



**CHANGES in COBRA, MILITARY LEAVE,
HIPAA and THE FAIR LABOR STANDARDS ACT**

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Changes in COBRA, Military Leave, HIPAA and the Fair Labor Standards Act

Two years ago on April 23, 2004 the U.S. Department of Labor issued new regulations amending key provisions of the Fair Labor Standards Act (the “FLSA”). The most significant changes were to what are commonly referred to as the “White Collar Exemptions” – the exemptions from overtime and minimum wage that are afforded to bona fide executive, administrative, professional, and computer science personnel under 29 C.F.R. §241. The Fair Pay regulations have now included a fifth category of exempt employee – the “highly compensated” employee.

As the preamble to the new regulations sets forth, the regulations have adopted the evolving case law of the recent past. The very lengthy (278 pages) preamble must be read to fully understand how the new regulations will be interpreted by DOL and the courts, in the future. In many cases the preamble helps illuminate and define the terms that are in the regulations. The preamble is found on the DOL’s website at www.dol.gov/fairpay.

A. Exclusions from the White Collar Exemptions

The Fair Pay regulations added a new section C.F.R. §241.3 which restricts the reach of the white collar exemptions. Blue collar workers, manual laborers, and any other worker who performs work involving repetitive operations with their hands, physical skill and energy are expressly excluded. Also, the regulations now expressly provide that all police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, park rangers, fire fighters, paramedics, EMT/ambulance personnel, investigators, inspectors correctional officers, probation and parole officers, can not be exempt under the white collar exemptions regardless of their rank or pay level. The regulations specifically state that that the primary duty of public safety personnel is public safety rather than any other auxiliary executive or administrative functions that may be performed. Under well established case law, FLSA exemptions are to be narrowly construed. Arnold v Ben Kanowsky, Inc., 361 U.S. 388 (1960).

B. Basic Criteria for White Collar Exemption

There are three criteria that must be met in order for a position to fall within one of the White Collar Exemptions.

1. Salary Level Test

Exempt individuals must be paid a minimum salary. There are two “salary level” tests. For most white collar exemptions, a minimum weekly salary of \$455/week (\$23,660/year) must be paid.¹ There is now a separate duties test for individuals who earn \$100,000 or more annually (provided that this amount includes a minimum salary of \$455 weekly). The work performed must not be manual or involving repetitive operations with the hands, physical skill, or energy and was customarily and regularly performed one or more exempt duties of an executive, administrative, or professional employee. 29 C.F.R. §41.601. The \$100,000 may include commissions and non-discretionary bonuses. These positions are called “Highly Compensated” employees.

2. Salary Basis Test

Employees included within the White Collar exemptions must be guaranteed a weekly salary which is defined as a predetermined amount of compensation each pay period. The salary can not be reduced because of the quality or quantity of the work performed or because of absences of less than one week. Improper deductions from salary will defeat the exemption and the courts have been very strict on upholding this rule. While partial day deductions from pay will still violate the salary basis test, there is one notable exception. Now disciplinary suspensions without pay may be imposed for one day or more (formerly it was an increment of one week) provided that the work rule violated was set forth in written policy (and not for an issue relating to attendance or performance). One of the principal ways to defeat the salary basis is the record keeping and payroll practices used by the employer. Hour for hour recording of time, paying extra compensation on an hour for hour basis may defeat the exemption. However, deductions from accrued leave accounts are permissible as well as paying addition compensation beyond the minimum guaranteed salary of \$455 may be permissible.

¹ If an individual’s salary is less than \$455 weekly, overtime compensation is guaranteed no matter what the duties of the position entail. 29 CFR §540.600.

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The regulations must be carefully scrutinized to determine if payroll and record keeping practices comport with the rules applicable to the salary basis test.

3. Primary Duty Test

To be exempt, each of the five “White Collar” type positions must meet the “primary duty” test established for that exemption. The short and long tests formerly in the regulations have been eliminated and now there is only one primary duty test for each exemption. The definition of primary duty is found in 29 C.F.R. §241.700. The primary duty is the employee’s “principal, main, major, or most important duty.” It includes factors such as the importance to the organization of the exempt duties, the time spent on performing exempt duties, the employee’s freedom from supervision in the exercise of the exempt duties, and the relationship between the employee’s salary and the compensation paid to non-exempt employees. DOL rejected the arguments that a numerical rule should be established for time spent on exempt duties. Generally if an employee spends 50% or more of work time on exempt duties, the primary duties test will be met.² The primary duty will be assessed based on all the facts of the case “with a major emphasis on the character of the employee’s job as a whole.”³ “Customarily and regularly” is defined in 29 C.F.R. §241.701; it does not mean the majority of the time, however, exempt work must be performed “recurrently” and “every workweek.”

C. Executive Employee Exemption

An executive’s primary duty must be the management of the enterprise or a recognized department or subdivision of the enterprise and must customarily and regularly direct the work of two or more full time employees.⁴ In addition, the executive must have the authority to hire and fire the employees or to make recommendations as to hiring, firing, advancing, or promoting that are given particular weight. 29 C.F.R. §241.100(a)(4). Management duties are defined in 29 C.F.R. §241.102 and include

² The regulations provide a useful example of a position that would not be exempt - an assistant retail store manager who spends over 50% of his time on the cash register and who is closely supervised by the manager and who earns little more than the nonexempt employees. 29 C.F.R. §241.700(c).

³ DOL adopted the reasoning of the Fourth Circuit in Counts v South Carolina Electric & Gas, Co., 317 F. 3d. 453 (4th Cir. 2003).

⁴ Two or more full-time or the equivalent. 29 C.F.R. §241.103. Volunteer labor or intermittent supervision does not count.

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interviewing, selecting, training, setting or adjusting pay rates, directing work, maintaining records, evaluating employees, handling employee complaints, disciplining, planning work, budgeting, etc. The frequency in which these duties are exercised or the recommendations on such actions sought and relied upon will be determinative. 29 C.F.R. §241.105.

D. Administrative Employee Exemption

An administrative employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers and include the exercise of discretion and independent judgment with respect to matters of significance "directly related to the management or general business operations" of the enterprise. (C.F.R. §§541.200 and 541.201). The regulations define "directly related to the management or general business operations" as "work directly related to assisting with the running or servicing of the business, as distinguished, for example from the working on a manufacturing production line or selling a product in a retail or service establishment."

The types of functions that are included as administrative in nature are tax, finance, accounting, budgeting, auditing, and insurance, quality control, purchasing, procurement, advertising, marketing, research, safety/health, personnel management, human resources, computer network, internet and database administration, legal/compliance, and similar activities. C.F.R. §541.201(b).

The exercise of discretion and independent judgment test requires that the employee compare and evaluate possible courses of conduct and act or make decisions after the various possibilities have been considered C.F.R. §541.202(a). In evaluating whether an employee exercises discretion and judgment, factors to consider include: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters with financial impact; whether the employee has authority to waive or deviate from established

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policies/procedures without prior approval; whether the employee has authority to negotiate/bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in short or long term business planning; whether the employee investigates and resolves matters of significance on behalf of management; whether the employee represents the company in handling/resolving grievances or in arbitrations (C.F.R. § 541.202(b). Whether the employee must meet one or more of these factors, has not been addressed in the regulations. Further, the regulations state that exercise of judgment/discretion is not negated by the fact that the employee's decision-making may not be final or unlimited for clearly in most work environments, decisions of most employees have some level of review by higher management. C.F.R. § 541.202(c) Discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources. C.F.R. §541.202(e) and C.F.R. §541.704. Clerical or secretarial work is excluded, as are data tabulation and other "mechanical, repetitive, recurrent, or routine work."

The regulations (C.F.R. §541.203) include ten (10) illustrative examples:

- Insurance Claims Adjuster: Generally exempt if, but duties include interviewing, inspecting, making recommendations regarding coverage, determining liability and claim value, negotiating settlements, and making recommendations regarding litigation.
- Financial Services Employees: Generally exempt if duties include collecting and analyzing customer financial data; matching customers to financial products; advising customers regarding different financial products; marketing, servicing or promoting financial products. However, the regulation contains a proviso stating that employees whose primary duty is selling financial products do not qualify for the exemption.
- Executive Assistant: Generally exempt if principal assistant to proprietor or senior executive and working without specific instructions and with delegated authority.

- Human Resources Managers: Generally exempt if the primary duty involves formulating, interpreting, implementation.
- Purchasing Agents: Generally exempt if the employee has the authority to bind the company on significant purchases.
- Inspectors: Ordinary inspection work will not qualify for the exemption.
- Examiners or Graders: Traditionally non-exempt as are lumber graders.
- Comparison Shoppers: Generally non-exempt if duties involve merely reporting to buyers; generally exempt if duties involve evaluating to set employer's prices.
- Public Sector Investigators/Inspectors: Generally non-exempt.

The regulations also specifically provide for exemptions for administrative work in educational establishments including K-12, special education, and licensed trade schools (C.F.R. §541.204). Academic administrative functions must relate to educational functions and excludes work such as building maintenance, psychologists, dietitians, and room managers (who may be exempt under other exemptions).

E. Professional Employee Exemption

A professional employee's primary duty must involve the performance of work requiring "advanced knowledge" in a "field of science or learning" customarily acquired by prolonged intellectual instruction. 29 C.F.R. §241.301 This requires generally an advanced academic degree, however, the new regulations allow for work experience to count if such experience is one leading to a traditional area of expertise deemed professional, e.g. practicing law or chemistry without the degree. C.F.R. §541.301(d) The regulations specifically exclude "mechanical arts or skilled trades." C.F.R. §541.301(c).

The regulations provide examples of professions that meet the exemption: lawyers, doctors, accountants, actuaries, architects, scientists, pharmacists, certified medical technologists, registered nurses (but not LPN's),⁵ dental hygienists (who have

⁵ However, in order to maintain the exemption, nurses must be paid on a purely fee or salary basis with no part of the compensation in the form of hourly wages. Elwell v University Hospital Home Care Services, April 2006

completed approved four year degree programs), teachers, physician assistants (who have completed accredited programs), executive and sous chefs (who have completed four year culinary arts programs) (but not cooks), athletic trainers (if certified and with a four year degrees), licensed funeral directors and embalmers. Paralegals are not exempt professional employees unless they would qualify by virtue of advanced specialized degrees in other fields such as the occasional engineer/paralegal. C.F.R. §541.301(e)(7).

The regulations allow for new types of professionals to come into existence as recognized by certifying organizations. C.F.R. §541.301(f). The regulations also continue to provide for creative professionals (C.F.R. §541.302).

F. Computer Employee Exemption

The regulations concerning computer employees have made a few substantial changes. Employees exempt under this exception must be paid on a salaried basis with an hourly rate at a minimum of \$27.63/hour. C.F.R. §§541.400, 541.402 The duties tests remain largely the same as before. The primary function must be computer systems analysis or programming. Employees working with computers who otherwise meet the tests for the executive or administrative exemption may be classified as exempt in accordance with those regulations.

G. Window of Correction

Liability for improper deductions will be limited to the time period in which the improper deductions were made, for employees in the same job classifications and working for the same managers responsible for the actual improper deductions.

Window of Correction or safe harbor rules have been reaffirmed and clarified. There will now be no loss of an exemption if the employer has a clearly communicated policy prohibiting improper deductions, reimburses employees for any improper deductions, and makes a good faith commitment to comply in the future.

Payroll practices which do not compromise the salary basis include: deductions from accrued leave accounts; time keeping requirements; scheduled shifts; paying additional compensation beyond minimum guarantee of \$455/week.

MILITARY LEAVE

The Uniformed Services Employment and Reemployment Rights Act (“USERRA”) regulations implementing post 9/11 amendments to the act took effect on January 18, 2006. USERRA protections against discrimination and retaliation, provides job restoration rights, and other benefits to those who have to leave employment for uniformed service. Uniformed service includes active duty in the armed services and their reserves as well as full-time service in the Army and Air National Guards, commissioned service in the Public Health Service and certain service in the National Disaster Medical System; active or inactive duty for training; and examinations for fitness for duty.

USERRA protections apply to all employees, full-time, part-time, seasonal, temporary, those on leaves of absence, and all others who are on the payroll. USERRA provides the following:

- Time off or intermittent leave before uniformed service starts in order for the employee to prepare for the military service.
- Paid military leave is not required but employers may but may do so (it is not uncommon for an employer to pay differential pay; note under Virginia law, local and state governments must provide 15 days of paid leave per fiscal year).
- Health coverage and other benefits are to be provided in the same manner as they are provided to anyone on leave without pay status.
- COBRA continuation rights are for a 24 month period (however, if the uniformed service is for less than 31 days, the employee does not have to pay the premium costs if those costs are covered by the employer during the period of pre-departure employment).

- Military leave is to count as “hours worked” for the purpose of determining employee eligibility for Family and Medical Leave (1250 hours within the 12 month period.
- Restoration rights are not lost if an pre-departure election is not made; USERRA job restoration rights to be preserved must be exercised within fixed periods of time depending on the length of service – within one day for service less than 31 days, within 14 days for service of 31-180 days, and 90 days for service longer than 180 days.
- When reinstated the employee is to be returned to the same position, status, seniority, and rate of pay that the employee would have received had he remained continuously employed (“escalator principle”).
- Returning employees may only be terminated for cause within the first year after their return if they served more than 180 days and within 180 days after their return if they served from 31-180 days.

The employer must post the USERRA notice in a prominent place in all work sites. The notice may be obtained at www.dol.gov/vets/programs/userra/USERRA_Private.pd#Non-Federal.

State Law Requirements

Employees of the state and political subdivisions of the Commonwealth are to receive 15 days of paid leave per federal fiscal year for military service. See § 44-93 of the *Code of Virginia*. This section also allows a local government to supplement the military pay of an employee on active federally funded duty to the extent the combined military pay and supplemental pay is equivalent to the employee’s regular pay. Section 44-93.1 allows the Commonwealth to provide such a supplement in pay. School divisions are required to provide supplemental pay. See 22.1-289.1. Effective July 1, 2006, a public employer must pay an employee who is to report to work within 8 hours after discharge for the full shift if the return to employment is for less than a shift.

HIPAA

Employers are indirectly regulated by HIPAA if they are a plan sponsor of ERISA health plans. An employer's health plan with fewer than 50 participants and which is self administered by the employer is excluded. Employers may also be directly covered as a provider entity if they have an on-site health clinic or provide on-site healthcare services for which they bill electronically. However, most employers are indirectly covered because they sponsor employee health plans that are covered entities. The extent to which employers are impacted depends upon whether the group health plan is fully-insured or self-insured.

A. Protected Health Information (PHI) (defined at 45 C.F.R. §160.103)

Protected health information (PHI) is individually identifiable information, including demographic information, related to the past, present, or future physical or mental health or condition, the provision of health care to an individual, or the past, present, or future payment for such health care, that is created or received by a covered entity. Individually identifiable information (45 C.F.R. §164.514(b)(2)) covers a broad range of identifiers of the individual, his relatives, employer or household members, including:

- name, address, telephone numbers, and email addresses
- social security number
- account numbers used to identify the patient in medical records, health plans
- certificate/license numbers, vehicle and device identifiers, serial numbers
- biometric identifiers (finger/voice prints), photographic images
- all elements of dates (except year) including birth date, admission date, discharge date, date of death, and all ages over 89

B. Physician's Notes

Medical information found in employee records is not PHI. HIPAA provides exceptions from the definition of PHI for medical information found in employee records

(45 C.F.R. §164.501) and for medical information created pursuant to OSHA medical surveillance obligations. (45 C.F.R. §164.512(b)(1)(v)) [Note: Although this information may not be covered under HIPAA, other federal and states laws place confidentiality restrictions on medical information]

C. Employer-Sponsored Health Plan

Although most employers are not covered in their role as an employer, they may sponsor employee health plans which are covered entities. In addition to sponsoring a plan, the employer may also be a plan administrator and plan fiduciary under ERISA. HIPAA recognizes that, under ERISA, a plan and its plan sponsor are separate legal entities. However, in practical terms it is the plan sponsor, *i.e.*, the employer that typically acts on behalf of the plan because the plan has no employees. Therefore, it will be the employer's responsibility as the plan sponsor and fiduciary to ensure the plan's compliance with the HIPAA regulations. An employer must examine each benefit it offers (*i.e.*, major medical, dental, optical, EAP, health reimbursement account, flexible spending account, and specialty medical policy such as cancer policy) to determine if it meets the HIPAA definition of a health plan and, if so, examine the employer's responsibilities under HIPAA. These responsibilities can vary from plan to plan.

Employers offering self-insured health plans will be the most directly affected. They will be responsible for the plan's full compliance with HIPAA regulations, even if they use a TPA for plan administration. Employers offering fully insured plans will be able to delegate many compliance functions to the insurer but the employer's group health plan will retain some responsibilities.

D. Requirements for Self-Insured Health Plans

A self-insured or self-funded group health plan with 50 or more participants sponsored by an employer must comply with all health plan requirements under the Privacy Regulations. Some of the key requirements are discussed below:

1. Notice of Privacy Practices (NPP).

The group health plan must have a notice of privacy practices available for any enrolled participants. Distribute if the named insured, *i.e.* employees, but not to dependents. 45 C.F.R. §164.520.

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2. Authorizations.

A health plan does not need an individual's consent or acknowledgment of its notice of privacy practices to use or disclose PHI for treatment, payment, or health care operations. (45 C.F.R. §164.506.) These activities include claim payment, stop-loss claims, subrogation, evaluating plan performance, underwriting, auditing, and medical reviews. A number of other disclosures do not require consent or authorization, including disclosures to comply with Workers' Compensation laws. 45 C.F.R. §§164.510 and 164.512.

Other uses and disclosures of information by the health plan require a written authorization from the individual. See 45 C.F.R. §164.508.

3. Complaints.

(45 C.F.R. §164.530(d)) The health plan must establish a procedure to handle privacy complaints from individuals. The notice of privacy practices should explain whether individuals should contact the TPA or the employer with complaints.

4. Business Associate Agreements.

(45 C.F.R. §504(e)) Any outside entity that receives PHI from the plan in order to perform functions on behalf of the plan is a business associate of the health plan. Business associates may include, for example, TPAs, preferred provider organizations, utilization review companies, subrogation recovery firms, accounting firms, insurance brokers, consultants, and outside legal counsel. The plan must have the required business associate agreements in place with each such business associate.

5. Administrative Requirements.

The employer-sponsored health plan is also subject to the Privacy Regulations' administrative requirements. See 45 C.F.R. § 164.530. The plan must:

- Designate a privacy official;
- Document the plan's privacy policies and procedures;

- Conduct privacy training;
- Establish information security measures;
- Establish a system for reporting noncompliance; and
- Establish and enforce sanctions for policy violations.

6. Limited Employer Access to PHI.

(45 C.F.R. §164.504(f).) Employers may not access any health plan PHI for non-plan purposes, and especially not for employment-related purposes. For example, an employer may not reassign an employee to another job based on information from the health plan that the employee is being treated for alcoholism. An employer receives personal information about the employees from a variety of sources, including directly from the employee. The concern of the Privacy Regulations, however, is information received from or through the employer's health plan.

7. Firewalls.

Employers must establish a "firewall" between plan-related uses of PHI and general corporate or employment-related uses of PHI. 45 C.F.R. §164.504(f)(2)(iii). Employers who currently have the same individual or group of individuals handling all benefit plans plus human resource matters should consider separating these functions. In small organizations where having different staff members for these functions is not feasible, the employer should, at a minimum, establish policies and conduct training regarding the confidentiality of PHI and the need to restrict uses as well as disclosures.

TPAs contacting an employer will need to be careful about the staff members at the employer's offices with whom they communicate, so that PHI is communicated only to authorized personnel. Covered entities and business associates will need to carefully consider the appropriate avenues of communication.

Employment records are not PHI, even if they contain health information about an employee. Employment records are not subject to this HIPAA's "confidentiality" requirements. Employment records may include medical information needed for an employer to carry out its obligations under the Family and Medical Leave

Act, Americans with Disabilities Act, and similar laws, as well as files or records related to occupational injury, disability insurance eligibility, sick leave requests and justifications, drug screening results, workplace medical surveillance, and fitness-for-duty tests of employees. Although not subject to the HIPAA "confidentiality," These type records have always been subject to "confidentiality" requirements under the Americans with Disabilities Act and must be kept separate from other personnel records.

8. Plan Document.

The health plan's plan document must be amended to include a number of specific provisions relating to privacy. See 45 C.F.R. § 164.504(f). No disclosures from the health plan to the employer are permitted until the plan document is amended. The plan document must identify all permitted and required uses and disclosures of PHI by the employer for plan administration purposes. The plan document must state that the employer will not use PHI received from the plan for employment-related actions or decisions, or in connection with any of the employer's other health plans. The plan document must identify which employees or classes of employees of the plan sponsor, or other persons under control of the plan sponsor, are to be given access to PHI (e.g., a benefits clerk, a benefits committee, or claims appeal committee). In addition, the employer must ensure that there is adequate separation between the employer and the plan to protect the privacy of plan-held information.

E. Insured Health Plans

Employer-sponsored health plans that offer benefits through an insurance contract with a health insurance company or HMO (Insured Plans) are also covered entities under HIPAA. For Insured Plans, however, most of the compliance responsibilities discussed above will fall on the insurer or HMO, since they are already covered entities under HIPAA. For example, the insurer or HMO will typically provide the Notice of Privacy Practices and handle compliance with regard to the individual's right to access and amend their records, and to obtain an accounting of disclosures. The policy behind this limited-compliance approach for the Insured Plan is that the insurance company or HMO will be providing these individual rights and privacy

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protections in its own role as a covered entity, and the incremental value of having the employer's Insured Plan duplicate these activities would not justify the additional burdens on the plan sponsor. The obligations of an employer that sponsors an Insured Plan with regard to HIPAA compliance are determined by the approach the plan takes to PHI.

1. The Hands-Off Approach.

Insured Plans can reduce their privacy obligations if they take a "hands-off" approach to PHI. An employer-sponsored health plan is not subject to most Privacy Regulations requirements if it provides benefits solely through an insurance contract with an insurer or HMO. To qualify under this "hands-off" approach, the Insured Plan may not create or receive any PHI, except in two limited situations. It may receive and use enrollment and disenrollment information and it may receive and use summary health information for the purpose of obtaining premium bids or modifying, amending, or terminating the plan. 45 C.F.R. § 164.504(f)(1)(ii). Even under this "hands-off" approach, there are two obligations on the Plan sponsor. It cannot retaliate against or intimidate an employee exercising his or her rights under the Privacy Regulations or require that an employee waive his or her right to file a complaint with DHHS as a condition for eligibility or participation in the plan. 45 C.F.R. § 164.530 (g), (b), (j), and (k). If the Insured Plan shares any PHI with the plan sponsor (employer) other than enrollment/disenrollment information and summary health information, the plan document must be amended as described above.

Most employers, as plan sponsors, have been more "hands on" in the past in helping employees with billing or coverage problems with either the insurance company or the provider. A "hands off" employer must discontinue this practice unless it obtains a signed authorization from the employee.

2. The Hands-On Approach.

If the Insured Plan does create or receive PHI in addition to enrollment/disenrollment and summary health information, *i.e.*, it takes a "hands-on" approach, it is generally subject to all of the Privacy Regulations requirements, including all of the administrative requirements discussed above, such as appointing a privacy

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official, documenting its policies and procedures, and providing training for its workforce. The responsibilities with regard to the notice of privacy practices are reduced, however. The Insured Plan must prepare and maintain a notice of privacy practices and provide that notice upon request (to anyone), but is not required to distribute the notice to all plan participants.

All health plans, including all Insured Plans, must limit employer access to PHI as described above and may not use health plan PHI for employment purposes.

F. Employer's Receipt and Use of Employees' Medical Information

HIPAA provides exceptions from the definition of PHI for medical information found in employee records (45 C.F.R. §164.501) and for medical information created pursuant to OSHA medical surveillance obligations. (45 C.F.R. §164.512(b)(1)(v))

Employers may have an obligation under OSHA or state laws to conduct medical surveillance on its employees. OSHA is authorized to adopt standards requiring medical screening and surveillance in certain industries. Medical screening is a method for detecting disease or bodily dysfunction in an individual without current symptoms, but who may be at high risk for certain adverse health outcomes. Medical surveillance, on the other hand, involves the analysis of health information to look for problems that may be occurring in the work place that require targeted prevention, and thus serves as a feedback loop to the employer. Thus, OSHA can require medical surveillance to determine whether a given occupation presents increased risks to employees, and, if it does, OSHA can then require medical screening of employees in that occupation to monitor their exposure to the increased hazards. Because an employer receives these medical records in its role as an "employer," it has no HIPAA responsibilities with respect to them. A provider, however, does have HIPAA responsibilities before it may release these medical records to an employer.

In order for a covered entity to disclose such information to the employer, several requirements must be satisfied.

- The covered entity must either be an on-site clinic or a clinic providing health care to an individual at the employer's request. The employer's request must be

in relation to “medical surveillance of the workplace” or to evaluate whether the individual has a work-related illness or injury.

- The protected health information disclosed must consist of findings concerning work-related illness or injury or a workplace related medical surveillance.
- The employer must need such findings in order to comply with its OSHA or VOSH obligations.
- The covered entity must provide written notice to the individual that the PHI will be disclosed to the employer. This notice must be provided by the covered entity at the time of the treatment, or, if the covered entity is an on-site clinic, by posting the notice in a prominent place at the site.

Even though employers are not covered entities and information received in their employer role is not PHI, employers will still need a signed authorization to obtain PHI from a provider or group health plan since these are covered entities. This would include information from a provider such as fitness for duty, to make decisions about the employer’s ADA accommodation responsibilities and results of drug screening. Any medical information provided directly by the employee such as off-work excuses, return to work slips, and FMLA certifications will not need an authorization.

Once a covered entity discloses PHI to another individual, such as the employer, the PHI loses its protection under HIPAA. However, the employer still has obligations under ADA and common law. An employer should not lose sight of the fact that even though HIPAA may not apply, HIPAA has raised the bar on employees’ expectations of privacy with respect to their health information.

The HIPAA regulations have changed the way subpoenas for medical information are handled. If an employer receives a subpoena for production of an employee’s health information, HIPAA does not apply unless the employer is self-insured and the subpoena requests health plan documents.