

HIPAA/TCPA Updates

Government agencies have issued a number of updates in light of the COVID-19 public health emergency. Below is a summary of some of those updates as they relate to our clients and their use of Phreesia.

Outline:

1. HHS will not penalize hospitals for noncompliance with certain HIPAA privacy requirements for a limited period of time.
2. HHS will not penalize hospitals for noncompliance with HIPAA while providing telehealth during the COVID-19 public health emergency.
3. Providers are permitted share minimally necessary PHI of a COVID-19 patient with law enforcement, paramedics, other first responders, and public health authorities without an individual's authorization under certain circumstances.
4. HHS recommends that providers adopt certain patient accommodations.
5. Automated COVID-19 texts aimed to protect the health and safety of patients are considered "emergency" texts and do not require prior express consent.

1. HHS will not penalize hospitals for noncompliance with certain HIPAA privacy requirements for a limited period of time.

- HHS will waive sanctions and penalties against a 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 above waiver 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.

See <https://www.hhs.gov/sites/default/files/hipaa-and-covid-19-limited-hipaa-waiver-bulletin-508.pdf> and <https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx>

2. HHS will not penalize healthcare providers for noncompliance with HIPAA while providing telehealth during the COVID-19 public health emergency.

- *During the COVID-19 public health emergency*, a practice that provides telehealth via non-public audio/video communication products will not be penalized for not complying with HIPAA requirements, such as the requirements to have a BAA or to ensure communications are secure.
- Under this waiver, the telehealth services may relate to health matters unrelated to COVID-19. If a patient has a sprained ankle, for example, the telehealth waiver still applies.
- Providers may use apps that have video chat features, such as Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, or Skype, to provide telehealth.
- Providers are further encouraged to:
 - » Advise patients that third-party apps may still have privacy risks.
 - » Enable all available encryption and privacy modes when using such applications.
 - » Avoid **public**-facing apps, such as Facebook Live, Twitch, TikTok. Certain providers (e.g., Skype for Business, Zoom, and Google) do offer HIPAA instances of their tools.

OCR will issue a notice to the public when the enforcement discretion ends, based upon the latest facts and circumstances. Thereafter, OCR will resume enforcement of the HIPAA Rules.

See <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>

3. Providers are permitted to share minimally necessary PHI of a COVID-19 patient with law enforcement, paramedics, other first responders, and public health authorities without an individual's authorization under certain circumstances.

- ***When the disclosure is needed to provide treatment.*** For example, a facility can 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.*** A hospital can disclose PHI about a COVID-19 patient 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).
- ***To notify a public health authority in order to prevent or control spread of disease.*** A facility can disclose PHI to a public health authority such as the CDC or state health department for the authorized purpose of preventing or controlling disease. 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 provider may disclose PHI to a first responder who may have been exposed to COVID-19 if the provider is authorized by law to notify persons as necessary in the conduct of a public health intervention or investigation. 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 provider 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. 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 reasons such as providing health care to the individual. 45 CFR 164.512(k)(5).

Except when required by law, or for treatment disclosures, a covered healthcare provider 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).

The above is condensed from: <https://www.hhs.gov/sites/default/files/covid-19-hipaa-and-first-responders-508.pdf>. Additional examples are available at the link.

4. HHS recommends that providers adopt certain patient accommodations.

HHS recommend the below practices in order to accommodate all segments of the community:

- Employing qualified interpreter services to assist individuals with limited English proficiency and individuals who are deaf or hard of hearing;
- Making emergency messaging available in languages prevalent in the affected area(s) and in multiple formats, such as audio, large print, and captioning and ensuring that websites providing emergency-related information are accessible;
- Making use of multiple outlets and resources for messaging to reach individuals with disabilities, individuals with limited English proficiency, and members of diverse faith communities;
- Considering and planning for the needs of individuals with mobility impairments and individuals with assistive devices or durable medical equipment in providing health care during emergencies;
- Stocking facilities with items that will help people to maintain independence, such as hearing aid batteries, canes, and walkers.

See <https://www.chhs.ca.gov/wp-content/uploads/2020/03/OCR-Civil-Rights-and-Coronavirus-03162020.pdf>

5. Automated COVID-19 texts aimed to protect the health and safety of patients are considered “emergency” texts and do not require prior express consent.

- Any such texting communications must:
 - » Be solely informational and made necessary because of the COVID-19 outbreak
 - » Be directly related to the “imminent health or safety risk” arising out of the COVID-19 outbreak
 - » Not contain content relating to advertising, telemarketing, or debt-collection, even if for COVID-19 healthcare treatment
- As a best practice, providers should aim to minimize what information is included in texts if no prior express consent is obtained. For example, a text advising patients to wait in their cars for their appointment poses a lower privacy risk than disclosing a patient’s COVID-19 test results.

See <https://www.fcc.gov/document/covid-19-tcpa-declaratory-ruling>

** The above statements are for informational purposes only and are not intended to provide legal advice. These statements are subject to change as the subject matter continues to develop.*

Late updated: 3/25/2020