

OBTAINING MEDICAL
RECORDS AFTER
DECEMBER 22, 2024:
WHAT YOU NEED TO
KNOW **NOW**

*PRESENTED TO:
Fayette County Bar Association
December 5, 2024*

LEGAL DISCLAIMER

Although the information provided in this presentation may be helpful in informing those who have an interest in data privacy issues, it does not constitute legal advice. It also does not necessarily represent the views of the University of Kentucky. This information is based in part on current federal laws and regulations and is subject to change based on changes in federal laws and regulations and/or subsequent case law. Where this information is based on federal law or regulation, consideration needs to be given as to whether it needs to be modified to reflect state law where that state law is more stringent than the federal law or other state law exceptions apply. This information is intended to be a general information resource and should not be relied upon as a substitute for competent legal advice specific to your circumstances. **YOU SHOULD EVALUATE AND CHECK ALL INFORMATION, OPINIONS AND RECOMMENDATIONS PROVIDED, AND/OR CONSULT WITH YOUR LEGAL OR OTHER ADVISOR, AS APPROPRIATE.**

AGENDA

- Introduction - A Brief History of HIPAA and the HIPAA Privacy Rule
 - New Provisions of the HIPAA Privacy Rule Regarding Reproductive Health Privacy
 - What These New Provisions Mean for Obtaining Medical Records
 - The Future of the Rule
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HEALTH
INSURANCE
PORTABILITY &
ACCOUNTABILITY
ACT OF 1996



INTRODUCTION

BACKGROUND

- 1996 – HIPAA enacted
- 2000 – Transactions & Code Sets
- 2003 – Privacy Rule
- 2005 – Security Rule
- 2006 – Enforcement Rule
- 2009 – HITECH enacted; Updated Enforcement Rule and New Breach Notification Rule
- 2013 –HIPAA Omnibus Rule Compliance
- 2019 – Notice of Enforcement Discretion – adjustment of penalties
- 2021 - proposed amendments to Privacy Rule
- 2022 – OCR published RFI on recognized security practices and on settlement sharing



INTRODUCTION

STRUCTURE OF HIPAA REGULATIONS - 45 CFR

- Part 160 – General Provisions
 - definitions, compliance, enforcement
- Part 162 – Transactions and Code Sets
- Part 164 – [https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title45/45cfr164_main_02.t](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title45/45cfr164_main_02.tpl)
[pl](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title45/45cfr164_main_02.t)
 - Subpart C – Security Rule
 - Subpart D – Data Breach Notification Rule
 - Subpart E - Privacy Rule

INTRODUCTION

WHO NEEDS TO COMPLY WITH HIPAA? “COVERED ENTITIES” 45 CFR §160.102

- Health Plans:
 - **Examples:** group health plans; health insurance issuers; HMOs.
 - Healthcare Clearing Houses:
 - **Examples:** billing services; repricing companies
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INTRODUCTION


WHO NEEDS TO COMPLY WITH HIPAA?

“COVERED ENTITIES” 45 CFR §160.102 (CONT'D)

- Healthcare Providers: providers of medical or health services and any other people or organizations who furnish, bill or are paid for health care in the normal course of business AND who transmits any health information in electronic form in connection with a *covered transaction*.
 - **Examples:** hospitals, physicians

INTRODUCTION

WHO NEEDS TO COMPLY WITH HIPAA?

- “Where provided, the standards, requirements, and implementation specifications . . . apply to a Business Associate.” 45 CFR 160.102(b).
 - Business Associates are persons or entities that create, receive, maintain, or transmit Protected Health Information (PHI) on behalf of a Covered Entity for payment or health care operations purposes or provide certain services that require the disclosure of PHI
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INTRODUCTION

PROTECTED HEALTH INFORMATION

- Individually Identifiable Health Information that is transmitted or maintained in any form or medium
- IIHI - subset of health information, including demographic information collected from an individual, and: (1) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) identifies the individual; or (ii) there is a reasonable basis to believe the information can be used to identify the individual.

INTRODUCTION

PROTECTED HEALTH INFORMATION

- Excludes:
 - FERPA records;
 - Employment records held by a CE in its role as an employer; and
 - IIHI regarding a person who has been deceased for more than 50 years.
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HIPAA PRIVACY RULE

PRIVACY COMPLIANCE

Three Issues –

- How to use and disclose Protected Health Information (PHI)
 - Patient's Rights - ACCESS
 - Provider's Legal Obligations
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DEPARTMENT OF HEALTH AND HUMAN SERVICES**Office of the Secretary****45 CFR Parts 160 and 164**

RIN 0945-AA20

HIPAA Privacy Rule To Support Reproductive Health Care Privacy

AGENCY: Office for Civil Rights (OCR), Office of the Secretary, Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: The Department of Health and Human Services (HHS or “Department”)

SUPPLEMENTARY INFORMATION:**Table of Contents**

I. Executive Summary

- A. Overview
- B. Effective and Compliance Dates
 - 1. 2023 Privacy Rule NPRM
 - 2. Overview of Comments
 - 3. Final Rule
 - 4. Response to Public Comments

II. Statutory and Regulatory Background

- A. Statutory Authority and History
 - 1. Health Insurance Portability and Accountability Act of 1996 (HIPAA)
 - 2. Health Information Technology for Economic and Clinical Health (HITECH) Act
- B. Regulatory History
 - 1. 2000 Privacy Rule

- 1. Clarifying When PHI May Be Used or Disclosed by Regulated Entities
- 2. Adding a New Category of Prohibited Uses and Disclosures
- 3. Clarifying Personal Representative Status in the Context of Reproductive Health Care
- 4. Request for Comments
- C. Section 164.509—Uses and Disclosures for Which an Attestation is Required
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 - 1. Current Provision
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NEW RULE ON REPRODUCTIVE HEALTH CARE PRIVACY

HIPAA PRIVACY RULE REPRODUCTIVE HEALTH CARE PRIVACY

Published April 26, 2024

Effective June 25, 2024

Compliance Date: 12/23/24, except for
NPP changes (compliance date 2/16/26)



► BACKGROUND

HHS issued the Final Rule to address what it perceived to be a “changing legal landscape” in the wake of the Supreme Court decision in *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022).

HHS expressed concern that the decision impacted reproductive health care beyond access to abortion and “increases the likelihood that an individual’s PHI may be disclosed in ways that cause harm to the interests that HIPAA seeks to protect, including the trust of individuals in health care providers and the health care system.” 89 Fed. Reg. at 32,978.

The Final Rule aims to prevent PHI from being used or disclosed to **investigate** or impose **liability** on individuals or providers, which might deter people from seeking lawful healthcare or fully sharing their medical information, and deter providers from providing care.

HIPAA PRIVACY RULE

REPRODUCTIVE HEALTH CARE PRIVACY

Prohibits the use or disclosure of PHI by a Covered Entity or their Business Associate for the following activities:

- To conduct a criminal, civil, or administrative **investigation** into or impose criminal, civil, or administrative **liability** on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care, where such health care is lawful under the circumstances in which it is provided.
- The identification of any person for the purpose of conducting such investigation or imposing such liability.

HIPAA PRIVACY RULE

REPRODUCTIVE HEALTH CARE PRIVACY

Reproductive Health Care: health care, as defined in this section, that affects the health of an individual in all matters relating to the reproductive system and to its functions and processes. This definition shall not be construed to set forth a standard of care for or regulate what constitutes clinically appropriate reproductive health care.

HIPAA PRIVACY RULE

REPRODUCTIVE HEALTH CARE PRIVACY


Examples: contraception, including emergency contraception; preconception screening and counseling; management of pregnancy and pregnancy-related conditions, including pregnancy screening, prenatal care, miscarriage management, treatment for preeclampsia, hypertension during pregnancy, gestational diabetes, molar or ectopic pregnancy, and pregnancy termination; fertility and infertility diagnosis and treatment, including assisted reproductive technology and its components (e.g., in vitro fertilization (IVF)); diagnosis and treatment of conditions that affect the reproductive system (e.g., perimenopause, menopause, endometriosis, adenomyosis); and other types of care, services and supplies used for the diagnosis and treatment of conditions related to the reproductive system (e.g., mammography, pregnancy-related nutrition services, postpartum care products).

HIPAA PRIVACY RULE

REPRODUCTIVE HEALTH CARE PRIVACY

When does the prohibition apply?

Answer: When the Covered Entity or Business Associate reasonably determines that one or more of the following conditions exists (see next slide).



HIPAA PRIVACY RULE

REPRODUCTIVE HEALTH CARE PRIVACY

1. The reproductive health care is lawful under the law of the state in which such health care is provided under the circumstances in which it is provided. Ex.: if a resident of one state traveled to another state to receive reproductive health care, such as an abortion, that is lawful in the state where such health care was provided.
2. The reproductive health care is protected, required, or authorized by Federal law, including the U.S. Constitution, regardless of the state in which such health care is provided. Ex: if use of the reproductive health care, such as contraception, is protected by the Constitution.
3. The reproductive health care was provided by a person other than the covered health care provider, health plan, or health care clearinghouse (or business associates) that receives the request for PHI and the presumption described below applies (see next slide).

HIPAA PRIVACY RULE

REPRODUCTIVE HEALTH CARE PRIVACY

Presumption: That the reproductive health care provided by a person other than the Covered Entity (or Business Associates) receiving the request was lawful, unless one of the following conditions is met:

1. The Covered Entity (or Business Associate) has actual knowledge that the reproductive health care was not lawful under the circumstances in which it was provided. Ex: an individual discloses to their doctor that they obtained reproductive health care from an unlicensed person and the doctor knows that the specific reproductive health care must be provided by a licensed health care provider.
2. The Covered Entity (or Business Associate) receives factual information from the person making the request for the use or disclosure of PHI that demonstrates a substantial factual basis that the reproductive health care was not lawful under the circumstances in which it was provided. Ex: a law enforcement official provides a health plan with evidence that the information being requested is reproductive health care that was provided by an unlicensed person where the law requires that such health care be provided by a licensed health care provider.



SO WHAT DOES THIS HAVE TO DO WITH:

- MY PERSONAL INJURY / ESTATE / DIVORCE CASE?
- MY LAW ENFORCEMENT INQUIRY?
- MY HEALTH OVERSIGHT INVESTIGATION?
- MY CORONER/MEDICAL EXAMINER DUTIES?

HIPAA PRIVACY RULE

REPRODUCTIVE HEALTH CARE PRIVACY

Is the request for any of the following purposes:

- Health oversight activities
- Judicial or administrative proceedings - subpoenas/discovery
- Law enforcement – warrants, investigative demands, identification purposes, victims of a crime, decedents where death is suspected to arise from criminal conduct, crime on the premises, crime in emergencies
- Regarding decedents, disclosures to coroners and medical examiners for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law.

THEN YOU MAY BE ASKED TO SIGN AN

ATTESTATION: [HHS OCR Model Attestation Form re Reproductive Health Care Use of Attestation Required](#)

Model Attestation Regarding a Requested Use or Disclosure of Protected Health Information Potentially Related to Reproductive Health Care

The entire form must be completed for the attestation to be valid.

Name of person(s) or specific identification of the class of persons to receive the requested PHI. <i>e.g., name of investigator and/or agency making the request</i>
Name or other specific identification of the person or class of persons from whom you are requesting the use or disclosure. <i>e.g., name of covered entity or business associate that maintains the PHI and/or name of their workforce member who handles requests for PHI</i>
Description of specific PHI requested, including name(s) of individual(s), if practicable, or a description of the class of individuals, whose protected health information you are requesting. <i>e.g., visit summary for [name of individual] on [date]; list of individuals who obtained [name of prescription medication] between [date range]</i>

I attest that the use or disclosure of PHI that I am requesting is not for a purpose prohibited by the HIPAA Privacy Rule at 45 CFR 164.502(a)(5)(iii) because of one of the following (check one box):

- The purpose of the use or disclosure of protected health information is **not** to investigate or impose liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care or to identify any person for such purposes.
- The purpose of the use or disclosure of protected health information **is** to investigate or impose liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care, or to identify any person for such purposes, but the reproductive health care at issue was **not lawful** under the circumstances in which it was provided.

I understand that I may be subject to criminal penalties pursuant to 42 U.S.C. 1320d-6 if I knowingly and in violation of HIPAA obtain individually identifiable health information relating to an individual or disclose individually identifiable health information to another person.

Signature of the person requesting the PHI


_____ Date _____

If you have signed as a representative of the person requesting PHI, provide a description of your authority to act for that person.

HIPAA PRIVACY RULE

REPRODUCTIVE HEALTH CARE PRIVACY

Health oversight agency: 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 authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant. Ex: CMS, OIG



HIPAA PRIVACY RULE

REPRODUCTIVE HEALTH CARE PRIVACY

Covered Entities and Business Associates:

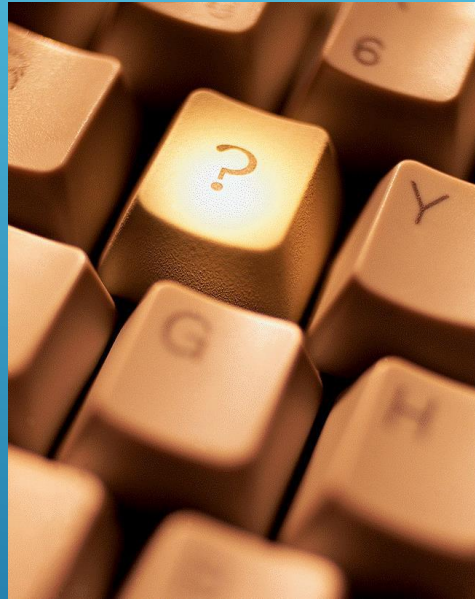
- may not rely on the attestation to disclose the requested PHI if any of the following is true:
 - It is missing any required element or statement or contains other content that is not required.
 - It is combined with other documents, except for documents provided to support the attestation.
 - CE or BA knows that material information in the attestation is false.
 - A reasonable covered entity or business associate in the same position would not believe the requestor's statement that the use or disclosure is not for a prohibited purpose as described above.

HIPAA PRIVACY RULE

The Future of the RHI Rule

- Implementation for Covered Entities and Business Associates is required on and after 12/23/24. These groups are considering the following issues:
 - Developing Attestations – adopt OCR’s model or develop new?
 - Developing Policies
 - Educating the Team
 - Changing Notices of Privacy Practices (some CEs may choose to do this before 2026)
 - OCR’s resolution agreement referencing RHI: [HHS Office for Civil Rights Settles with Holy Redeemer Hospital Over Disclosure of Patient’s Protected Health Information, Including Reproductive Health Information | HHS.gov](#)
- [Texas v. HHS, 5:24-cv-00204-H \(N.D. Tex.\)](#)– Dispositive motions to be filed January 17, 2025

QUESTIONS?



THANK YOU!

