

Does HIPAA Require Our Company to Obtain an Individual's Authorization Before Receiving the Individual's Protected Health Information (PHI) for FMLA Compliance Purposes?

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QUESTION: Our company occasionally requests individually identifiable health information in connection with our obligations under federal laws other than HIPAA. For example, we may request a medical certification of a serious health condition under the FMLA. Does HIPAA require us to obtain an individual's authorization in these circumstances?

ANSWER: When an employer seeks health information under a federal law other than HIPAA, the employer must comply with both HIPAA and the other federal law. Whether an authorization is required under HIPAA depends on the person to whom the information relates and the source from which the information is obtained. Often, an employee seeking leave under the FMLA will obtain requested information from a health care provider and then forward it to the employer. Although the information is PHI when it is in the hands of the provider, the provider can disclose the individual's own PHI to that individual without an authorization. HIPAA does not affect the employee's ability to then provide that information to the employer.

But the answer is different if the employer and health care provider communicate directly. The provider's information about the employee's medical condition is PHI, and it cannot be released to the employer except as permitted under HIPAA. In general, HIPAA requires that the employee specifically authorize the disclosure. Thus, the provider (assuming the provider is subject to HIPAA, as most are) would not be willing to disclose information to the employer without an individual authorization that satisfies all of HIPAA's technical requirements. If the employee is seeking FMLA leave because of an eligible family member's illness, the information would relate to the family member, not the employee. In such situations, a provider would likely require the family member's authorization to release the information to either the employee or the employer.

FMLA regulations also limit the contact that an employer may have with an employee's health care provider. If the employee submits a sufficient medical certification signed by a provider, the employer may not request additional information from the provider. However, the employer may contact the provider (through a representative who is a health care provider, human resources professional, leave administrator, or management official—but not the employee's direct supervisor) for purposes of clarification and authentication of the medical certification after the employer has given the employee an

opportunity to cure any deficiencies. Even then, if the clarification or authentication involves the disclosure of individually identifiable health information, the employee's HIPAA authorization should be obtained. If the employee refuses to provide the authorization, the employer may deny the FMLA leave.

For more information, see EBIA's HIPAA Portability, Privacy & Security manual at Section XXIII.D.4 ("Authorization May Be Required to Obtain PHI for Purposes of FMLA or ADA") and EBIA's Group Health Plan Mandates manual at Section XVII.I ("HIPAA Privacy and the FMLA").

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