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Gavel to Gavel: The oft-misunderstood privacy rule of HIPAA

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The Health Insurance Portability and Accountability Act of 1996, or HIPAA, earned its 15 minutes of fame last summer when individuals, such as Dallas Cowboys quarterback Dak Prescott, refused to answer media inquiries regarding their vaccine statuses because of HIPAA. Employers handle a variety of their employees' medical information. So, what role does HIPAA play?

HIPAA almost never applies to employers. HIPAA's Privacy Rule only applies to "covered entities." Covered entities generally include health plans, health care clearinghouses, and most health care providers. In some limited contexts, it also applies to those covered entities' business associates. But covered entities are not obligated to ensure the privacy of medical information if they obtain the information as an employer, not a provider. In other words, if your employer happens to be a covered entity, and that entity obtains your health care information as your employer, HIPAA won't prevent disclosure.

As the U.S. Department of Health and Human Services recently explained, "the Privacy Rule does not protect your employment records, even if the information in those records is health-related." Even though COVID and vaccines pushed HIPAA to center stage, employers have always acquired a variety of medical information from employees for employment-specific reasons. A few examples include: (1) processing FMLA requests, (2) responding to accommodation requests, and (3) analyzing workers' compensation claims. HIPAA does not protect this information.

But don't worry. HIPAA's inapplicability to employment records does not give employers carte blanche to disclose private health information. Other constraints exist. For example, the Americans with Disabilities Act ("ADA") requires employers to maintain certain medical information confidentially and in a medical file separate from the employee's personnel file. Under the ADA, employers may disclose medical information, but only in limited circumstances. Perhaps, a supervisor may need to know about necessary restrictions on an employee's work. The Genetic Information Nondiscrimination Act ("GINA") places similar restrictions on employers with certain health information. Additionally, employers must be cognizant of various state laws that address employee privacy rights. Employees may challenge their employer's noncompliance under these statutes or with common law tort theories.

Even though HIPAA tried to take on the lead role during the pandemic, only covered entities are subject to its protections. With other protections out there, though, employers still need to treat their employees' medical information with caution to maintain privacy under ADA, GINA, and any applicable state law.

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