

HIPAA IN A EMERGENCY

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How Do HIPAA Rules, Patient Privacy Apply in Emergencies?

Covered entities of all sizes should understand how the **HIPAA Privacy Rule** applies in various situations. There is a critical balance that must be found, guaranteeing that appropriate uses and disclosures of information can be made when necessary to treat a patient, but also to protect the nation's public health



Understanding emergency disclosure

Healthcare organizations are permitted, but not necessarily required, to use and disclose PHI without the patient's consent in certain situations. These include the following:

- To the individual (unless required for access or accounting of disclosures);
- Treatment, payment, and healthcare operations;
- Opportunity to agree or object;
- Incident to an otherwise permitted use and disclosure;
- Public interest and benefit activities;
- Limited data set for the purposes of research, public health or health care operations.

A covered entity may share protected health information with a patient's family members, relatives, friends, or other persons identified by the patient as involved in the patient's care. A covered entity also may share information about a patient as necessary to identify, locate, and notify family members, guardians, or anyone else responsible for the patient's care, of the patient's location, general condition, or death. This may include, where necessary to notify family members and others, the police, the press, or the public at large.

Is the HIPAA Privacy Rule suspended during a national or public health emergency?

- No.
- CAUTION: State law may be much stricter than federal law
 - Pre-emption analysis needs to be done regarding all of the exceptions below.
 - The stricter law to protect privacy (whether federal or state) pre-empts.
 - Thus in some states, the exceptions listed below will not be legal.
- The Secretary of HHS may waive certain provisions of the Rule under the Project Bioshield Act of 2004 (PL 108-276) and Section 1135(b)(7) of the Social Security Act.

What provisions may be waived?

- If the President declares an emergency or disaster and the Secretary declares a public health emergency, the Secretary may waive sanctions and penalties against a covered hospital that does not comply with certain provisions of the HIPAA Privacy Rule.
- Following are the waivable provisions:
 - i. Patient's right to agree or object
 - 1. The requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care (45 CFR 164.510(b)).
 - 2. The requirement to honor a request to opt out of the facility directory (45 CFR 164.510(a)).
 - ii. Notice: The requirement to distribute a notice of privacy practices (45 CFR 164.520) .
 - iii. Restrictions by patients:
 - 1. The patient's right to request privacy restrictions (45 CFR 164.522(a)).

The patient's right to request confidential communications (45 CFR 164.522(b)) When and to what entities does the waiver apply?

- If the Secretary issues such a waiver, it only applies:
 - In the emergency area and for the emergency period identified in the public health emergency declaration.
 - To hospitals that have instituted a disaster protocol. The waiver would apply to all patients at such hospitals.
 - For up to seventy-two hours from the time the hospital implements its disaster protocol.
 - In a pandemic infectious disease, the waiver is in effect until the termination of the declaration of the public health emergency

- When the Presidential or Secretarial declaration terminates, a hospital must then comply with all the requirements of the Privacy Rule for any patient still under its care, even if seventy-two hours has not elapsed since implementation of its disaster protocol.
- Regardless of the activation of an emergency waiver, the HIPAA Privacy Rule permits disclosures for treatment purposes and certain disclosures to disaster relief organizations. For instance, the Privacy Rule allows covered entities (CEs) to share protected health information (PHI) with the American Red Cross so it can notify family members of the patient's location (45 CFR 164.510(b)(4)).

- Does the HIPAA Privacy Rule permit CEs to disclose protected health information, without individuals' authorization, to public officials responding to a bioterrorism threat or other public health emergency?
- 1. Yes.
 - a. The Rule recognizes that various agencies and public officials will need PHI to deal effectively with a bioterrorism threat or emergency.
 - b. To facilitate the communications that are essential to a quick and effective response to such events, the Privacy Rule permits CEs to disclose needed information to public officials in a variety of ways.

- CEs may disclose PHI, without the individual's authorization, to a **public health authority** acting as authorized by law in response to a bioterrorism threat or public health emergency (see 45 CFR 164.512(b)), public health activities).
- The Privacy Rule also permits a CE to disclose PHI to **public officials** who are reasonably able to prevent or lessen a serious and imminent threat to public health or safety related to bioterrorism (see 45 CFR 164.512(j)), to avert a serious threat to health or safety).
- Providers can also share patient information to the extent necessary to seek **payment** for these healthcare services

In addition, disclosure of PHI without the individual's authorization is permitted:

- Where the circumstances of the emergency implicates law enforcement activities (*see* 45 CFR 164.512(f));
- National security and intelligence activities (*see* 45 CFR 164.512(k)(2)) ;or
- Judicial and administrative proceedings (*see* 45 CFR 164.512(e)).

Can healthcare information be shared in a severe disaster?

- 1. Yes
- 2. Providers and health plans covered by the HIPAA Privacy Rule can share patient information in all of the following ways:
 - **Treatment:** Healthcare providers can share patient information as necessary to provide treatment, which includes.
 - Sharing information with other providers (including hospitals and clinics);
 - Referring patients for treatment (including linking patients with available providers in areas where the patients have relocated); and
 - Coordinating patient care with others (such as emergency relief workers or others that can help in finding patients appropriate health services).
 - Providers can also share patient information to the extent necessary to seek **payment** for these healthcare services

- **Notification:** Healthcare providers can share patient information as necessary to identify, locate, and notify family members, guardians, or anyone else responsible for the individual's care of the individual's location, general condition, or death.
 - The healthcare provider should get verbal permission from individuals, when possible; but if the individual is incapacitated or not available, providers may share information for these purposes if, in their professional judgment, doing so is in the patient's best interest.
 - Thus, when necessary, the hospital may notify the police, the press, or the public at large to the extent necessary to help locate, identify, or otherwise notify family members and others as to the location and general condition of their loved ones.
 - In addition, when a healthcare provider is sharing information with disaster relief organizations that, like the American Red Cross, are authorized by law or by their charters to assist in disaster relief efforts, it is unnecessary to obtain a patient's permission to share the information if doing so would interfere with the organization's ability to respond to the emergency.

Imminent Danger

- Providers can share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public-consistent with applicable law and the provider's standards of ethical conduct.

Facility Directory

- Healthcare facilities maintaining a directory of patients can tell people who call or ask about individuals whether the individual is at the facility, their location in the facility, and general condition.

- Of course, the HIPAA Privacy Rule does not apply to disclosures if they are not made by entities covered by the Privacy Rule. Thus, for instance, the HIPAA Privacy Rule does not restrict the American Red Cross from sharing patient information.

DISCLOSURES FOR PUBLIC HEALTH ACTIVITIES

- Background
 - The HIPAA Privacy Rule recognizes the legitimate need for public health authorities and others responsible for ensuring public health and safety to have access to PHI to carry out their public health mission.
 - The Rule also recognizes that public health reports made by CEs are an important means of identifying threats to the health and safety of the public at large, as well as individuals.
 - The Rule permits CEs to disclose PHI without authorization for specified public health purposes.

General Public Health Activities

- The Privacy Rule permits CEs to disclose PHI, without authorization, to public health authorities who are legally authorized to receive such reports for the purpose of preventing or controlling disease, injury, or disability (*see* 45 CFR 164.512(b)(1)(i)). This would include, for example,
 - The reporting of a disease or injury;
 - Reporting vital events, such as births or deaths; and
 - Conducting public health surveillance, investigations or interventions

- Generally, CEs are required reasonably to limit the PHI disclosed for public health purposes to the minimum amount necessary to accomplish the public health purpose.
- CEs are not required to make a minimum necessary determination for public health disclosures that are made pursuant to an individual's authorization, or for disclosures that are required by other law (*see* 45 CFR 164.502(b)).
- For disclosures to a public health authority, CEs may reasonably rely on a minimum necessary determination made by the public health authority in requesting the PHI (*see* 45 CFR 164.514(d)(3)(iii)(A)).
- For routine and recurring public health disclosures, CEs may develop standard protocols, as part of their minimum necessary policies and procedures, that address the types and amount of PHI that may be disclosed for such purposes

AT A GLANCE – May I disclose protected health information for public health emergency preparedness purposes?

(From the perspective of the source of the information)

