The American Recovery Reinvestment Act
and Health Care Reform Puzzle

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### Comparison of Breach Notification Provisions in the HITECH Act\(^1\) and the Alaska Personal Information Protection Act

<table>
<thead>
<tr>
<th>Standard</th>
<th>HITECH/HIPAA</th>
<th>AK PIPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reporting Trigger</td>
<td>Discovery of breach of unsecured protected health information (PHI). “Unsecured PHI” is PHI that is not secured through a means that HHS has approved as rendering the PHI unusable or unreadable to unauthorized persons.(^2)</td>
<td>Discovery or notification of a breach, if there is a reasonable likelihood that harm to the consumers has resulted or will result from the breach.(^3)</td>
</tr>
<tr>
<td>Definition of Breach</td>
<td>The acquisition, access, use or disclosure of PHI in a manner not permitted under HIPAA, which compromises the security or privacy of the PHI.(^4)</td>
<td>Unauthorized acquisition, or reasonable belief of unauthorized acquisition of personal information that compromises the security, confidentiality or integrity of the personal information.(^5)</td>
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<tr>
<td>Exceptions to Breach</td>
<td>Breach excludes unintentional acquisition, access or use of PHI by a person working under the authority of a covered entity or business associate, if made in good faith, within the scope of authority and does not result in further use or disclosure of the PHI. Also excluded are disclosures between persons at the same covered entity, business associate or organized health care arrangement if persons are authorized and information will not be further used or disclosed in an impermissible manner. Finally, the last exclusion is for a disclosure of PHI where the covered entity or business associate has the good faith belief that the information could not have been retained.</td>
<td>Notification not required for good faith acquisition of information by an employee or agent for a legitimate purpose, as long as the information is not used for an illegitimate purpose and is not further disclosed.</td>
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</tbody>
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\(^1\) The Health Information Technology for Economic and Clinical Health Act, which modified the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The regulations regarding breach reporting are still in interim form, regs expected 3/2012.

\(^2\) Please note that even if your data is with a program that meets HHS standards and thus generally “secured”, you could still have unsecured PHI floating on jump drives, cds, home laptops, etc. Guidance can be found at 74 Fed. Reg. 42740 (Aug. 24, 2009).

\(^3\) Determination of whether this will result in harm should be documented in writing and maintained for five years.

\(^4\) For the purposes of this definition, “compromises the security or privacy of the PHI” means poses a significant risk of financial, reputational or other harm to the individual.

\(^5\) “Personal information” means information in any form on an individual that is not encrypted or redacted, or is encrypted and the key has been accessed, and that consists of a combinations of an individual’s name and one or more of the following: SSN, driver’s license or state ID, account numbers, credit card numbers, debit card numbers, personal code, security code, password or personal identification number.
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<td>Type of Notification</td>
<td>Written notification to each individual by first class mail.</td>
<td>Written notification or electronic means if the primary method of communication with the individual is electronic or if it is consistent with the Electronic Signatures in Global and National Commerce Act.</td>
</tr>
<tr>
<td>What to do if Contact Information is not Sufficient?</td>
<td>If contact information is not sufficient for more than 10 individuals, notification must also be on the home page of the covered entity website or in major media (print or broadcast).</td>
<td>Notice may be provided by email, if an email address is available. It must also be clearly posted on the website and provided to major statewide media.</td>
</tr>
<tr>
<td>What if Notice is Cost Prohibitive?</td>
<td>Not addressed.</td>
<td>If cost would exceed $150,000 and number of affected individuals exceeds 300,000, then notice can be provided by email, and should be clearly posted on the website and provided to major statewide media.</td>
</tr>
<tr>
<td>Number of Persons Affected that Triggers Notification to Media</td>
<td>More than 500 residents of a state or jurisdiction.</td>
<td>Any amount, if contact information is insufficient. Otherwise, 300,000.</td>
</tr>
<tr>
<td>When to Send Notice</td>
<td>Within 60 calendar days after discovery. “Discovery” occurs when the breach is known or should reasonably have been known.</td>
<td>In the most “expeditious time possible and without unreasonable delay”…as necessary to determine the scope of the breach and restore the integrity of the information system.</td>
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| Information to be Included in Notice | 1. Brief description of breach, including date of breach and date of discovery.  
2. Description of the types of PHI involved.  
3. Steps the individual should take to protect themselves.  
4. Brief description of what the entity is doing to mitigate, investigate and protect.  
5. Contact procedures for questions or additional information, including a toll-free telephone number, email, Web site or address. | Not addressed. |
| Notice to Government and Third Parties | Required notice to HHS, immediately if more than 500 persons, and in an annual log if less than 500 persons affected. | If more than 1,000 state residents affected, shall provide general notice to consumer credit reporting agencies. |
| Who is responsible for notice? | Covered Entity. Business Associates are required to report to Covered Entities, who are then responsible for notice (unless otherwise agreed upon in the business associate agreement). | “Information distributor” or “information collector”. “Information recipients” are required to notify the information distributor. |
| Delay Permitted? | Yes, for law enforcement, if a law enforcement official states that notice would impede a criminal investigation or otherwise cause damage to national security. Only for 30 days, unless law enforcement request is in writing. | Yes, if a law enforcement agency determines that disclosing the breach will interfere with a criminal investigation. |
| Effective Date of Breach Notification Provisions | September 15, 2009 | July 1, 2009 |
## Providing Health Insurance – What are the costs?

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<tr>
<th>#</th>
<th>Description</th>
<th>Penalties</th>
<th>Cost</th>
</tr>
</thead>
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<tr>
<td>1.</td>
<td>Provide PPACA compliant health coverage for all employees.</td>
<td>None</td>
<td>Cost of health insurance plan that pays for at least 60% of covered health care expenses, with employee cost limited to 9.5% of family income or less.</td>
</tr>
</tbody>
</table>
| 2. | Provide limited health plan to employees.            | Penalty A = $3,000/yr. x (# of full-time equivalent employees receiving the tax credit - 30) | Cost of limited health insurance plan for those employees who choose the plan + Penalty A.  
Penalty A Example 1: If Employer has 100 full-time equivalents and 80 select the employer plan and 20 select the tax credit for alternate coverage, then there would be no penalty because the number of employees receiving tax credit does not exceed 30.  
Penalty A Example 2: If Employer has 100 full-time equivalents and 50 select the employer plan and 50 select the tax credit for alternate coverage, then the penalty would equal $3,000 x (50-30) = $60,000.  
Penalty A Example 3: If Employer has 100 full-time equivalents and 10 select the employer plan and 90 select the tax credit for alternate coverage, then the penalty would exceed the total for Penalty B below ($3,000 x 90-30 = $180,000) and so Penalty A would equal Penalty B: $140,000. Employer would pay this penalty in addition to the cost for the ten employees who selected the plan. |
| 3. | Continue to provide no insurance for employees.       | Penalty B = $2,000/yr. x (# of full-time equivalent employees – 30) | Penalty B  
Penalty B Example: If Employer has 100 full-time equivalents, it would pay $2,000 x (100-30) = $140,000 |
Calculating the Penalty: Is providing health insurance worth it?

- Cost of fully PPACA compliant health plan < Penalty B = Implement compliant plan.
- Cost of fully PPACA compliant health plan > Penalty B = Conduct additional analysis of limited health plan costs.
  - Estimated cost of limited plan + Penalty A < Penalty B = Offer limited plan.
  - Estimated cost of limited plan + Penalty A > Penalty B = Offer nothing.

A few examples:

1. Employer X has 50 employees. He contacted his insurance broker and determined that providing PPACA compliant health insurance would cost $10,000 per year, per employee.
   a. Cost of PPACA compliant health plan = $10,000 x 50 = $500,000
      Penalty B = $2,000 x (50-30) = $40,000
      Cost of PPACA compliant health plan ($500,000) > Penalty B ($40,000)
      Therefore, conduct additional analysis of limited health plan costs
   b. Limited health plan would cost $2,000 per year, per employee and Employer X estimates that ½ the employees would choose the limited plan and ½ would receive the tax credit
      Est. cost of ltd. plan + Penalty A = ($2,000 x 25) + (25-30<0, so no Pen A) = $50,000
      Penalty B = $40,000
      Est. cost of ltd. plan + Penalty A = $50,000 > Penalty B ($40,000)
      Therefore, Employer X is financially better off offering nothing, if he thinks he correctly estimated the number of employees choosing each option.

2. Employer X has 100 employees. He contacted his insurance broker and determined that providing PPACA compliant health insurance would cost $10,000 per year, per employee. He also thinks that ½ the employees will choose the limited option and the other half would choose the credit.
   a. Cost of PPACA compliant health plan = $10,000 x 100 = $1,000,000
      Penalty B = $2,000 x (100-30) = $140,000
      Cost of PPACA compliant health plan ($1,000,000) > Penalty B ($140,000)
      Therefore, conduct additional analysis of limited health plan costs
b. Limited health plan would cost $1,000 per year, per employee

Est. cost of ltd. plan + Penalty A = ($1,000 x 50) + ($3,000 x (50-30)) = $110,000
Penalty B = $140,000
Est. cost of ltd. plan + Penalty A ($110,000) < Penalty B ($140,000)

Therefore, Employer X is financially better off providing a limited plan, if he thinks he correctly estimated the number of employees choosing each option.

3. Employer X has 100 employees. He contacted his insurance broker and determined that providing PPACA compliant health insurance would cost $10,000 per year, per employee. He believes that 10 employees will choose the limited plan and 90 will choose the credit.
   a. Cost of PPACA compliant health plan = $10,000 x 100 = $1,000,000
      Penalty B = $2,000 x (100-30) = $140,000
      Cost of PPACA compliant health plan ($1,000,000) > Penalty B ($140,000)

      Therefore, conduct additional analysis of limited health plan costs
   b. Limited health plan would cost $1,000 per year, per employee

      Est. cost of ltd. plan + Penalty A = ($1,000 x 10) + ($3,000 x (90-30)) = $190,000
      Penalty B = $140,000
      Est. cost of ltd. plan + Penalty A ($190,000) > Penalty B ($140,000)

      Therefore, Employer X is financially better off offering nothing, if he thinks he correctly estimated the number of employees choosing each option.

If the employer has no idea whether his employees will choose the limited option or the tax credit, it will be extremely difficult to determine what option to select.
Health Reform Resources:

- **General Summaries:**
  - White House: [http://www.whitehouse.gov/healthreform/healthcare-overview](http://www.whitehouse.gov/healthreform/healthcare-overview)

- **IRS Guidance on W-2 requirement:**

- **Affordable Care Act Tax Provisions:**

- **Great flowchart on employer requirements:**
  - [http://healthreform.kff.org/~/media/Files/KHS/Flowcharts/requirement_flowchart_2.pdf](http://healthreform.kff.org/~/media/Files/KHS/Flowcharts/requirement_flowchart_2.pdf)

- **Robert Wood Johnson Health Policy Brief Series on Health Reform Issues:**
  - [http://12.26.46.21/coverage/product.jsp?id=43708](http://12.26.46.21/coverage/product.jsp?id=43708)