



Jumping through Two Hoops

HIPAA and State Law Compliance

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HIPAA State Law and Preemption
Audio Summit

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ShawPittman LLP





HIPAA: The Law of the Land?

- Sort of, or is it maybe?
- One national privacy standard would:
 - Be easier to administer
 - Create uniform privacy protection for us all.
- BUT...
 - Don't forget about federalism
 - And then there's the abortion issue.
- SO....
 - HIPAA is the law of the land, except...



The Law

The General Rule

- HIPAA § 261 creates part C of Title XI of the Social Security
- § 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 Law

The Exceptions

- HIPAA § 1178
- “(2) Exceptions --A provision or requirement...or a standard or implementation provision...,shall not supersede a contrary provision of State law...if”:



The Law

The Exceptions

§ 1178 (2)

- (A) the Secretary determines the provision
 - (i) is necessary
 - (I) to prevent fraud and abuse;
 - (II) to ensure appropriate State regulation of insurance and health plans;
 - (III) for State reporting of health care delivery or costs; or
 - (IV) for other purposes; or
 - (ii) addresses controlled substances, or



The Law

The Exceptions

- § 1178 (2)
 - (B) “subject to section 264(c)(2) of [HIPAA], relates to the privacy of [IIIH].”
- HIPAA § 264 (c)
 - “(2) Preemption -- A regulation...shall not supercede a contrary provision of State law, if [it is] more stringent than the requirements, standards,... imposed under the regulation.”



The Regulation

- 45 CFR Part 160, Subpart B
- §160.203 General Rule and Exceptions --
A standard, requirement or implementation specifications ...that is contrary to a provision of State law preempts the provision of State law...” unless
- (b) The provision of State law relates to the privacy of health information and is more stringent than a [HIPAA Privacy] standard...



So... What's Contrary?

- §160.202 Contrary....means:
 - (1) A covered entity would find it impossible to comply with both the State and federal requirements; or
 - (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub. L. 104-191, as applicable.



So... What's More Stringent?

- §160.202 More Stringent means...a State law that 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 IIHI



So... What's More Stringent?

- §160.202 More Stringent means, ...
 - (2) State law permits greater rights of access or amendment, provided that State law which authorizes or prohibits disclosure of PHI about a minor to a parent or guardian.
 - (3) State law provides a greater amount of information to the individual,
 - (4) State law narrows the scope or duration of an authorization or consent for use or disclosure of PHI,



So... What's More Stringent?

- §160.202 More Stringent means,...
 - (5) With respect to record keeping or accounting disclosures, provides for the retention or reporting of more detailed information or for a longer duration.
 - (6) Generally, provides greater privacy protection for the individual.



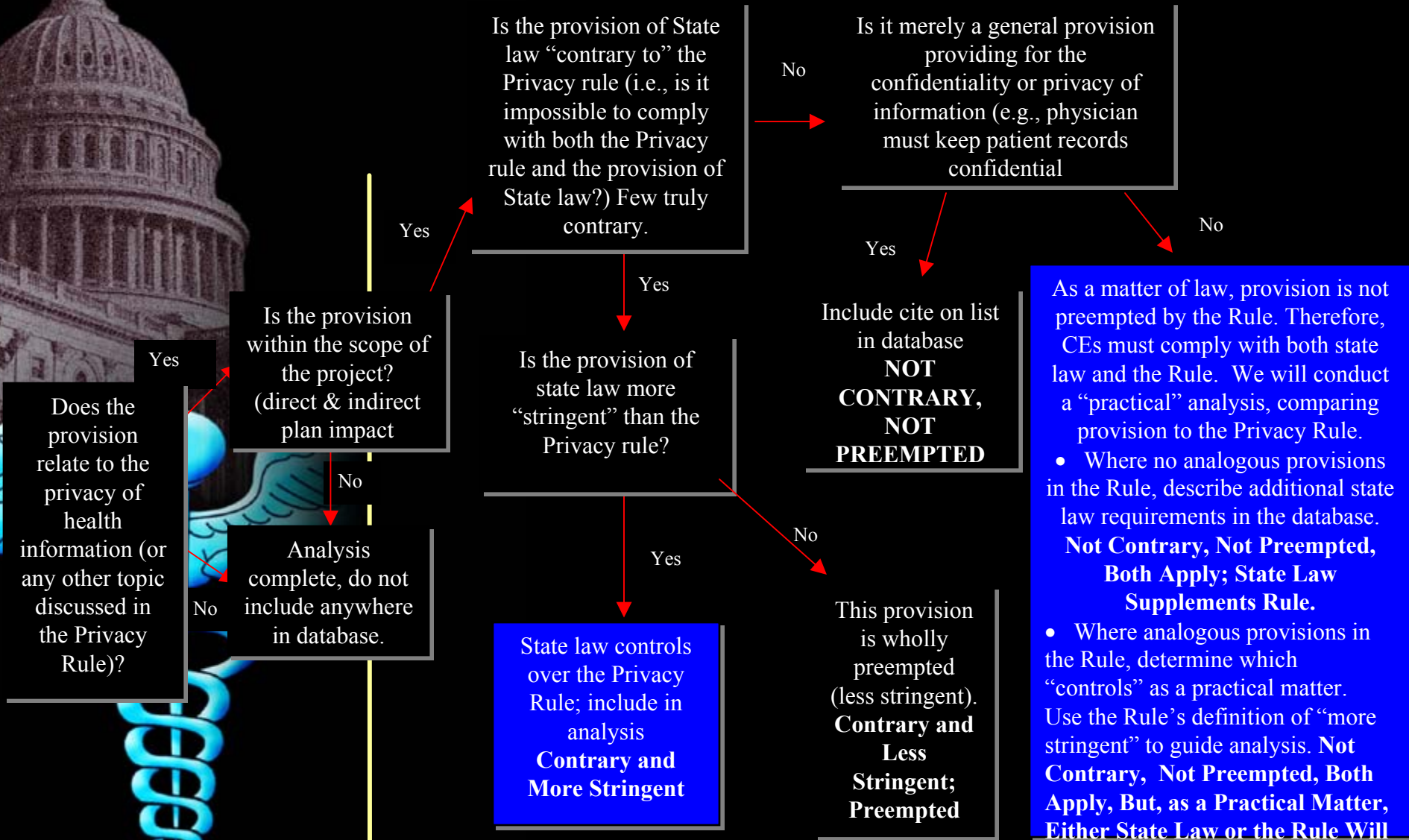
Shaw Pittman's Preemption Project

- Chosen by HIAA, BCBSA and AAHP to conduct national preemption analysis.
- Objective--A national preemption standard for health plans
- 50 States, DC, PR, VI, GU
- Review of
 - Statutes
 - AG opinions
 - Case law based on above
 - Regs
 - Con. Law



HIPAA PRIVACY RULE PREEMPTION PROJECT - ANALYTICAL FLOWCHART

January 2002



HIPAA PRIVACY PREEMPTION EXTRANET

" SETTING THE GOLD 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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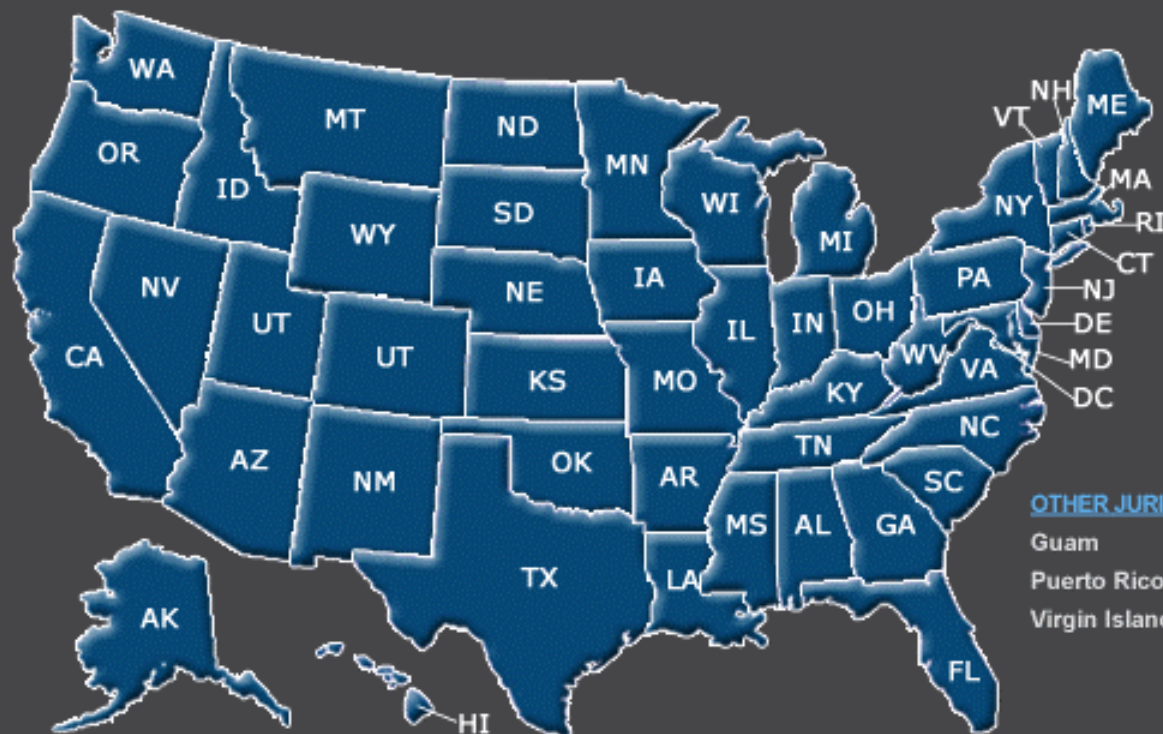
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Health
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OVERVIEW OF ANALYSIS:

CLICK ON A STATE:



OTHER JURISDICTIONS:

- Guam
- Puerto Rico
- Virgin Islands

BROWSE BY JURISDICTION:

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

Model: HMO Act EFFECTIVE DATE: 03/06/2002

Direct Impact on Health Insurance Plans

I. **Health Maintenance Organization Act , N.D. Cent. Code § 26.1-18.1-23 (2001); N.D. Admin. Code § 45-06-07-01, et seq. (2001).**

A. **Scope**

1. **Summary of Provision**

This law applies to any "health maintenance organization" ("HMO"), which is defined as "any person that undertakes to provide or arrange for the delivery of basic health care services to enrollees on a pre-paid basis, except for enrollee responsibility for copayments or deductibles or both." N.D. Cent. Code § 26.1-18.1-01. See also N.D. Admin. Code §§ 45-06-07-01 and 45-06-07-03.12. This law is hereinafter referred to as the "HMO Act."

B. **Protected Information**

1. **Summary of Provision**

The HMO Act protects "[a]ny data or information pertaining to the diagnosis, treatment, or health of any enrollee or applicant obtained from the person or from any provider by any [HMO]" (hereinafter the "protected information"). N.D. Cent. Code § 26.1-18.1-01.

2. **Comparison to Protected Health Information**

The information protected under the HMO Act is a subset of PHI, as PHI includes information in any form that (1) relates to the past, present or

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2. Comparison to Protected Health Information

The information protected under the HMO Act is a subset of PHI, as PHI includes information in any form that (1) relates to the past, present or future health or condition of an individual, payment for care, or the provision of health care, and (2) is created or received by a health care provider, health plan, employer or health care clearinghouse. 45 C.F.R. § 164.501. The Privacy Rule will, therefore, protect greater amounts of information, as the HMO Act does not expressly protect payment-related information.

C. Uses and Disclosures

1. Summary and General Overview

a. Summary of Provision

The HMO Act provides that protected information may only be disclosed by an HMO in four enumerated circumstances: (1) to the extent necessary to carry out the purposes of the HMO Act; (2) upon the express consent of the enrollee or applicant; (3) pursuant to a statute or a court order for the production of evidence or the discovery thereof; or (4) in the event of a claim or litigation between the person and the HMO wherein the data or information is pertinent. N.D. Cent. Code § 26.1-18.1-23. Stated otherwise, unless legal permission is obtained, disclosure may only be made under three specific circumstances.

b. Explanation of Preemptive and Practical Effect

The Privacy Rule permits additional disclosures without consent or authorization (e.g., law enforcement) where certain conditions are met. See 45 C.F.R. § 164.512. Under these circumstances, it is possible to comply with both the HMO Act and the Privacy Rule by complying with the more restrictive provisions of the HMO Act. As a result, this provision is not "contrary to" the Privacy Rule and is not preempted by the Privacy Rule. Although compliance with both authorities is required, as a practical matter an HMO may only disclose protected information for one of the four enumerated disclosures under the HMO Act. Each of the four disclosures, however, may be restricted by a parallel Privacy Rule provision which may impose additional conditions on the release of protected information. Each disclosure is discussed below.

2. With Authorization or Consent of the Individual

Summary of Decision

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2. With Authorization or Consent of the Individual

a. Summary of Provision

The HMO Act permits disclosure of protected information "upon the express consent of the enrollee or applicant." N.D. Cent. Code § 26.1-18.1-23.

b. Explanation of Preemptive and Practical Effect

The Privacy Rule also permits disclosures of PHI for any purpose with the written authorization of the individual (provided certain authorization requirements are met). See 45 C.F.R. §§ 164.502(a)(1)(iv), 164.508. This provision of the HMO Act is not contrary to the Privacy Rule as it is possible to comply with both the Privacy Rule and this provision. Consequently, this provision of the HMO Act is not preempted. As a practical matter, the two authorities are similar and the HMO Act provision does not impose any additional requirements over those imposed by the Privacy Rule.

3. For Health Care Operations and Payment

a. Summary of Provision

The HMO Act permits disclosure of protected information "to the extent necessary to carry out the purposes of [the HMO Act]." N.D. Cent. Code § 26.1-18.1-23.

b. Explanation of Preemptive and Practical Effect

The Privacy Rule provides that an HMO may disclose PHI without consent or authorization for, among other things, health care operations, payment and health oversight. 45 C.F.R. §§ 164.501, 164.502(a)(1)(iii) and 164.512(b)(1). The permitted disclosures referenced in the HMO Act provision described above are likely subsumed within the Privacy Rule's permitted disclosures for health care operations, payment and/or health care oversight. Because state law is not contrary to the Privacy Rule (i.e., it is possible to comply with both), this provision of state law is not preempted and an HMO must comply with both authorities. As a practical matter, whether this provision of the HMO Act will be limited by the Privacy Rule will depend on the specific circumstances of the particular disclosure at issue. If the disclosure does not fall within one of the permitted disclosures set forth in the Privacy Rule, authorization is required.

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4. For Judicial and Administrative Proceedings - Discovery

a. Summary of Provision

The HMO Act permits disclosure of protected information "pursuant to statute or court order for the production of evidence or the discovery thereof." N.D. Cent. Code § 26.1-18.1-23.

b. Explanation of Preemptive and Practical Effect

The Privacy Rule permits disclosure of PHI in the course of any judicial or administrative proceeding in response to (1) a court or administrative order (provided the HMO discloses only the PHI expressly authorized in the order) or (2) a subpoena, discovery request or other lawful process, even without a court order, where certain "assurances" are received from the party requesting the information. 45 C.F.R. § 164.512(e)(1)(i). The Privacy Rule also permits disclosures that are "required by law" where such disclosure complies with, and is limited to, the relevant requirements of such law. Id. § 164.512(a). Since it is possible to comply with both the HMO Act and the Privacy Rule, the two authorities are not contrary and this provision of the HMO Act is not preempted. As a practical matter, since both authorities remain in effect, the more stringent provision will control in any given circumstance. Because the Privacy Rule contains additional requirements for release of information in this context, such requirements will likely control.

5. For Judicial and Administrative Proceedings - Claim or Litigation

a. Summary of Provision

The HMO Act permits disclosure of protected information "in the event of a claim or litigation between the person and the [HMO] wherein the data or information is pertinent." N.D. Cent. Code § 26.1-18.1-23.

b. Explanation of Preemptive and Practical Effect

The Privacy Rule permits an HMO to release PHI in the course of any judicial or administrative proceeding in response to (a) a court or administrative order (provided the HMO discloses only the PHI expressly authorized in the order) or (b) a subpoena, discovery request or other lawful process, even if there is no court or administrative order, where certain "assurances" are received from the party requesting the information. 45 C.F.R. § 614.512(e). In addition, the Privacy Rule permits disclosure without consent for health care operations, the definition of which includes resolution of internal grievances. 45 C.F.R. §§ 164.501, 164.502(a)(1)(iii). Under these circumstances, it is possible to comply with both the HMO Act and the Privacy Rule by complying with the more restrictive provisions. As a result, this provision is not "contrary to" the Privacy Rule and is not preempted by the Privacy Rule. Although compliance with both authorities is

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What About the Constitution?

- Quintiles v. WebMD, USDC, Eastern District of N. Carolina, No. 5;01-CV-180-BO(3)
- “The Dormant Commerce Clause prevents the individual states from regulating the interstate transmission of data.”
- “It is well established that the Commerce Clause precludes a state from regulating a commercial transaction outside its jurisdiction, even if the article of commerce at issue had a connection to that state or the effect of that transaction would be felt by that state.”





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