

# Business Associate Amendment



**Mail to:** Western Health Advantage, Attn: Sales  
2349 Gateway Oaks Drive, Suite 100, Sacramento, CA 95833

**Fax to:** 916.568.1338

**Email to:** whasales@westernhealth.com

**Direct questions to:** 916.563.3198 or 888.499.3198 toll-free  
Monday through Friday 8:30 a.m. to 5 p.m. (excluding holidays)

Indicate One:  AGENT  AGENCY

COMMERCIAL  MEDICARE

**Name:** \_\_\_\_\_

This Amendment ("Amendment"), effective \_\_\_\_\_, supplements and is made a part of the Agent Agreement ("Agreement") dated \_\_\_\_\_ by and between Western Health Advantage ("Health Plan") and \_\_\_\_\_ ("Business Associate").

The parties agree that the terms and conditions of this Amendment shall apply to the Agreement and also to any other agreement or arrangement whereby Business Associate is in the role of a Business Associate to Health Plan, whether this Amendment is specifically referenced or not.

- A. Health Plan and Business Associate are parties to the Agreement pursuant to which Business Associate provides a service to, or performs a function on behalf of, Health Plan and, in connection therewith, uses or discloses Protected Health Information ("PHI"), which includes Electronic Protected Health Information ("EPHI"), that is subject to protection under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and certain privacy and security regulations found at 45 CFR Parts 160 through 164, as now or hereafter amended ("HIPAA Regulations");
- B. Health Plan is a Covered Entity as that term is defined in the HIPAA Regulations. Business Associate creates or receives PHI and/or EPHI from or on behalf of Health Plan and is, therefore, a Business Associate, as defined in the HIPAA Regulations;
- C. Pursuant to the HIPAA Regulations, Business Associate, as a Business Associate of Health Plan, must agree in writing to certain mandatory provisions regarding the safeguarding, use and disclosure of PHI and EPHI; and
- D. The purpose of this Amendment is to satisfy the Business Associate contract requirements as set forth at § 164.314(a) and § 164.504(e) of the HIPAA Regulations, as they may be amended from time-to-time.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties agree as follows:

- 1. **Definitions.** Capitalized terms in this Amendment have the meanings set forth in this section. In the event of a conflict between the definition of a term as it appears in this section and the definition of that term in the HIPAA Regulations, the definition appearing in the HIPAA Regulations shall control.
  - a. "Breach" means the unauthorized acquisition, access, Use, or Disclosure of PHI that compromises the security or privacy of such information, except where an unauthorized person to whom such information is disclosed would not reasonably have been able to retain such information, and shall have the meaning given to such term under HIPAA and the HIPAA regulations, including 45 CFR § 164.402, as well as California Civil Code §§ 1798.29 and 1798.82.
  - b. "Data Aggregation" means the combining of protected health information by Business Associate with the protected health information received by Business Associate in its capacity as a business associate of Health Plan, to permit data analyses that relate to the health care operations of the parties, and shall have the meaning given to such term under HIPAA and the HIPAA regulations, including 45 CFR § 164.501.
  - c. "Designated Record Set" means a group of records that is:
    - (i) The medical records and billing records about individuals maintained by or for Health Plan;
    - (ii) The enrollment, payment, claims adjudication, and case or medical management record systems maintained by or for Health Plan; or
    - (iii) Used, in whole or in part, by or for Health Plan to make decisions about individuals and shall have the

meaning given to such term under HIPAA and the HIPAA regulations, including 45 CFR § 164.501

- d. "Disclosure" means the release, transfer, provision of access to, or divulging in any manner of information outside the Business Associate's organization.
  - e. "Electronic PHI" means PHI that is transmitted by or maintained in electronic media and shall have the meaning given to such term under HIPAA and the HIPAA Regulations, including 45 CFR § 160.103.
  - f. "Individual" means the person who is the subject of Protected Health Information.
  - g. "Protected Health Information" ("PHI") means any information, including Electronic PHI, whether oral or recorded in any form or medium: (i) that relates to the past, present, or future physical or mental condition of an individual; the provision of health care to an individual; or the past, present or future payment of the provision of health care to an individual, and (ii) that identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual, and shall have the meaning given to such term under HIPAA and the HIPAA Regulations, including, but not limited to 45 CFR § 160.103. For the purposes of this Amendment, PHI includes all medical information and health insurance information as defined in California Civil Code §§ 56.05 and 1798.82.
  - h. "Required By Law" means a mandate contained in law that compels an entity to make a Use or Disclosure of protected health information and that is enforceable in a court of law, and shall have the meaning given to such term under HIPAA and the HIPAA Regulations, including 45 CFR § 164.103.
  - i. "Secretary" means the Secretary, Department of Health and Human Services, or his or her designee.
  - j. "Security Incident" means the attempted or successful unauthorized access, Use, Disclosure, modification, or destruction of information of interference with system operations, and shall have the meaning given to such term under HIPAA and the HIPAA Regulations, including 45 CFR § 164.304.
  - k. "Unsecured PHI" means PHI that is not rendered unusable, unreadable, or indecipherable to unauthorized individuals through the use of an Encryption or Destruction technology or methodology specified by the Secretary in guidance issued under Section 13402(h)(2) of the HITECH Act on the Health and Human Services website, as such guidance may be revised from time to time, and shall have the meaning given to such term under HIPAA and the HIPAA Regulations, including 45 CFR § 164.402.
  - l. "Use" of PHI means the sharing, employment, application, utilization, examination, or analysis of PHI within the Business Associate's organization.
2. **Scope of Use and Disclosure of PHI.** Except as otherwise limited in this Amendment:
- a. Business Associate shall use and disclose PHI solely to provide the services, or perform the functions, described in the Agreement, provided that such Use or Disclosure would not violate the HIPAA Regulations if so used or disclosed by Health Plan, or the minimum necessary policies and procedures of Business Associate required by § 164.514 of the HIPAA Regulations. Further, each such Use and Disclosure, respectively, shall be in compliance with each applicable requirement of § 164.504(e) of the HIPAA Regulations, relating to business associate contracts, and shall not violate California Civil Code §56 et seq. or California Civil Code §1798 et seq. Business Associate may use or disclose PHI for the proper management and administration of Business Associate or to provide Data Aggregation services to Health Plan. Business Associate may Use or Disclose PHI as Required By Law. Business Associate may not use or disclose PHI in a manner that would violate Subpart E of 45 CFR Part 164 if done by Health Plan.
3. **Obligations of Business Associate.** Business Associate shall:
- a. Not Use or Disclose PHI other than as permitted or required by the Agreement or as Required By Law. Business Associate may consult with Health Plan to assist with determination of whether Use or Disclosure is permitted or required in the event of uncertainty.
  - b. Use reasonable and appropriate safeguards to prevent Use or Disclosure of the PHI other than as provided for by this Amendment.
  - c. Mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a Use or Disclosure of PHI by Business Associate in violation of the requirements of this Amendment and report the mitigation actions taken to Health Plan within 30 days from the date Business Associate discovers the Use or Disclosure.
  - d. Report to Health Plan any Use or Disclosure of the PHI not provided for by this Amendment of which Business Associate becomes aware, including breaches of unsecured PHI as required under of § 164.410 of the HIPAA Regulations, and any Security Incident of which Business Associate becomes aware. Submit an initial report

to Health Plan no later than three business days from the date of discovery of the Use or Disclosure. The initial report shall include as much detail as possible, but shall at least include the nature and extent of the PHI involved and the recipients(s) of the PHI. Within a reasonable time from the completion of Business Associate's investigation, but in no case later than 30 days from the discovery of the Use or Disclosure, submit a final report fully describing the incident, the results of the investigation, and the mitigation efforts and remediation actions taken by Business Associate. Cooperate with Health Plan's risk assessment by providing relevant requested information including, but not limited to, the nature and extent of the PHI involved, the recipient(s) of the PHI, the names of individuals whose information was disclosed or impacted, and whether the PHI was actually acquired or viewed.

- e. Require contractors, subcontractors, and/or agents to whom Business Associate provides PHI created or received by Business Associate on behalf of Health Plan to agree in writing to the same restrictions and conditions that apply to Business Associate with respect to such PHI under this Amendment, in accordance with of §§ 164.502 and 164.308 of the HIPAA Regulations.
- f. Utilize only contractors, subcontractors, or other agents who are physically located within a jurisdiction subject to the laws of the United States and ensure that no contractor, subcontractor, or agent maintains, processes, uses, or discloses PHI subject to this Amendment in any way that will remove the PHI from such jurisdiction.
- g. Provide access, at the request of Health Plan, upon 15 days' written notice, to PHI in a Designated Record Set, to Health Plan in order to meet the requirements under § 164.524 of the HIPAA Regulations. If Health Plan and Business Associate mutually agree, Business Associate may provide such access directly to Individual, provided that such access is provided to the Individual in the time-frames set forth in § 164.524 of the HIPAA Regulations.
- h. Make any amendment(s) to PHI in a Designated Record Set that the Health Plan directs or agrees to pursuant to § 164.526 of the HIPAA Regulations at the request of Health Plan within 30 days, or take other measures as necessary to satisfy Health Plan's obligations under § 164.526 of the HIPAA Regulations.
- i. Make internal practices, books, and records, including, but not limited to, policies and procedures, relating to the use and disclosure of PHI created or received by Business Associate on behalf of Health Plan available for the Secretary and the Health Plan to access, if requested, in a time and manner designated by the Secretary, for purposes of the Secretary determining Health Plan's compliance with the HIPAA Regulations.
- j. Maintain for a period of six (6) years an accounting of all disclosures of PHI that are required to be maintained under § 164.528 of the HIPAA Regulations. Such accounting will include the date of the disclosure, the name of the recipient, a description of PHI disclosed and the purpose of the disclosure.
- k. Provide to Health Plan within 30 days of Health Plan's request, information collected in accordance with Section 3.j. of this Amendment, to permit Health Plan to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with § 164.528 of the HIPAA Regulations. If Health Plan and Business Associate mutually agree, Business Associate may provide such accounting directly to Individual, provided that such accounting is provided to the Individual in the time-frames set forth in § 164.528 of the HIPAA Regulations.
- l. Make reasonable efforts to implement any restriction of the Use or Disclosure of PHI that Health Plan has agreed to under Section 4.c. of this Amendment.
- m. With respect to EPHI, implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of the EPHI that Business Associate creates, receives, maintains, or transmits on behalf of Health Plan as required by 45 CFR Part 164, Subpart C.
- n. With respect to EPHI, ensure that any agent, including a subcontractor, to whom Business Associate provides EPHI, agrees to implement reasonable and appropriate safeguards to protect the EPHI.
- o. With respect to EPHI, report to Health Plan any Security Incident of which Business Associate becomes aware.
- p. Not transmit nor permit any subcontractor to transmit, move, ship, mail or in any way convey or communicate any PHI or EPHI to a location outside of the United States of America without the advance written consent of the Health Plan.
- q. HITECH Requirements: Sections 164.306 (security standards), 164.308 (administrative safeguards), 164.310 (physical safeguards), 164.312 (technical safeguards), 164.314 (organizational standards), and 164.316 (policies and procedures and documentation requirements) of the HIPAA Regulations, shall apply to Business Associate in the same manner that such sections apply to Health Plan. The additional requirements of Title XIII of the "Health Information Technology for Economic and Clinical Health Act" or the "HITECH Act" contained in Public Law 111-005 that relate to privacy and/or security and that are made applicable with respect to covered entities

shall also be applicable to Business Associate and shall be and by this reference hereby are incorporated into this Amendment.

- r. Upon the expiration or earlier termination of the Agreement, for any reason, Business Associate shall return or destroy all PHI received from Health Plan, or created or received by Business Associate on behalf of Health Plan that Business Associate still maintains and retain no copies of such PHI; provided that if such return or destruction of PHI is infeasible, Business Associate shall provide to Health Plan notification of the conditions that make return or destruction infeasible and shall extend the protections of this Amendment to such PHI and limit further uses and disclosures of such PHI to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such PHI.
  - s. In the event Business Associate is Required By Law to disclose PHI, Business Associate shall promptly notify Health Plan of such requirement. Business Associate shall give Health Plan sufficient opportunity to oppose or take other appropriate action before Business Associate discloses the PHI.
  - t. In the event Business Associate is served with legal process or a request from a governmental agency that may potentially require the disclosure of PHI, Business Associate shall promptly, and in any case within two business days of its receipt of such legal process or request, notify Health Plan. Business Associate shall not disclose the PHI without Health Plan's consent unless pursuant to a valid and specific court order or to comply with a requirement for review of documents by a governmental regulatory agency under its statutory or regulatory authority to regulate the activities of either party.
  - u. Subject to the limitations set forth in Section 13405(d)(2) of the HITECH Act, Business Associate shall not directly or indirectly receive remuneration in exchange for any of Health Plan's PHI unless Business Associate first obtains authorization from Health Plan. Health Plan shall not grant such authorization unless the subject of the PHI has granted Health Plan a valid authorization that includes a specification of whether the PHI can be further exchanged for remuneration by the entity receiving the individual's PHI.
  - v. Business Associate agrees to make reasonable efforts to trace lost or translate indecipherable transmissions. Business Associate shall bear all costs associated with the recreation of incomplete, lost or indecipherable transmissions if such loss is the result of an act or omission of Business Associate.
  - w. If Business Associate fails to adhere to any of the privacy, confidentiality, and/or data security provisions set forth in this Amendment or any other agreement it has with Health Plan or if there is a Security Incident or Breach of PHI in Business Associate's possession and, as a result, PHI or any other confidential information is unlawfully accessed, used or disclosed, Business Associate agrees to pay and reimburse Health Plan for any and all costs, direct or indirect, incurred by Health Plan associated with any Security Incident or Breach notification obligations.
  - x. Business Associate shall make its internal practices, books and records relating to the use, disclosure or security of PHI received from Health Plan (or created or received by Business Associate on behalf of Health Plan) available to any state or federal agency, including the U.S. Department of Health and Human Services, for purposes of determining Health Plan's and/or Business Associate's compliance with federal/state privacy and security laws and regulations.
  - y. Business Associate shall agree to cooperate with a vendor risk assessment, upon request from Health Plan.
4. **Obligations of Health Plan.** Health Plan shall:
- a. Provide Business Associate with the notice of privacy practices that Health Plan furnishes to Individuals in accordance with § 164.520 of the HIPAA Regulations.
  - b. Promptly notify Business Associate of any changes in, or revocation of, permission by Individual to use or disclose PHI, to the extent that such changes may affect Business Associate's Use or Disclosure of PHI.
  - c. Promptly notify Business Associate of any restriction to the Use or Disclosure of PHI that Health Plan has agreed to in accordance with § 164.522 of the HIPAA Regulations, to the extent that such restriction may affect Business Associate's Use or Disclosure of PHI.
  - d. Not request Business Associate to use or disclose PHI in any manner that would not be permissible under the HIPAA Regulations if so used or disclosed by Health Plan, unless such Use or Disclosure is necessary for the purposes of Data Aggregation or management and administrative activities of Business Associate under the Agreement.
5. **Termination for Breach.** Upon Health Plan's knowledge of a material breach of the terms of this Amendment by Business Associate, Health Plan shall, in accordance with the notification requirement and cure period set forth in the Agreement, provide an opportunity for Business Associate to cure the breach or end the violation. Health Plan may

terminate the Agreement if Business Associate does not cure the breach or end the violation within the cure period set forth in the Agreement.

**6. Insurance and Indemnification.**

- a. In addition to any general and/or professional liability insurance coverage required of Business Associate under any other agreement, Business Associate agrees to obtain and maintain, at its sole expense, liability insurance on an occurrence basis, covering any and all claims, liabilities, demands, damages, losses, costs and expenses arising from a breach of the security, privacy, or confidentiality obligations of Business Associate, its officers, employees, agents and subcontractors, under this Amendment. A copy of such policy or a certificate evidencing the policy shall be provided to Health Plan within 30 days of executing this Amendment.
- b. Business Associate agrees to defend at Health Plan's election, indemnify, and hold harmless Health Plan, its officers, agents or employees from and against any and all claims, liabilities, demands, damages, losses, costs and expenses (including costs and reasonable attorneys' fees), or claims for injury or damages, including, but not limited to civil money penalties imposed on Health Plan by the Secretary and costs of notification required by of §§ 164.404 and 164.406 of the HIPAA Regulations, that are caused by or result from the acts or omissions of Business Associate, it officers, employees, agents and subcontractors with respect to the use and disclosure of Health Plan's PHI.
- c. Health Plan agrees to defend at Business Associate's election, indemnify, and hold harmless Business Associate, its officers, agents and employees from and against any and all claims, liabilities, demands, damages, losses, costs and expenses (including costs and reasonable attorneys' fees), or claims for injury or damages that are caused by or result from the acts or omissions of Health Plan, its officers, agents or employees with respect to the use and disclosure of Health Plan's PHI.

- 7. **Assistance in Litigation.** Business Associate shall make itself, and any employees or agents assisting Business Associate in the performance of its obligations under this Amendment, available to Health Plan at no cost to Health Plan to testify as witnesses, or otherwise, in the event of litigation or administrative proceedings against Health Plan, its directors, officer, agents or employees based upon claimed violation of HIPAA, the HIPAA Regulations or other laws relating to security and privacy.
- 8. **Amendment.** The parties agree to take such action to amend this Amendment from time-to-time as is necessary for Health Plan to comply with the requirements of HIPAA and the HIPAA Regulations. This Amendment shall be automatically amended to incorporate any new or changed provisions of HIPAA upon the effective date of such new or changed provisions. Such automatic amendment shall be effective whether it is reduced to writing or not.
- 9. **Survival.** The respective rights and obligations of Business Associate under Section 6 of this Amendment shall survive the termination of the Agreement.
- 10. **Interpretation.** Any ambiguity in this Amendment shall be resolved to permit Health Plan to comply with the HIPAA Regulations.
- 11. **Conflict of Terms.** Business Associate is an independent contractor and nothing in this Amendment is intended to create or imply an agency or employment relationship between Health Plan and Business Associate.
- 12. **Independent Contractor.** Except as expressly modified by the terms of this Amendment, all of the terms and conditions set forth in the Agreement shall remain in full force and effect.
- 13. **Other Terms Remain in Force.** Except as expressly modified by the terms of this Amendment, all of the terms and conditions set forth in the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have executed this Amendment as of the date(s) set forth below.

**BUSINESS ASSOCIATE**

Printed Name \_\_\_\_\_ Title \_\_\_\_\_

Signature \_\_\_\_\_ Date \_\_\_\_\_

**WESTERN HEALTH ADVANTAGE**

\_\_\_\_\_  
Signature

Rebecca Downing, Privacy Officer  
Printed Name and Title