



AMERICAN ACADEMY *of* ACTUARIES

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April 25, 2002

U.S. Department of Health and Human Services  
Office of Civil Rights  
Attention: Privacy 2  
Hubert H. Humphrey Building, Room 425A  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

Attention: Felicia Farmer

Re: Standards for Privacy of Individually Identifiable Health Information:

I am writing to you as Vice-Chair of the American Academy of Actuaries' Workers' Compensation Subcommittee to assist the Department of Health and Human Services ("HHS") in considering revisions to its Standards for Privacy of Individually Identifiable Health Information (65 Fed. Reg. 12433), as proposed March 27, 2002 (67 Fed. Reg. 14776).

The American Academy of Actuaries is the public policy organization for actuaries practicing in all specialties within the United States. A major purpose of the Academy is to act as the public information organization for the profession. The Academy is non-partisan and assists the public policy process through the presentation of clear and objective actuarial analysis. The Academy regularly prepares testimony for Congress, provides information to federal elected officials, comments on proposed federal regulations, and works closely with state officials on issues related to insurance. The Academy also develops and upholds actuarial standards of conduct, qualification and practice and the Code of Professional Conduct for all actuaries practicing in the United States.

The Academy recommends that any medical privacy legislation or regulation ensure that the workers' compensation (WC) system continues to operate efficiently, while still protecting the privacy of WC claimants. We put together the attached "Public Statement on Medical Privacy in the Workers' Compensation System" to highlight our concerns on this issue for regulators and legislators. The attached "Addendum" provides specific examples of how system performance may be affected and how costs might increase if privacy regulations and legislation do not explicitly authorize and list permissible disclosures of individually identifiable medical information to WC service providers along with restrictions on further disclosure of this information to other parties. Please contact us if you have questions on these documents or if we can be of further assistance.

Sincerely,

Richard A. Hofmann, ACAS, MAAA, Vice-Chair  
Workers' Compensation Subcommittee



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## PUBLIC STATEMENT ON

### **Medical Privacy in the Workers' Compensation System**

In 1996, the Health Insurance Portability and Accountability Act (HIPAA) charged the federal government with developing a set of rules regulating medical privacy within the health insurance system. In 2001, the U.S. Department of Health and Human Services (HHS) released their Standards for Privacy of Individually Identifiable Health Information, which do not directly apply to the workers' compensation (WC) system, but still include provisions that limit the flow of medical information from covered entities to WC insurers and benefit administrators. The privacy of medical information of patients injured while working should be considered no less sacrosanct than that of those patients injured outside of work. However, the American Academy of Actuaries (the Academy) believes that any medical privacy legislation or regulation must ensure that the WC system continues to operate efficiently, while still protecting the privacy of WC claimants. The Academy is concerned that medical privacy provisions need to recognize the difference in information needs between group health and WC claim payers, or else restricting the flow of information could lead to increased costs for employers from:

- delays in the delivery of appropriate medical treatment, because WC payers must first determine whether the injury was work related and must be aware of other conditions to authorize appropriate treatment plans.
- delays in the payment of workers' compensation benefits for lost wages, because lack of medical information may impede the ability of WC payers to reduce lost wage benefits through aggressive treatment protocols.
- delays in returning injured workers to their jobs, because employers need information on medical conditions to determine if an injured worker is able to return to work, to assess the appropriate accommodations for light duty or restricted capacity, and to assure that the return to work won't result in re-injury.
- difficulties administering state workers' compensation second injury funds, if information on pre-existing conditions is not available, and
- increased durations of disability, because of other delays in administering the WC system (e.g. independent medical examiners may be unable to obtain the information needed to determine the degree of permanent disability after maximum medical improvement occurs)

WC service providers rely on timely medical information to reserve claims, assess return to work options, control losses, administer loss prevention programs and determine coverage, among other functions. While it is appropriate that regulations govern how medical information is used for these purposes, overly restrictive regulations could restrain the WC system and increase costs. In the extreme, concerns about potential penalties associated with the release of medical information to WC providers in Hawaii after it passed its medical privacy act caused WC hearings to stop and virtually shut down the system in that state. Hawaii's act has since been repealed.

The bottom line is to enact provisions that will protect the medical privacy of all WC claimants without compromising the efficiency and effectiveness of the workers' compensation system. To that end, the Academy recommends that all regulations and future legislation addressing this issue explicitly authorize and list permissible disclosures of individually identifiable medical information to employers and WC service providers along with restrictions on further disclosure of this information to other parties. This will preserve prompt access to the information WC service providers need for medical services and benefit administration, while still protecting the privacy of claimant medical information. In conclusion, the Academy cautions public policymakers that implementing medical privacy provisions without clarification on the permitted disclosures to WC service providers could reduce the efficiency and effectiveness of the WC system and increase costs to employers. The Academy's WC Working Group is available to provide specific examples of how costs might increase and answer questions public policymakers may have on this issue.



**ADDENDUM to PUBLIC STATEMENT  
ON  
Medical Privacy in the Workers' Compensation System**

The American Academy of Actuaries (the Academy) cautions public policymakers that implementing medical privacy provisions without clarification on the permitted disclosures of protected health information (PHI) to workers' compensation (WC) service providers and other parties could reduce the efficiency and effectiveness of the WC system and increase costs to employers. The Academy's WC Working Group has compiled the following specific examples of how system performance may be affected and how costs might increase if privacy regulations or legislation does not explicitly authorize and list permissible disclosures of individually identifiable medical information to WC service providers along with restrictions on further disclosure of this information to other parties.

- 1) Claim Frequency - If injured workers refuse to authorize release of PHI, or if doctors believe that regulations prevent them from transmitting information related to prior medical conditions, some WC claim payers may opt to pay many smaller claims that would not have been covered prior to adoption of privacy regulations rather than deny them and incur substantial legal costs. If claims due to non-occupational injuries are covered more often prospectively due to lack of medical information, this will increase the overall cost of WC coverage. Furthermore, claim frequencies may also increase if restrictions on the release of PHI inhibit the ability of employers to access the individual claim information needed to design loss prevention programs, especially the redesign of workstations and other ergonomic programs included in the Department of Labor proposed ergonomic standards.
- 2) Litigation & Administrative Costs – The alternative to accepting claims with insufficient documentation is to deny them and force the release of information through the formal hearing process. This could delay the receipt of both lost income and medical benefits for the injured worker, plus the workers' information could become subject to public disclosure through the hearing process. Both employers and employees would incur legal costs on a significantly higher percentage of cases, and the budget of state workers' compensation agencies will have to increase in order to handle the increased caseloads.
- 3) Medical Claim Severity – Medical providers may experience increased costs and risks if they are required to make legal determinations as to what information is the minimum necessary to release when the WC claim payer requests “all the medical records you have on the patient,” as is commonly the case. This may result in the denial of care by the provider or delay in the receipt of payments. Delays in the receipt of information may inhibit the use of managed care techniques designed to reduce costs. The key to controlling WC medical costs is early intervention and providing appropriate care for the injured worker. Without knowledge of pre-existing conditions, a WC payer may not authorize a more expensive initial treatment plan, which may have been deemed appropriate if complete medical information had been provided. An inappropriate treatment plan could lead to further complications, extended medical care, and significantly higher indemnity costs due to a prolonged period of disability.
- 4) Indemnity Claim Severity – Restrictions on the release of PHI to WC payers could increase the amount and duration of disability benefits in several ways. First, temporary disability payments may increase due to the extended amount of time needed to accept or deny a claim. If the WC payer routinely denies claims due to insufficient information, then more claims are likely to be litigated and result in longer durations. Alternatively, if the WC payer routinely begins payments immediately to avoid litigation, then

more will have been paid on claims that were ultimately denied. Second, if employers are unable to receive adequate information on the accommodations needed to facilitate the injured workers' ability to return to work at either restricted or full capacity, then temporary total and/or partial benefits may increase. Finally, restrictions on PHI could affect the amount and timing of permanent partial benefits by inhibiting the ability of the WC payer (or an independent medical examiner assigned by the state) to determine if the injured worker has reached maximum medical improvement and if so, the degree of permanent disability.

- 5) Insurance Industry Financial Uncertainty – With reduced knowledge of a claimant's medical history, claim analysts may be less able to accurately estimate the ultimate cost of claims when establishing individual claim reserves. Because of this potential change in case reserve adequacy, it will likely take many years for actuaries to accurately assess the ultimate cost of claims in the new environment. This uncertainty could adversely affect the adequacy of future rate and reserve levels and may impair the financial condition of the WC insurance industry.

In conclusion, the Academy believes that privacy regulations should be designed to preserve prompt access to the information that WC service providers need to administer benefits and medical services to injured workers, while still protecting the privacy of claimant medical information. Otherwise, the potential cost increases cited above could ultimately be borne by employers and/or insurers. Injured workers may also suffer significant delays in receiving benefits and a potentially greater loss of privacy due to an increasingly litigious WC system.