CONFIDENTIALITY

Protecting and Releasing Health Information in California

November 2017

16th Edition

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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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PRIVACY: HIPAA IN CALIFORNIA

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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. §§160.1[illegible]160.502(a)]

a. Use or disclosure [45 C.F.R. §164.501]

(1) Use – sharing, employment, application, utilization, examination, 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