

CONFIDENTIALITY

Protecting and Releasing Health Information in California

November 2017
16th Edition

Allan D. Jergesen

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PREFACE

This publication is designed to produce accurate and authoritative information on the subject matter covered. It is sold with the understanding that CHIA is not engaged in rendering legal service. This publication should not be viewed as legal advice or take the place of advice provided by a health care provider's legal counsel. If legal or other expert assistance is required, if there are differences of opinion or where the law is unclear, the advice of legal counsel should be sought.

This publication is designed to inform health information management and other health care professionals about the new HIPAA privacy and security rules and includes the California Preemption rules.

This publication reviews situations in which providers are called upon to disclose information – including releases pursuant to court orders, subpoenas, reporting requirements, patient treatment regimens, and billing and payment activities.

This publication will go a long way towards familiarizing the reader with health information confidentiality, as governed by HIPAA, as amended by the HITECH Act and the HIPAA Omnibus Rule, and by California state law.

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SAMPLE

TABLE OF CONTENTS

	<u>Page</u>
PART ONE PRIVACY: HIPAA IN CALIFORNIA	1
I. BACKGROUND.....	1
A. Health Insurance Portability and Accountability Act of 1996 ("HIPAA")	1
B. Congressional Direction to DHHS	1
C. DHHS Response	1
D. Subsequent Revisions	2
II. THE STATE LAW PREEMPTION ISSUE	2
A. Preemption Rule	2
B. Exceptions	3
C. "More Stringent" Standard	3
III. CALIFORNIA – APPLICABLE CONFIDENTIALITY RULES	4
A. HIPAA Privacy Rules	4
B. California Confidentiality Laws.....	5
C. Federal Alcohol and Drug Abuse Confidentiality Regulations	6
IV. ENFORCEMENT AND PENALTIES	6
A. HIPAA	6
B. California Law	7
PART TWO PRIVACY: GENERAL HEALTH INFORMATION	9
I. HIPAA AND CMIA	9
A. Areas of Application.....	9
B. General Privacy Rule.....	9
C. Approach to Exceptions to Authorization Requirement	9

II.	GENERAL HEALTH INFORMATION – EXCEPTIONS TO WRITTEN AUTHORIZATION REQUIREMENT.....	10
A.	Disclosures under Legal Process	10
B.	Disclosures to Law Enforcement Agencies	13
C.	Disclosures to Patient or Patient’s Personal Representative.....	14
D.	Disclosures Otherwise Specifically Required by Law	14
E.	Disclosures to County Coroner.....	14
F.	Disclosures under Reporting Laws	14
G.	Disclosures for Public Health Activities.....	15
H.	Disclosures for Health Oversight Activities.....	16
I.	Disclosures for Workers’ Compensation.....	16
J.	Disclosures for Treatment Activities	16
K.	Disclosures for Payment Purposes.....	16
L.	Disclosures for Health Care Operations	17
M.	Disclosures to Business Associates	17
N.	Disclosures for Research.....	18
O.	Disclosures to Prevent Danger to Identified Person	19
P.	Disclosures for Organ Procurement	19
Q.	Disclosures Permitted by HIPAA and Not Recognized by CMIA.....	19
III.	WRITTEN AUTHORIZATION.....	20
A.	Form	20
B.	SNFs and ICFs	20
C.	Contents	20
D.	Invalidity.....	21
E.	Signature	22
F.	Special Situations Requiring Authorizations	22
G.	Situation Where Authorization Is Insufficient	23

SAMPLE

IV.	RELEASE OF BASIC PATIENT INFORMATION.....	23
A.	General Rule.....	23
B.	Disclosures to Outside Inquirers.....	23
C.	Disclosures of Limited Information to Defined Recipients for Specific Purposes	24
PART THREE PRIVACY: PATIENT RIGHTS		27
I.	NOTICE OF PRIVACY PRACTICES.....	27
A.	Requirement of Notice	27
B.	Request for Acknowledgment.....	27
C.	Contents of Notice	27
D.	Model NPP.....	28
II.	PATIENT REQUESTS FOR SPECIAL PRIVACY PROTECTION	28
A.	Request for Restrictions on Uses or Disclosures	28
B.	Request for Communications to Patient by Alternative Means or Locations	29
III.	PATIENT ACCESS TO HEALTH RECORDS	29
A.	Relevant Laws	29
B.	Person Granted Access.....	29
C.	Records Covered.....	30
D.	Right of Access.....	30
E.	Exceptions	34
F.	Summary of Patient Records.....	34
G.	Denial of Access	35
IV.	PATIENT AMENDMENT OF HEALTH RECORDS	35
A.	Applicable Laws.....	35
B.	Request for Amendment.....	35
C.	Decision Regarding Amendment.....	36

D.	Acceptance of Amendment.....	36
E.	Denial of Amendment.....	36
F.	Future Disclosures.....	37
V.	ACCOUNTING FOR DISCLOSURES.....	37
A.	Patient Right to Receive Accounting.....	37
B.	Exceptions to Accounting Right.....	37
C.	Content of Accounting.....	38
D.	Time for Accounting.....	39
E.	Charges for Accounting.....	39
F.	Documentation.....	39
	PART FOUR PRIVACY: SPECIAL HEALTH INFORMATION.....	40
I.	PSYCHIATRIC/MENTAL HEALTH INFORMATION.....	40
A.	Lanterman-Petris-Short Act.....	40
B.	Applicability.....	40
C.	General Rule of Confidentiality.....	40
D.	Exceptions – Written Authorization Needed.....	40
E.	Exceptions – No Written Authorization Needed.....	42
II.	SUBSTANCE ABUSE INFORMATION.....	46
A.	Federal Alcohol and Drug Abuse Confidentiality Regulations.....	46
B.	Applicability.....	46
C.	Disclosures with Written Authorization.....	48
D.	Disclosures without Written Authorization.....	49
E.	Notice to Patient of Confidentiality Requirements.....	50
F.	Court Orders.....	51
III.	HIV TEST RESULTS.....	51
A.	General Rule.....	51

B.	Exceptions	51
PART FIVE DISCLOSURE OF SECURITY BREACHES		53
I.	NEW FOCUS ON PROTECTING PATIENTS FROM SECURITY BREACHES.....	53
A.	New Concerns about ePHI Integrity	53
B.	Antecedents.....	53
II.	LAWS REQUIRING DISCLOSURE OF SECURITY BREACHES.....	53
A.	California “Medical Identity Theft” Law	53
B.	California “Improper Access Notification” Law.....	53
C.	HITECH Act	54
III.	REPORTING AND DISCLOSURE REQUIREMENTS	54
A.	Approach to Laws	54
B.	Obligation to Provide Notification.....	54
C.	Process for Determining Obligation to Notify.....	55
D.	Timing of Notification	56
E.	Form of Notification.....	56
F.	Contents of Notification.....	57
PART SIX NEW CHALLENGES		59
I.	ELECTRONIC COMMUNICATIONS – FAXING, E-MAILING, AND TEXTING PHI.....	59
A.	Advent of New Forms of Communication	59
B.	General Privacy and Security Considerations	59
C.	Use of Personally Owned Electronic Devices (“BYOD”).....	61
II.	ELECTRONIC SIGNATURES	61
A.	Increased Use of Electronic Signatures.....	61
B.	Legality of Electronic Signatures	61
C.	Authentication of Electronic Signatures.....	62

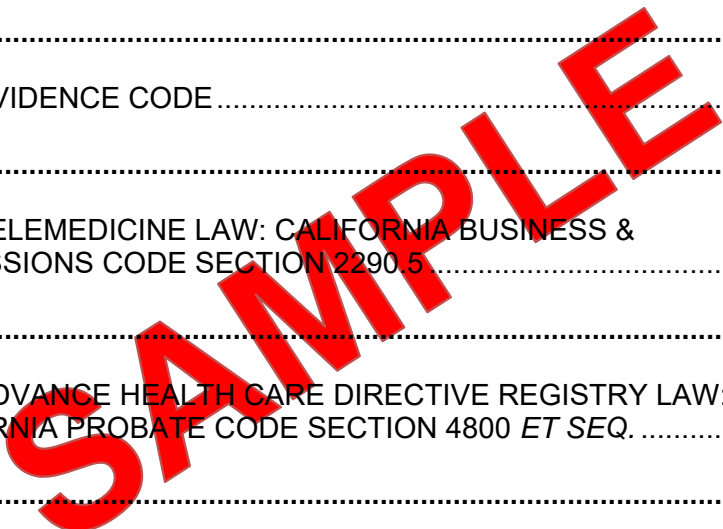
D.	Electronic Signatures in Health Documents	62
III.	SOCIAL MEDIA AND PATIENT CONFIDENTIALITY	63
A.	Rise of Social Media	63
B.	General Employer Concerns	63
C.	Avoiding Health Information Privacy Violations on Social Media.....	63
PART SEVEN CURRENT TRENDS.....		65
I.	CHANGING ENFORCEMENT FOCUS.....	65
A.	Early Emphasis on Education.....	65
B.	Current Focus on Implementation	65
II.	OCR AUDITS	65
A.	Prescribed in HITECH Act	65
B.	Phase 1 Pilot Audit Program (2012)	65
C.	Phase 2 Permanent Audit Program (2016).....	65
III.	OCR ENFORCEMENT	66
A.	OCR Reports	66
B.	Sources of OCR Investigations.....	66
C.	Focus on Security Breaches of ePHI.....	66
D.	Examples	67
IV.	DPH ENFORCEMENT	67
A.	DPH as Enforcement Agency	67
B.	Use of Existing Citation System.....	67
V.	PRIVATE ENFORCEMENT	68
A.	Availability	68
B.	Liability for CMIA Violations	68
C.	Class Actions for Security Breaches.....	68

SAMPLE

APPENDIX A	69
AUTHORIZATION FOR USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION	69
APPENDIX B	73
PATIENT REQUEST FOR HEALTH INFORMAITON.....	73
APPENDIX C	75
WRITTEN NOTICE ACCOMPANYING DISCLOSURE OF ALCOHOL OR DRUG ABUSE INFORMATION	75
APPENDIX D	77
FEDERAL ALCOHOL AND DRUG ABUSE CONFIDENTIALITY RULES: 42 C.F.R. §2.1 ET SEQ.....	77
OBRA SNF RESIDENT ACCESS RULES: 42 C.F.R §483.10(B)(2)	91
APPENDIX E	93
HIPAA SECURITY AND PRIVACY RULES: 45 C.F.R. §160.102 <i>ET SEQ.</i>	93
APPENDIX F	165
CALIFORNIA CONFIDENTIALITY OF MEDICAL INFORMATION ACT: CALIFORNIA CIVIL CODE SECTION 56 <i>ET SEQ.</i>	165
CALIFORNIA MEDICAL IDENTITY THEFT LAW: CALIFORNIA CIVIL CODE SECTION 1798.82	181
APPENDIX G	185
CALIFORNIA IMPROPER ACCESS NOTIFICATION LAW: CALIFORNIA HEALTH & SAFETY CODE SECTION 1280.15.....	185
CALIFORNIA BLOOD DONOR LAW: CALIFORNIA HEALTH & SAFETY CODE SECTION 1603.3	186
CALIFORNIA BIRTH CERTIFICATE LAW: CALIFORNIA HEALTH & SAFETY CODE SECTION 102425 <i>ET SEQ.</i>	187
CALIFORNIA HIV CONFIDENTIALITY LAW: CALIFORNIA HEALTH & SAFETY CODE SECTION 120975 <i>ET SEQ.</i>	191
CALIFORNIA PATIENT ACCESS LAW: CALIFORNIA HEALTH & SAFETY CODE SECTION 123100 <i>ET SEQ.</i>	194
CALIFORNIA OFFICE OF INFORMATION INTEGRITY LAW: CALIFORNIA HEALTH & SAFETY CODE SECTION 130200 <i>ET SEQ.</i>	201

SAMPLE

APPENDIX H	203
CALIFORNIA LANTERMAN-PETRIS-SHORT ACT: CALIFORNIA WELFARE & INSTITUTIONS CODE SECTION 5326 ET SEQ.	203
CALIFORNIA MEDI-CAL TELEMEDICINE LAW: CALIFORNIA WELFARE & INSTITUTIONS CODE SECTION 14132.725	209
APPENDIX I	211
CALIFORNIA PATIENT SUBPOENA NOTIFICATION LAW: CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1985.3.....	211
APPENDIX J	213
CALIFORNIA EVIDENCE CODE	213
APPENDIX K	219
CALIFORNIA TELEMEDICINE LAW: CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 2290.5	219
APPENDIX L	221
CALIFORNIA ADVANCE HEALTH CARE DIRECTIVE REGISTRY LAW: CALIFORNIA PROBATE CODE SECTION 4800 <i>ET SEQ.</i>	221
APPENDIX M	223
CALIFORNIA HOSPITAL LICENSING LAWS	223
APPENDIX N	225
HITECH ACT: 42 U.S.C. SECTION 17921 <i>ET SEQ.</i>	225
SECURITY BREACH NOTIFICATION REGULATIONS: 45 C.F.R. SECTIONS 164.400: 164.414	235
Appendix O	239
MODIFICATIONS TO THE STANDARDS FOR PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION -- FINAL RULE	239
APPENDIX P	243
HHS ADOPTS FINAL SECURITY STANDARDS, TRANSACTION MODIFICATIONS FOR ELECTRONIC HEALTH INFORMATION UNDER HIPAA.....	243



APPENDIX Q	245
ADMINISTRATIVE SIMPLIFICATION UNDER HIPAA: NATIONAL STANDARDS FOR TRANSACTIONS, SECURITY AND PRIVACY	245
APPENDIX R	249
PROTECTING THE PRIVACY OF PATIENTS' HEALTH INFORMATION	249
APPENDIX S	253
OFFICE OF THE CIVIL RIGHTS – FREQUENTLY ASKED QUESTIONS ON HIPAA.....	253
APPENDIX T	255
LEGAL REFERENCES ON THE INTERNET.....	255
APPENDIX U	257
OFFICE OF THE CIVIL RIGHTS – NOTICE OF PRIVACY PRACTICES	257

SAMPLE

PART ONE

PRIVACY: HIPAA IN CALIFORNIA

I. Background

- A. Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)
 - 1. Enacted by Congress in 1996
 - 2. Divisions
 - a. “Portability” provisions – focus on ability of employees to maintain health coverage when moving between jobs (ERISA rules)
 - b. “Accountability” provisions – impose harsher penalties for Medicare/Medicaid fraud or abuse
 - c. “Administrative simplification” provisions – create national standards to facilitate transmission and use of electronic health information; includes national security and privacy standards
- B. Congressional Direction to DHHS – Congress directs federal Department of Health and Human Services (“DHHS”) to create rules governing electronic health care information in absence of congressional action
- C. DHHS Response – DHHS creates rules governing electronic health information
 - 1. E-healthcare transactions and code sets rules [65 Federal Register 50311 (August 17, 2000)] – prescribe standardized formats for electronic data interchange (“EDI”) between providers and payors, effective for all covered entities on October 16, 2003
 - 2. National identifier rules [67 Federal Register 38009 (May 31, 2002) (employers); 69 Federal Register 3434 (January 23, 2004) (health care providers)] – create single employer and provider identifiers for electronic transmissions; no national patient identifier rules yet
 - 3. Security rules [68 Federal Register 4334 (February 20, 2003)] – create national standards to protect electronic health information from loss or theft, effective on April 21, 2005.
 - 4. Privacy rules [65 Federal Register 82461 (December 28, 2000); 67 Federal Register 53182 (August 14, 2002)] – create national confidentiality standards for all health information (both electronic and non-electronic), effective on April 14, 2003.

D. Subsequent Revisions

1. HITECH Act [42 U.S.C. §17921 *et seq.*] – generally effective on February 18, 2010
 - a. Enacted as part of American Recovery and Reinvestment Act of 2009 (“stimulus” bill)
 - b. Provides \$19 billion in federal assistance to hospitals and physicians to implement electronic medical record systems
 - c. Brings genetic information under within definition of “protected health information” – follows on protections provided by Genetic Information Nondiscrimination Act (“GINA”)
 - d. Imposes additional privacy and security requirements in limited areas – *e.g.*, for business associates
 - e. Creates obligation to report breaches in security of protected health information
 - f. Directs DHHS Office for Civil Rights (OCR) to establish program for auditing compliance with HIPAA privacy and security rules
 - g. Emphasizes enforcement – increased penalties; potential enforcement by state attorney general; expanded focus on smaller organizations
2. Security breach notification rules [74 Federal Register 42740 (August 24, 2009)] – effective on September 23, 2009
3. HIPAA Omnibus Rule [78 Federal Register 5566 (January 25, 2013)] – compliance date of September 23, 2013
 - a. Implements HITECH Act
 - b. Makes further changes in specific portions of privacy and security rules, including security breach notification rules

II. The State Law Preemption Issue

A. Preemption Rule

A HIPAA “standard, requirement, or implementation specification” dealing with privacy “preempts” (i.e., supersedes) any provision of state law that is contrary to it [45 C.F.R. §160.203]

B. Exceptions

1. Provision of state law relates to the confidentiality of health information and is “more stringent” than the comparable HIPAA privacy rule [45 C.F.R. §160.203(b)]
2. Provision of state law provides for the (1) reporting of disease or injury, child abuse, birth, or death, or (2) conduct of public health surveillance, investigation, or intervention [45 C.F.R. §160.203(c)]
3. Provision of state law requires health plan to report, or to provide access to, information for purpose of management audits, financial audits, program monitoring and evaluation, or licensure or certification of facility or individual [45 C.F.R. §160.203(d)]
4. DHHS determines that provision of state law [45 C.F.R. §160.203(a)]:
 - a. Is necessary:
 - (1) To prevent fraud and abuse,
 - (2) To ensure appropriate state regulation of insurance and health plans;
 - (3) To report health care delivery or costs for state purposes; or
 - (4) To serve a compelling need related to public health, safety, or welfare, and DHHS determines that intrusion into privacy is warranted when balanced against need to be served, or
 - b. Has as its principal purpose the regulation of controlled substances

C. “More Stringent” Standard – Provision of state law is deemed to be “more stringent” if [45 C.F.R. §160.202]:

1. With respect to a use or disclosure – state law provision prohibits or restricts use or disclosure where HIPAA privacy rules would permit it, unless disclosure is to (1) federal Department of Health and Human Services to determine if provider is complying with HIPAA rules, or (2) patient
2. With respect to patient’s access to or amendment of protected health information – state law provision permits greater rights of access or amendment (except that state law always prevails with respect to access to minor’s protected health information by parent, guardian, or other person *in loco parentis*)

3. With respect to authorization or any other permission from patient for release of protected health information – state law provision narrows scope or duration of authorization or permission, increases privacy protections, or reduces coercive effect
4. With respect to information provided to patient about use, disclosure, rights, or remedies – state law provision requires provider to give more information
5. With respect to recordkeeping or accounting requirements – state law provision provides for retention or reporting of more detailed information or for retention over a longer period
6. With respect to any other matter – state law provision provides greater privacy protections

III. California – Applicable Confidentiality Rules

A. HIPAA Privacy Rules

1. Apply to “use or disclosure of “protected health information” by “covered entities” [45 C.F.R. §§160.102, 160.502(a)]
 - a. Use or disclosure [45 C.F.R. §164.501]
 - (1) Use or disclosure for purposes of research, teaching, training, employment, application, utilization, evaluation, or analysis of protected health information within a covered entity
 - (2) Disclosure – release, transfer, provision of access to, or any other divulging protected health information outside a covered entity
 - b. Protected health information (“PHI”)
 - (1) Individually identifiable health information – does not include health information with all identifiers redacted
 - (2) HIPAA definition now excludes information regarding persons who have been deceased for more than 50 years [45 C.F.R. §160.103] – but not applicable in California, which does not limit definition of “medical information” [Cal. Civil Code §56.05(g)]
 - c. Covered entities
 - (1) Health plans
 - (2) Health care clearinghouses
 - (3) Covered health care providers