BakerHostetler

# FAQs by Employers Regarding the Anthem Breach

**If you have additional questions please call our 24-hour breach hotline at 855-217-5204, or send an email to breachresponse@bakerlaw.com.**

**Do we have any legal obligations under HIPAA?** It depends on your contractual relationship with Anthem and whether the group health plan offered by your company is self-insured. If your company's group health plan is self-insured and your company contracts with Anthem to administer the plan, process claims, etc., then your company's group health plan is a HIPAA covered entity ultimately responsible for the privacy and security of the plan's protected health information (PHI) and Anthem is your company's business associate under HIPAA. If however your company's group health plan is a fully insured group health plan provided by Anthem, then Anthem will likely be viewed as the HIPAA covered entity responsible for the privacy and security of the plan's PHI. Covered entities and business associates have different legal obligations under HIPAA, so it is very important to identify the role played by your company and by Anthem regarding your company's group health plan.

**Who has the HIPAA breach notification obligation - the employer plan sponsor or Anthem?** It depends on your relationship and contract with Anthem. The covered entity generally has the notification obligation, unless it has delegated such responsibilities to a business associate.

**I am an employer that offers a fully insured group health plan for my employees. Do I have any HIPAA breach notification obligations?** HIPAA recognizes that certain fully insured group health plans do not need to satisfy all of the requirements of the HIPAA Privacy Rule since those responsibilities will be carried out by the health insurance issuer or HMO with which the group health plan has contracted for coverage of its members. Generally, it is more appropriate for the health insurance issuer or HMO providing the fully insured coverage to provide the breach notifications to affected individuals.

**If we don't have an Anthem contract, do we need to be doing anything?** You should at least check to make sure that you and your employees are not at all affected by the Anthem breach. For example, if you have a contract with a Blue Cross organization other than Anthem, it is possible that some of your employees' data could be involved because Blue Cross organizations use each other's provider networks. If you are able to conclude that you and your employees are not at all affected by the Anthem breach, you should at least consider checking with your own health insurer and asking for assurances that they encrypt all their records and that Anthem has no access to any of your plan records -- and make a record of having asked.

**The media is saying this is not a HIPAA breach, is that accurate?** The HIPAA Privacy Rule protects all individually identifiable health information, including demographic information and common identifiers such as name, address birth date and Social Security Numbers associated with a health plan. The fact that this incident may not involve medical records or clinical information does not mean it is not a HIPAA breach. Plan sponsors should carefully review any communications from Anthem to fully understand the scope of this breach and its HIPAA implications.

**Should we be undertaking sending notices?** Again, it depends on your relationship with Anthem. Under HIPAA, the covered entity generally has the obligation to send notices to affected individuals. If Anthem is acting as your business associate, you should review your agreement with Anthem to determine if any breach notification duties have been delegated to Anthem. If notification duties have not been contractually delegated to Anthem, your company can consider whether notification by Anthem will fully satisfy any HIPAA notification requirements that your company's self-insured group health plan may have.

**Can Anthem contact our employees directly?** There is no prohibition under HIPAA preventing Anthem from contacting your employees. Moreover, in some cases, they have a legal obligation to do so. However, if you want to have input on those communications, we recommend reaching out to your contact at Anthem.

**Employees are asking questions, what should we do?** Reassure your employees that you are monitoring the situation and direct them to Anthem's website for more information (http://www.anthemfacts.com). Current and former Anthem members can also contact Anthem at 877-263-7995. Point out that Anthem will offer credit monitoring to affected individuals and encourage employees to accept that offer. It is also advisable for all employees to monitor their payment card accounts, bank accounts, credit reports and explanation of benefits statements carefully. If they see any unusual activity, they should quickly contact their bank, payment card issuer, credit reporting agency, or Anthem. Employees can also obtain a copy of their credit report, free of charge, once every 12 months from each of the three nationwide credit reporting companies. To order a free credit report, employees can visit www.annualcreditreport.com or call toll free at 1-877-322-8228. Employees may also contact the three major credit bureaus to place a 90-day fraud alert on their credit reports. Fraud alerts protect against the possibility of an identity thief opening new credit accounts. When a merchant checks the credit history of someone applying for credit, the merchant gets an "alert" that there may be fraud on the account.

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