Is Your Business Associate An Agent?

There is always a lot of discussion regarding business associates and their relationships to the covered entity. Should you conduct a pre-contract survey or questionnaire? Should you conduct a risk analysis on them or accept theirs? Should you allow them access to our EHR/EMR to execute the duties you hired them for? While there are many questions, one that does get overlooked is whether the business associate (BA) is an "agent" of the covered entity. This is an important distinction and worth looking at the definition of an agent and how it impacts your relationship with your business associate.

The privacy rule uses the Federal common law of agency to identify business associates as agents to the covered entity. As explained in the preamble of the Omnibus Rule (Jan 2013), an analysis of whether a business associate is an agent will be fact specific, taking into account the terms of a business associate agreement as well as the totality of the circumstances involved in the ongoing relationship between the parties. The essential factor in determining whether an agency relationship exists between a covered entity and its business associate (or business associate and its subcontractor) is the right or authority of a covered entity to control the business associate's conduct in the course of performing a service on behalf of the covered entity. The right or authority to control the business associate's conduct also is the essential factor in determining whether an agency relationship exists between a business associate and its business associate subcontractor. Therefore, this guidance applies in the same manner to both covered entities (with regard to their business associates) and business associates (with regard to their subcontractors).

The authority of a covered entity to give interim instructions or directions is the type of control that differentiates covered entities in agency relationships from those in non-agency relationships. A business associate generally would not be an agent if it enters into a business associate agreement with a covered entity that only sets terms and conditions that create contractual obligations between the two parties. So, if the only control is for a covered entity to amend the terms of the agreement or sue for breach of contract, this generally indicates that a business associate is not acting as an agent. On the other hand, a business associate generally would be an agent if it enters into a business associate agreement with a covered entity that granted the covered entity the authority to direct the performance of the service provided by its business associate after the relationship was established. Simply put, if the covered entity controls the business associates behavior, the business associate is then an agent of the covered entity. The preamble uses this example; if the terms of a business associate agreement between a covered entity and its business associate stated that ''a business associate must make available protected health information in accordance with § 164.524 (access to PHI), based on the instructions to be provided by or under the direction of a covered entity,'' then this would create an agency relationship between the covered entity and business associate for this activity because the covered entity has a right to give interim instructions and direction during the course of the relationship. An agency relationship also could exist between a covered entity and its business associate if a covered entity contracts out or delegates a particular obligation under the HIPAA Rules to its business associate.
Use these four factors to determine if an agency relationship exists:

1. The time, place, and purpose of a business associate agent's conduct;
2. Whether the covered entity controls the business associate agents course of conduct;
3. Whether a business associate agent's conduct is commonly done by a business associate to accomplish the service performed on behalf of a covered entity; and
4. Whether or not the covered entity reasonably expected that a business associate agent would engage in the conduct in question.

It is important to determine if this relationship exists with the business associates (business associates with their sub-contractors) because if it does, the covered entity is liable for their acts, omissions, and subject to civil money payment as spelled out in 45 CFR 160.402(c) and cited here:

45 CFR 160.402(c):
c) Violation attributed to a covered entity or business associate.

(1) A covered entity is liable, in accordance with the Federal common law of agency, for a civil money penalty for a violation based on the act or omission of any *agent* of the covered entity, including a workforce member or business associate, acting within the scope of the agency.

(2) A business associate is liable, in accordance with the Federal common law of agency, for a civil money penalty for a violation based on the act or omission of any *agent* of the business associate, including a workforce member or subcontractor, acting within the scope of the agency.

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In addition to being subject to liability for the acts or omissions of a business associate agent, the rule of agency also affects how the covered entity would respond to a breach reported by the business associate. The breach notification rule defines when a breach is discovered as follows: a breach is deemed discovered if "any person, other than the individual committing the breach, that is an employee, officer, or other *agent* of such entity or associate" knows or should reasonably have known of the breach. If a business associate is acting as an agent of a covered entity, then the business associate's discovery of the breach will be *imputed* to the covered entity. In other words, the date the business associate discovers the breach, is the date of discovery for the covered entity.

After discovering a breach, the breach notification rule requires the business associate to notify the covered entity without unreasonable delay and in no case, later than 60 calendar days after the discovery of the breach. Afterwards, the covered entity would then notify the affected individuals without unreasonable delay and in no case, later than 60 calendar days of being notified by the business associate. Theoretically, individuals could be notified of a breach 120 days after it was first discovered; 60 days' notification period for the business associate, and 60 more days for the covered entity. However, this reporting period is limited to a maximum of 60 days when the business associate is an agent of the covered entity. Remember, the date of discovery by the business associate is *imputed* to the covered entity, so the 60-day notification clock for the covered entity begins when the business associate agent discovers the breach, not when the business associate reports it to the covered entity. This twist to the notification period should be addressed clearly in the business associate agreement and/or contract to ensure the covered entity has enough time to make notifications to the affected individuals.

In summary, the privacy rule uses the Federal rule of agency to define when a business associate is an agent of the covered entity. When this relationship exists, the covered entity should be aware of their liability for acts or omissions of the business associate as well as the time frame for reporting a breach and notifying the affected individuals. Take a moment today to review your business associate relationships and your business associate agreements to determine if you need to make any changes. And finally, remember that HIPAA compliance is a journey, not a destination. Happy Trekking.

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