

An Overview of State Privacy Laws and Preemption Issues Under HIPAA

13th National HIPAA Summit
September 25, 2006
Washington, D.C.



Michael R. Costa, Esq., M.P.H.
Greenberg Traurig, LLP

One International Place, 3rd Floor • Boston, MA 02110
617.310.6065 • 617.310.6001 (fax)

E-mail: costam@gtlaw.com

<http://www.gtlaw.com>

GREENBERG
ATTORNEYS AT LAW
TRAURIG^{LLP}

Agenda

- The Legal Framework Governing Preemption;
- The Preemption Rule in Operation;
- Overview of Various State Privacy Laws;
- Conclusion



The Legal Framework Governing Preemption



GREENBERG
ATTORNEYS AT LAW
TRAURIG LLP

- Preemption is a product of our “federalist” system of government -
 - Single federal system with defined powers (e.g., coin money, declare war, regulate interstate commerce).
 - State governments have authority to govern and regulate in areas not reserved to the federal government (e.g., health and welfare of its citizens).



- Total Preemption: Invalidates all State laws dealing with the regulated area regardless of whether they actually conflict with federal law.
- Partial Preemption: Allows States to legislate and regulate in an area covered by federal law, but only to the extent permitted by federal law or that it does not conflict with the federal law.



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 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

- 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;



What's More Stringent?

- **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 or remedy;



What's More Stringent?

- **More Stringent means...**
 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.



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

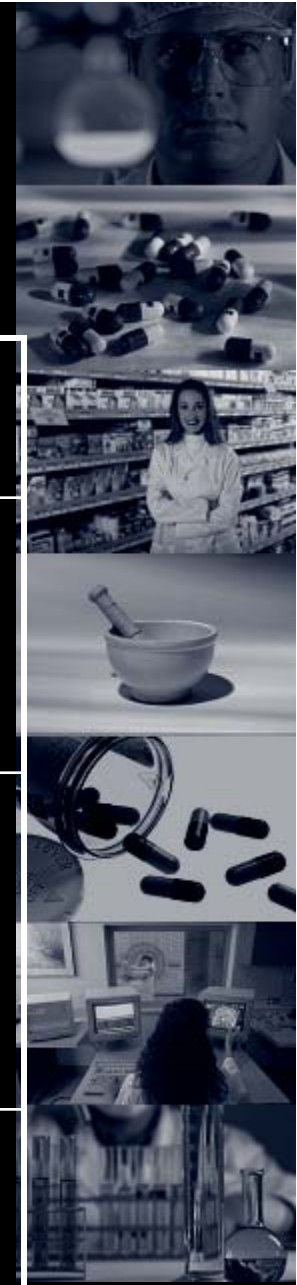


Analyzing State law on a provision-by-provision basis.

- 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?



HIPAA Preemption Table



	HIPAA REQUIRES	HIPAA PROHIBITS	HIPAA PERMITS
State Law REQUIRES	Not Contrary	Contrary – It is impossible to comply with both	Not Contrary
State Law PROHIBITS	Contrary—It is impossible to comply with both	Not Contrary	Contrary—The state law is an obstacle
State Law PERMITS	Not Contrary	Contrary—The state law is an obstacle	Not Contrary

Preemption Example

- **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

- **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.



Preemption Example

- **Question** My State law authorizes health care providers to report suspected child abuse to the State Department of Health and Social Services. Does the HIPAA Privacy Rule preempt this State law?
- **Answer** No. The Privacy Rule permits covered health care providers and other covered entities to disclose reports of child abuse or neglect to public health authorities or other appropriate government authorities. See 45 C.F.R. 164.512(b)(1)(ii). Thus, there is no conflict between the State law and the Privacy Rule, and no preemption. Covered entities may report such information and be in compliance with both the State law and the Privacy Rule.



Preemption Resources

- California-
<http://www.aha.org/aha/issues/HIPAA/map/california.html>
- Florida-
<http://www.aha.org/aha/issues/HIPAA/map/florida.html>
- Illinois-
<http://www.aha.org/aha/issues/HIPAA/map/illinois.html>
- Massachusetts-
<http://www.aha.org/aha/issues/HIPAA/map/massachusetts.html>
- Michigan-
<http://www.aha.org/aha/issues/HIPAA/map/michigan.htm>
- New York-
<http://www.aha.org/aha/issues/HIPAA/map/newyork.html>
- Texas-
<http://www.aha.org/aha/issues/HIPAA/map/texas.html>



Preemption Resources

- Vermont-

<http://www.aha.org/aha/issues/HIPAA/map/vermont.html>

- Virginia-

<http://www.aha.org/aha/issues/HIPAA/map/virginia.html>

- Washington, DC-

<http://www.aha.org/aha/issues/HIPAA/map/washingtondc.html>

- West Virginia-

<http://www.aha.org/aha/issues/HIPAA/map/westvirginia.html>

- Wisconsin-

<http://www.aha.org/aha/issues/HIPAA/map/wisconsin.html>



Preemption Resources

- State Health Privacy Laws -a 50-state survey and database of existing state policies already in place, published by the Health Privacy Project-

http://www.healthprivacy.org/info-url_nocat2304/info-url_nocat.htm

- 50- State Preemption Analysis-

<http://www.nacdsfoundation.org/user-assets/documents/word/hipaa/1205OverviewChart.DOC>



Contact

Michael R. Costa, Esq., M.P.H.
Greenberg Traurig, LLP
One International Place- 20th Floor
Boston, MA 02110
(617) 310-6065
E-mail: costam@gtlaw.com



GREENBERG
ATTORNEYS AT LAW
TRAURIG^{LLP}