

HIPAA State Preemption- the HIPAA Statute

- Continued applicability of State law
- Exception: HIPAA Preempts a state standard or requirement that prevents application of a HIPAA requirement
- State law defined to include law, decisions, rules, regulations and other State action having the effect of law (e.g. State Bulletins)

HIPAA State Preemption-the Preamble to the HIPAA Final Regulations

- “General rule” is that HIPAA preempts “contrary” provisions of State law
- Three Exceptions: Contrary and more stringent state laws
 - (1) (a) to prevent fraud and abuse, (b) regulate insurance and health plans and (c) report on health care delivery and other purposes,
 - (2) addressing controlled substances, and
 - (3) more stringent privacy requirement

HIPAA State Preemption-the Preamble to the HIPAA Final Regulations

- Four definitions:
 - “Contrary”
 - “More Stringent”
 - “Relates to the Privacy of Individually Identifiable Health Information”
 - “State Law”

HIPAA State Preemption-the Preamble to the HIPAA Final Regulations

- Defined other purposes
 - Purposes related to improving
 - The Medicare program
 - The Medicaid program , or
 - The efficiency and effectiveness of the health care system
- Defined individual
 - Means the person who is the subject of individually identifiable health information

HIPAA State Preemption-the Preamble to the HIPAA Final Regulations

- Process to request exception determinations:
 - any person, not just the State may request
 - Determination is effective until revoked by Secretary

HIPAA State Preemption-the Preamble to the HIPAA Final Regulations

- Federal law conflicts
 - General Rule: comply with both
 - Examples in preamble of interactions

HIPAA State Preemption-the HIPAA Final Regulations

- Contrary means
 - Covered entity would find it impossible to comply with both
 - State law is an obstacle to accomplishment of full purposes and objectives of HIPAA s

HIPAA State Preemption-the HIPAA Final Regulations

- More stringent means a State law that meets one or more of following criteria
 - State law prohibits or restricts a use or disclosure in circumstance where use or disclosure would be permitted by HIPAA, except if disclosure
 - Is required by Secretary to determine if Covered entity is in compliance with HIPAA, or
 - To the individual who is the subject of individually identifiable health information

HIPAA State Preemption-the HIPAA Final Regulations

- More stringent means a State law that meets one or more of following criteria continued
 - State law permits greater right to access or amend
 - HIPAA does not preempt State law that authorizes or permits disclosure about minor to parent, guardian or person acting in loco parentis State law provides greater amount of health information to the individual
 - State law that narrows the scope or duration, increases privacy protections or reduces the coercive effect of circumstances surrounding authorization or consent

HIPAA State Preemption-the HIPAA Final Regulations

- More stringent means a State law that meets one or more of following criteria continued
 - State law requires more detailed information or longer duration for retention or reporting of information
 - State law provides greater privacy protection for the individual who is the subject of individually identifiable health information

HIPAA State Preemption-the HIPAA Final Regulations

- Relates to the privacy of individually identifiable health information means
 - With respect to a State law
 - State law has the **specific purpose** of protecting privacy of health information
 - Or affects the privacy of health information in a direct, clear and substantial way

HIPAA State Preemption-the HIPAA Final Regulations

- State law means
 - Constitution
 - Statute
 - Regulation
 - Rule
 - Common law
 - Other State action having the force and effect of law

HIPAA State Preemption-the Need for State Analysis

- Needed for
 - Notice of Privacy Practices
 - Description of use or disclosure must reflect more stringent State law
 - Forms
 - Notice of Privacy Practices
 - Consent
 - Authorization

HIPAA State Preemption-the State Analysis

- JOINT EFFORT of
 - Michigan Society of Health Care Attorneys and
 - State Bar of Michigan Health Law Section
- Co-chairs: Joy Berent and Cindy Wisner
- Honigman Miller Schwartz and Cohn-initial chart analysis
 - First DRAFT distributed for review and reaction by mid-December 2001
 - Plan to distribute to members of each association by mid-April 2002

26 HIPAA Preemptions Where Michigan State Law Is Contrary To And NOT More Stringent Than The HIPAA Rule

- 12 HIPAA required consent preemptions
 - will change if proposed modifications become final
- 4 HIPAA research preemptions
 - proposed modifications will change HIPAA requirements, but HIPAA will continue to preempt
- Misc. areas preempted-3 substance abuse, 6 mental health, 2 minors, 2 dental, 3 legal proceedings, 2 disclosure and 2 insurance/tpas, 2 prescription drugs, 3 legal proceedings, 1 evidence, 6 patient rights and research

MCL 330.1748

(Confidentiality of Mental Health Records)

Disclosure for Legal Proceedings

As to subpoenas, however, the Rule applies because state law permits disclosure of nonprivileged information pursuant to a subpoena without a court order, while the Rule permits such disclosure pursuant to a subpoena without a court order only if certain additional requirements short of a court order are met.

See 164.512(e)(i)(iii)-(iv).

MCL 330.1748

(Confidentiality of Mental Health Records)

Disclosure for Benefits Purposes

The Rule applies because individual consent* is required prior to a disclosure for payment purposes. See definition of payment at 164.501 (includes benefit eligibility determinations). To the extent the disclosure involves PHI used for non-TPO purposes, the Rule also applies because it requires an authorization. By allowing disclosure without authorization, state law is contrary to and preempted by the Rule. (*will change if proposed modifications become final)

MCL 330.1748

(Confidentiality of Mental Health Records)

Disclosure for Research Purposes

The Rule applies because it requires authorization* or an authorization waiver* approved by the Institutional Review Board ("IRB") or privacy board, while state law allows disclosure, even for research purposes, at the record holder's discretion. (*Proposed modifications will change research requirements)

MCL 330.1748

(Confidentiality of Mental Health Records)

Evaluation and Accreditation

To the extent the disclosure is limited to health care operations, the Rule applies as it would only permit disclosure with consent*. (*will change if proposed modifications become final)

MCL 330.1750

(Privileged Communications as Evidence)

Disclosure in Legal Proceedings

Assuming that the privileged communications contain confidential health information, the Rule applies because it requires a court order for disclosure without consent or authorization, or upon satisfaction of other criteria, while state law allows disclosure in civil or administrative proceedings simply upon notice to the individual.

MCL 333.2632

(Confidentiality of Information Obtained During Research)

Disclosure of Research Information

The Rule applies because it requires either an authorization or an IRB or privacy board approval of an authorization waiver* prior to using or disclosing PHI for research purposes, whereas state law appears to allow the use or disclosure of confidential health information without such authorization or authorization waiver provided it is in strict conformity with the research project. (*Proposed modifications will change research requirements)

MCL 333.5127

(Consent by Minor for VD or HIV Testing)

Disclosure Disclosure to Minor's Spouse

The rule applies because it provides greater protection of PHI by permitting the minor to object to the disclosure to his or her spouse, whereas state law does not grant a similar right.

MCL 333.6111

(Records of Substance Abuse Treatment)

Disclosure With Consent

The Rule applies because it mandates a consent* prior to TPO for the use or disclosure of confidential health information, whereas state law is permissive. (*will change if proposed modifications become final)

MCL 333.6113

(Additional Disclosures of Substance Abuse Records)

Research Purposes

The Rule applies because the Rule requires consent**, authorization or an IRB or privacy board approved authorization waiver to disclose PHI for research* purposes. (**will change if proposed modifications become final *Proposed modifications will change research requirements)

MCL 333.6121

(Validity of Minor Consent to Substance Abuse Treatment)

Disclosure to Minor's Spouse

The Rule applies because it provides greater protections of PHI by permitting the individual to object to the disclosure to his or her spouse, whereas state law does not grant a similar right.

MCL 333.16648

(Confidentiality of Dental Records)

Disclosure Regarding Claim for Payment

The Rule applies because state law permits disclosure for purposes of payment without prior consent, whereas the Rule mandates consent *prior to disclosure for payment purposes. (*will change if proposed modifications become final)

MCL 333.16648

(Confidentiality of Dental Records)

Disclosure for Payment Purposes

The Rule applies because state law permits disclosure for predeterminations, treatment reviews and audits without prior consent, whereas the Rule mandates consent* prior to such disclosure. Note: The Rule does not require health plans to obtain consent prior to payment. (*will change if proposed modifications become final)

MCL 333.17752

(Prescription Drug Records)

Disclosure for Treatment

The Rule applies because it requires consent* prior to treatment-related disclosures, whereas state law does not. (*will change if proposed modifications become final)

MCL 333.17752

(Prescription Drug Records)

Disclosure for Research Purposes

The Rule applies because it requires either an authorization or an IRB or privacy board approval of an authorization waiver for the disclosure of PHI used in research*, whereas state law permits such disclosure without authorization. (*Proposed modifications will change research requirements)

MCL 333.18513

(Confidentiality of Communications to Social Workers)

Disclosure for Supervisory Process

The Rule applies because it requires consent* prior to disclosure for health care operations (e.g., required supervisory process), whereas state law does not. (*will change if proposed modifications become final)

MCL 333.20201

(Policies Regarding Patient Rights and Responsibilities in Facilities and Agencies)

Disclosure for Transfer

The Rule applies because it requires consent* for treatment purposes, whereas state law would permit disclosure without consent for treatment purposes. (*will change if proposed modifications become final)

MCL 333.20201

(Policies Regarding Patient Rights and Responsibilities in Facilities and Agencies)

Disclosure for Payment Purposes

The Rule applies because it requires consent* for payment purposes, whereas state law would permit disclosure without consent for payment purposes. (*will change if proposed modifications become final)

Note: While no Rule counterpart expressly exists, the policies underlying the Rule are compatible with this state law as to the policies to protect individual privacy.

MCL 333.21743

(Confidentiality of Clinical Records by MDSS and Nursing Homes)

Disclosure Upon Death

The Rule applies because it only permits the disclosure of limited information for notification of death, dependent upon the professional judgment of the covered entity whereas state law grants broader disclosures to the decedent's relative or guardian.

MCL 400.712

(Adult Foster Care)

Contested Case

The Rule applies because state law permits disclosure to a party to a contested case whereas the Rule only permits disclosure in such context to a party in response to a subpoena or where the covered entity obtains satisfactory assurances of confidentiality.

MCL 550.934

(Confidentiality Obligations of TPAs)

Disclosure for Purchase of Insurance

The Rule applies because it would require individual authorization if the stop loss policy holder is the employer (not a covered entity), but not if the policy holder is the group health plan (a covered entity). Disclosure for TPO pursuant to consent only is applicable to covered entities.

MCL 550.934

(Confidentiality Obligations of TPAs)

Disclosure to Plan Fiduciary

The Rule applies because it would prohibit disclosure to a plan fiduciary who is an employer sponsoring a group health plan administered by the TPA while state law would permit such disclosure. Note: Both state law and the Rule would apply if the plan fiduciary is not the employer.

MCL 600.2157

(Waiver of Physician-Patient Privilege)

Waiver of Privilege

The Rule applies because it only permits disclosure of the confidential information in connection with a court proceeding in response to a court order or subpoena or, if the court order or subpoena has been issued, and the covered entity has given the person whose confidential health information is at issue an opportunity to object and assert the privilege. Practically speaking, given state law, it is likely that if the person objecting to disclosure had filed suit to recover for personal injuries or malpractice, the court would, given the state law here, consider that privilege to have been

Opinion No. 5709

(May 20, 1980)

(County Mental Health Board and Recipient mental Health Records)

Shared Mental Health Information

The Rule applies because it requires consent* for treatment purposes, whereas state law appears to permit the use and disclosure among community mental health programs without consent. (*will change if proposed modifications become final)

Note: Assuming consent is obtained at the onset of treatment, however, both state law and the Rule would apply.

Opinion No. 2994

(January 16, 1945)

(Disclosure of Patient's Admissions)

Disclosure of Data

The Rule applies because state law is contrary to and provides less protection than the Rule by prohibiting a covered entity from disclosing a patient's confidential health information in this context without express authorization. Note: It appears from this Opinion that the attorney's informal request did not arise in the context of judicial proceedings.

Rule 325.14910

(Content and Maintenance of Patient Records)

Access to Patient Records by Staff

The Rule applies because although state law and the Rule both permit access by program personnel in treatment, the Rule imposes limitations even on those personnel with access rights, based on the “minimum necessary” standard. State law, on the other hand, would permit all personnel involved in treatment access, therefore, the Rule is contrary to and more protective than state law.

Rule 330.7051

(Disclosures Regarding Mental Health Proceedings)

Disclosure for Payment

The Rule applies because it requires consent* prior to a provider's disclosure of confidential health information for payment purposes. (*will change if proposed modifications become final)
The Rule, however, does not require health plans to obtain consent for payment purposes, and thus, both state law and the Rule would apply to health plans that elect not to obtain consent.