United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 21, 2008

S.A.M.

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: American Water Works Service Co., Inc.
Case 4-CA-36034

530-6067-6000
530-6001-3740
530-6067-6001-3750
530-6067-5200

This Section 8(a)(5) was submitted for advice as to whether, in connection with the Union's grievance over the Employer's audit and termination of health care coverage for the dependents of 200 employees, the Employer unlawfully refused to provide the Union with: 1) the names of impacted employees; 2) the names of dependents who lost coverage; 3) the documents related to appeals filed by five employees; and 4) the reasons for termination of coverage for each dependent. The Employer has refused to provide the information asserting that the information possesses a "legitimate aura of confidentiality", the Employer promised employees confidentiality, and HIPAA bars its disclosure.[1]

We first conclude that all the requested information is necessary and relevant for the processing of the Union's grievance, but that the information constitutes "protected health information" under HIPAA. We next conclude that the names of the impacted employee and their dependents denied coverage is not confidential information under Board law, but that the documents related to the five appeals and the reasons for termination of dependent coverage is confidential. Thus absent concerns over HIPAA, the Employer was required to provide the names of the impacted employees and dependents denied coverage, and to bargain with the Union over an accommodation for the remaining information. Finally, addressing the Employer's HIPAA defense, we conclude that (a) the Employer unlawfully

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[1] Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996). HIPAA's Privacy Rule, published by the Department of HHS, Office for Civil Rights, (45 CFR Parts 160, 162 and 164 (HIPAA Administrative Simplification Regulation Text, March 2006)) regulates the use and disclosure of an individual's "protected health information."

refused to provide the impacted employees' names because a non-covered operation of the Employer which did not have a HIPAA obligation in fact possessed this information; (b) the Employer unlawfully refused to provide the names of the dependents because HIPAA does not bar disclosure of information that is either required to be provided under the Act or is sought for grievance processing, and both those HIPAA exceptions apply to the dependents' names; and (c) regarding the documents pertaining to the employees' appeals and the reasons for termination of coverage, the Employer unlawfully failed to bargain in good faith over a mutually agreeable accommodation to provide this confidential information; HIPAA does not bar accommodation bargaining required under the NLRA, and the HIPAA exception for information required to be provided under the Act does not bar the disclosure of information upon the parties' reaching an accommodation agreement.

FACTS

American Water Works Service Co., Inc. (Employer) is a subsidiary of American Water Works Company, Inc., a national water utility company that has operations in 16 states, with 2,500 employees. The Employer provides legal, human resources, and accounting services to all of American Water Works Company, Inc.'s subsidiaries.[2] The Utility Workers of America (Union), along with 20 affiliated local unions, represents the 2,500 employees working nationwide.

The Union and Employer are signatories to the National Benefits Agreement (NBA), effective from August 1, 2005 to July 31, 2010. The NBA outlines employees' and their families' health insurance benefits. Employees are covered by the Employer's self-insured health care plan (Plan), which is administered pursuant to the NBA. As a self-insured plan, the Employer reimburses employees directly for their health care expenses; there is no third-party insurance provider.

The Employer's Plan includes a HIPAA policy, which provides:

> This Plan will not use or disclose information that is protected by HIPAA ("Protected Health Information") except as necessary for treatment, payment, health care operations, and plan administration functions, or as otherwise

[2] The Employer, so named on the unfair labor practice charge, has not challenged its status as the employer of the represented employees.

permitted or required by law, without your written authorization.

The Plan is administered by the Employer's Benefits Services Center (BSC), a unit within the Employer's Human Resources operation. The BSC provides benefit information to employees, and enrolls and disenrolls employees and their beneficiaries. The BSC has 17 employees, in addition to the Director of Compensation and Benefits, a Human Resources employee, who has served as the Plan Administrator since 2004. The BSC occupies the same building as the Employer's Human Resources department which also provides payroll, labor management, accounting, and tax services. The BSC is the only office that requires an access card to gain entry and its computer access to employees' medical records and information is password-protected. Only the BSC employees and the Plan Administrator have access cards and computer access to the BSC offices and records, respectively.

In October 2007,[3] without consulting with the Union, the Employer notified its employees that it had hired a contractor, ACS HR Solutions (ACS), to conduct a "dependent eligibility review", i.e., an audit to ensure that only eligible dependents of employees were covered by its health insurance plan.[4] Employees were required to complete a verification worksheet and provide documents to prove dependent eligibility, such as marriage and birth certificates, tax returns, school enrollment information, and adoption papers (if applicable). Employees not complying with the audit would have their dependent coverage automatically terminated as of December 31. Employee appeals challenging the termination of coverage were to be filed with ACS.

On November 12, the Employer sent the employees a letter regarding the audit which read in part:

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[3] All dates are in 2007 unless noted otherwise.

[4] The Union and the Employer are parties to a Memorandum of Agreement (MOA) dated November 4, 2004, that allows the Employer to conduct employee health insurance eligibility reviews provided they were in accordance with a procedure the parties jointly developed. The MOA was in effect at the time the Employer conducted the audit. On November 16, 2007, the Union filed a grievance on behalf of all of its locals citing the Employer's violation of the MOA by unilaterally implementing an employee dependent eligibility audit. The status of this grievance is unknown.

> [We have] taken all necessary steps to ensure the confidentiality of employee information....When the eligibility review project is complete, all personal information will be transferred to [BSC]....[We] will continue to maintain all personal records under the privacy mandates established by [HIPAA].

When the audit was completed on January 25, 2008,[5] ACS provided the BSC Supervisor with a report containing the names of 200 employees, and their 203 dependents who were determined to be ineligible for health care coverage. That day, the BSC Supervisor provided the affected employees' names to the Human Resources department. The payroll office used the information to adjust the impacted employees' healthcare payroll deductions. Also that day, the Employer's Labor Relations Director provided the Union by email with a spreadsheet showing the number of employees impacted in each of the 20 affected locals, and five appeals that had been filed with ACS.

Upon receipt of the email, the Union contacted the Labor Relations Director and requested the Employer provide the names of affected employees and their dependents, and any documents pertaining to the five appeals. The Employer responded it did not have the information. On February 5, the Union further requested that the Employer provide the reason for the termination of coverage for each dependent. On February 8, the Employer stated it would provide the affected employees' names by February 15. With respect to the other information, the Employer claimed it had privacy and confidentiality concerns.

On February 13, the Union made a written request for: 1) the names of the affected employees; 2) their dependents; 3) the documents pertaining to the five appeals; and 4) the reasons for termination of coverage for each dependent.

When the Employer did not respond, the Union on February 25 filed a grievance over the termination of dependent health care coverage. In its grievance, the Union assured the Employer that any information provided would be held in confidence and would only be used by those persons evaluating and processing the grievance. The Union further noted that the grievance had arisen under the NBA and requested that the Employer consider the grievance on a national level rather than having the locals file individual grievances.

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[5] All dates hereafter are 2008, unless noted otherwise.

On February 26, the Employer agreed to process the grievance at the national level, and stated that if the Union agreed that the locals would not file individual grievances, it would provide the Union with the impacted employees' names. The Union agreed to the Employer's precondition later that day and reiterated its remaining information requests. However, on February 29, the Employer notified the Union that it could not provide any of the requested information because such disclosure would violate HIPAA. The Employer indicated that it would provide the requested information only for those employees who completed an authorization for release of health information.

On March 13, the Union filed the instant unfair labor practice charge alleging the Employer refused to provide the Union with information necessary for the Union to administer the NBA and to process its grievance protesting the termination of dependent health care coverage in violation of Section 8(a)(5).[6]

On March 19, the BSC manager sent a letter to each of the impacted employees along with an authorization form that would allow release of the employee's health information to the Union. To date, only 14 employees have signed authorization forms. The Employer has provided the Union with these employees' dependent eligibility review documents.

The Employer asserts confidentiality interests to justify its refusal to provide any of the requested information. First, the Employer claims that as a "hybrid entity" under HIPAA, it is barred from disclosing the information sought which constitutes "protected health information." Second, the Employer contends that the information possesses an "aura of confidentiality" and disclosing the identity of the affected employees would reveal employees who sought coverage for ineligible dependents or other personal information, such as the loss of dependent status due to an employee's divorce. Finally, the Employer notes it promised employees confidentiality pursuant to its November 2007 letter to employees regarding the audit.

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[6] As an example of why it needs the information, the Union states it learned that an employee had lost coverage for her child because, pursuant to a court order, the ex-husband claimed the child on his tax returns, although the employee remained responsible for providing insurance coverage for the child.

ACTION

All the requested information is necessary and relevant for the processing of the Union's grievance, but the information constitutes "protected health information" under HIPAA. The names of the impacted employee and their dependents denied coverage are not confidential under Board law, but the documents related to the five appeals and the reasons for termination of dependent coverage are confidential. Thus without regard to HIPAA, the Employer would be required to provide the names of the impacted employees and their dependents denied coverage, and to bargain over an accommodation for the remaining information. Addressing the Employer's HIPAA defense, we conclude that (a) the Employer unlawfully refused to provide the impacted employees' names because a non-covered operation of the Employer, which did not have a HIPAA obligation, in fact possessed this information; (c) the Employer unlawfully refused to provide the names of the dependents because HIPAA does not bar disclosure of information that is either required to be provided under the Act or is sought for grievance processing; and (c) regarding the documents pertaining to the employees' appeals and the reasons for termination of coverage, the Employer unlawfully failed to bargain in good faith over a mutually agreeable accommodation to provide this confidential information; HIPAA does not bar accommodation bargaining required under the Act, and the HIPAA exception for information required to be provided under the Act does not bar the disclosure of information upon the parties' reaching an accommodation agreement.

I. The Union's Information Requests

The Union's outstanding information request is for the Employer to provide the: 1) names of the impacted employees; 2) names of dependents who lost coverage; 3) documents pertaining to the five employees' appeals; and 4) reasons for termination of coverage for each dependent.

A. Information requested is necessary and relevant

A union is generally entitled to information that is necessary and relevant to its collective-bargaining responsibilities.[7] Information requested by a union to help it process a grievance is presumptively relevant and must

[7] NLRB v. Acme Industrial Co., 385 U.S. 432, 436 (1967).

be disclosed.[8] The standard used to test the relevance is a "liberal discovery standard."[9]

As an initial matter, we conclude that all the requested information is necessary and relevant to the Union's ability to enforce and police the NBA, which provides for health care coverage for employees and their dependents. The information sought is necessary to process the Union's grievance and to assess whether the Employer improperly terminated coverage for any of the impacted employees' 203 dependents.

B. Employer has raised confidentiality interests

A union's interest in relevant information does not always predominate when an employer asserts a legitimate and substantial interest in maintaining confidentiality.[10] Determining an employer's duty to supply assertedly confidential information requires a balancing of the union's need for the information against the employer's legitimate and substantial confidentiality interest. An employer has the burden to show that it has a legitimate confidentiality interest.[11] Even if the information is confidential, an employer may not simply refuse to provide the information but rather must bargain in good faith over an accommodation of its confidentiality interest and the union's need for the information.[12] If it fails to bargain over an accommodation, the Board will order bargaining as affirmative relief, and may direct conditional disclosure of the information through a confidentiality agreement, protective order, or some other appropriate procedure.[13]

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[8] Wilshire Foam Products, Inc., 282 NLRB 1137, 1140 (1987).

[9] Pfizer, Inc., 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985), Loral Electronic Systems, 253 NLRB 851, 853 (1980).

[10] Detroit Edison v. NLRB, 440 U.S. 301, 318 (1979).

[11] Exxon Co. USA, 321 NLRB 896, 898 (1996), enf'd mem; 116 F.3d 1476 (5th Cir. 1997); McDonnell Douglas Corp., 224 NLRB 881, 890 (1976).

[12] See Pennsylvania Power Co., 301 NLRB 1104, 1105-06 (1991) (citing Minnesota Mining & Mfg. Co., 261 NLRB 27 (1982), enfd. sub nom. Oil, Chemical & Atomic Workers Local 6-418 v. NLRB, 711 F.2d 348 (D.C. Cir. 1983)).

[13] Exxon Co. USA, 321 NLRB at 899. See United States Testing Co. v. NLRB, 160 F.3d 14, 20-21 (D.C. Cir. 1998) (holding that an employer that invokes confidentiality

In determining whether a confidentiality interest exists, the Board considers such factors as: (1) whether another law protects the confidentiality of the information;[14] (2) the information possesses a "legitimate aura of confidentiality;"[15] and (3) the employer promised employees confidentiality.[16] The Employer asserts the information here is confidential under each of these factors. We discuss the Employer's asserted confidentiality interests under Board law, and finally the Employer's duty to disclose the requested information under HIPAA.

II. The Confidentiality Interests

A. HIPAA

The Employer claims that all the information requested constitutes "protected health information" (PHI) under HIPAA, and that the Employer as a "hybrid covered entity" under HIPAA is barred from disclosing such information to the Union.

HIPPA generally prohibits a "covered entity" from disclosing all "individually identifiable health

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concerns must offer to accommodate that concern with its bargaining duty, such as by "making an offer to release the information conditionally or by placing restrictions on the use of that information"), enf'g 324 NLRB 854 (1997). Cf. Pennsylvania Power Co., 301 NLRB at 1108 n.18 (rather than ordering the parties to bargain over an accommodation, the Board ordered a limited disclosure remedy).

[14] See Postal Service, 305 NLRB 997, 998 (1991), citing Detroit Edison, 440 U.S. at 318 n.16 (employer's Inspection Service Procedures instructions and FOIA's law-enforcement exception); Goodyear Atomic Corp., 266 NLRB 890, 891-92 (1983), enfd. 738 F.2d 155 (6th Cir. 1984) (Privacy Act exception).

[15] See Exxon Co. USA, 321 NLRB 896, 898-99 (names of persons who had disclosed their drug or alcohol-related arrests, convictions, and rehabilitation); Johns-Manville Sales Corp., 252 NLRB 368, 368 (1980) (names of employees with medical disorder).

[16] See Wayne Memorial Hospital Assn., 322 NLRB 100, 103 n.14 (1996); Remington Arms Co., 298 NLRB 266, 273 (1990); Washington Gas Light Co., 273 NLRB 116, 117 (1984).

information" or PHI.[17] A plan participant's name and dependents, as well as enrollment and disenrollment information, involves individually identifiable information, and is therefore PHI.[18] A "covered entity" means: a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form.[19] Most employers do not qualify as covered entities subject to HIPAA. Here, the Employer administers a self-insured health plan which reimburses employees directly for medical care. Accordingly, the Employer as a "health plan" is a "covered entity" subject to HIPAA.

A single entity that performs both covered and non-covered functions may limit its obligations under HIPAA by separating its health care components from its other components by constructing an information "firewall" to ensure that "the [health plan] does not disclose [PHI] to another component of the covered entity."[20] If the entity successfully establishes itself as a "hybrid entity,"[21] only those operations which perform "covered functions", and not the non-covered operations, are subject to HIPAA's nondisclosure requirements.

We agree that all the requested information is PHI because it involves "individually identifiable information." We further agree that the Employer is a hybrid entity under HIPAA because it has designated the BSC, a separate department, to administer its health plan and has erected an information firewall around the BSC. The BSC occupies the same building as the rest of the

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[17] PHI is information that relates to, among other things, "the past, present, or future payment for the provision of health care" and that can be used to identify the individual. 45 CFR § 160.103.

[18] PHI is broadly defined to include any individually identifiable health information such as name, address, birth date, or social security number. See 45 CFR § 160.103.

[19] 45 CFR § 160.102(a)(1)-(3).

[20] 45 CFR §§ 164.504(c)(2)(i).

[21] 45 CFR §§ 164.103 & 105. Hybrid entity means a single legal entity: 1) That is a covered entity; 2) Whose business activities include both covered and non-covered functions; and 3) That designates health care components in accordance with paragraph § 164.105(a)(2)(iii)(C).

Employer's Human Resources department, however, it has its own employees and is the only department with secured doors and restricted computer access. Thus, the BSC is a "covered entity" subject to HIPAA but the Employer's remaining operations are not.

B. "Legitimate aura of confidentiality"

The Board has recognized that certain information has a "legitimate aura of confidentiality."[22] The Board in Detroit Newspaper Agency,[23] described as confidential a few categories of information that would justify nondisclosure:

> [I]nformation... which would reveal, contrary to promises or reasonable expectations, highly personal information, such as individual medical records or psychological test results;... substantial proprietary information, such as trade secrets; [information] which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses....[24]

However, while certain types of information may have "a legitimate aura of confidentiality," the Board has rejected blanket claims of confidentiality.[25] The Board instead requires a specific demonstration of a confidential interest in the particular information requested.[26]

C. Employer's promise of confidentiality

The Board considers an employer's promise of confidentiality to employees in determining whether the employer has demonstrated a substantial confidentiality

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[22] See Exxon Co. USA, 321 NLRB 896, 898 (1996), enf'd mem., 116 F.3d 1476 (5th Cir. 1997); McDonnell Douglas Corp., 224 NLRB 881, 890 (1976).

[23] 317 NLRB 1071 (1995).

[24] Id. at 1073.

[25] See, e.g., Washington Gas Light Co., 273 NLRB at 116 (employer violated Act by refusing to disclose certain confidential information to the union, since the employer failed to prove that its general confidentiality claim regarding all material in the employees' personnel files outweighed the union's need for the information requested).

[26] Id.

interest.[27] However, research has uncovered no cases and the Employer has cited no authority where the Board has found that a refusal to turn over otherwise necessary and relevant information was justified based solely on an employer's promise of confidentiality to its employees.[28]

III. The Employer's Confidentiality Interests

A. The Names of the Impacted Employees and the Names of the Dependents Denied Coverage

Under Board law, the names of affected employees does not fall under any of the categories deemed to possess an "aura of confidentiality".[29] The dependents' names also do not possess an "aura of confidentiality" because such information does not reveal anything beyond those employees who had their dependent care coverage terminated.[30] Unlike the categories of information that the Board has deemed

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[27] See Wayne Memorial Hospital Assn., 322 NLRB 100, 103 n. 14 (1996); Remington Arms Co., 298 NLRB 266, 273 (1990); Washington Gas Light Co., 273 NLRB 116, 117 (1984).

[28] See Northern Indiana Public Service Co., 347 NLRB No. 17, sl. op. at 3 (2006)(in finding employer had confidentiality interest in investigator's notes of supervisor misconduct obtained by promises of employee confidentiality, Board noted that "a promise of confidentiality is relevant to the issue of whether the information will be considered confidential"); Mobil Oil Corp., 303 NLRB 789, 781 (1991)(in finding employer had confidentiality interest in identity of employee informant to drug use, Board noted that "The pledge of confidentiality is reasonable in light of the general potential for retaliation against informants in the investigation of criminal drug use."). See also Detroit Edison, 440 U.S. at 301 (the Supreme Court held that an employer did not violate Section 8(a)(5) by refusing to provide a union with employer scores on psychological aptitude tests and based its holding on the inherent confidentiality of the tests along with the employer's promise of confidentiality).

[29] Detroit Newspapers Agency, 317 NLRB at 1073.

[30] See Wayne Memorial Hospital, 322 NLRB at 104 ("...the Respondent [] has not shown, or indeed alleged, that the particular items requested by the Union - [an employee's] evaluations and written warnings - are inherently confidential or contain sensitive data, or that it has some other legitimate and rational basis for wanting to protect [such information] from being disclosed to the Union.")

confidential, e.g., individual medical records, psychological test results, or trade secrets, the employees' and dependents' names constitute basic information and do not otherwise implicate any personal information.[31]

The Employer's November 2007 letter promising employees confidentiality regarding the audit did not encompass employee participants' and their dependents' names. The letter stated that the information provided for the audit would, "be restricted to only those employees who are working directly on the [audit]...." and that the Employer "w[ould] continue to maintain all personal records under the privacy mandates established by [HIPAA]." Thus, the Employer's promise of confidentiality concerned only the substantive information and documents provided by employees to prove dependent eligibility.

B. The Documents Related to the Five Appeals, and the Reasons for Termination

We conclude that the Employer has a legitimate confidentiality interest in the documents pertaining to the five employees' appeals, and the reasons for termination of coverage for each dependent because such information possesses an "aura of confidentiality" and the Employer promised employees confidentiality.

Employees participating in the audit were required to provide information and documents about their dependents to prove eligibility for coverage. Such information included their dependents' school enrollment information, marriage and birth certificates, adoption papers, and tax returns.

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[31] Id. See also, Laurel Baye Healthcare of Lake Lanier, LLC and UFCW, Local 1996, 346 NLRB 159 (2005) (employer ordered to furnish union with employee names and names of their dependents for first contract bargaining as presumptively relevant information that and "must be furnished upon request.") Compare, United States Testing Co., 324 NLRB 854 (1997) where the Board affirmed ALJ's order requiring the employer to turn over premiums paid and claims made on behalf of employees and dependents, but held that the employer not need provide names of employees and dependents who had made medical claims. The ALJ noted that the employer considered claimant names confidential because such information could reveal the private nature of the medical claim. Id at 859. In contrast, the dependent names here, standing alone, cannot be linked to medical claim information.

These types of documents contain information of a personal nature and would be part of an employee's appeal documents. The reasons for termination of coverage also would reveal personal information, such as the loss of dependent coverage because of divorce, custody, or other family matters. Employees have a reasonable expectation that information pertaining to his or her marriage, personal finances, or familial relationships will be kept private and separate from the workplace.[32] This expectation was further reinforced by the Employer's November 2007 letter to employees which promised that, "[it] had taken all necessary steps to ensure the confidentiality of employee information...." Thus, the employees were assured and could reasonably believe that the documents and information they provided to prove dependent eligibility, which involved personal information (unlike the participants' and dependent names), would be treated confidentially and not disclosed.

Having resolved the confidentiality status of the requested information under traditional Board law, the only remaining confidentiality issue is the Employer's claim that HIPAA bars disclosure of the information as PHI. We discuss that issue below.

IV. The Employer's Duty to Disclose Under HIPAA

A. Names of Impacted Employees

The Employer refused to provide the names of impacted employees based on its claim that the BSC, which possesses the information as PHI, cannot disclose such PHI to the Employer. We reject this HIPAA defense because the evidence shows that the Employer's Human Resources department, an Employer operation not covered by HIPPA, in fact possessed this information.

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[32] See, e.g., Pulaski Construction and New Jersey Regional Council of Carpenters Local 34018, 345 NLRB 931 (2005) (employer did not raise confidentiality interest but Board, nonetheless, did not order the turnover of personal tax returns requested by the union). Cheboygan Health Care Center, 338 NLRB 802 (2003)(employer did not raise confidentiality interest but Board, nonetheless, did not order the turnover of employees' social security numbers; Tritac Corp., 286 NLRB 522 (1987) (polygraph results are confidential because they contain employee responses to questions involving alcohol and drug use, commitment of crimes, and hospitalization or incarceration); Washington Gas Light Co., 273 NLRB 116, 117 (1984) (employee personnel records not confidential in their entirety but may contain confidential information such as medical information).

The BSC provided the names of the 200 impacted employees to the Human Resources department, specifically to the payroll office, which used it to adjust the impacted employees' health care payroll deductions. The BSC legitimately passed this information to the payroll office because HIPAA permits a covered entity to use or disclose PHI to carry out "health care operations" which includes "business management and general administrative activities of the entity."[33] Thus, the Employer's HIPAA defense fails because this information in fact had passed through the information firewall from the BSC to a non-covered operation of the Employer. Accordingly, because a non-covered Employer operation with no HIPAA obligation possessed this the impacted employee names, which is not otherwise confidential under Board law, the Employer violated the Act by failing to provide the Union with this information.

B. The Names of the Dependents Denied Coverage

The Employer refused to provide the names of the dependents based on its claim that the BSC cannot disclose such PHI to the Employer under HIPAA. We have already determined that, under traditional Board law, this information is not confidential and would be subject to disclosure. We reject the Employer's HIPAA defense because two exceptions to HIPAA's non-disclosure rule apply here; one exception applies to information which is required to be provided under the Act, and another applies to information sought for grievance processing.

HIPAA does not bar disclosure of information required to be provided under the Act. Specifically, the Rule permits covered entities to make disclosures required by law.[34] Further, HHS comments contained in the Standards for Privacy of Individually Identifiable Health Information, expressly explain that this provision authorizes disclosure of information that a covered entity is required to provide under the NLRA:

> The National Labor Relations Act...may contain provisions that require covered entities...to use

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[33] 45 CFR § 164.501(6).

[34] Section 164.512(a). The Employer's Plan HIPAA policy recognizes and is in accord with this HIPAA regulation. Under the Plan's HIPAA provision, the Plan may disclose an employee's PHI without an employee's written authorization if "otherwise permitted or required by law."

> or disclose [PHI] for specific purposes.... When a covered entity is faced with a question as to whether the privacy regulation would prohibit disclosure of [PHI] that it seeks to disclose pursuant to a federal law, the covered entity should determine if the disclosure is required by that law....If it is mandatory, a covered entity may disclose the [PHI]...."[35]

In reaching this conclusion, HHS also relied on another HIPAA exception that permits a covered entity to "use or disclose [PHI] to carry out ... health care operations" without an individual's authorization.[36] HHS explained that the definition of "health care operations" includes "business management and general administrative activities of the entity, including . . . Resolution of internal grievances."[37] Thus, this exception permits disclosure of PHI in the circumstances of this case.[38] The Union seeks this information for processing a grievance over the Employer's discontinuation of health care coverage, provided for in the NBA, of 200 employees' dependents.

In sum, the dependents' names are not confidential information under Board law and thus must be provided under the Act, and the dependents' names also are relevant to the Union's NBA grievance. The above exceptions to HIPAA thus

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[35] 65 Fed. Reg. 82462, 82485 (December 28, 2000).

[36] 45 CFR § 164.506(c)(1) ("Standard: Permitted uses and disclosures").

[37] 45 CFR § 164.501(6)(iii).

[38] See 65 Fed. Reg. 82598:

> Comment: A few comments expressed concern that the regulation did not address the obligation of covered entities to disclose [PHI] to collective bargaining representatives under the National Labor Relations Act.
> Response: The final rule does not prohibit disclosures that covered entities must make pursuant to other laws. To the extent a covered entity is required by law to disclose [PHI] to collective-bargaining representatives under the NLRA, it may do so without an authorization. Also, the definition of "health care operations" at § 164.501 permits disclosures for purposes of grievance resolution.

apply; HIPAA does not bar the Employer from disclosing the dependents' names to the Union. Accordingly, the Employer violated Section 8(a)(5) when it refused to provide this information.[39]

D. The Documents Related to the Five Appeals, and the Reasons for Termination

We have concluded that this information is confidential under the Act. Accordingly, as earlier discussed, it is not subject to immediate disclosure. Rather, the Employer's collective-bargaining relationship with the Union requires it to bargain in good faith over an accommodation to provide the information to the Union while protecting its interest.[40] That duty to bargain is not barred by HIPAA; HIPAA only pertains to whether or not information may be disclosed.

Once the parties' good faith bargaining results in an agreement that accommodates the employer's privacy concerns, the employer's duty to turn over the information under the Act becomes mandatory. At that point, the HIPAA exceptions discussed above permitting disclosure of information required to be provided under the NLRA specifically apply. HIPAA thus not only does not bar the Act's bargaining accommodation process, a HIPAA exception then applies to not bar the disclosure of information within the bargained accommodation.

In sum, the HHS comments to the HIPPA Privacy Rule make clear that HIPAA's nondisclosure rules and the Act's duty to provide confidential information are not in conflict. Rather, HIPAA freely allows for disclosure of PHI pursuant to accommodation bargaining and does not alter the Employer's duty to provide PHI if it is required under the NLRA. Accordingly, the Employer violated Section 8(a)(5) when it failed to bargain with the Union over an accommodation of its interests.

In sum, a Section 8(a)(5) complaint should issue, absent settlement, alleging that the Employer: 1) unlawfully refused to provide the Union with the names of impacted employees and the names of dependents denied coverage ; and 2) unlawfully refused to bargain over a

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[39] Under the same analysis the Employer would be obligated to provide the names of the affected employees even if that information were only in the hands of its HIPPA covered component.

[40] Detroit Edison v. NLRB, 440 U.S. at 318-320.

mutually satisfactory accommodation of the Employer's confidentiality interests and the Union's need for the appeals documents, and reasons for termination for each dependent.

B.J.K.