

**HIPAA PRIVACY REGULATIONS GOVERN FMLA CERTIFICATION
PROCEDURES FOR ALL EMPLOYERS
By Karen Sutherland**

The HIPAA Privacy Regulations govern the use and disclosure of confidential personal healthcare information (“PHI”). Many employers believe that they are “exempt” from HIPAA because they are not a “covered entity” under HIPAA, *i.e.* a healthcare provider, a healthcare insurer or a healthcare clearinghouse. While it is generally true that only covered entities must comply with HIPAA, all employers will be affected by HIPAA, especially in the human resources area. For example, most employers possess medical information for some employees related to the Americans with Disabilities Act (“ADA”) and the Family Medical Leave Act (“FMLA”). HIPAA does not regulate the employer’s use and disclosure of this medical information.

HIPAA does come into play when an employer attempts to obtain PHI from an employee’s doctor to verify an FMLA claim. For example, the FMLA requires that employers permit employees to take leave from work for a serious health condition or to care for family members with a serious health condition. Under the FMLA, an employer can require that an employee provide verification of the serious health condition by a doctor. In fact, the Department of Labor has even created an FMLA certification form that many employers use to verify the existence of a serious health condition. The employer typically sends the FMLA certification to the doctor or asks the employer to bring it to the doctor personally.

Some doctors have refused to complete the FMLA form on the grounds that HIPAA prohibits disclosure of PHI to a third party such as an employer. The doctors are usually correct. Under HIPAA, a doctor or other health care provider cannot disclose PHI to a patient’s employer to verify an FMLA claim unless the patient gives the doctor a written authorization that complies with HIPAA. The reason that employers need an authorization to get an FMLA certification from an employee’s doctor is because the doctor, not the employer, is covered by HIPAA. A doctor cannot disclose protected healthcare information to a patient’s employer without an authorization from the patient. As a result, the employer must now use a HIPAA authorization along with the FMLA certification unless the employer give the FMLA form to the employee and has the employee obtain the information from the care provider and then give it to the employer, in which case a release is not necessary.

This brief article is a broad summary only. It lacks specificity about the law and about the effects of different fact patterns, and thus shall not be applied without consulting an attorney. It also focuses on Washington State law and federal law, and the laws of other jurisdictions may vary materially. The information set forth in this article is a broad and general overview of complex topics, and is not legal advice. It also does not take into account any changes to the law or in interpretations of the law that may have occurred since it was written. For more information, contact Karen Sutherland at ksutherland@omwlaw.com