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RESPONDING TO
GOVERNMENT SUBPOENAS
AND OTHER OFFICIAL
INQUIRIES UNDER HIPAA

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CONCEPTS TO KEEP IN MIND

- General HIPAA Rule:** A Covered Entity (“CE”) may not use or disclose Protected Health Information (“PHI”) except as permitted by the privacy regulations.
- Preemption:** HIPAA preempts State law except when State law is more stringent.
- Other Federal Laws:** HIPAA works alongside other Federal laws.
- Accountings:** A CE must account for certain disclosures.
- Minimum Necessary Rule:** Minimum necessary rule will apply in most situations.

COMMON SCENARIO:

A health provider receives a request for patient records in relation to a civil action.

HIPAA RULE

CE may disclose PHI in the course of a judicial or administrative proceeding if:

- The patient executes a HIPAA-compliant authorization which permits the disclosure; or
- The disclosure is made in response to an order of a court or administrative tribunal; or
- The disclosure is made in response to a subpoena, discovery request or other lawful process without an order and the CE receives a “satisfactory assurance.”

IF THE REQUEST IS ACCOMPANIED BY AN AUTHORIZATION

PHI can be disclosed, if:

- HIPAA-compliant form of authorization; and
- Disclosure is limited to that PHI expressly authorized for disclosure by the patient

Note: No accounting requirement with an authorization.

IF THE REQUEST IS ACCOMPANIED BY A COURT OR ADMINISTRATIVE ORDER

PHI can be disclosed if the order is:

- An enforceable court order (need to be familiar with state requirements for court orders);
- or -
- An authorized administrative order (need to be familiar with which Administrative agencies are authorized to order production of PHI).

Note: May only disclose that PHI which is expressly requested by the applicable court or authorized administrative body.

IF THE REQUEST IS ACCOMPANIED BY SATISFACTORY ASSURANCE

PHI can be disclosed if the CE receives satisfactory assurances (in the form of a written statement and accompanying documentation) from the party seeking the PHI that:

- Notice was given; in other words:
 - there were good faith reasonable efforts to give written notice to patient at patient's last known address; and
 - The notice had sufficient information for patient to raise objection; and
 - time for objection elapsed with no objections or objections were resolved; or

- A qualified protective order (QPO) is being obtained by demonstrating that:
 - The parties to dispute agreed to QPO and have presented it to court or agency, or
 - The party seeking PHI has requested QPO from court/agency

QPO DEFINED

A QPO is order of court/agency or stipulation by parties that:

- Prohibits parties from using or disclosing PHI for any other purpose and
- Requires return or destruction of PHI at end of proceeding.

OFFICE OF CIVIL RIGHTS ("OCR") INTERPRETATION

- For purpose of satisfactory assurances, a copy of the subpoena (or other request pursuant to lawful process) is sufficient on its face (i.e., no additional documents needed) when it demonstrates that:
 - the individual whose PHI is requested is a party to the litigation
 - notice of the request has been provided to the individual or his or her attorney, and
 - the time for the individual to raise objections has elapsed and no objections were filed or all objections filed have been resolved.

NOTE:

- CE can also release PHI in response to a subpoena or other legal process if CE makes reasonable efforts to:
 - Provide notice to patient as per above
 - or -
 - Seek a QPO

CONSIDER WHETHER THE PHI IS SUBJECT TO ADDITIONAL PROTECTIONS

- Federal Law (42 CFR 2) provides special protection for substance abuse treatment information
- State laws commonly have special protections for:
 - Mental health records
 - HIV/AIDS records
 - Records regarding genetic testing
 - Records regarding sexually transmitted diseases
- HIPAA preempts these State laws unless the State Law is more protective of the patient.

SPECIALLY PROTECTED INFORMATION

- Under 42 CFR 2, programs that qualify as substance abuse programs can only release patient records pursuant to a subpoena or discovery request, if the subpoena or discovery request is accompanied by:
 - A HIPAA compliant authorization that is also compliant with 42 CFR 2; or
 - A court order that meets the requirements of 42 CFR 2.
- A subpoena accompanied by satisfactory assurance is not sufficient for release of substance abuse treatment records.

OCR INTERPRETATION

When determining whether to release PHI that relates to substance abuse treatment pursuant to a subpoena, OCR confirms that it is proper to follow the rules in 42 CFR 2.

CONSIDER WHETHER OTHER STATE LAWS APPLY

- To the extent that other state laws are more protective than HIPAA, they may also apply.
- Common considerations include:
 - Statutory and common law privilege protections (e.g., physician/patient privilege);
 - State civil procedures laws; and
 - Facility licensing laws.

OTHER STATE LAWS

Example: In New York, the Civil Practice Law (CPLR 3122) requires that any subpoena served on a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient.

This significantly impacts the analysis of responding to subpoenas.

EXAMPLE NEW YORK STATE LAW SUBPOENA RESPONSE PROCESS

1. CE receives a subpoena without a court order or other documentation.



CE responds by requesting a HIPAA authorization or court-ordered subpoena.

2. CE receives a subpoena with a non-HIPAA-compliant patient consent.



CE responds by requesting a HIPAA authorization or court-ordered subpoena.

SUBPOENA RESPONSE PROCESS (cont'd)

3. CE receives a subpoena with a satisfactory assurance form.



The satisfactory assurance satisfies HIPAA, but not NYS law. CE must request a patient authorization or a court order.

4. CE receives a court ordered subpoena or a subpoena with a HIPAA authorization.



CE may disclose the PHI to the requestor in accordance with the subpoena.

COMMON SCENARIO

An ambulatory surgery center receives a request for information pursuant to a criminal subpoena.

HIPAA RULE

A CE may disclose PHI for law enforcement purposes to a “law enforcement official”, pursuant to legal process and as otherwise required by law, in compliance with:

- A court order or a court ordered warrant, or subpoena or summons issued by a judicial officer;
- A grand jury subpoena;
- A HIPAA-compliant authorization signed by the patient; or

- An administrative request, including an administrative subpoena or summons, or civil or an authorized investigative demand, or similar process authorized under law, provided that:
 - the information sought is relevant and material to a legitimate law enforcement inquiry;
 - the request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and
 - de-identified information could not reasonably be used.

OCR INTERPRETATION

If a CE receives an administrative request from a law enforcement official, the CE must verify:

- the identity and authority of the public official making the request; and
- that the three previously stated conditions are met.

Note: Disclosures must be limited to the minimum necessary for the intended purpose.

WHO IS A LAW ENFORCEMENT OFFICIAL?

HIPAA defines a “law enforcement official” as an officer or employee of any agency or authority of the United States (or subdivision thereof) which is empowered by law to investigate or conduct an official inquiry into a potential violation of law or to prosecute or otherwise conduct a criminal, civil or administrative proceeding, arising from an alleged violation of law.

OCR INTERPRETATION

- The OCR has stated that an employee of a State child support enforcement agency (“Agency”) is considered to be a law enforcement official.
- In addition, the National Medical Support Notice (NMSN), a national form sent by the Agency, constitutes a written administrative request by a law enforcement official.
- Therefore a Covered Entity may respond to the NMSN provided it receives written assurances regarding relevance, the request is specific and de-identified information cannot reasonably be used.

IMPACT OF STATE LAW

- The rules relative to specially protected information (e.g., HIV/AIDS, substance abuse, mental health) often also apply to grand jury subpoenas and other law enforcement purposes.
- Privilege protections (e.g., physician/patient privilege) also need to be considered in this context.

COMMON SCENARIO

The covered entity receives a request for information from a health oversight agency (e.g., an office of professional conduct) for use in a proceeding.

HIPAA RULE

CE may disclose PHI to a “health oversight agency,” for “oversight activities” authorized by law.

Note: Oversight activities include audits, civil, administrative, and criminal investigations or proceedings, inspections, licensure or disciplinary actions.

EXCEPTION

Health oversight activities do not include an investigation or other activity in which the patient is the subject of the investigation or activity and the investigation or activity does not arise out of, and is not directly related to:

- the receipt of health care;
- a claim for public benefits related to health; or
- qualification for, or receipt of, public benefits or services when a patient's health is integral to the claim for public benefits or services.

If the investigation is not for one of these purposes, the rules governing disclosures for law enforcement purposes apply.

WHAT IS A HEALTH OVERSIGHT AGENCY

HIPAA defines a health oversight agency as a person or entity at any level of the federal, state, local or tribal government that:

- oversees the health care system; or
- a government program that requires health information to determine eligibility or compliance or to enforce civil rights laws.

EXAMPLES OF HEALTH OVERSIGHT AGENCIES

The Federal Government acknowledges that the definition of health oversight agency is broad. In addition to obvious agencies which monitor health systems (e.g., Departments of Health, Insurance Departments, CMS), the following are also agencies that engage in health oversight:

- U.S. Department of Justice (when enforcing civil rights, e.g., ADA, civil rights of institutionalize persons);
- Environmental Protection Agency;
- Federal Department of Education

NOT HEALTH OVERSIGHT AGENCIES

- Private accreditation organizations because they are performing health care operations on behalf of CEs. In order to obtain PHI, accrediting groups must enter into business associate agreements with CEs for these purposes.
- Private entities, such as coding committees, that help government health plans make coding and payment decisions are performing services on behalf of the government agencies and, therefore, must enter into business associate agreements in order to receive PHI from the CE.

COMMON SCENARIO

A hospital receives a request for information from a state agency in order to investigate allegations of abuse.

HIPAA RULE

- CE may disclose PHI to a public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect.
- CE may disclose PHI about an individual, other than a child, whom the CE reasonably believes to be a victim of abuse, neglect or domestic violence to a government authority authorized to receive such reports, provided:
 - the disclosure is required by law and limited to the requirements of that law;
 - the individual agrees to the disclosure; or

- the individual is unable to agree because of incapacity and the disclosure is authorized by law. In such case, the law enforcement or other public official authorized to receive the report must represent that the PHI is not intended to be used against the individual and that an immediate enforcement activity will be adversely affected by waiting for the individual's consent.

ADDITIONAL REQUIREMENT

If the CE makes a report about an individual who the CE suspects has been abused (other than in regard to children), the CE must promptly inform the individual about the report unless:

- The CE, in the exercise of professional judgment, believes informing the individual would place him/ her at risk of serious harm;
- The CE would be informing a personal representative who the CE believes is responsible for the abuse or neglect.

CONSIDERATIONS

When disclosing information related to abuse, consider the following:

- Is the required information pertaining to an adult or child?
- Are there any state reporting requirements or restrictions for adults?

For example: In some states, there are reporting requirements when a health care facility becomes aware that an adult patient who is mentally disabled (but having capacity) is being abused.

CONSIDERATIONS

(cont'd)

- Which agencies are authorized to receive reports of abuse?

Example: A social services agency may be authorized by law to investigate allegations of child abuse and the CE can share information with the SS agency for that purpose. However, if the police, who are not specifically authorized to receive reports of child abuse, make the same request, their request must fit within a different exception in order for the CE to disclose the PHI.

COMMON SCENARIO

The police walk into a hospital emergency room demanding information about a patient.

HIPAA RULE

CE is permitted to disclose PHI to a law enforcement official for a law enforcement purpose under any of the following circumstances:

- When Required By Law, including laws that require the reporting of certain types of wounds or other physical injuries.
- When There is Evidence of a Crime on the Premises and there is good faith belief that the PHI constitutes evidence of criminal conduct that occurred on the CE's premises.

- In Order to Identify or Locate an Individual provided that only the following information is disclosed:
 - Name, address and social security number
 - Date and place of birth
 - ABO blood type and Rh factor
 - Type of injury
 - Date and time of treatment and/or death, if applicable
 - A description of distinguishing physical characteristics.

Note: Except as otherwise permitted, information related to DNA or DNA analysis, dental records or typing, samples or analysis of body fluids or tissue cannot be disclosed for purposes of locating or identifying an individual.

- Regarding a Patient Believed to be a Victim of a Crime provided:
 - The patient agrees to the disclosure; or
 - CE believe the disclosure is in the best interest of the victim, but cannot obtain the patient's agreement because of incapacity or other emergency circumstances, and the law enforcement official states that:
 - such information is not intended to be used against the patient-victim; or
 - immediate law enforcement activity would be materially adversely affected by waiting until the patient-victim gains sufficient capacity to agree.

- In Order to Provide Notice About the Death of a Patient when the CE suspects the death resulted from criminal conduct.
- In a Medical Emergency when disclosure of the patient's health information is necessary to alert law enforcement to:
 - The commission and nature of a crime;
 - The location of the crime or victims of the crime; and
 - The identity, description and location of the perpetrator of the crime.

Exception: If the medical emergency is the result of abuse, neglect, or domestic violence, any disclosure to law enforcement officials for law enforcement purposes must be made pursuant to that provision.

REMEMBER:

Disclosure is also permitted when there is adequate legal process (e.g., court order or summons issued by a judicial officer) discussed earlier.

OCR INTERPRETATION

The OCR has stated that disclosures to law enforcement officials are subject to the minimum necessary rule; however, when reasonable to do so, the CE may rely upon representation of the law enforcement official as to what information is the minimum necessary for their lawful purpose.

Note: If the law enforcement official making the request is not known to the CE, the CE must verify the identity and authority of such person before disclosing information.

RECOMMENDATIONS

Decisions regarding disclosures to law enforcement officials are among the most complicated under HIPAA. Because of the number of different exceptions under HIPAA, various state laws, and privilege protections, it is virtually impossible to make a standard rule that addresses all circumstances. When reviewing requests from law enforcement officials, consider the following:

- Understand the purpose of the law enforcement official's request.
- Review the law enforcement official's authority to obtain the requested information for the stated purpose (remember: different officials have different authority).

RECOMMENDATIONS

- Don't hesitate to request appropriate legal process (e.g., a court order) if the disclosure is not clearly permissible (it may not be difficult for the law enforcement official to obtain and may protect the health care facility).
- If the investigation for which information is being requested involves the CE, immediately involve legal counsel.
- Don't forget about restrictions under State law.

COMMON SCENARIO

A health care provider receives a request for information in order for an entity to conduct public health surveillance

HIPAA RULE

CE may disclose PHI for public health purposes to the following entities under the following circumstances:

- To Prevent or Control Disease if to a public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including but not limited to the reporting of disease, injury, and vital events (such as birth or death) and the conduct of public health surveillance, interventions or investigations.

- To Report Information to the Food and Drug Administration (FDA) with respect to an FDA-regulated product or activity related to the quality, safety or effectiveness of such FDA-regulated product or activity for:
 - Collecting and reporting defects
 - Tracking products
 - Enabling product recalls:
 - Conducting post-marketing surveillance, or

- To Notify Persons of Exposure to Communicable Diseases if the CE is authorized by law to notify each person as necessary in the conduct of a public health intervention or investigation.

HIPAA RULE (Employers)

CE may disclose to an employer if the following four requirements are met:

- CE is a health care provider which is a member of the workforce of such employer (e.g., on-site medical clinic), or provides health care to the individual at the request of the employer:
 - To conduct an evaluation relating to medical surveillance of the workplace; or
 - To evaluate whether the individual has a work-related illness or injury;
- The PHI consists of findings concerning a work-related illness or injury or a workplace-related medical surveillance;

- The Employer needs such findings in order to comply with its obligations to report occupational injuries and illnesses under Federal laws and related regulations such as the Occupational Safety and Health Act (“OSHA”), or similar state laws, or to carry out responsibilities for workplace medical surveillance; and

- CE provides written notice to the patient that the foregoing disclosures will be made to the individual's employer:
 - By giving a copy of the notice to the individual at the time the health care is provided; or
 - If the health care is provided on the work site of the employer, by posting the notice in a prominent place at the location where the health care is provided.

REMEMBER:

Even though HIPAA authorizes a disclosure to an employer, other State laws (e.g., HIV/AIDS confidentiality laws) may not allow for such disclosure.

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OTHER PERMISSIBLE DISCLOSURES TO GOVERNMENT OFFICIALS

HIPAA RULE

The CE may use or disclose PHI to the extent required by law, as limited to the relevant requirements of such law.

- To Identify a Deceased Person or Cause of Death: if to a coroner or medical examiner for the purpose of performing duties authorized by law.
- To Make Necessary Funeral Arrangements if to funeral directors (even prior to death).
 - For Purposes of Workers' Compensation to comply with laws relating to workers' compensation or other similar programs.
 - For Cadaveric Organ, Eye or Tissue Donation Purposes if to organ procurement organizations.

- To Avert a Serious Threat to Health or Safety if the CE believes, in good faith, that the disclosure:
 - Is necessary to prevent or lessen a serious and imminent threat to the health or safety of the public and such disclosure is made to persons reasonably able to prevent or lessen the threat; or
 - Is necessary for law enforcement authorities to identify or apprehend an individual who appears to have escaped from lawful custody; or who has made statements regarding participation in a violent crime which may have caused serious physical harm to the victim, subject to certain limitations.

- For Proper Execution of a Military Mission concerning individuals who are Armed Forces personnel or foreign military personnel, if the appropriate military authority published an appropriate notice in the Federal Register.
- For National Security and Intelligence Activities to authorized Federal officials for activities authorized by the National Security Act and implementing authority.
- For Protective Services for the President and Others to authorized federal officials for the provision of protective services to the President or other persons authorized by Federal law or for the conduct of authorized investigations.

- To a Correctional Institution or a law enforcement official in a custodial situation if the PHI is necessary for:
 - The provision of health care to such individual;
 - The health and safety of such individual or other inmates;
 - The health and safety of the officers or employees of or others at the correctional institution;
 - Law enforcement on the premises of the correctional institution; or
 - The administration and maintenance of the safety, security, and good order of the correctional institution.

NOTE:

All of the permitted legal disclosures are subject to specific HIPAA requirements which must be reviewed prior to disclosures.

ACCOUNTING FOR DISCLOSURES

An individual has a right to receive an accounting of disclosures of PHI made by a Covered Entity, subject to several exceptions.

Among other exceptions, a covered entity does not need to account for disclosures made:

- For treatment, payment and health care operations purposes;
- Pursuant to a HIPAA authorization; or
- To the individual.

REMINDER: ACCOUNTINGS

All of the legal disclosures discussed today must be included in an accounting, unless there is a HIPAA-compliant authorization.

CE will need to log these disclosures as they occur.

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DISCUSSION/QUESTIONS

