Transparency for Employers – Sacrificing Privacy in the Name of Insurance Shopping

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As part of the drive for more transparency in health care and related insurance claims, the Texas Legislature during its 80th Session passed House Bill 2015 (Smithee, Duncan) to allow employers to gain information about claims paid by their group health insurance policies.1 The stated goal of the legislation was to allow employers to gain access to information that would be useful in shopping for the best health coverage bargain,2 but the question remains whether the release of this information serves anyone well.

House Bill 2015 creates a new chapter in the Texas Insurance Code entitled, “Reporting of Claims Information.” After listing the relevant definitions and establishing that governmental entities are considered employers under the chapter, the bill then clarifies what information must be reported and to whom. Within 30 days from the date of a written request from the sponsoring employer, plan, or plan administrator, health insurance issuers must provide a report on claims information. The report will not be required if the party has received a report on the particular employer or group health plan more than twice in a 12-month period.3

The report, which must be provided in writing or through a secure electronic file or web portal, must contain all information that the issuer has that is requested by the employer, plan, or plan administrator for a 36 month period. Information in the report must include aggregate paid claims by month, total premiums paid by month, total number of covered employees on a monthly basis, and the total dollar amount of claims pending at the time of the report. Also to be included is a statement on pre-certification requests for hospital stays of five days or longer that were made within 30 days of the report if the related claim information is not otherwise included in the report. In terms of the total number of employees covered, the issuer must provide data on whether the coverage was for the employee only, the employee and dependents only, the employee and spouse, or the employee plus a spouse and dependents.4

The bill also requires issuers to report information on particular individuals whose total paid claims over the 12-month period preceding the report were in excess of $15,000. For those individuals, the issuer must provide unique identifying numbers or codes, the amounts paid, dates of service, and applicable procedure codes and diagnosis codes.5

The bill does prohibit the disclosure of information the issuer is otherwise prohibited from disclosing under a state or federal law that is more stringent in its privacy

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1 H.B. 2015, 80th Leg., Reg. Sess. (Tx. 2007).
3 H.B. 2015, supra note 1.
4 Id.
5 Id.
protections than the Health Insurance Portability and Accountability Act of 1996 (HIPAA). If information is withheld, the issuer must notify the entity requesting the report that information is being withheld and provide a list of categories of claim information that the issuer has determined must be withheld. Some additional privacy protections are provided through a requirement that plan sponsors certify that they will safeguard pre-certification and individual’s claims data.\(^6\)

The entity requesting the report may also seek additional information about specified individuals from the issuer if the request is made within 10 days of receipt of the report. This additional information may include information on the individual’s prognosis or recovery if available and most recent case management information for those in active case management. Anticipated future costs and treatment plans may also be requested. The issuer has 15 days to respond to a request for additional information.\(^7\)

Issuers are protected from liability for releasing information pursuant to the chapter, and administrative penalties may be imposed on issuers who do not comply with the chapter.\(^8\)

Not surprisingly, reactions to the new law have been mixed. The Texas Association of Benefit Administrators applaud the law for “facilitat[ing] the timely and accurate exchange of information” to allow employers to seek more competitive rates based on an analysis of the relevant loss data.\(^9\) An employment lawyer with the firm Haynes and Boone reiterated that the information is essential to allowing companies to shop for better rates.\(^10\)

Privacy advocates, such as Deborah Peel of Patient Privacy Rights, worry that the law will give employers the information they need to fire anyone who is too expensive. Given the amount of information provided, particularly about the individuals who exceed $15,000 in claims – not a difficult hurdle in today’s healthcare market – it is likely that employers can cross-reference payroll records with the claims data and determine the identity of the individual. Also, unlike under HIPAA, the bill does not require patients to be notified at any time or by any manner that their records have been released.\(^11\)

And not all employment lawyers support the new law. Employers who fire individuals who have medical issues for non-medical reasons may still be subject to lawsuits alleging discrimination if they received a HB 2015 report.\(^12\)

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\(^6\) Id.
\(^7\) Id.
\(^8\) Id.
\(^11\) Id.
\(^12\) Id.
The Texas Department of Insurance has not proposed or adopted any rules relating to HB 2015. The Department does not foresee proposing any rules unless or until it receives complaints or information that the law is not working as intended.  

The first issue with the bill is whether it will actually help lower insurance costs. Having loss information may allow an employer a better sense of whether their current policy is a good bargain, but that does not necessarily translate into getting a better deal. Particularly as the cost of healthcare continues to skyrocket, insurance companies are not going to be satisfied basing premiums on three years worth of loss data. This is particularly true for small employers, those who need the most help affording insurance, as the insurance companies will argue correctly that one individual having a good or bad year health-wise would completely change the loss portfolio for that company.

Even if you accept the economic argument for the bill, serious privacy concerns remain. If everyone acts in good faith and there are no leaks, it is still not clear that unwanted and/or unwarranted disclosures will not occur. While HB 2015 states clearly that information that has more stringent privacy protections than those under HIPAA should not be disclosed, it does not specify exactly what information about that claim is protected. If an individual’s total paid claims exceed $15,000 based on mental health or substance abuse treatment, an issuer could read the law to say no separate information about the individual should be provided, not even that the claims exceed the $15,000 threshold. An insurer would be equally justified in reading the law as requiring the report to state that a certain individual had more than $15,000 in claims relating to particular dates of service but explaining that the diagnosis and procedure codes are confidential. While the employer may not know the exact basis of the claims, the employer would know it is one of a narrowly defined list of issues – particularly given that the issuer must provide a list of claim types it will not disclose – and could easily find the person based on dates of service. Without greater clarity on what types of information may be withheld and in what situations, the attempted recognition of the need for higher protections in certain cases will not be properly implemented.

Furthermore, assuming that no leaks will occur requires a large leap of faith. Within the last few months there have been numerous reports of private medical information being released. One of the most shocking was the loss of a National Institutes of Health laptop containing information on heart disease patients that was not encrypted and was left in a car trunk. If information from the National Institutes of Health, an entity that deals largely with confidential health information, can be so easily disclosed through carelessness there is no reason to believe employers who are not used to having this information will be able to secure it properly. And once the information has been improperly released, even if the release was accidental, there is no reversing the damage caused.

13 Telephone interview with Doug Danzeiser, Deputy Commissioner, Regulatory Matters, Life, Health & Licensing Program, Texas Department of Insurance, in Austin, Tx. (April 17, 2008).
HB 2015 was a misguided attempt to address the decreasing availability of employer-sponsored health coverage in Texas. While the intent may have been noble, the reality of the law is likely to be less so as people realize that their employers now have access to very specific information about anyone who makes claims under their health insurance. The $15,000 threshold is so low as to be almost useless in today’s world. Anyone with a chronic condition, anyone who is in an accident, or anyone who has a serious disease, even if it is a temporary one like walking pneumonia, will have their records opened under the law. While the bill’s impact is not the same as if the medical records themselves were given to employer, it is close enough and the potential damage is the same. As the old joke says, it is not paranoia if they really are after you.

*Health Law Perspectives* (April 2008), available at:
http://www.law.uh.edu/healthlaw/perspectives/homepage.asp