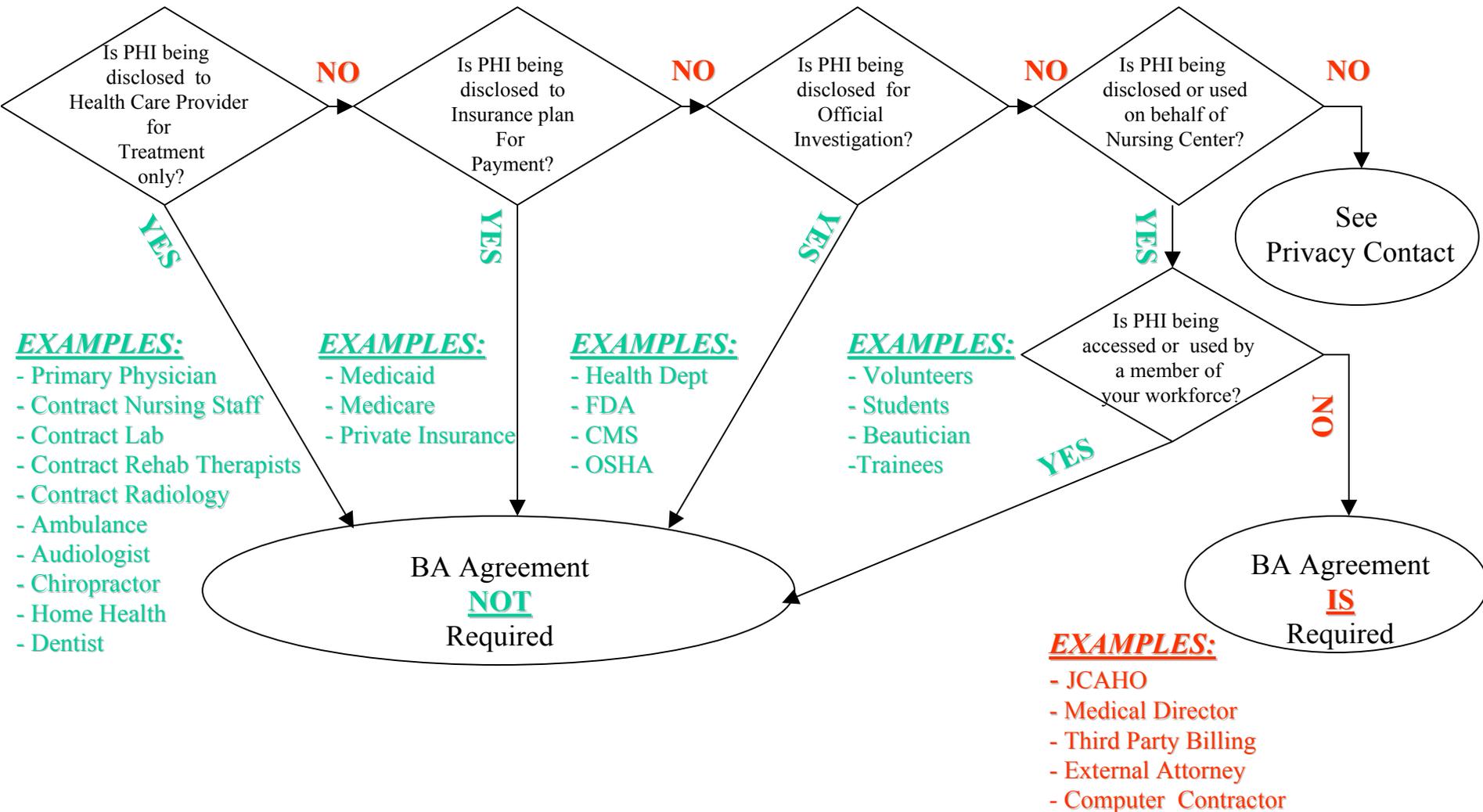


# Decision Tree: When is the BA Agreement Required ?



## Instructions for "Decision Tree: When is the BA Agreement Required"

### Purpose:

Your facility is a *Covered Entity* under HIPAA. HIPAA requires Covered Entities to sign agreements with certain organizations and individuals to whom they share protected health information (their "Business Associates.") Your facility's Business Associates are outside organizations or individuals who perform some function or service for your facility that requires them to have access to your patients' information.

*The "Determining When a Business Associate Agreement is Required" Decision Tree is a tool to guide you through determining which relationships required the Business Associate Agreement. The HIPAA rule on Business Associates has many complicated details and exceptions, as well as a number of ambiguous definitions and interpretations. This tool should help simplify the process. Because there is analysis at every stage of the decision tree, we suggest you use this educational supplement until you become familiar with the definitions and interpretations required for compliance.*

**Before you use this decision tree you must make an initial decision: "Is Protected Health Information (PHI) being disclosed to an outside entity?"**

*You must understand what constitutes PHI is to make this determination. Protected Health Information (PHI) can be broadly defined as meaning 1) any oral or recorded information relating to past, present, or future physical or mental health of an individual, the provision of health care to the individual, or the payment for health care and 2) that also contains information which makes impossible to identify the individual.*

*If you decide that PHI is actually being disclosed from your site, then move on to Decision Point #1.*

**➤ DECISION POINT #1—Is PHI being disclosed to another healthcare provider for treatment purposes only?**

The most frequent disclosures that facilities make to outside entities are for services or products used solely to treat a resident or group of residents. When the disclosure of PHI is to outside entities for treatment only purposes, then a Business Associate Agreement is not required.

The following are common examples of disclosures of PHI that **do not** require Business Associate Agreements due to the "treatment only" provision.

1. Providers of direct health care services for residents such as: attending physicians, dentists, podiatrists, psychologists, hospitals, clinics, dialysis facilities, laboratories, radiology providers, pharmacy distributors, and optometrists.
2. Providers of medical or care related supplies such as incontinence, enteral/parenteral, and food supplies, as well as pumps and durable medical equipment.
3. Ambulance and other medical transportation systems that request resident billing information in order to transport.

***SPECIAL NOTE:*** There are instances where health care professionals provide treatment directly to the resident on their behalf, yet also perform other services on the Facility's behalf and ***would*** be considered a Business Associate. For example, a pharmacy may not only distribute medications but may also provide pharmacy consultant services. Likewise, a medical supply company may not only supply the wound care product but may also provide wound therapy consultation.

These situations highlight the importance of examining all dimensions and functions of the relationship between the outside entity and the facility before making a quick decision. You can not assume exemption simply based on job title or function.

➤ **DECISION POINT #2 – Is PHI being disclosed to an insurance plan for Payment Purposes?**

A facility may disclose PHI to an insurance plan, including private insurance, Medicaid and Medicare, for residents, in order to assure payment for those services. Neither the health plan nor the facility is considered business associates of each other since both are considered to act individually on behalf of the resident.

The following examples illustrate payment for services that **do not** require a Business Associate Agreement.

1. MDS information sent to CMS for RUG categorization and payment.
2. Rehabilitation progress notes sent to a managed care company to verify treatment sessions.
3. Benefit and eligibility verification on the part of the facility.

***SPECIAL NOTE:*** If documents containing PHI, such as a remittance advice or Explanation of Benefits (EOB), are given to a bank in order to consolidate payments to the facility, then a Business Associate Agreement would be required. In this situation they are performing a function on behalf of the facility and not for the individual resident.

➤ **DECISION POINT #3 – Is PHI being disclosed for official investigation or proceeding?**

There are a number of exemptions to the Business Associate Agreement requirement if the PHI that is disclosed by the facility is required for:

- 1) Activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections and licensure; disciplinary actions; civil, administrative, or criminal proceedings or actions.
- 2) Appropriate governmental oversight of health care systems, government benefit programs, or government regulatory programs

The following examples illustrate disclosure of PHI to oversight, regulatory and legal agencies that **do not** require a Business Associate Agreement.

1. Reporting of state-required reportable diseases via telephone/written reporting cards to the Department of Public Health. Some examples of notifiable diseases are:
  - AIDS
  - Anthrax
  - Botulism
  - Diphtheria
  - Hepatitis A, B and C
  - Legionellosis
  - Malaria
  - Malaria
  - Plague
  - Rubella
  - Streptococcal disease, invasive, group A
  - Syphilis
  - Tetanus
  - Tuberculosis
2. A CMS survey (e.g. the facility's annual health department survey) where PHI is reviewed by a surveyor
3. A Department of Health/DHHS/State agency visit which was prompted due to staff/visitor/resident complaint
4. Death reporting to the state
5. Law enforcement officials investigating abuse of a resident
6. OSHA reporting
7. To a social services or protective agency authorized to receive reports of abuse, neglect, or domestic violence (except child abuse);
8. For judicial or administrative proceedings where required by order of a court or administrative tribunal or in response to a subpoena or discovery request.

Decide first if the oversight agency has legal authority to receive the PHI. If so, then a Business Associate agreement **is not** required.

➤ **DECISION POINT #4 Is PHI being disclosed or accessed on behalf of the facility?**

The term “on behalf of the facility” means functions that a facility needs to get done but chooses to outsource to another entity. These situations will require a Business Associate Agreement when the exchange of PHI is necessary for the function or service to be performed.

The function or service is provided for the direct benefit of the facility and typically involves activities that support, and/or enhance the facility’s ability to provide direct care to residents. Specific examples mentioned in the rule include:

- Claims processing & administrations
- Data analysis, processing, administration
- Utilization review
- Quality assurance
- Billing
- Benefit management
- Practice management
- Financial Services
- Legal services
- Actuarial services
- Consulting services
- Data aggregation
- Management
- Administrative
- Accreditation

The following are examples of services provided on the covered entity’s behalf that would require a Business Associate Agreement.

1. Agencies providing accreditation services such as JCAHO
2. Medical Directors acting in their administrative role on behalf of a facility.
3. Software vendors having access to PHI during the course of business.
4. Computer hardware service companies having access to PHI in electronic form.
5. Companies providing billing services that have access to PHI in the course of receiving electronic transactions to submit to payers for reimbursement.
6. Non-Facility Consultants such as: HIM/Medical Record, Dietary, Infection Control
7. Non-Facility Contracted Nurse’s Aide or Medication Aide Instructors
8. Payers performing functions that are in addition to, and not directly related to the provision of insurance.
9. Attorneys who are representing the facility in a legal dispute.
11. Shredding services that have direct access to PHI in order to do their job.

*SPECIAL NOTE:* In the vast majority of cases where PHI is exchanged with an outside entity on the facility’s behalf, the facility is responsible to pay the entity for the service or product the outside entity provides. This is in contrast to the “treatment only” situation where the resident themselves or their insurer are typically financially responsible.

➤ **DECISION POINT #5 – Is the Entity that is receiving the PHI considered part of your workforce?**

Workforce is defined as employees, volunteers, students, trainees, and other persons whose conduct, in the performance of work, is under the direct control of the covered entity, **whether or not they are paid by the covered entity.**

The following examples are typical instances of people who are not employed by us but are defined by HIPAA as “workforce”, and would not need a Business Associate Agreement.

1. A volunteer working in HIM/Medical records filing loose reports of discharged residents – The volunteer’s conduct is under the control of the covered entity.
2. A student performing a clinical internship at the facility - Although their internship defines the scope of their activities, while they are in the facility, the performance of these activities is supervised/overseen by a member of the CE’s workforce.
3. Beauticians/Barbers who work on site and are under the control of the facility.

***SPECIAL NOTE:***

There are some instances when a facility has the choice of whether to consider a contractor as workforce versus Business Associate. For example, temporary staffing resources in the billing office who participate in management meetings and who spend most of their time at the facility could be considered either workforce or business associate. The presumption is made that if there is not a Business Associate Agreement in place then it is assumed that the resource is part of your workforce. The decision-maker needs to weigh the pros and cons of such a decision from an operational and legal standpoint.

**Common Business Associates**

The following list contains entities that are typically Business Associates by the nature of their relationship with the facility. *This list does not include all possible Business Associates and assume all services are provided by persons non considered workforce .* You should routinely analyze these and all future contracts according to the decision tree to assure compliance and avoid the possibility of signing Business Associate Agreements when they are not required.

Attorney (external)	Medical Director (external)	Medical Coding Service
Mental health consultant	Medical Record Consultant	Ancillary Charge System
CNA instructors	Pharmacy Consultant	
Computer consultant	Psychiatry Consultant	
Contracted Billing	Record Destruction Service	
Infection Control Consultant	Transcription Services	
JCAHO	Record Copying Service	

*Temporary/contracted employees such as nursing or therapy may be considered either as workforce or business associate.*