
**HIPAA COW
PRIVACY NETWORKING GROUP**

**COVID-19: WISCONSIN AND HIPAA DISCLOSURES FOR TREATMENT, PAYMENT,
HEALTHCARE OPERATIONS AND IMMINENT THREAT FOR
LAW ENFORCEMENT, FIRST RESPONDERS**

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State Preemption Issues: Wisconsin Statute 146.816(2); Wisconsin Statute 146.82(1); Wisconsin Statute 51.30 is referenced in Wisconsin Statute 146.816

Background: 45 CFR Part 160, Subpart B Preemption analysis

Attachments:

- Office for Civil Rights (OCR) COVID-19 and HIPAA: Disclosures to Law Enforcement, Paramedics, Other First Responders and Public Health Authorities
- Department of Health and Human Services COVID-19 & HIPAA Bulletin Limited Waiver of HIPAA Sanctions and Penalties During a Nationwide Public Health Emergency

Definitions: Reference HIPAA COW Preemption Analysis Supplement Definitions

Applicable Regulations/Standards:

Wisconsin Statute 146.82(1) references HIPAA: CONFIDENTIALITY. All patient health care records shall remain confidential. Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient. This subsection does not prohibit reports made in compliance with s. 253.12 (2), 255.40, or 979.01; records generated and disclosed to the controlled substances board pursuant to s. 961.385; testimony authorized under s. 905.04 (4) (h); or releases made for purposes of health care operations, as defined in 45 CFR 164.501, *and as authorized under 45 CFR 164, subpart E.*

Wisconsin Statute 146.816(2) permits the use, disclosure or request for disclosure of protected health information by a covered entity defined in Wisconsin Statute 51.30 and 146.82 or its business associate that meets all the following criteria:

- (a) the use, disclosure, or request for disclosure in compliance with 45 CFR 164.500 to 164.534. [subpart E]
- (b) the use, disclosure, or request for disclosure in any of the following circumstances:
 1. For purposes of treatment.
 2. For purposes of payment.
 3. For purposes of health care operations.
 4. For purposes of disclosing information about a patient in a good faith effort to prevent or lessen a serious and imminent threat to the health or safety of a person or the public.

The HIPAA Privacy Rule permits a covered entity to disclose the protected health information of an individual with law enforcement, paramedics, other first responders, and public health authorities without the individual's HIPAA authorization, in certain circumstances, including the following:

- When the disclosure is needed to provide treatment. 45 CFR 164.502(a)(1)(ii); 45 CFR 164.506(c)(2).
- When the disclosure of protected health information to first responders is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public. A covered entity may disclose protected health information to prevent or lessen a serious and imminent threat to a person or the public, when such disclosure is made to someone they believe can prevent or lessen the threat, which may include the target of the threat. 45 CFR 164.512(j)(1)

Implementation Analysis: Follow Both State and HIPAA. Wisconsin statutes reference 45 CFR Part 164, Subpart E. The minimum necessary standard (45 CFR 164.502(b)) applies for disclosures of non-treatment purposes. Refer to the attached OCR document. Page 3 addresses the protected health information for disclosures to dispatch.

Resources: Department of Health and Human Services, HIPAA Combined Rule
<https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/combined-regulation-text/index.html>

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ATTACHMENT 1



COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities

Does the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule allow a covered entity to share the name or other identifying information of an individual who has been infected with, or exposed to, the virus SARS-CoV-2, or the disease caused by the virus, Coronavirus Disease 2019 (COVID-19), with law enforcement, paramedics, other first responders, and public health authorities without an individual's authorization?

Yes, the HIPAA Privacy Rule permits a covered entity to disclose the protected health information (PHI) of an individual who has been infected with, or exposed to, COVID-19, with law enforcement, paramedics, other first responders, and public health authorities¹ without the individual's HIPAA authorization, in certain circumstances, including the following²:

- ***When the disclosure is needed to provide treatment.*** For example, HIPAA permits a covered skilled nursing facility to disclose PHI about an individual who has COVID-19 to emergency medical transport personnel who will provide treatment while transporting the individual to a hospital's emergency department. 45 CFR 164.502(a)(1)(ii); 45 CFR 164.506(c)(2).
- ***When such notification is required by law.*** For example, HIPAA permits a covered entity, such as a hospital, to disclose PHI about an individual who tests positive for COVID-19 in accordance with a state law requiring the reporting of confirmed or suspected cases of infectious disease to public health officials. 45 CFR 164.512(a).

¹ Under HIPAA, "public health authority" means an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is responsible for public health matters as part of its official mandate. 45 CFR 164.501 (definition of "public health authority").

² The HIPAA Privacy Rule limitations only apply if the entity or individual that is disclosing protected health information meets the definition of a HIPAA covered entity or business associate. This guidance provides examples of disclosures from certain types of entities, some of which are covered by HIPAA, and others that may not be. While the entities in the examples are covered under HIPAA, the examples are not intended to imply that all public health authorities, 911 call centers, or prison doctors, for example, are covered by HIPAA and are required to comply with the HIPAA Rules.

- ***To notify a public health authority in order to prevent or control spread of disease.*** For example, HIPAA permits a covered entity to disclose PHI to a public health authority (such as the Centers for Disease Control and Prevention (CDC), or state, tribal, local, and territorial public health departments) that is authorized by law to collect or receive PHI for the purpose of preventing or controlling disease, injury, or disability, including for public health surveillance, public health investigations, and public health interventions. 45 CFR 164.512(b)(1)(i); see also 45 CFR 164.501 (providing the definition of “public health authority”).
- ***When first responders may be at risk of infection.*** A covered entity may disclose PHI to a first responder who may have been exposed to COVID-19, or may otherwise be at risk of contracting or spreading COVID-19, if the covered entity is authorized by law, such as state law, to notify persons as necessary in the conduct of a public health intervention or investigation. For example, HIPAA permits a covered county health department, in accordance with a state law, to disclose PHI to a police officer or other person who may come into contact with a person who tested positive for COVID-19, for purposes of preventing or controlling the spread of COVID-19. 45 CFR 164.512(b)(1)(iv).
- ***When the disclosure of PHI to first responders is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public.*** A covered entity may disclose PHI to prevent or lessen a serious and imminent threat to a person or the public, when such disclosure is made to someone they believe can prevent or lessen the threat, which may include the target of the threat. For example, HIPAA permits a covered entity, consistent with applicable law and standards of ethical conduct, to disclose PHI about individuals who have tested positive for COVID-19 to fire department personnel, child welfare workers, mental health crisis services personnel, or others charged with protecting the health or safety of the public if the covered entity believes in good faith that the disclosure of the information is necessary to prevent or minimize the threat of imminent exposure to such personnel in the discharge of their duties. 45 CFR 164.512(j)(1).
- ***When responding to a request for PHI by a correctional institution or law enforcement official having lawful custody of an inmate or other individual,*** if the facility or official represents that the PHI is needed for:
 - providing health care to the individual;
 - the health and safety of the individual, other inmates, officers, employees and others present at the correctional institution, or persons responsible for the transporting or transferring of inmates;
 - law enforcement on the premises of the correctional institution; or o the administration and maintenance of the safety, security, and good order of the correctional institution.

For example, HIPAA permits a covered entity, such as a physician, located at a prison medical facility to share an inmate’s positive COVID-19 test results with correctional officers at the facility for the health and safety of all people at the facility. 45 CFR 164.512(k)(5).

General Considerations: Except when required by law, or for treatment disclosures, a covered entity must make reasonable efforts to limit the information used or disclosed under any provision listed above to that which is the “minimum necessary” to accomplish the purpose for the disclosure. 45 CFR 164.502(b).

In some cases, more than one provision of the HIPAA Privacy Rule may apply to permit a particular use or disclosure of PHI by a covered entity. The illustrative examples below involve uses and disclosures of PHI that are permitted under 45 CFR 164.512(a), 164.512(b)(1), and/or 164.512(j)(1), depending on the circumstances.

ADDITIONAL EXAMPLES:

- **Example:** A covered entity, such as a hospital, may provide a list of the names and addresses of all individuals it knows to have tested positive, or received treatment, for COVID-19 to an EMS dispatch for use on a per-call basis. The EMS dispatch (even if it is a covered entity) would be allowed to use information on the list to inform EMS personnel who are responding to any particular emergency call so that they can take extra precautions or use personal protective equipment (PPE).

Discussion: Under this example, a covered entity should not post the contents of such a list publicly, such as on a website or through distribution to the media. A covered entity under this example also should not distribute compiled lists of individuals to EMS personnel, and instead should disclose only an individual’s information on a per-call basis. Sharing the lists or disclosing the contents publicly would not ordinarily constitute the minimum necessary to accomplish the purpose of the disclosure (*i.e.*, protecting the health and safety of the first responders from infectious disease for each particular call).

- **Example:** A 911 call center may ask screening questions of all callers, for example, their temperature, or whether they have a cough or difficulty breathing, to identify potential cases of COVID-19. To the extent that the call center may be a HIPAA covered entity, the call center is permitted to inform a police officer being dispatched to the scene of the name, address, and screening results of the persons who may be encountered so that the officer can take extra precautions or use PPE to lessen the officer’s risk of exposure to COVID-19, even if the subject of the dispatch is for a non-medical situation.

Discussion: Under this example, a 911 call center that is a covered entity should only disclose the minimum amount of information that the officer needs to take appropriate precautions to minimize the risk of exposure. Depending on the circumstances, the minimum necessary PHI may include, for example, an individual’s name and the result of the screening.

Covered entities should consult other applicable laws (*e.g.*, state and local statutes and regulations) in their jurisdiction prior to using or making disclosures of individuals’ PHI, as such laws may place further restrictions on disclosures that are permitted by HIPAA.

Resources

The CDC’s National Institute for Occupational Safety and Health (NIOSH) has published a document that adds COVID-19 to its list of potentially life-threatening infectious diseases to which emergency response employees

(EREs) may be exposed while transporting or assisting victims of emergencies, and for which the medical facilities receiving the victims of emergencies would be required by law to notify the EREs of the potential exposure for purposes of the EREs seeking necessary diagnosis or medical treatment. More information is available at https://www.cdc.gov/niosh/docs/2020-119/default.html?deliveryName=USCDC_10_4DM24118.

Information about HIPAA Privacy and COVID-19 is available at <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>.

Information about disclosures of PHI to law enforcement officials is available in OCR's HIPAA Guide for Law Enforcement at https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/special/emergency/final_hipaa_guide_law_enforcement.pdf.

Information about uses and disclosures of PHI for public health is available at <https://www.hhs.gov/hipaa/for-professionals/special-topics/public-health/index.html>.



ATTACHMENT 2

March 2020

COVID-19 & HIPAA Bulletin Limited Waiver of HIPAA Sanctions and Penalties During a Nationwide Public Health Emergency

The Novel Coronavirus Disease (COVID-19) outbreak imposes additional challenges on health care providers. Often questions arise about the ability of entities covered by the HIPAA regulations to share information, including with friends and family, public health officials, and emergency personnel. As summarized in more detail below, the HIPAA Privacy Rule allows patient information to be shared to assist in nationwide public health emergencies, and to assist patients in receiving the care they need. In addition, while the HIPAA Privacy Rule is not suspended during a public health or other emergency, the Secretary of HHS may waive certain provisions of the Privacy Rule under the Project Bioshield Act of 2004 (PL 108-276) and section 1135(b)(7) of the Social Security Act.

In response to President Donald J. Trump's declaration of a nationwide emergency concerning COVID-19, and Secretary of the U.S. Department of Health and Human Services (HHS) Alex M. Azar's earlier declaration of a public health emergency on January 31, 2020, Secretary Azar has exercised the authority to waive sanctions and penalties against a covered hospital that does not comply with the following provisions of the HIPAA Privacy Rule:

- the requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care. See 45 CFR 164.510(b).
- the requirement to honor a request to opt out of the facility directory. See 45 CFR 164.510(a).
- the requirement to distribute a notice of privacy practices. See 45 CFR 164.520.
- the patient's right to request privacy restrictions. See 45 CFR 164.522(a).
- the patient's right to request confidential communications. See 45 CFR 164.522(b).

The waiver became effective on March 15, 2020. When the Secretary issues such a waiver, it only applies: (1) in the emergency area identified in the public health emergency declaration; (2) to hospitals that have instituted a disaster protocol; and (3) for up to 72 hours from the time the hospital implements its disaster protocol. When the Presidential or Secretarial declaration terminates, a hospital must then comply with all the requirements of the Privacy Rule for any patient still under its care, even if 72 hours have not elapsed since implementation of its disaster protocol.

More on HIPAA Privacy and Disclosures in Emergency Situations

Even without a waiver, the HIPAA Privacy Rule always allows patient information to be shared for the following purposes and under the following conditions.

Treatment Under the Privacy Rule, covered entities may disclose, without a patient's authorization, protected health information about the patient as necessary to treat the patient or to treat a different patient. Treatment

includes the coordination or management of health care and related services by one or more health care providers and others, consultation between providers, and the referral of patients for treatment. See 45 CFR §§ 164.502(a)(1)(ii), 164.506(c), and the definition of “treatment” at 164.501.

Public Health Activities The HIPAA Privacy Rule recognizes the legitimate need for public health authorities and others responsible for ensuring public health and safety to have access to protected health information that is necessary to carry out their public health mission. Therefore, the Privacy Rule permits covered entities to disclose needed protected health information without individual authorization:

- **To a public health authority**, such as the CDC or a state or local health department, that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury or disability. This would include, for example, the reporting of disease or injury; reporting vital events, such as births or deaths; and conducting public health surveillance, investigations, or interventions. A “public health authority” is an agency or authority of the United States government, a State, a territory, a political subdivision of a State or territory, or Indian tribe that is responsible for public health matters as part of its official mandate, as well as a person or entity acting under a grant of authority from, or under a contract with, a public health agency. See 45 CFR §§ 164.501 and 164.512(b)(1)(i). For example, a covered entity may disclose to the CDC protected health information on an ongoing basis as needed to report all prior and prospective cases of patients exposed to or suspected or confirmed to have COVID-19.
- **At the direction of a public health authority, to a foreign government agency** that is acting in collaboration with the public health authority. See 45 CFR 164.512(b)(1)(i).
- **To persons at risk** of contracting or spreading a disease or condition if other law, such as state law, authorizes the covered entity to notify such persons as necessary to prevent or control the spread of the disease or otherwise to carry out public health interventions or investigations. See 45 CFR 164.512(b)(1)(iv).

Disclosures to Family, Friends, and Others Involved in an Individual’s Care and for Notification A covered entity may share protected health information with a patient’s family members, relatives, friends, or other persons identified by the patient as involved in the patient’s care. A covered entity also may share information about a patient as necessary to identify, locate, and notify family members, guardians, or anyone else responsible for the patient’s care, of the patient’s location, general condition, or death. This may include, where necessary to notify family members and others, the police, the press, or the public at large. See 45 CFR 164.510(b).

- The covered entity should get verbal permission from individuals or otherwise be able to reasonably infer that the patient does not object, when possible; if the individual is incapacitated or not available, covered entities may share information for these purposes if, in their professional judgment, doing so is in the patient’s best interest.
- For patients who are unconscious or incapacitated: A health care provider may share relevant information about the patient with family, friends, or others involved in the patient’s care or payment for care, if the health care provider determines, based on professional judgment, that doing so is in the best interests of the patient. For example, a provider may determine that it is in the best interests of an elderly patient to share relevant information with the patient’s adult child, but generally could not share unrelated information about the patient’s medical history without permission.

- In addition, a covered entity may share protected health information with disaster relief organizations that, like the American Red Cross, are authorized by law or by their charters to assist in disaster relief efforts, for the purpose of coordinating the notification of family members or other persons involved in the patient’s care, of the patient’s location, general condition, or death. It is unnecessary to obtain a patient’s permission to share the information in this situation if doing so would interfere with the organization’s ability to respond to the emergency.

Disclosures to Prevent or Lessen a Serious and Imminent Threat Health care providers may share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public – consistent with applicable law (such as state statutes, regulations, or case law) and the provider’s standards of ethical conduct. See 45 CFR 164.512(j). Thus, providers may disclose a patient’s health information to anyone who is in a position to prevent or lessen the serious and imminent threat, including family, friends, caregivers, and law enforcement without a patient’s permission. HIPAA expressly defers to the professional judgment of health professionals in making determinations about the nature and severity of the threat to health and safety. See 45 CFR 164.512(j).

Disclosures to the Media or Others Not Involved in the Care of the Patient/Notification In general, except in the limited circumstances described elsewhere in this Bulletin, affirmative reporting to the media or the public at large about an identifiable patient, or the disclosure to the public or media of specific information about treatment of an identifiable patient, such as specific tests, test results or details of a patient’s illness, may not be done without the patient’s written authorization (or the written authorization of a personal representative who is a person legally authorized to make health care decisions for the patient). See 45 CFR 164.508 for the requirements for a HIPAA authorization. Where a patient has not objected to or restricted the release of protected health information, a covered hospital or other health care facility may, upon a request to disclose information about a particular patient asked for by name, release limited facility directory information to acknowledge an individual is a patient at the facility, and may provide basic information about the patient’s condition in general terms (e.g., critical or stable, deceased, or treated and released). Covered entities may also disclose information when the patient is incapacitated, if the disclosure is believed to be in the best interest of the patient and is consistent with any prior expressed preferences of the patient. See 45 CFR 164.510(a).

Minimum Necessary For most disclosures, a covered entity must make reasonable efforts to limit the information disclosed to that which is the “minimum necessary” to accomplish the purpose. (Minimum necessary requirements do not apply to disclosures to health care providers for treatment purposes.) Covered entities may rely on representations from a public health authority or other public official that the requested information is the minimum necessary for the purpose, when that reliance is reasonable under the circumstances. For example, a covered entity may rely on representations from the CDC that the protected health information requested by the CDC about all patients exposed to or suspected or confirmed to have COVID-19 is the minimum necessary for the public health purpose. In addition, internally, covered entities should continue to apply their role-based access policies to limit access to protected health information to only those workforce members who need it to carry out their duties. See 45 CFR §§ 164.502(b), 164.514(d).

Safeguarding Patient Information

In an emergency situation, covered entities must continue to implement reasonable safeguards to protect patient information against intentional or unintentional impermissible uses and disclosures. Further, covered entities

(and their business associates) must apply the administrative, physical, and technical safeguards of the HIPAA Security Rule to electronic protected health information.

HIPAA Applies Only to Covered Entities and Business Associates

The HIPAA Privacy Rule applies to disclosures made by employees, volunteers, and other members of a covered entity's or business associate's workforce. Covered entities are health plans, health care clearinghouses, and those health care providers that conduct one or more covered health care transactions electronically, such as transmitting health care claims to a health plan. Business associates generally are persons or entities (other than members of the workforce of a covered entity) that perform functions or activities on behalf of, or provide certain services to, a covered entity that involve creating, receiving, maintaining, or transmitting protected health information. Business associates also include subcontractors that create, receive, maintain, or transmit protected health information on behalf of another business associate. The Privacy Rule does not apply to disclosures made by entities or other persons who are not covered entities or business associates (although such persons or entities are free to follow the standards on a voluntary basis if desired). There may be other state or federal rules that apply.

Business Associates

A business associate of a covered entity (including a business associate that is a subcontractor) may make disclosures permitted by the Privacy Rule, such as to a public health authority, on behalf of a covered entity or another business associate to the extent authorized by its business associate agreement.

Other Resources

The COVID-19 Public Health Emergency declaration is available at:

<https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx>

For more information on COVID-19, please visit: <https://www.coronavirus.gov>

For more information on HIPAA and Public Health, please visit:

<https://www.hhs.gov/hipaa/forprofessionals/special-topics/public-health/index.html>

For more information on HIPAA and Emergency Preparedness, Planning, and Response, please

<https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/index.html>

General information on understanding the HIPAA Privacy Rule may be found at:

<https://www.hhs.gov/hipaa/for-professionals/privacy/index.html>

For information regarding how Federal civil rights laws apply in an emergency, please visit:

<https://www.hhs.gov/civil-rights/for-individuals/special-topics/emergencypreparedness/index.html>