



**Webinar: Privacy Conundrums**

*Iris Tilley*  
*Barran Liebman LLP*

  
 citycounty insurance services  
[www.cisregion.org](http://www.cisregion.org)

---

---

---

---

---

---

---

---

**HIPAA Myth:**

Health care providers can share personal health information with employers.



**HIPAA Truth:**

*Employers can't receive personal health information about their employees without an employee's explicit, written authorization.*




---

---

---


---

---

---

---

---



**True or False:**

*"I don't have time to keep OFLA/FMLA leave of absence requests separate from an employee's personnel file (nor do I have the space). It's OK, therefore, to keep all of these documents about an employee in one 'personnel file'."*

**False!** Records relating to an employee's OFLA/FMLA leave of absence, workers' compensation claim, fitness-for-duty exams, or other medical information should never be stored in the employee's official personnel file.

---

---

---

---

---

---

---

---

**True or False:**

*FMLA (and OFLA) allows an employer to talk to an employee's physician after receiving the employee's completed medical certification form from the employee.*



**False!**

*An employer is limited, by law, to talk to an employee's doctor "for purposes of clarification and authentication of the medical condition," and only after the employee is given a chance to fix any uncertainties or issues in the medical certification form. It is recommended that CIS members consult with the Pre-Loss team or their outside counsel about this particular process.*

---

---

---

---

---

---

---

---

**Privacy Conundrums:  
A Best Practices Guide for  
Sensitive Employment Records**

Iris Tilley  
Barran Liebman LLP

---

---

---

---

---

---

---

---

**Overview**

- Sources of Law
- Records and the Employment Relationship

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Key Sources of Law

- Constitutions (federal and state)
- Health Insurance Portability and Accountability Act (HIPAA)
- Americans with Disabilities Act (ADA)
- Family Medical Leave Act (FMLA)
- Employee Retirement Income Security Act (ERISA)
- Federal Trade Commission Act
- State Law

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## Constitutional Privacy

- **Federal**
  - Bill of Rights First Amendment (speech, association)
    - Third Amendment (home)
    - Fourth Amendment (unreasonable search and seizure)
    - Fifth Amendment (testimonial self-incrimination)
    - Ninth Amendment (retained rights)
- **State**
  - May afford greater rights than federal.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## HIPAA

- HIPAA covers the transfer and storage of personally identifiable health information between (or within) covered entities and between covered entities and business associates.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## HIPAA

- What is a covered entity?
  - health plans;
  - health care clearinghouses; and
  - health care providers that conduct certain types of transactions in electronic form

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## HIPAA

- New requirements took effect this month.
  - Compliance date: September 23, 2013/2104
  - Updated business associate agreements & notices of privacy practices

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## HIPAA for Employers

- Sponsors of Insured Health Plans
  - Hands-off insured plans are exempt from most of HIPAA's requirements.
  - Plan sponsor must not receive PHI except for summary information.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## HIPAA for Employers

- Self-Insured Plans are covered entities.
- The plan and the employer are distinct entities under HIPAA.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## HIPAA for Employers

- The transfer of information between a health plan and an employer is often a challenge.
- A covered entity may share certain information with an employer:
  - Enrollment forms
  - Summary information
  - De-identified information
  - Information distributed pursuant to authorization.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## HIPAA is an Enforcement Priority

- HIPAA audits are on the uptick.
- While not required, self-audits of HIPAA procedures and processes are often wise.
- Audits can protect against a government audit.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## Lessons Learned from HIPAA Audits

- Administering self-insured health plan claims in-house is an area of potential error.
  - Employees processing health claims information may be overheard if placed with human resources or in a high-traffic area.
- Computer systems will be an OCR priority.
  - Simple issues like computers that do not automatically log off are common issues.
  - Limiting computer access to databases is also a concern.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## ADA

- The ADA imposes privacy requirements on medical information employers receive about applicants and employees—information must be treated as a confidential medical record.



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## FMLA

- FMLA allows employers to request a certification from a health care provider establishing that an employee qualifies for FMLA leave and mandates privacy protection for these certifications.



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## The Federal Trade Commission Act

- The FTC Act authorizes the federal trade commission to bring enforcement actions to stop unfair or deceptive trade practices, including a company's violations of its own stated privacy practices or false statements about information security.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## State Statutes

- ORS 652.750
  - Allows employee the right to inspect own personnel file.
- ORS 659A.136
  - Limits use of medical examination information obtained by an employer in determining whether the employee has a disability affecting employee's ability to perform job functions.
- ORS 656.360
  - Requires insurers and their claims agents to keep workers' compensation records confidential.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## State Statutes – Public Employers

- ORS 192.502(2)
  - Exempts information of a personal nature from public disclosure where disclosure would constitute an unreasonable invasion of privacy.
- ORS 192.502(12)
  - Exempts employee and retiree address, telephone number, and other nonfinancial and financial records maintained by PERS from disclosure.
- Similar protection is available under federal law as well.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Records and the Employment Relationship

- Recruitment & Hiring Decision
- Hiring
- Course of Employment
  - Employment Records
  - Self-Insured Health Plan Administration
  - Insured-Plan Administration
- Termination

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## Recruitment & Hiring Decision

- Resume/Application
- Recommendations/References
- Drug Test



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## Drug Test

- Third-party medical provider
  - Prospective employee signs authorization form
  - Entity delivers results to Initech via an electronic transmission
- Why should Initech keep the results confidential?
- HIPAA?
  - State law?



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---



## HIPAA and Drug Test Results

- HIPAA covers the transfer and storage of personally identifiable health information between (or within) covered entities and between covered entities and business associates.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## HIPAA and Drug Test Results

- A **covered entity** is a health plan, a health care clearinghouse, certain health care providers, and certain sponsors of the Medicare prescription drug card.
- A **business associate** is an entity that performs a function or activity on behalf of a covered entity or provides specific services for the covered entity and has access to PHI.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## HIPAA and Drug Test Results

- Do you need a business associate agreement?
  - No



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## Best Practices Summary - Recruitment Documentation

Record	Where to File	Special Considerations
Application Materials	Personnel File (but separate references)	ORS 652.750 ORS 646A.622
Drug Test Results	Separate Medical File	Positive results should be treated with extra care.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Hiring

- New hire paperwork:
  - Employee manual acknowledgement
  - Form I-9
  - Automatic deposit form
  - Form W-4
  - Benefit enrollment forms
  - New Hire Form (file online with I&I)



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Hiring

- Sensitive Information:
  - Bank account records
  - Social Security Number
  - Home address



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Best Practices Summary - Hiring Documentation

Record	Where to File	Special Considerations
Employee manual acknowledgement	Personnel File	ORS 652.750
Automatic deposit form	Personnel File	ORS 652.750 ORS 646A.622
Form W-4	Personnel File	ORS 652.750 ORS 646A.622
Benefit enrollment forms	Separate Benefits File	ORS 646A.622
New Hire Form	Personnel File	ORS 652.750 ORS 646A.622
Form I-9	Separate File	ORS 646A.622

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Course of Employment

- Scenario #1
- Trip & fall during work.



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Scenario #1: Workers' Compensation

Laws Implicated:

- ORS 656.360 (if self insured)
- ORS 652.750

Best Practices:

- Keep Workers' Compensation records separate from other portions of the employee file.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Course of Employment

- Scenario # 2—Self-Insured Health Plan
  - Storage of medical claims information
  - HIPAA covered transaction
    - Privacy Rule
    - Security Rule



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## Scenario #2: HIPAA

- Privacy Rule
  - Use and Disclosure
    - Minimum Necessary
    - Authorization
    - De-Identified Information
  - Individual Rights and Privacy Notice
    - Individual Rights
    - Privacy Notice



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## Scenario #2: HIPAA

- Privacy Rule (cont.)
  - Administrative Requirements
    - Designate a privacy officer
    - Train workforce on privacy policies and procedures
    - Establish safeguards to protect PHI (like computer passwords and locking file cabinets)
    - System for lodging complaints
    - Discipline for those who violate
    - Do not discipline those who exercise their rights
    - Mitigate harmful effects of disclosure
    - Don't require individuals to waive rights

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

## Scenario #2: HIPAA

- Security Rule
  - Generally, requires covered entities and business associates that electronically maintain or transmit PHI to implement safeguards to protect electronic PHI.



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Scenario #2: HIPAA

- Security Rule (cont.)
  - HHS has issued specific security standards.
  - They are too numerous to cover here, but they include administrative, physical, and technical safeguards to protect electronic PHI.
  - Entities covered by the security rule, should examine these requirements in detail.

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Course of Employment

- Scenario #3
  - Protected Leave
    - FMLA
      - Certifications should be kept in a separate confidential medical file under strict lock and key.
    - ADA
      - Also requires treatment of this information as a confidential medical record.



BARRAN LIEBMAN LLP

---

---

---

---

---

---

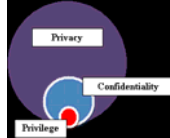
---

---

## Course of Employment

### ■ Scenario #4

- Communications with company's attorney or in-house counsel.
- These records should be kept in a separate file.



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Best Practices Summary - Course of Employment

Record	Where to File	Special Considerations
Performance Evaluations and related notes	Personnel File	ORS 652.750
Communications with attorneys	Separate File	
Payroll records	Payroll File	ORS 646A.622
Records relating to a conviction or violation of the law	Separate File	
Workers' Compensation Records	Separate File	ORS 656.360

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Best Practices Summary - Course of Employment (cont.)

Record	Where to File	Special Considerations
Medical Records Related to Protected Leave	Medical File	FMLA ADA ORS 659A.136
Records related to self-insured health plan	Benefits File	HIPAA ADA
Any records related to a fully-insured and externally administered plan	Benefits File	

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Termination

- Scenario #4
  - Request for Form W-2
  - Do not distribute without authorization, court order, or appropriate power of attorney.



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Electronic Recordkeeping Systems

- Arguably more secure.
- Key is controlling access to specific file types.
- Use directories with passwords to create secure storage for sensitive records.



BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---

## Best Practices Summary - Termination

Record	Where to File	Special Considerations
W-2	Personnel File	ORS 646A.622
Notes and documentation addressing reason for termination	Personnel File	ORS 652.750
Records of Final Paycheck	Payroll File	ORS 646A.622

BARRAN LIEBMAN LLP

---

---

---

---

---

---

---

---





**Thank You**  
Iris K. Tilley  
itilley@barran.com  
503-228-0500

BARRAN LIEBMAN LLP

---

---

---

---

---


---

---

---

# CIS UPCOMING EVENTS

Webinar: **CIS Online Learning Tutorial**  
October 2nd @ 10:00 am for all employees  
October 9th @ 10:00 am for all employees



**CIS Learning Center**  
learn.cisoregon.org

*Come learn what you've been missing.*

---

---

---

---

---

---

---

---

# CIS UPCOMING EVENTS

## Instructor-Led Training

**Avoiding Harassment & Discrimination in the Government Workplace**  
OCT 15<sup>th</sup> – Cornelius 9:00-11:00 am  
or 1:00-3:00 pm

**Performance Evaluations & Performance Coaching**  
OCT 15<sup>th</sup> – Troutdale 9:00-11:30 am  
or 1:00-3:30 pm

**Defensive Driving (Public Works/Parks)**  
NOV 7<sup>th</sup> – Roseburg Public Works 8:00 – 10:30 am

## Conferences

**CIS Annual Conference**  
FEB 26<sup>th</sup> – 28<sup>th</sup> - Portland Marriott Downtown

---

---

---

---

---

---

---

---



## CIS UPCOMING EVENTS

### Working with Volunteers

Webinar  
October 24<sup>th</sup> @ 10:00 am

Presented by:  
**Tamara Jones**  
CIS Pre-Loss Attorney



citycounty insurance services  
[www.cisoregon.org](http://www.cisoregon.org)

Register at  
[www.cisoregon.org](http://www.cisoregon.org) -  
Upcoming Events



---

---

---

---

---

---

---

---