Drug and Alcohol Records Acquisition and Storage in the Workplace
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Despite the increase in education about and employee assistance directed to the avoidance and treatment of substance abuse, employees and health care payors sustain billions of dollars in costs attributable to loss of productivity, employee injury, domestic violence and alcohol induced medical conditions. Employees who undergo drug and alcohol screening as a precedent to employment, in response to a workplace policy or while in treatment, are often requested by prospective or current employers or a tribal, state or federal agencies to consent to the release of drug and alcohol testing or treatment records. This paper addresses the privacy concerns that attach to drug and alcohol testing and treatment records in the work environment.

The following workplace scenarios illustrate the need for substance abuse information and the issues relating to use and dissemination of information:

**Scenario A:** A job candidate has submitted an application for employment to work as a long haul truck driver. Pursuant to the federal standards regulating interstate trucking, the candidate is required to submit to a preemployment drug test. The candidate refuses to submit and is denied employment. The candidate attempts to seek redress arguing an invasion of privacy. (See Appendix A for further discussion on Department of Transportation Regulations that mandate testing. The bulletin reiterates that transportation companies are not required to have donor authorization to obtain or disclose drug and alcohol records).

**Scenario B:** A nurse at a tribal clinic is suspected of diverting narcotics for personal use. She suffers from a chronic pain syndrome related to injuries sustained several years ago in a car accident. The nurse can’t perform the essential functions to provide direct patient care, but is responsible for the administrative aspects of the medical services of the clinic. Her job duties place her in a position to have access to the narcotics kept under lock and key. She is requested to submit to a drug screen that turns up positive for the same pain medication that she is regularly prescribed by her physician. Her employer is uncertain about what the next steps should be to rule out the suspicions of diverting narcotics.

**Scenario C:** While operating a forklift at a tribally run business, employee C backs into another employee who is pushed to the ground and injured. Pursuant to the workplace policy that mandates “drug and alcohol testing for all accidents for which reasonable suspicion exists that the employee’s behavior demonstrates evidence of unsafe work behavior,” the forklift driver
is required to take a drug test. The results are positive for marijuana. The results are sent to
the medical review officer who discusses the positive result with the driver who insists he has
not used marijuana, but frequently hangs out with friends while they smoke marijuana. The
medical review officer requests a confirmation of the screening test that is again positive. The
test results are sent to the business, which offers the employee the option of getting into
evaluated for substance abuse or termination. The employee declines either option and seeks
a review with the employment panel. He requests that the written drug test result not be
submitted to the panel as he is concerned about further disclosure into the tribal community.
The employee will stipulate verbally that the test was positive, but denies that he was smoking
marijuana.

Each of these scenarios presents circumstances when the employer’s policies dictate
that a candidate or employee submit to drug testing. The issues surface when the employer
must decide how the information will be used. With that as a foundation, the following
discussion addresses acquisition of drug and alcohol test results and treatment records and the
privacy restrictions placed on disclosure, security, use and redisclosure.

Federal Laws lead the way to protect the confidentiality of substance abuse records.

Recognizing that a certain societal stigma often attaches to the entry and completion of
a drug and alcohol rehabilitation program, the federal government adopted very restrictive
statutes that limit the disclosures, use of drug and alcohol test results, and information that a
person is undergoing or has undergone evaluation and/or treatment for substance abuse. 42
CFR Part 2 Appendix B. The regulations are intended:

- to insure that an alcohol or drug abuse patient at a federally assisted alcohol or
drug abuse program is not made more vulnerable by reason of the availability of
his or her patient record than an individual who does not have an alcohol or drug
problem or who does not seek treatment.

42 CFR 2.3 (a)(b)(1). To enforce this goal, a criminal penalty, assessed as a fine of not more
than $500 for the first offense and not more than $5000 for each subsequent offense may be
assessed. 42 CFR 2.4. The federal laws entitled Health Insurance Portability and
regulations, along with Washington state statutes and relevant tribal laws require a careful
analysis in the work place to find answers to the following questions:

1. Can an employer requests the results of a drug or alcohol test?
2. If the employer is entitled to get the results of a drug and alcohol test, what type of consent must be obtained from the employee donor?

3. If the employee is enrolled or has previously enrolled in a substance abuse recovery program pursuant to a return to work or similar agreement, what type of information can the employer receive about the employee’s treatment and ability to return to work?

4. Once an appropriate consent has been received, which company employees are allowed access to the information?

5. How must the information be stored to protect confidentiality?

**Applicability of the Federal Regulations**

The Federal regulations providing privacy of substance abuse records apply to most work environments. Many of the state and tribal laws and health care privacy acts adopt the common elements contained in the federal statute. The federal regulations governing the privacy of substance abuse records apply to:

"Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States."

24 CFR 2.1 § 290ee-3(a). The breadth of the regulation is far reaching when consideration is given to the large number of drug and alcohol treatment programs that are financed, in whole or in part through monies received from the federal government. In addition, many clinics that provide services to evaluate, diagnose and provide follow-up care for substance abusers are recipients of federal funding through third party payors such as Medicaid or recipients of monies available through § 638 funding or military benefits. 42 CFR 2.12b1-4, 5,6.

The initial step is to determine whether this federal regulation applies to the records which the employer seeks. The statute defines the scope of protected information in 42 CFR 2.12 (e).

"These regulations cover any information (including information on referral and intake) about alcohol and drug abuse patients obtained by a program, (if the program is federally assisted in any manner described in § 2.12(b). Coverage includes but is not limited to, treatment or rehabilitation programs, employee assistance programs, programs within general hospitals, school-based programs,
and private practitioners who hold themselves out as providing, and provide alcohol or drug abuse diagnosis, treatment or referral for treatment.”

If the employer determines that the program that evaluated, treated or referred an employee is federally assisted, written consent is mandatory to obtain the test results and any other diagnostic or evaluative treatment limited to the purpose of the disclosure. The consent form must include the following:

(a) Required elements. A written consent to a disclosure under these regulations must include:

1. The specific name or general designation of the program or person permitted to make the disclosure.

2. The name or title of the individual or the name of the organization to which disclosure is to be made.

3. The name of the patient.

4. The purpose of the disclosure.

5. How much and what kind of information is to be disclosed.

6. The signature of the patient and, when required for a patient who is a minor, the signature of a person authorized to give consent under § 2.14; or, when required for a patient who is incompetent or deceased, the signature of a person authorized to sign under § 2.15 in lieu of the patient.

7. The date on which the consent is signed.

8. A statement that the consent is subject to revocation at any time except to the extent that the program or person which is to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.

9. The date, event, or condition upon which the consent will expire if not revoked before. This date, event, or condition must insure that the consent will last no longer than reasonably necessary to serve the purpose for which it is given.

10. This consent is subject to revocation at any time except to the extent that the program which is to make the disclosure has already taken action in reliance on it. If not previously revoked, the consent will terminate upon (specific date, even or condition).
(b) Sample consent form.

(c) Expired, deficient, or false consent. A disclosure may not be made on the basis of a consent which:
   
   (1) Has expired:
   (2) On its face substantially fails to conform to any of the requirements set forth in paragraph (a) of this section;
   (3) Is known to have been revoked; or

What must you do with the records when they are received?

The intent of the statute is to minimize both the amount of information disclosed and the number and identity of the recipients. Dissemination of this information within the work environment is on an absolute “need to know” basis. Once the records are sent to the employer, the federal regulations require that:

“Written records which are subject to these regulations must be maintained in a secure room, locked file cabinet, safe or other similar container when not in use; and

“Each program shall adopt in writing procedures which regulate and control access to and use of written records which are subject to these regulations.” 42 CFR 2.16 (a) and (b).

To comply with these regulations, the records must not be maintained with any other personnel file or employee files. In addition to the restrictions on securing records, the regulations also prevent the redisclosure of the information received. 42 CFR 2.32 provides that no further disclosure of the records received may be made unless a written consent compliant with the regulations has been signed. Note that a general medical release or a subpoena are not sufficient to allow for production of these records.

Responding to a Request for Employee Records.

Employers often receive requests for copies for employee work records. The request may be sent as part of a workers compensation process, a criminal investigation, or civil litigation. Under the federal regulations, the employer may produce substance abuse records maintained by an employer upon receipt of a signed written federally compliant consent. Without such a written consent, the employer can only release the records to any individual or office, including law enforcement in response to a specific court order accompanied by a subpoena. It is not uncommon for law enforcement to request the records and present a subpoena. However, the court order that is necessary to allow disclosure in these criminal investigator settings may only be issued under three circumstances that must be substantiated in the court record:
1. To protect against an existing threat to life or serious bodily injury, including suspected child abuse and neglect and verbal threats against third parties;
2. When necessary for an investigation or prosecution of an extremely serious crimes, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon; or
3. Disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

42 CFR 2.63
The Scope of Provider Disclosure

Employers need to be aware that the health care providers involved with drug and alcohol treatment may also be limited in their disclosure of confidential information. If the provider falls with the statutory definition, the provider is required to disclose the least amount of information needed for the purpose of the request. If the request is to secure confirmation that an employee is attending treatment regularly and complying with the program, then the provider will only be allowed to state that information. If the purpose of the request for records and scope of the consent is to seek an opinion on the employee’s fitness for return to work, then the provider should limit the disclosure to the request and need for information.

Use of Confidential Substance Abuse Information

Once the employer receives the information, the hard and fast rule is to limit both the scope and nature of the information to those that need to know. If the test results are a preemployment screening, then only the Medical Review Officer, if one exists and the hiring decision maker should see the results. If the records relate to treatment of an employee completed as a term of employment or a condition of return to work, then the records and/or information in the records should be limited to those managerial personnel who are involved with the employee discipline. The limited redisclosure of information likely necessitates that the human resource manager or decision maker not disclose the reason for an employee’s absence from work due to substance abuse evaluation or treatment to the workers managers or co-workers. Training all decision makers about the need to protect confidential information, both from a secured storage requirement and a need to know disclosure policy is key to preventing any potential harm to the employee from wrongful disclosure.

How does HIPAA effect an employer’s ability to obtain drug and alcohol records or respond to a request for production of such records?
Many of the restrictions contained in the federal regulations are also present in the HIPAA “privacy” regulations. The provisions that are unique to HIPAA and relate to these issues of disclosure in an employment setting are reviewed. This is a brief summary about HIPAA’s application to substance abuse records. Appendix C is a copy of “The Confidentiality of Alcohol & Drug Abuse Patient Record Regulation and the HIPAA Privacy Rule: Implication for Alcohol & Substance Abuse Programs” published by the federal government. The publication more fully explains the intricacies of the privacy regulations under 42 CFR and HIPAA.

The initial inquiry in a HIPAA analysis is whether the statute applies to the situation being addressed. HIPAA applies to “covered entities” that are health care plans, including Medicaid, health providers (doctors, psychologists, hospitals, pharmacists, etc) who electronically transmit protected health information in connection with health insurance claims or other specified transactions, business associates of covered health plans and covered health care providers. In the employment setting, these privacy regulations most commonly impact health care employers, companies who handle or make electronic payment for health care services and companies that process health care or disability benefits for which health care information is exchanged.

The privacy statute restricts the type of information that may be disseminated without consent. The information that may not be disclosed without appropriate written consent is called “PHI”- Personal Health Information. PHI includes

“any information (in any form) created or received by a covered health care provider or health plan (or business associate) regarding the provision of health care, payment for health care, or physical or mental condition of a specifically identified individual.”

Common work settings in which HIPAA applies are health clinics, hospitals or other treatment centers and/or the benefits coordinator for health or disability insurance. Other employment environments governed by the statute would be insurance companies, government agencies that provide payment for medical services and human resource, pension specialists or workers compensation specialists who electronically submit or receive PHI for payment.

When an employer needs copies of drug and alcohol treatment records, the employer can have the candidate or employee complete a modified consent form that complies with the federal regulations under 42 CFR Part 2 and be compliant with both sets of regulations. The
form must be modified to add a written statement that the information received cannot be
redisclosed. HIPAA also allows a written consent to be provided by the person’s personal
representative, including a guardian, parent or other person authorized to make medical
decisions for the individual. The surrogate must include a description of the surrogate’s
authority to act on the consent form. For example, the surrogate may indicate that she is the
personal representative for the estate of a deceased worker or is the court appointed guardian
for a currently incompetent worker. These surrogate signators may come in to play if an
employee is injured while working and is unable to provide written consent to obtain records
from the employer. That situation might arise when the injured employee is seeking redress
under worker’s compensation or in civil litigation. Appendix D is a copy of the consent form to
be used when the drug and alcohol tests or records are sought in a HIPAA governed setting.
The form is modified to include the surrogate’s description of authority, and an
acknowledgement that the disclosure is not for treatment or payment of health care operations.
When a consent form is signed, a copy of the signed consent form must be given to the
employee or designee and the employer and provider must keep the copy for 6 years from the
expiration date.

The employer must make sure that no information is provided without a valid written,
signed consent form. Unlike the federal regulations, HIPAA allows a covered entity to produce
PHI in response to a subpoena or discovery request if the covered entity is satisfied that
reasonable efforts have been made to notify the individual that the information is being
requested and/or to have an opportunity to seek a protective order. What does this mean for
the employer?

1. The candidate or employee for whom drug and alcohol tests and treatment
information is requested, must sign or have a recognized signator sign a consent
form compliant with the federal regulations.

2. If a subpoena is received seeking all records maintained by an employer, the
records received from outside providers relating to drug and alcohol tests or
treatment may not be produced in response to the subpoena if the employer falls
under the federal statute. Good practice dictates that either a written consent or
a court order, along with a subpoena be obtained before that drug and alcohol
records are released.

How do state and tribal codes apply to release of drug and alcohol treatment records and test
results?
If an employer is subject to tribal codes, and not seeking information from a federally regulated drug and alcohol treatment provider, then the disclosure must be compliant with the tribal codes. Good practice would encourage the use of a written consent form that satisfies both the federal and HIPAA guidelines. These guidelines are the result of very extensive drafting and consideration of input provided by both drug and alcohol patients and providers. This distillation of efforts to protect against the unlimited disclosure of the identity and treatment provided to a substance abuser will further a similar purpose for those under tribal governments. Washington law incorporates the federal protection for the disclosure of drug and alcohol records.

The Health Care Information Act contained in RCW Chapter 70.02 (Appendix E) delineates the steps necessary to obtain health care information. The Act applies to health care providers, an individual assisting a health care provider in the delivery of health care or an agent and employee of a health care provider. RCW 70.02.02. The chapter explains how to secure health care information when a patient has provided authorization and when a patient has not provided authorization. However, these statutes are supplemented by RCW 70.96A.150, which requires compliance with the federal statute governing privacy of drug and alcohol treatment records. 42 CFR Part 2.

The treatment records may be released in four circumstances:

1. Prior written consent (that must comply with the federal regulations);
2. If authorized by an appropriate court order of the court of competent jurisdiction granted after application showing good cause (see section 42 CFR 2.61 – 2.67 regarding the federal standard for securing a court order);
3. To comply with state law mandating the reporting of suspected child abuse and neglect; or
4. When a patient commits a crime on program premises or against program personnel or threatens to do so.

Specific Washington provisions that supplement the federal regulations are:

a) The consent must be dated and will be effective for only 90 days from the date of the signed consent;
b) The patient must identify the nature of the information to be disclosed and to whom the disclosure is made. RCW 70.02.030(2)(b);
c) A copy of the authorization and/or revocations must be maintained. RCW 70.02.030(7);

d) The term of the authorization for a person under the supervision of the department of corrections expires at the end of supervision, unless the patient is part of an ongoing treatment program and information is to be exchanged until treatment is completed. RCW 70.02.030 (8).

Other Federal Statutes Covering Drug and Alcohol records in the Workplace

The Family and Medical Leave Act “FMLA” is only applicable to covered employers. (A discussion of the Act is outside the scope of this paper). If the employer is covered by the FMLA and has received drug and alcohol evaluation or treatment records from an employee to establish a serious medical condition, the employer must maintain the confidentiality of the records.

“Records and documents relating to medical certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (see 29 CFR Sec 1630.14(c)(1)) except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

(2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided information upon request.”

29 CFR 825.500.

When the employer is dealing with either an FMLA or ADA eligible employee who has authorized the release of information about drug or alcohol treatment, extra care must be taken for maintaining the records, but also for taking a moment to deliberate on which company individuals are in the “need to know” circle and what is necessary for disclosure. If an employee is required to attend treatment for substance abuse that requires a change in schedule, the supervisor or manager does not need to know the type of care that is being sought, rather only that the employer may need to provide a change in schedule.
SUMMARY

Having a uniform written consent form compliant with the federal regulations and HIPAA privacy rules that is used with all candidates and employees with facilitate the appropriately authorized release of records. Vigilant storage of records and a policy on who needs to know information contained in substance abuse records will limit the likelihood of claims for violations of the federal statute, defamation and breach of privacy under state law. Further information may be obtained from the Internet sites and the Comparison of Federal Regulations, HIPAA and Washington State Laws for Disclosure of Drug and Alcohol Records listed in Appendix F.