

**HIPAA PRIVACY RULE
PREEMPTION ANALYSIS MATRIX
FOR MICHIGAN LAW**

**Prepared by the Michigan State Bar Health Care Law
Section
and
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A. FORMAT OF THIS MATRIX

1. In this Matrix, the regulations issued under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) entitled, *Standards for Privacy of Individually Identifiable Health Information*, are referred to as the “Rule.”
2. This Matrix has been organized into five numbered columns. In some cases, the reader is referred by the information contained in one column to information contained in another column.
3. Gray shaded horizontal headings divide each section of the Matrix by the source of the particular Michigan law (*e.g.*, Public Health Code, Mental Health Code).
4. A parenthetical phrase has been included below the citation in Column 1 of the Matrix entitled, “Citation,” to provide the reader with the context of each Michigan law analyzed.

5. In some cases, we have included numbers in brackets and bold typeface in Column 2 of the Matrix entitled, “Brief Summary of Pertinent Provision.” We have not attempted to summarize the State law in its entirety, but have addressed only the provisions concerning privacy or confidentiality. *See also*, Section C.8, below. These bracketed numbers, therefore, do not correspond to any specific subsection of the Michigan law that is being analyzed. The bracketed numbers merely separate, for purposes of this Matrix, the different issues addressed by various subsections of the Michigan law. For each such bracket, a brief or descriptive or short title is included at the corresponding number in Columns 3, 4 and 5 to help the reader identify each separate analysis. Readers are encouraged to refer to the applicable Michigan law for the full and precise wording of each Michigan law.

6. The Michigan laws analyzed in this Matrix sometimes include cross-references to other Michigan laws. Such cross-referenced laws either are addressed elsewhere in the Matrix, or were not relevant to the preemption analysis.

7. A reference in Column 4 to “Both” means that Michigan law and the Rule are not contrary to one another and, therefore, in accordance with the Rule, a covered entity must comply with both laws. 65 Fed. Reg. 82581. This conclusion also applies to instances where Michigan law mandates a disclosure and the Rule permits such disclosure.

B. SCOPE OF THIS MATRIX

1. This Matrix is intended as a guide to assist readers in determining when the Rule preempts Michigan law, and, further, to aid readers in preparing forms that meet the requirements of the Rule.

2. The preemption analysis contained in this Matrix analyzes Michigan court rules, statutes, the Michigan Constitution, administrative rules, Attorney General opinions and case law. This Matrix does not include or analyze bulletins or other materials which may have the “force and effect of law,” such as Medicaid bulletins, even though such items may fall within the Rule’s definition of State law. Readers are advised that such items also will warrant a preemption analysis.

3. Michigan law contains several substantially similar statutes regarding the obligations of covered entities to report specific exposures or diseases to a state agency. We have included some, but not all, of these laws in the Matrix (*See, e.g.*, MCL 333.5129) because the preemption analysis is substantially the same for each of them.

4. This Matrix does not analyze any other federal laws. Readers are reminded that the Rule, by its terms, does not preempt other federal laws.

5. The preemption analysis contained in this Matrix does not address any determinations by the Secretary of the Department of Health and Human Services that a particular Michigan law is not preempted because the Michigan law is necessary to prevent fraud and abuse, ensure appropriate state regulation of health plans and insurance, report on health care delivery costs, regulate controlled substances or serve a compelling public need. *See* 160.203(a). Such determinations are contemplated under the Rule, but, of course, none have been issued insofar as the compliance date for the Rule has not yet occurred.

6. The Michigan law cited within this Matrix is current as of December 1, 2001, and does not include an analysis of proposed House Bill 4936 of 2001 entitled “Health Care Information Protection and Privacy Act.” Readers are reminded of the need to update Michigan laws after December 1, 2001.

7. As noted in the Foreword to this Matrix, the Matrix does not analyze the changes to the Rule proposed by the Notice of Proposed Rulemaking (“NPRM”) issued on March 21, 2002. The Matrix must be updated once any changes to the Privacy Rule proposed in the NPRM (or otherwise) become final.

C. Assumptions or General Rules
Adopted for Purposes of this
Preemption Analysis

1. Each Michigan law is analyzed in isolation without regard to the analysis of other potentially applicable Michigan laws. Therefore, the reader is advised to examine the preemption analysis of a particular Michigan law in the context of its relationship to other applicable Michigan laws.

2. Unlike the Rule, Michigan law does not distinguish between the terms, “consent” and “authorization.” Whenever possible, we have identified whether Michigan law contemplates a consent or authorization as defined under the Rule. In our analysis, we then used the term which comports with the Rule’s usage, even if the Michigan law uses another term. For example, if Michigan law speaks of consent, but the context of the law indicates that an authorization (as defined under the Rule) is intended, we have used the term authorization.

3. In cases where both State law and the Rule would require either a consent or authorization, the form of the consent or authorization would likely have to comport with the Rule's requirements, except that informed consent provisions of State law address circumstances that are distinct and different from the consent required under the Rule. In that circumstance, the informed consent requirements under State law are likely to control.

4. For purposes of our analysis, we generally have referred to "protected health information," "individually identifiable health information," and information protected under Michigan law as "confidential health information." When it is clear that we are discussing such information as treated under the Rule, we have used the term, PHI.

5. Where a Michigan law requires informed consent and also includes requirements pertaining to the use and disclosure of confidential health information, we have treated the informed consent requirement as tantamount to consent under the Rule. When, however, Michigan law involving informed consent includes no references to requirements pertaining to the use and disclosure of confidential health information, we have concluded that no Rule counterpart exists.

6. Unlike the Rule, Michigan law generally does not distinguish between “use” and “disclosure.” Therefore, we have made certain judgments, as indicated throughout this Matrix, as to whether a use or disclosure is contemplated under Michigan law.

7. Unless otherwise indicated, we have assumed that health care providers described in the Matrix transmit health information electronically in connection with a transaction covered by the Rule.

8. Many Michigan laws analyzed in this Matrix which contain provisions that “relate to the privacy of individually identifiable health information,” as defined in the Rule, also contain provisions which speak to other matters. In general we have not included provisions of State law which do not speak to the protection of confidential health information. Some of these provisions may, nevertheless, be included if they are needed to provide a context for those provisions that are relevant to this preemption analysis. Readers should realize, therefore, that the summaries of Michigan law included in the Matrix at Column 2 are not intended to be complete descriptions of the referenced law.

9. Various Michigan laws have not been amended to reflect the name changes of certain state agencies. The Matrix generally uses the current name of the relevant state agencies.

10. In analyzing Michigan law, it was not always possible to discern when a state agency is acting as a covered entity, a hybrid entity or a business associate. In such circumstances, we made reasoned judgments regarding the role of the state agency and explained those judgments in our conclusions.

11. This analysis in the Matrix focuses on when the Rule preempts State law. Occasionally, the analysis includes references to the Preamble or Commentary to the Rule or to the Guidance issued on July 6, 2001, where necessary.

12. The analysis contained in this Matrix with respect to Michigan Attorney General opinions and common law is limited to the precise issue decided by the Attorney General or the court.

13. Certain Michigan laws regulate the conduct of employers in their capacities as employers. Since employers are not covered entities under the Rule, their regulation as employers likely will be a matter of Michigan law. Nevertheless, where the Rule imposes obligations on employers in their role as covered entities, we determined which regulatory scheme applies.

14. Where we have stated that the Rule and State law contain “compatible” provisions, the intent is to indicate that the provisions of State law do not pose an obstacle to compliance with the Rule, and that they are, therefore, not “contrary” to one another.

15. There are many State laws which speak to certain processes or procedures (*e.g.*, referrals) that would necessarily contain confidential health information, but which contain no specific requirements for protecting the privacy or confidentiality of that information, or simply do not speak to that issue. Generally, we have not referenced those State law provisions in this Matrix. In these cases, the Rule would control, unless a different State law addresses the requirement to protect the confidential health information. We have included only those State laws which address requirements, limitations, exceptions, *etc.* for protecting confidential health information.