



Jumping through Two Hoops: the HIPAA Privacy Rule and State Law Compliance Issues

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The HIPAA Colloquium
August 23, 2002**

Introduction

- **Topic 1:** The Legal Framework Governing Preemption under the Privacy Rule
- **Topic 2:** How to Conduct a Preemption Analysis
- **Topic 3:** The ShawPittman HIPAA Privacy Preemption Extranet

Topic 1: The Legal Framework Governing Preemption

HIPAA: The Law of the Land?

- HIPAA § 261 created part C of Title XI of the Social Security Act (the Administrative Simplification Provisions)
 - Our focus: Privacy
- One national standard vs. state experimentation?
 - One national standard would:
 - be easier to administer
 - create uniform privacy protection for all
 - But,...

The Statute

- § 1178 -- Effect of State Law “(1) **General Rule** -- Except as provided in paragraph (2), a provision or requirement under this Part, or a standard or implementation specification. . . shall supercede any contrary provisions of State law, including a provision of State law that requires medical or health plan records. . . to be maintained or transmitted in written rather than electronic form.”

The Exceptions

- “(2) **Exceptions** -- A provision or requirement. . . or a standard or implementation provision. . . shall not supercede a contrary provision of State law [if one of four situations apply].”



The Exceptions

1. The Secretary of HHS determines the provision,
 - is necessary
 - to prevent fraud and abuse;
 - to ensure appropriate State regulation of insurance and health plans;
 - for State reporting of health care delivery or costs; or
 - for other purposes; or
 - addresses controlled substances.

The Exceptions

2. The provision of State law relates to the privacy of health information and is more stringent than a standard, requirement, or implementation specification adopted under the Privacy Rule.
3. The provision of State law provides for the reporting of disease or injury, child abuse, birth or death, or for the conduct of public health surveillance, investigation, or intervention.

The Exceptions

4. The provision of State law requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals.

The Privacy Rule

- The Privacy Rule does not preempt State law where the provision of State law relates to the privacy of health information and is contrary to and more stringent than a provision of the Privacy Rule.

- The Privacy Rule also does not preempt:
 - State laws that provide for the reporting of disease or injury, child abuse, birth or death, or for the conduct of public health surveillance investigation or intervention;
 - State laws that require a health plan to report, or to provide access to information, for the purpose of management or financial audits, program monitoring and evaluation, licensing, and related issues;
 - Laws that the Secretary of HHS has determined should not be preempted. 45 C.F.R. §160.203.

What's Contrary?

- **Contrary means:**
 - A covered entity would find it *impossible* to comply with both the State and federal requirements; or
 - The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Administrative Simplification regulations. 45 C.F.R. §160.202.

What's More Stringent?

- **A State law is “more stringent” when it meets one or more of the following criteria:**
 1. The State law prohibits or restricts a use or disclosure that would be permitted by HIPAA, except if the disclosure is:
 - Required by the Secretary to determine HIPAA compliance; or
 - To the individual who is the subject of the individually identifiable health information;



➤ **More Stringent means...**





2. The State law permits greater rights of access or amendment, provided that nothing in the Privacy Rule may be construed to preempt any State law to the extent that it authorizes or prohibits disclosure of protected health information about a minor to a parent, guardian or person acting in *loco parentis*;

3. The State law provides a greater amount of information to the individual about a use, disclosure, right of remedy;

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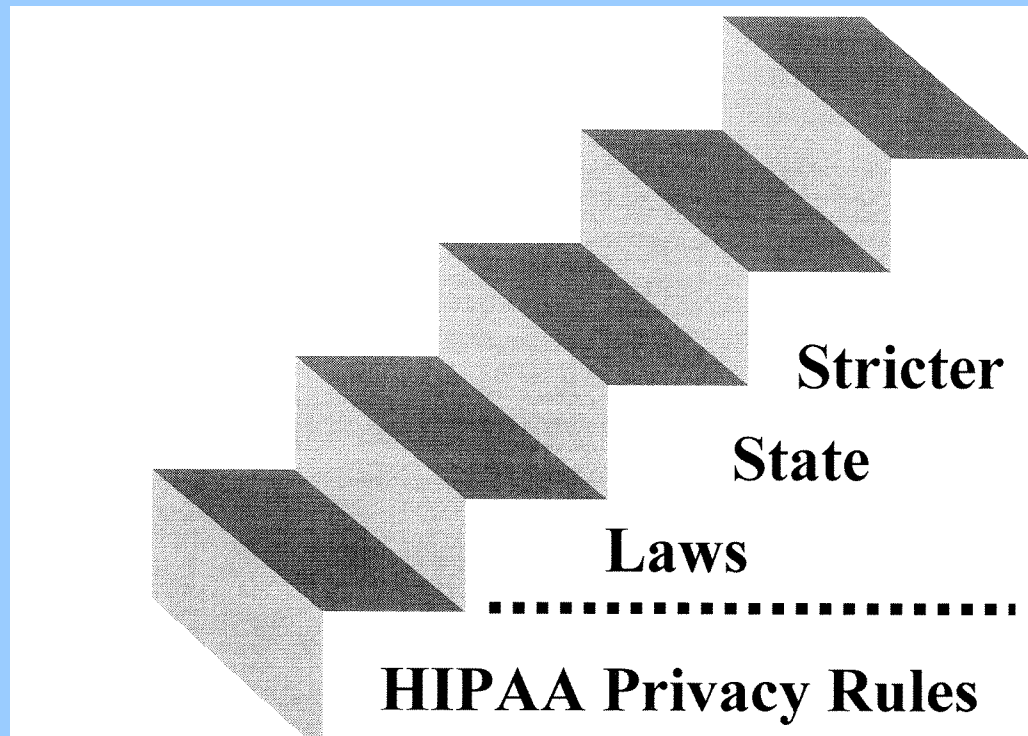
➤ **More Stringent means...**

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4. The State law narrows the scope or duration of an authorization or consent for use or disclosure of individually identifiable health information or reduces the coercive effect of the circumstances surrounding the authorization or consent;
 5. With respect to record keeping or accounting disclosures, the State law provides for the retention or reporting of more detailed information or for a longer duration; or
 6. The State law generally provides greater privacy protection for the individual. 45 C.F.R. §160.202.

Topic 2: How To Conduct A Preemption Analysis

The Effect

- In general, the Privacy Rule creates a federal floor of privacy, upon which states may still place stricter standards.



Step 1: Identifying Relevant State Law

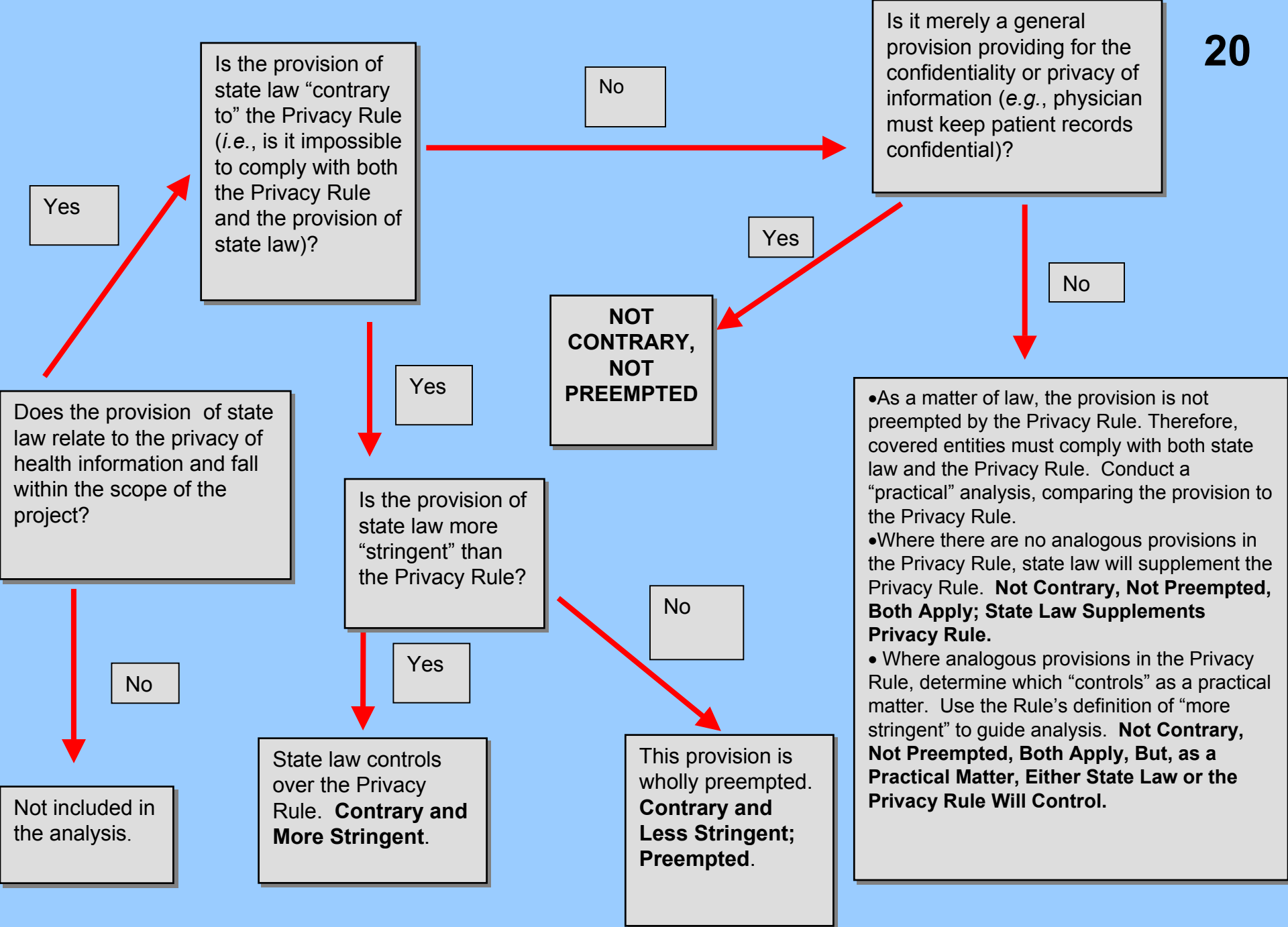
- **What State laws are at issue?**
 - State constitutions
 - Statutes
 - Regulations
 - Rules
 - Common law
 - Other state action having the force of law. 45 C.F.R. § 160.202

- Does the State law “relate to” the privacy of health information (e.g., does the State law have the specific purpose of protecting the privacy of health information or affect the privacy of health information in a direct, clear, and substantial way)? 45 C.F.R. § 160.202



Step 2: Analyzing State law on a provision-by-provision basis.

- Is State law contrary to the Privacy Rule (*i.e.*, is it impossible to comply with both)?
- Is State law more stringent than the Privacy Rule?



Yes

Is the provision of state law "contrary to" the Privacy Rule (i.e., is it impossible to comply with both the Privacy Rule and the provision of state law)?

No

Is it merely a general provision providing for the confidentiality or privacy of information (e.g., physician must keep patient records confidential)?

Yes

NOT CONTRARY, NOT PREEMPTED

No

Does the provision of state law relate to the privacy of health information and fall within the scope of the project?

Yes

Is the provision of state law more "stringent" than the Privacy Rule?

- As a matter of law, the provision is not preempted by the Privacy Rule. Therefore, covered entities must comply with both state law and the Privacy Rule. Conduct a "practical" analysis, comparing the provision to the Privacy Rule.
- Where there are no analogous provisions in the Privacy Rule, state law will supplement the Privacy Rule. **Not Contrary, Not Preempted, Both Apply; State Law Supplements Privacy Rule.**
- Where analogous provisions in the Privacy Rule, determine which "controls" as a practical matter. Use the Rule's definition of "more stringent" to guide analysis. **Not Contrary, Not Preempted, Both Apply, But, as a Practical Matter, Either State Law or the Privacy Rule Will Control.**

No

Not included in the analysis.

State law controls over the Privacy Rule. **Contrary and More Stringent.**

No

This provision is wholly preempted. **Contrary and Less Stringent; Preempted.**

Preemption Example 1

- **State law** provides that HIV-related information may only be disclosed with the authorization of the individual.
- **The Privacy Rule** permits a health plan to disclose PHI for T, P, & HCO without the consent or authorization of the individual.
- **Contrary?** No. You can comply with both by complying with the more restrictive State law.
- **Practical Impact:** The more restrictive State law will control.

Preemption Example 2

- **State law** provides that a health plan may use and disclose health information received or created for fundraising activities.
- **The Privacy Rule** provides that only a narrow subset of PHI may be used for fundraising (demographic data and dates that health care was provided), without an authorization, and that certain other requirements be met. 45 C.F.R. § 164.514(f).
- **Contrary?** No, it is possible to comply with both by complying with the more stringent provisions of the Privacy Rule.
- **Practical Impact:** Follow the Privacy Rule

Preemption Example 3

- **State law** *precludes*, without exception, a provider from giving an individual access to his or her medical records to the extent that they are mental health records.
- **The Privacy Rule** *requires* a health care provider to grant an individual access to his or her PHI, with limited exceptions.

Preemption Example 3

- **Contrary?** Yes. It is impossible for a provider to comply with both State law and the Privacy Rule (assuming an exception does not apply).
- **Relates to the privacy of health information?** Yes.
- **More Stringent?** No. The Privacy Rule grants an individual greater rights of access than state law.
- **Preempted?** Yes. State law is *contrary* and *less stringent* than the Privacy Rule.

Preemption Example 4

- **State Law** requires an insurer to take action on a request for amendment within 30 days.
- **The Privacy Rule** generally requires a health plan to act within 60 days of a request for amendment.
- **Contrary?** No, it is possible to comply with both by complying with the more stringent State law provisions.
- **Practical Impact:** Follow the State law requirement.



Topic 3: The ShawPittman HIPAA Privacy Preemption Extranet

ShawPittman's Preemption Project

- Chosen by HIAA, BCBSA and AAHP to conduct a national preemption analysis applicable to health plans.
- Objective -- A national preemption standard for health plans.
- 50 States, plus D.C., P.R., V.I. and Guam.

➤ WHAT IS COVERED IN THE ANALYSIS?

- Statutes and regulations that have a direct application to health insurance plans (e.g., health insurers, HMOs, pre-paid health plans, Medicaid managed care plans and Blue Plans) and pharmacies.
- Statutes and regulations that have an indirect application to health insurance plans (e.g., that limit the information that downstream providers can disclose to health insurance plans for payment and HCO).



➤ **WHAT IS COVERED IN THE ANALYSIS?**

- Case law and attorneys general opinions that interpret the relevant statutes and regulations included in the Analysis.
- A list of specifically included and excluded topics is set forth in the Scope Memorandum.

Topic 3: Initial Screen

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Shaw Pittman LLP HIPAA PRIVACY PREEMPTION EXTRANET

" SETTING THE INDUSTRY STANDARD FOR HIPAA PRIVACY PREEMPTION "

- [Preemption Analysis](#)
- HIPAA Privacy Preemption Analysis for 54 jurisdictions
- [Recent Developments](#)
- What's new in the field of privacy
- [Discussion](#)
- Exchange messages and ideas with other health plans
- [Links](#)
- Other useful websites

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Preemption Analysis

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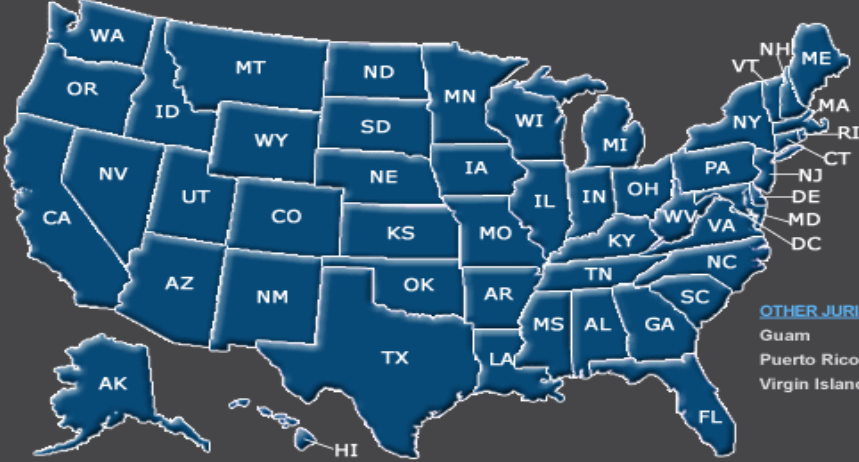
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Important: Please read this document prior to using this analysis.

Scope of Work and Analytical Framework for the Shaw Pittman LLP HIPAA-Privacy Rule Preemption Analysis. (Click once to view)

 Scope of Work.pdf 

CLICK ON A STATE:



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Effective Date, Direct vs. Indirect Analysis, Title, and Scope

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**PREEMPTION AND PRACTICAL ANALYSIS
UNDER THE
HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996**


Illinois  **EFFECTIVE DATE: 03/14/2002**

[Link to Illinois Statutes](#)

No Public Website Exists for Illinois Regulations

Direct Impact on Health Insurance Plans 

I. **Insurance Information and Privacy Protection Act, 215 Ill. Comp. Stat. 5/1001, et seq. (2001).** 

A. **Scope** 

1. **Summary of Provision**

The provisions of the Insurance Information and Privacy Protection Act (the "Privacy Protection Act") apply to insurance institutions, agents, or insurance support organizations which in the case of life, health or disability insurance, collect, receive or maintain information in connection with insurance transactions which pertain to individuals who are residents of Illinois or engage in insurance transactions with applicants, individuals, or policyholders who are residents of Illinois. 215 Ill. Comp. Stat. 5/1002(A)(1). An "insurance institution" is defined as "any corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyd's insurer, fraternal benefit society or other person engaged in the business of insurance," as

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Protected Information

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B. Protected Information

1. Summary of Provision 

Protected information may be composed of one or more of the following three types of information, depending on the right or obligation at issue: (1) personal information, (2) medical record information, and (3) privileged information.

Personal information means any individually identifiable information gathered in connection with an insurance transaction from which judgments can be made about an individual's character, habits, avocations, finances, occupation, general reputation, credit, health or any other personal characteristics, including an individual's name and address and "medical record information." *Id.* 5/1003(T). It does not include "privileged information." *Id.*

Medical-record information is defined as personal information which: (1) relates to an individual's physical or mental condition, medical history or medical treatment, and (2) is obtained from a medical professional or medical-care institution, from the individual, or from the individual's spouse, parent or legal guardian. *Id.* 5/1003(R).

Privileged information means individually identifiable information that relates to a claim for insurance benefits or a civil or criminal proceeding involving an individual and is collected in connection with or in reasonable anticipation of a claim for insurance benefits or a civil or criminal proceeding involving an individual. *Id.* 5/1003(W). Privileged information will be considered personal information if disclosed in violation of this Act. *Id.*

2. Comparison to Protected Health Information

The federal health care privacy regulation (the "Privacy Rule") governs the uses and disclosure of "protected health information" ("PHI"). 45 C.F.R. Parts 160, 164. Because the information protected under the Privacy Protection Act pertains primarily to information that is gathered in connection with an insurance transaction, it will, in most circumstances, be narrower than the definition of PHI and therefore subsumed within it. The Privacy Rule will, in most circumstances therefore, protect greater amounts of information and will apply to the extent explained in the analysis of "preemptive and practical effect" that follows. On the other hand, the information protected by the Privacy Protection Act may be broader than PHI in some instances, in that it covers information gathered in connection with an insurance transaction and that pertains to a person's "habits, avocations, finances, occupation, general reputation or credit." These latter items are not encompassed in the definition of PHI. *See id.* 164.501. As a practical matter, however, given the substantial overlap between the information protected under state law and that protected under the Privacy Rule, an insurance institution would likely treat most protected information as PHI.

C. Uses and Disclosures

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Topics and Subtopics


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C. Uses and Disclosures 


1. Summary and General Overview

a. Summary of Provision

The Privacy Protection Act provides that health insurance plans may disclose personal or privileged information *only* in eighteen enumerated circumstances (including with consent). 215 Ill. Comp. Stat. § 5/1014. Stated otherwise, an insurance institution may only make the specified seventeen disclosures unless legal permission is obtained.

b. Explanation of Preemptive and Practical Effect

The Privacy Rule permits additional disclosures without consent or authorization (*e.g.*, where the covered entity reasonably believes the individual to be a victim of domestic violence, if certain requirements are met). *See* 45 C.F.R. § 164.512. Since it is possible to comply with both authorities (*e.g.*, an entity could restrict disclosures to those permitted by the more restrictive statute), the state law is not contrary to the Privacy Rule and is not preempted. Although state law is not actually contrary to the Privacy Rule, as a practical matter, a health insurance plan may only disclose protected information for one of the eighteen enumerated disclosures in the Privacy Protection Act (because the Privacy Protection Act is more restrictive). Each of the eighteen disclosures, however, could be restricted by a parallel Privacy Rule provision. In this instance, because one of the disclosures allowed under the Privacy Protection Act is for disclosures "otherwise permitted or required by law," it appears that any disclosure that is permitted or required by the Privacy Rule will also be permissible under the Privacy Protection Act.

2. With Authorization or Consent of the Individual 

a. Summary of Provision

The Privacy Protection Act permits disclosure of protected information with written authorization of the individual. 215 Ill. Comp. Stat. 5/1014(A). (The content requirements for the authorization are addressed under a separate heading below.)

b. Explanation of Preemptive and Practical Effect

The Privacy Rule also permits disclosure of PHI for any purpose with the written authorization of the individual (provided certain authorization requirements are met, as addressed below). 45 C.F.R. § 164.502(a)(1)(iv). This provision is not contrary to the Privacy Rule as it is possible to comply with both the Privacy Rule and this statute. Consequently, this provision of the Privacy Protection Act is not

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Topics and Subtopics

- **13 Topics - Track Privacy Rule**
 - Uses and Disclosures
 - Consents and Authorizations
 - Standards Impacting Uses and Disclosures
 - Individual Access Rights
 - Individual Amendment Rights
 - Individual Accounting Rights
 - Notice
 - Individual Right to Request Restriction on Use or Disclosure

Topics and Subtopics

- **13 Topics - Track Privacy Rule**
 - Individual Right to Request Confidential Communications
 - Administrative Requirements
 - Selected Supplemental Requirements Impacting Health Insurance Plans
 - Other

Topics and Subtopics

- **Subtopics Vary By Topic**
- **Uses and Disclosures**
 - 50 subtopics: For example, (1) for fundraising, (2) for health oversight activities, and (3) with authorization or consent of the individual.
- **Notice**
 - 7 subtopics: For example, (1) to whom, (2) timing of distribution, (3) method of distribution, and (4) content of notice.

List Statutes/Regulations

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List of Laws and Regulations Relating to Privacy and Within the Scope of the Project but Which Do Not Supplement the Privacy Rule Through Preemptive or Practical Effect







Access to Records, Tissue Banks and Non-Transplant Anatomic Banks, 10 N.Y.C.R.R. § 52-2.9(a) (2002).
Certified Home Health Agencies, Long Term Home Health Care Programs and AIDS Home Care Programs Minimum Standards, 10 N.Y.C.R.R. §§ 763.2, 763.14 (2002).
Community Residences, 14 N.Y.C.R.R. § 586.10.
Definition of Professional Misconduct Applicable to Physicians Assistants and Specialists Assistants, N.Y. Educ. Law § 6530(2001).
Health Maintenance Organizations, Disclosure of Information, N.Y. Pub. Health Law § 4408(2)(e) (2001).
Hospice Operation, Patient Family Care Services, 10 N.Y.C.R.R. § 794.1 (2002).
Intermediate Care Facilities for Persons Who Are Developmentally Disabled, 14 N.Y.C.R.R. § 681.3 (2002).
Licensed Home Care Services - Minimum Standards, 10 N.Y.C.R.R. §§ 766.1, 766.12 (2001).
Life, Accident and Health Annuities, Disclosure of Information, N.Y. Ins. Law § 3217-a (2001).
Department of Mental Hygiene, Office of Mental Health, Confidentiality and Disclosure, 14 N.Y.C.R.R. § 505.7(b)(9)-(10) (2001).
Non-Profit Medical and Dental Indemnity, or Health and Hospital Service Corporations, Disclosure of Information, N.Y. Insurance Law § 4324 (2002).
Medical Facilities, Minimum Standards, Hospitals, 10 N.Y.C.R.R. §§ 405.7(a)(13), 405.10(a)(6) (2002).
Medical Facilities, Minimum Standards, Nursing Homes, 10 N.Y.C.R.R. §§ 415.3(d)(1), 415.22(d) (2002).
Newborn Hearing Screening, 10 N.Y.C.R.R. § 69-8.2 (2002).
Operation of Hospitals for the Mentally Ill, 14 N.Y.C.R.R. § 582.8 (2002).
Operation of Outpatient Facilities for the Mentally Disabled, 14 N.Y.C.R.R. § 85.9 (2002).
Operation of Psychiatric Inpatient Units of General Hospitals, 14 N.Y.C.R. § 580.8 (2002).
Outpatient Programs for the Mentally Ill, 14 N.Y.C.R.R. §§ 585.6, 585.14 (2002).
Prenatal Care Assistance Program, 10 N.Y.C.R.R. § 85.40 (2002).
Requirements for the Operation of Medically Supervised Ambulatory Substance Abuse Programs, 14 N.Y.C.R.R. § 1035.5 (2002).
Requirements Regarding Testing, Confidentiality and Precautions Concerning the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome, 14 N.Y.C.R.R. § 505.1 (2002).
Residential Treatment Facilities for Children and Youth, 14 N.Y.C.R.R. § 584.16 (2002).
Social Services Law, Residential Programs for Adults, Rights of Residents in Adult Care Facilities, N.Y. Soc. Serv. Law § 461-d (2001).
Social Services Law, Residential Programs for Adults, Records and Reports, N.Y. Soc. Serv. Law § 461-e (2001).
Specialty Hospitals, 14 N.Y.C.R.R. § 680.6 (2002).
Testing for Phenylketouria and Other Diseases and Conditions/Early Intervention Program, 10 N.Y.C.R.R. § 69-4 , et seq. (2002).

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There are numerous ways to review the information

- Entire State analysis
 - By Search terms (e.g., AIDS)
 - Sorted:
 - by statute.
 - by topics and subtopics
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