramatically broadens the scope and increases the rigor of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule and Security Standards.

Specifically, the HITECH Act expands HIPAA privacy rules and security standards to Business Associates of covered entities.

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“Covered entities” include a health care provider that conducts certain transactions in electronic form; a health care clearinghouse; and a health plan. Business Associates of covered entities include vendors who provide services directly to the covered entities including services in IT, financial support, marketing, legal support, and other areas. Now, business associates are subject to the same requirements for Protected Health Information (PHI) data security as covered entities, and will face the same penalties for noncompliance. A provision of the Act effective February 17, 2010, requires business associate agreements to be revised to include these new privacy or security requirements.

### *Notification of Breaches of Unsecured PHI*

In addition, effective September 23, 2009, the Act mandates the following:

- a) A business associate of a covered entity that discovers a breach of unsecured PHI shall notify the covered entity of such breach.
- b) A covered entity must notify each individual whose unsecured PHI has been, or is reasonably believed to have been, accessed, acquired, used or disclosed due to breach.
- c) Unless delay permitted for law enforcement purposes, all notifications must be provided no later than 60 days after discovery of the breach.
- d) Notice required to the individual is to be promptly provided in writing sent by first-class mail to the individual or next of kin at the last known address of that individual, or if specified as a preference by the individual, by electronic mail.
- e) Breaches involving 10 or more individuals for whom there is insufficient or out-of-date contact information requires conspicuous posting on covered entity’s website or with major media outlet.
- f) If a breach involves 500 or more individuals, notice must also be provided to the Health and Human Services Department.

The HITECH Act defines unsecured PHI as any PHI that is not secured by technology standards that renders it unusable, unreadable or indecipherable to unauthorized individuals and is developed or endorsed by an organization that is accredited by the American National Standards Institute. Therefore, information that is encrypted using approved methods is not unsecured; notice is not required for secured PHI.

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A “direct threat” is “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” If the CDC is designating H1N1 as another strain of seasonal flu, it does not pose a direct threat that justifies disability-related inquiries and medical examinations. However, if the CDC or a local health authority designates that H1N1 is significantly more severe than seasonal flu, it could rise to the level of a “direct threat,” with that health authority assessment as objective evidence.

PHI

### **Q: Can we ask an employee about their sickness?**

**A:** An employer may ask employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat, because it is not disability related. Employers must treat all information about an employee’s illness as confidential. If an employee has been absent, an employer can ask “why?”

### **Q: Can we send employees home if they display flu-like symptoms?**

**A:** Yes, just be sure to apply this practice uniformly, in a non-discriminatory fashion.

### **Q: When should we have an employee who has H1N1 or H1N1 symptoms return to work?**

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**A:** The CDC has indicated that in general business settings (i.e., non-health care settings) employees may return to work at least 24 hours after no longer having or exhibiting signs of a fever (100 Degrees F) without the aid of fever-reducing medications. This is a change from the CDC’s prior position that employees should stay out of work seven days after the start of the illness or 24 hours after no longer having a fever (whichever was longer).

**Q: Can we require doctor’s notes for employee’s returning to work?**

**A:** Generally, yes. Employers may require employees who have been away from work during a pandemic to provide a doctor’s note certifying their fitness to return to work. However, employers should consider the practical aspects of doing this; doctors and other health care professionals may be too busy during and after a pandemic outbreak to provide fitness-for-duty notes. Employers should consider adopting flexible approaches such as permitting certification from local clinics or permitting confirmation by email that the employee does not have the pandemic virus.

**Q: Can we require employees to wash their hands more?**

**A:** Yes. Employers can require infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal – that does not involve any ADA considerations. During a pandemic, employers can require employees to wear personal protective equipment. However, employers may need to give reasonable accommodation to employee’s with a related disability, such as non-latex gloves.

**Q: Is H1N1 automatically an FMLA covered serious condition?**

**A:** No. H1N1 needs to satisfy the definition of a “serious health condition” under the FMLA regulations. In the context of H1N1, a serious health condition under the FMLA is defined as: a) more than 3 calendar days of incapacity plus two treatments by a health care provider (the first of which must occur within 7 days of the first day of incapacity and the second within 30 days of the first day of incapacity); or b) more than 3 calendar



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**Encryption of PHI**

As required by the HITECH Act, the HHS Secretary has issued guidance specifying the technologies and methodologies that render PHI “unusable, unreadable or indecipherable” to unauthorized persons. The guidance provides that data destruction and encryption are compliant methods, and provides an encryption and destruction “safe harbors” that protects covered entities and business associates from having to give notice under the breach notification provisions.

**For encryption:**

- 1) For data at rest, acceptable processes are those consistent with NIST (National Institute of Standards and Technology) Special Publication 800-111.
- 2) For data in motion, such as data moving through a network, acceptable processes are those in compliance with FIPS (Federal Information Processing Standard 140-2).

**For destruction:**

- 1) Paper, film, or other hard copy media on which PHI is stored or recorded must be shredded or destroyed such that the PHI cannot be read or otherwise cannot be reconstructed.
- 2) Electronic media on which PHI is stored or recorded must be cleared, purged, or destroyed consistent with NIST Special Publication 800-88, Guidelines for Media Sanitization, such that the PHI cannot be retrieved.

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### Penalties and Enforcement

The HITECH ACT imposes higher civil monetary penalties against individuals, covered entities, and business associates who violate the HIPAA Rules. These penalties range from \$100 to \$50,000 for each violation, and from \$25,000 to \$1.5 million for similar violations within a calendar year. Penalty levels are based on culpability, from no knowledge of violation to willful neglect; the HHS Secretary will be required to impose civil penalties for willful neglect violations. The Act also creates and allowance for the Office of Civil Rights to pursue an investigation and impose civil penalties for an alleged criminal violation of the HIPAA Rules, if the individual has not been prosecuted criminally by the Justice Department. Further, state attorney generals will now be authorized to bring a civil action in federal district court against individuals who violate the HIPAA Rules. •

### • New Massachusetts Health Care Reporting in Effect

The Massachusetts Division of Health Care Finance and Policy has amended the state's Employer Fair Share Contribution (FSC) regulations to clarify filing and contribution requirements for employers. Under the Massachusetts Health Care Reform Act of 2006, employers with 11 or more employees must contribute to their workers' health insurance costs (at least 33% of the cost) or pay an annual "fair share" contribution of \$295 per employee to the Division of Unemployment Assistance (DUA).

The updated regulations require more rigorous documentation from employers. Effective Oct. 1, 2009, in order to be considered a contributing employer, an employer must maintain a written group health plan document and communicate it in writing to employees. The plan document must spell out the offer of insurance to employees, the percentage of premiums the employer will pay, and the minimum number of hours required for an employee to be eligible for full-time benefits. One advantage of this requirement is that it allows employers to define the threshold for full-time benefits, rather than relying on the provisions of their insurance contracts, which often define "full-time employee" more liberally.

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days of incapacity plus on treatment by a health care provider (within 7 days of first day of incapacity) plus continuing treatment (including prescription medication) under the supervision of a health care provider. Like with seasonal flu, many individuals may not seek health care treatment for H1N1, therefore many cases of H1N1 will not qualify as FMLA serious health conditions. •

For more guidance, look to the CDC and EEOC's websites, including the recently published EEOC publication at: [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html)

### • Questions & Answers

**Q: We are considering extending our group health plan coverage to domestic partners of employees, even though we know we are not required to by law. If we choose to, do we have to do anything special with the benefit as far as taxes?**

**A:** Yes. If you provide health insurance coverage for domestic partners or other beneficiaries who are not dependents as defined by the Internal Revenue Service (IRS), you must calculate the estimated fair market value (FMV) of those health benefits and credit that amount to the employee as "imputed income." Usually, you only need to calculate this amount once a year—at year's end.

Q & A's

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You would simply report *the value of the benefit, minus any amount the employee actually paid for that benefit*, as income on the employee's W-2 for that year. The IRS has not designated how employers are to calculate the FMV of that benefit, however prior guidance provides that the IRS permits actuarial calculation or it may be calculated as the difference between the cost of the employee plus one and the cost of the employee, minus employee payments toward that cost. You should come up with a reasonable method of calculating the FMV of the domestic partner health coverage and add that as income to the covered employee – this is true also in the case of an older, dependent child who no longer meets the IRS definition of tax dependent.

**Q: We always give out employees 10 or 15 lbs. turkeys rights before Thanksgiving. Someone said we have to charge the employee. Is that true?**

**A:** It is legal to give employees benefits other than traditional wage/health coverage, like a turkey – it's just another form of fringe benefit. In the past, it was permissible for employers to give cash or equivalent-value gifts worth less than \$25 without any tax consequences. However, today the IRS takes the position that all fringe benefits are considered taxable wages unless specifically excluded by the Internal Revenue Code.

The Code excludes many de minimus or nominal type gifts from being taxable, including: group meals, tickets to theater or sporting event, traditional birthday gifts or holiday gifts with low fair market value (not cash or cash equivalent), flowers, and occasional break treats such as coffee, doughnuts, soft drinks, etc. Your holiday turkey is permitted without any tax consequences for the employee. However, if you gave employee cash to purchase their holiday turkey, that would no longer be considered a de minimus gift – and it would have to be included as wages in the employee's taxable earnings.

**Q: I heard about this new state law, PA 09-126, which allows an employer to stop paying group health insurance premiums for an employee or his dependents as of 72 hours after the employee quits or is terminated for any reason other than layoff – and that health insurance carrier must prorate that months and return any percent of the premiums for the unused part of the month. Does this mean I am required to terminate coverage 72 hours after I terminate an employee, or can I still**

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The amendments further stipulate that employers may use premium reimbursement arrangements to satisfy FSC requirements. In a premium reimbursement arrangement, employees pay directly for individual health insurance coverage, and employers reimburse them for a portion of the premiums. To qualify, employers must (1) designate one or more specific insurance plans for employee enrollment; (2) communicate the designated plans to employees in writing; (3) maintain a written plan document that specifies the insurance carrier, plan benefits, and employer contribution percentage for each designated plan; and (4) submit quarterly records of the details of all plans, including communications with employees. •

### • Latest (8/27/2009) New I-9 Form Available

## I-9 Forms

The August 27, 2009 revision to the I-9 is available on the United States Citizenship and Immigration Services website. Employers may use this recent revision to the form or continue to use the form with a revision dates of 2/2/09 which is found in the lower right hand corner. Employers should not use earlier versions of the form. •

## Race Discrimination and Disparate Treatment on Supreme Court's Docket Again

The Supreme Court recently decided to hear the case of *Lewis v. City of Chicago*, the facts of which sound similar to the recently decided New Haven firefighter case, *Ricci v. DeStefano*. In *Lewis v. City of Chicago*, the City of Chicago administered a written test to firefighter job applicants in 1995. The City notified applicants of the results at the end of January 1996. Plaintiffs filed an EEOC charge on March 21, 1997 claiming that the test had a disparate impact on black applicants and was not a valid test of fire fighting aptitude. Under Title VII of the Civil Rights Act of 1964, a plaintiff seeking to bring suit for employment discrimination must first file a charge of discrimination with the EEOC within 300 days after the unlawful employment practice occurred.

### Discrimination

The EEOC charge of discrimination was filed more than 400 days after the plaintiffs were notified, but within 300 days of the City's beginning to hire applicants. An Illinois trial court ruled that each hiring was a fresh violation of Title VII. However, the Seventh Circuit Court of Appeals reverse, holding that the "discrimination was complete when the tests were scored" and "was discovered when the applicants learned the results." Therefore, the EEOC charge was not filed on time and the case should be dismissed.

The Seventh Circuit rejected the applicants' arguments that this was a "continuing violation" and that "the statute of limitations begins to run upon injury (or discovery of the injury) and is not restarted by subsequent injuries."

The question the Supreme Court will be deciding is: Where an employer adopts an employment practice that discriminates against African Americans in violation of Title VII's disparate impact provision, must a plaintiff file an EEOC charge within 300 days after the announcement of the practice, or may a plaintiff file the charge within 300 days after the employer's use of that announced discriminatory practice?

The "continuing violation" theory has long been raised by employees in discrimination matters, enabling plaintiff's to connect past events to more recent events and use all the events as evidence of the employer's discrimination. The outcome of this case could be significant for employers. If the Supreme Court agrees with the firefighter applicants, employers may be subject to disparate impact claims long after the initial employment policy or practice was adopted. •

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**carry their coverage to the end of the month, as I normally do?**

**A:** As long as the terms of your group health plan permit it, you can continue to carry the insurance through the end of the month. This new Connecticut law does not require employers to terminate coverage after 72 hours. The law just requires insurance carriers make sure their procedures allow an employer to notify them of termination of coverage after 72 hours and allow them to promptly return any premium amount prepaid for the month.

If electing to terminate group health plan coverage, an employer must do two things within 72 hours of the termination: 1) Notify the health insurer or health care center that it elects to terminate the employee's health insurance, as well as provide the employee's name and other identifying information, date of termination, and whether the employee had dependent coverage, so that the health insurer or health care center can properly process the request; and, 2) notify the employee of the termination of health insurance coverage (should be done in writing).

The law applies to group policies issued to employers subject to Connecticut's minimum wage law. The law does not apply where a collective bargaining agreement requires the employer to pay the premium for an employee under the group health insurance policy after the date of such employee's termination. An employer's obligations under COBRA or state continuation coverage are not altered by this new state law.

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**Q: We require employee's to sign the performance appraisal confirming that they reviewed it. We have a disclaimer on it that says that this does not mean the employee agrees with it. Sue just got a poor appraisal and she refuses to sign the appraisal. What should we do?**

**A:** As your disclaimer states, she is not signing in agreement, she is just signing off that she received a copy or read the appraisal. You can just have the supervisor/manager write on it that employee reviewed it (or employee received a copy) and refused to sign – then the manager should sign that statement. Employers generally do not have sufficient grounds to terminate an employee for not signing the acknowledgement, however.

**Q: One of our employees has a same sex partner and they went through a civil union ceremony a few years ago. The employee and her partner are covered under our group health plan, which provides coverage for employees, their spouse, and their dependents. I know that same sex marriage is now legal in Connecticut, so does that mean the partner is no longer eligible for coverage, at least not until the employee and partner become actually married?**

**A:** No, not exactly. Currently, Connecticut law provides that same sex spouses and civil union partners are to be treated just as opposite sex spouses, included for employee benefit and health care purposes. "Spouse" is defined by the state (whether or not expressly defined in the health plan) as to include same sex spouses and civil union partners. Connecticut Public Act 09-13 repeals the civil union law effective October 1, 2010. No new civil unions may be entered into on or after October 1, 2010. However, this repeal does not impact valid civil unions entered into prior October 1, 2010. Parties to an existing civil union may enter into a same sex marriage, but if not, by operation of law, the existing valid civil union merges into a marriage effective October 1, 2010 (unless the civil union has been dissolved or annulled or is in the process of being dissolved or annulled).•

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## • Reminder: Annual Part D Notices Coming Up

Medicare Part-D regulations require all health care Plan Sponsors whose plans contain prescription drug coverage, to distribute an Annual Notice to plan participants who are or who might be eligible for Medicare Part-D coverage or have covered family members who may be eligible. Notices are due each November 15<sup>th</sup>.

On September 18, 2009, CMS released additional updated guidance with new sample notices. Plan Sponsors have the option of using the sample notices or producing their own notices which contain all of the necessary elements, as described in the updated guidance.

This guidance is available on the CMS website: [http://www.cms.hhs.gov/CreditableCoverage/08\\_CCafterJanuary1.asp#TopOfPage](http://www.cms.hhs.gov/CreditableCoverage/08_CCafterJanuary1.asp#TopOfPage).

Plan Sponsors should provide the notice to all health plan participants or Part-D eligible individuals who apply for the Plan's drug coverage as well as to COBRA beneficiaries. Plan Sponsors may mail the notice as a stand alone mailing or choose to incorporate the notice into other documents or disclosures, so long as there is prominent first-page, 14-point reference to the incorporated notice language. Plan Sponsors may also deliver the notice electronically to plan participants who have the ability to access the Plan Sponsor's electronic information system on a daily basis as a part of their work duties. Plan Sponsors should inform participants that they are to share the electronic notice with all family members who are covered under the group health plan. •