

HIPAA Anyone?

Been to the doctor lately? How about a visit to your dentist? If so, you've probably frequently heard, "I'm sorry, you will have to sign this HIPAA form." Americans have become increasingly concerned about the privacy of their health and personal information that they hand over to professionals everyday.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) assisted in creating new minimum federal privacy standards for individual health care information. April 14, 2004, was the compliance date for the HIPAA Privacy Rule for small health plans, which are plans that spend less than \$5,000,000 in premium annually if fully insured, or that pay less than \$5,000,000 in claims annually if self-insured.

Independent agents and brokers need to be aware of how these relatively new laws and regulations affect them. Proactively comply with these privacy requirements to protect yourself from the potential of incurring significant penalties and liability that may not be covered by insurance.

If your agency participates in any of the following, producers should conduct a thorough review of the HIPAA rules:


- Does the producer sell health insurance directly to an individual?
- Does the producer sell a group health plan to an employer?
- Does a producer/third-party administrator set up and/or manage a self-insured health plan that is covered by stop loss insurance?

If a government entity audits an agency for a possible HIPAA or other privacy violation, it will want to see to what extent the agency complied with applicable laws. Virtually all E&O policies will not indemnify the insured for fines or penalties. However, E&O policies are available that contain additional coverages that, absent of other limitations or exclusions, provide coverage for responding to an investigation by any state regulatory agency, insurance department or other government agency.

Regulations require the agency to protect the privacy of personal information by adopting appropriate policies and procedures. Did you provide restricted access to only those employees who needed to see the information? Did the agency give employees a policies-and-procedures manual and provide training?

As with any claim submitted, whether it is covered will always depend on the particular facts and circumstance of the claim and the form of the policy issued. It is important you read and understand your policy. There are, however, certain general coverage guidelines. For example, did the alleged violation arise out of the insured's providing services as a general insurance agent, insurance agent or insurance broker? If so, policies generally cover claims caused by negligent acts, errors or omissions in rendering services to others. Activities may be covered under additional coverages or by endorsement.

Whether the claim is covered will depend upon how or why the information was used. If the information was disclosed in the course of placing an insurance policy or submitting a claim under a policy, the alleged error would most likely, absent of other limitations or exclusions, be a claim covered under the policy. However, if the information was disclosed to a company seeking marketing information or an individual seeking contact information, the claim would most likely not be covered.

It is important to talk to your carriers. Ask for written instructions on your compliance obligations from the insurance carrier's standpoint, and then implement the processes outlined by your carriers. It pays to comply. 

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Factors Affecting Coverage

What limitations or exclusions are likely to affect coverage? Remember, whether a limitation or exclusion applies depends on the facts and the circumstances of any given claim. There are, however, some policy terms

that are likely to affect coverage for HIPAA violation claims:

- For intentional acts, E&O policies will only cover negligent acts including but not limited to acts of dishonesty, fraud, criminal conduct, malice or assault or battery. Other policies' provisions state the exclusion does not apply to insureds

who do not personally participate in or ratify the intentional acts and who give notification once discovering such acts.

- Some E&O policy forms exclude any dishonest, fraudulent, criminal or malicious acts or assault or battery. You can purchase an endorsement that says the exclusion does not apply to insureds who do not personally participate in or ratify the intentional acts and who notify the E&O carrier once such acts are discovered.
- The exception is insured vs. insured. E&O policies do not cover claims or disputes between insureds, which may include shareholders, directors, officers, former officers and directors, employees, former employees and independent contractors.

—R.E.

