



WILMER CUTLER PICKERING HALE AND DORR LLP

The Role of Health Care in the National Legislative Debate

Kirk J. Nahra

WilmerHale

Washington, DC

202.663.6128

kirk.nahra@wilmerhale.com

@kirkjnahrawork

March 4, 2020



My Presentation

- We are having a more active debate on national privacy legislation than at any point in the past 20 years
- Still a long ways away (probably), but lots of progress and some clear concepts emerging
- Health care role is very much up in the air
- While the health care privacy eco-system has been relatively settled for many years, it is now facing meaningful upheaval – and may not be getting enough attention in the national debate



Health Care Privacy

- HIPAA Rules have set the benchmark for the health care industry for almost two decades
- Increasing challenges with the existing structure given a variety of changes in both the traditional health care industry and in the broader health information ecosystem
- While HIPAA still works well where it applies (although this may be a controversial statement), there are increasing situations where it doesn't fit
- And some situations – even in the core health care system – where it may not work well



Health Care Privacy

- You have heard about the debate/discussion over patient access
- Critical goal of many in the health care system
- Current real time debate
- One of the issues being debated involves the limitations of the HIPAA rules – what do you do when one goal (patient access) runs into the HIPAA limitations
- We will be watching how the final rules make this decision (at least for the time being)



Another example – the HIPAA RFI

Should OCR modify the Privacy Rule to clarify the scope of covered entities' ability to disclose PHI to social services agencies and community-based support programs where necessary to facilitate treatment and coordination of care with the provision of other services to the individual? For example, if a disabled individual needs housing near a specific health care provider to facilitate their health care needs, to what extent should the Privacy Rule permit a covered entity to disclose PHI to an agency that arranges for such housing?



Non-HIPAA Health Information

- Continued expansion of tech companies into the health care space
- Enormous growth in mobile apps, wearables, health-related web sites, wellness program issues, etc –
- General concern is volume of health data that isn't regulated by HIPAA
- And lots of questions – in the media and otherwise – even when the data “probably” is regulated by HIPAA



More “next generation” issues

- An emerging (and related) issue - bringing “outside” HIPAA information “inside” HIPAA
- CEs are gathering all kinds of data about their patients/customers/insureds from outside the health care system and using it for “health care purposes”



Recent Headlines

“When a Health Plan Knows How You Shop.”

(New York Times)

- Health plan prediction models using consumer data from data brokers (e.g., income, marital status, number of cars), to predict emergency room use and urgent care.



Health Care “solutions”

- 3 Main Possibilities
- Something specific for this non-HIPAA health care data
- Something that covers all health care data (a “general” HIPAA)
- A broader overall privacy law (with or without a HIPAA carve-out)



So where are we going on health care privacy?

- Current national debate is not focused on health care
- Freestanding effort on healthcare privacy is not currently active (some minor exceptions)
- Health care is not being addressed thoughtfully in the current debate over a national privacy law
- Default position of health care industry has been “carve us out of new law”



Some things to think about

California Consumer Privacy Act – how is your health information protected?

1. HIPAA protected information (generally exempted from CCPA)
2. CMIA covered companies/information (generally exempted from CCPA)
3. Common Rule/Clinical research (generally exempted from CCPA)
4. CCPA – probably covers your health information if it isn't exempted
5. BUT CCPA doesn't cover non-profits
6. And CCPA doesn't generally cover employers and employee information
7. How can consumers, businesses and others deal with this?
8. Is this the best approach?



A different approach

- GDPR – Broad principles establishing data privacy and security law across the EU
- Protects all personal information in all settings
- Application to a wide range of US companies
- Health care industry simply part of the overall legislation
- Health care data considered sensitive information with certain special restrictions
- Not a recommendation but an alternative model



California and the National Debate

- California law has re-invigorated the national privacy debate
- Industry is concerned about California by itself
- Industry is concerned about other states passing “California-like” laws
- Some in industry are concerned about global issues and EU “adequacy”
- Could lead to a US law – with preemption – but could be a “strong” or “weak” law



Health Care in the National Debate

- Isolated “solution” to issue of “non-HIPAA health data” seems to have disappeared
- Health care industry – regulated by HIPAA – could be left alone (excluded from application of national law, as is largely true with California)
- New provisions could apply to HIPAA entities – in addition to HIPAA



Health Care in the National Debate

- New provisions likely would “cover” “non-HIPAA health care data” (and entities)
- Could lead to different standards
- Overlap issue of pre-emption – would health care industry “want” to be covered if strong preemption of state law
- Or a national law could replace HIPAA (possible but unlikely)



Today

- Lots of activity – stakeholders defining positions, draft legislation in Congress, congressional hearings
- Proposed legislation and principles from many sources
- Still a long way to go – but lots of activity throughout the year



Today – A Prediction

- Not likely to have national legislation in this Congress (although more likely than in the past) (way below 50-50)
- Major driver will be the wild card of other states
- If 3-5 significant states pass “California-like” laws, then Industry will need to support a federal law
- Health care will not be a focus of “special” attention unless something changes



Questions?

Kirk J. Nahra

WilmerHale

202.663.6128

kirk.nahra@wilmerhale.com

@kirkjnahrawork