



LEGAL ADVICE FOR HEALTH PLANS

HEALTH LAW ALERT

April 30, 2019

Penalty Caps Reduced for Some HIPAA Violations Cap for Most Severe Violations Unchanged

The Department of Health and Human Services (HHS) announced today¹ a reduction in the maximum amount of Civil Money Penalties (CMP) that the Agency can assess in one year for some types of violations of the HIPAA Privacy, Security, Breach Notification, and Transactions Rules. HHS is making the change based on an ambiguity in the HITECH Act, which established the current CMP scheme, and the agency's enforcement discretion. Although HHS is not proposing any change to the applicable Rules at this time, it "expects in future rulemaking to revise the penalty tiers in the current regulation to better reflect the text of the HITECH Act."

Under the HITECH Act, CMP for HIPAA violations are determined based on four levels of culpability, with a range of potential dollar amounts for each violation. The HITECH Act also established cumulative annual limits on identical violations that occur in a calendar year, but referenced two different annual limits for three of the culpability tiers. In drafting the enforcement Rule, HHS applied the higher of these two different limits for the three tiers. HHS has now decided, however, "the better reading of the HITECH Act is to apply [the lower] annual limits" to three of the culpability tiers. The annual limit for the highest level of culpability remains unchanged.

Prior to the notice of enforcement discretion, the annual limit for all four levels of culpability, after being adjusted for inflation, was \$1,677,299. ([Click here](#) for my Health Law Alert on adjustment of CMP for inflation.) Under the enforcement discretion, the annual limits remain the same for the highest level of culpability, but are reduced to approximately² \$28,526, \$114,102, and \$285,256, respectively, for the other three culpability levels.

¹ The Department informally published the notice of enforcement discretion on Friday, April 26th when it filed the notice with the Office of the Federal Register.

² The inflation adjustment is based on my estimate.

The notice of enforcement discretion is published at 84 *Federal Register* 18151 ([click here](#)) (or see the “Health Law Alerts” section of the “Resources” page at [tbixbylaw.com](#)).

Culpability Tiers

The HITECH Act established four types of culpability for HIPAA violations and assigned different CMP to those tiers. The types of culpability are:

1. “the covered entity or business associate did not know and, by exercising reasonable diligence, would not have known that the covered entity or business associate violated such provision”;
2. “the violation was due to reasonable cause and not to willful neglect”;
3. “the violation was due to willful neglect and was corrected [within 30 days]”; and
4. “the violation was due to willful neglect and was not corrected [within 30 days].”

Penalties for these tiers under the notice of enforcement discretion are:

| Culpability Tier | Minimum Penalty/Violation | Annual Limit |
|---|---------------------------|--------------|
| No knowledge of violation: | \$114 | \$28,526* |
| Reasonable cause, not willful neglect | \$1,141 | \$114,102* |
| Willful neglect, but corrected in 30 days | \$11,410 | \$285,256* |
| Willful neglect, not corrected in 30 days | \$57,051 | \$1,711,533 |

* Inflation adjustment based on my estimate.

Few large covered entities or business associates are likely to qualify for the “no knowledge” level of culpability a decade-and-a-half after the HIPAA Rules went into effect. But the enforcement discretion does give covered entities and business associates the opportunity to argue for lower penalties, particularly if one can show prompt corrective action (*i.e.*, within 30 days of discovering a violation) to address violations.

For more information, please contact Tom Bixby at (608) 661-4310 or TBixby@tbixbylaw.com

Thomas D. Bixby Law Office LLC
(608) 661-4310 | www.tbixbylaw.com

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