
State Regulation of Health Information: California and Hawaii



HIPAA Summit West - Pre-Conference Symposia

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HIPAA Privacy — General Rules

- ◆ A “Covered Entity” may not use or disclose Protected Health Information (“PHI”) except:
 - ❖ as authorized by the individual, by -
 - verbal agreement - directories, release to family involved in treatment, etc.
 - consent - for treatment, payment, or healthcare operations (required for providers only)
 - authorization - for other purposes
 - ❖ for governmental or other specified purposes
 - ❖ as required by HIPAA



HIPAA Meets State Law

- ◆ What happens when HIPAA meets State medical privacy laws?
 - ❖ There are definite differences between the protection provided in HIPAA and the protections provided under the laws of California and Hawaii
- ◆ Fifty states = 50 different combinations of HIPAA and State law



Preemption Under HIPAA

- ◆ HIPAA (not just privacy):
 - Public Law 104-191; Section 1178:
HIPAA (any provision, requirement, standard or implementation specification of HIPAA) shall supersede any contrary provision of State law.
- ◆ Privacy regulations: Details on how HIPAA preemption applies to State privacy laws
- ◆ This is *partial* preemption, not total



Exceptions to Preemption /1

- ❖ State laws addressing **controlled substances**
- ❖ Where DHHS determines a State law is **necessary** --
 - to prevent fraud and abuse
 - to ensure appropriate regulation of health plans
 - for reporting on healthcare delivery or costs
 - to serve a ***compelling need*** related to public health, safety or welfare
 - DHHS must determine invasion of privacy is warranted when balanced against the need



Exceptions to Preemption /2

- ❖ **Public health laws** for reporting disease, injury, child abuse, birth or death, or public health surveillance, investigation or intervention
- ❖ Laws requiring **health plans** to report or provide access to information for audits, program monitoring, or facility or individual licensure or certification.
- ❖ Laws relating to the privacy of health information that are **contrary to and more stringent than** the HIPAA requirements



Preemption: Contrary

- ◆ **Contrary** means -
 - ❖ Covered entity **could not comply with both** State law and the HIPAA requirement

or

 - ❖ State law stands as an **obstacle** to the accomplishment and execution of the full purposes and objectives of HIPAA



Preemption: More Stringent /1

- ◆ **More stringent** means that State law -
 - ❖ Has stricter limits on use or disclosure of health information
 - Except for disclosures to DHHS or patient
 - ❖ Gives greater rights of access to or correction of health information by the patient
 - Does not affect State laws authorizing or prohibiting disclosure of information about a minor to parent or guardian
 - ❖ Has harsher penalties for unauthorized use or disclosure



Preemption: More Stringent /2

- ◆ **More stringent** means that State law -
 - ❖ Provides greater information to individuals regarding use, disclosure, rights or remedies
 - ❖ Has stricter requirements for authorizing or consenting to disclosure/use of information
 - ❖ Has stricter standards for record-keeping or accounting for disclosures of information
 - ❖ With respect to any other matter provides greater privacy protection to the patient



Requesting Exceptions /1

- ◆ Process for requesting exceptions from DHHS
 - ❖ Anyone may request an exception
 - Request by a state must be submitted through its chief elected official or designee
 - ❖ Must be in writing



Requesting Exceptions /2

- ◆ Request for exception must state:
 - ❖ State law for which exception requested
 - ❖ Portion of HIPAA for which the exception is requested
 - ❖ Portion of HIPAA that will not be implemented (or the additional data that will be collected) if the exception is granted
 - ❖ How CEs would be affected by the exception
 - ❖ Why State law should not be preempted.



Requesting Exceptions /3

- ◆ No time limit within which DHHS must make determination on exception request.
- ◆ HIPAA standard in question remains in effect until decision re exception is made.
- ◆ Exception determinations are to be made by DHHS Office for Civil Rights
- ◆ Advisory opinions dropped from final rule.



Duration of Exceptions

- ◆ If granted, exception remains in effect until -
 - ❖ The State law or the HIPAA provision that provided the basis for the exception is materially changed so that the basis for the exception no longer exists; or
 - ❖ DHHS revokes the exception based on a determination that the ground supporting the exception's need no longer exists.



How Preemption Will Work

- ◆ Preemption will focus on specific elements and aspects of State laws
 - ❖ HIPAA will be the baseline
 - ❖ State law will be given effect only to the extent that (a) there is no HIPAA law on the issue; (b) State law is more stringent; or (c) there is an exception
 - ❖ Exemptions will apply to specific State laws, not entire State schemes



California Medical Privacy Laws

- ◆ California laws on medical confidentiality:
 - ❖ Confidentiality of Medical Information Act - requires patient authorization for release of information unless release otherwise permitted or required by law
 - ❖ Lanterman-Petris-Short Act - protects mental health information
 - ❖ HIV test confidentiality law - strict protection for information concerning HIV tests, including identity of persons tested
 - ❖ Miscellaneous other provisions



California Medical Privacy Laws

- ◆ No California equivalents for --
 - ❖ Business associates
 - CEs must contract with entities that receive PHI in order to perform service for/on behalf of CE
 - ❖ Minimum necessary
 - CEs should not ask for or release more than the minimum necessary PHI required for the purposes for which release is sought



California Medical Privacy Laws

- ◆ No California equivalents (cont'd) --
 - ❖ Notice to patient of CE practices with respect to its handling of PHI
 - No notice requirement in CA law
 - ❖ Requirement of patient consent for use of PHI for treatment, payment and operations
 - California permits disclosure for such purposes without patient authorization or notice

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