

# HIPAA Privacy

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# WorkGroups<sup>®</sup>

## Teleconference

# Introduction to Disclosure and Preemption Issues

[Ver 2.0]

## Rules and Resources

Wednesday, January 14, 2004  
10:00 a.m. – 11:00 a.m., CST



**“Introduction to Preemption & Disclosure Issues ”**  
**– Setting the Stage –**

**Five Basic Features of Privacy Regulations**

I. Basic Rule and general concepts

**II. Permitted uses & disclosures**

III. Other Patient Rights

IV. Administrative Requirements

**V. Technical Provisions**



**II. Permitted uses & disclosures**

**A. For treatment, payment and healthcare operations**

**B. With authorizations**

C. “Opt-outs”

**D. Exceptions**

E. Patient

**V. Technical Provisions**

**A. Preemption of state law**

B. Compliance and enforcement

C. Transition provisions

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**Subpart B—Preemption of State Law**

**§ 160.201 Applicability.** The provisions of this subpart implement section 1178 of the Act, as added by section 262 of Public Law 104–191.

**§ 160.202 Definitions.** For purposes of this subpart, the following terms have the following meanings:

*Contrary*, when used to compare a provision of State law to a standard, requirement, or implementation specification adopted under this subchapter, means:

- (1) A covered entity would find it impossible to comply with both the State and federal requirements; or
- (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub. L. 104–191, as applicable.

*More stringent* means, in the context of a comparison of a provision of State law and a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter, a State law that meets one or more of the following criteria:

- (1) With respect to a use or disclosure, the law prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted under this subchapter, except if the disclosure is:
  - (i) Required by the Secretary in connection with determining whether a covered entity is in compliance with this subchapter; or
  - (ii) To the individual who is the subject of the individually identifiable health information.
- (2) With respect to the rights of an individual, who is the subject of the individually identifiable health information, regarding access to or amendment of individually identifiable health information, permits greater rights of access or amendment, as applicable.
- (3) With respect to information to be provided to an individual who is the subject of the individually identifiable health information about a use, a disclosure, rights, and remedies, provides the greater amount of information.
- (4) With respect to the form, substance, or the need for express legal permission from an individual, who is the subject of the individually identifiable health information, for use or disclosure of individually identifiable health information, provides requirements that narrow the scope or duration, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the express legal permission, as applicable.
- (5) With respect to recordkeeping or requirements relating to accounting of disclosures, provides for the retention or reporting of more detailed information or for a longer duration.
- (6) With respect to any other matter, provides greater privacy protection for the individual who is the subject of the individually identifiable health information.

*Relates to the privacy of individually identifiable health information* means, with respect to a State law, that the State law has the specific purpose of protecting the privacy of health information or affects the privacy of health information in a direct, clear, and substantial way.

*State law* means a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law.

**§ 160.203 General rule and exceptions.** A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law. This general rule applies, except if one or more of the following conditions is met:

(a) A determination is made by the Secretary under § 160.204 that the provision of State law:

(1) Is necessary:

(i) To prevent fraud and abuse related to the provision of or payment for health care;

(ii) To ensure appropriate State regulation of insurance and health plans to the extent expressly authorized by statute or regulation;

(iii) For State reporting on health care delivery or costs; or

(iv) For purposes of serving a compelling need related to public health, safety, or welfare, and, if a standard, requirement, or implementation specification under part 164 of this subchapter is at issue, if the Secretary determines that the intrusion into privacy is warranted when balanced against the need to be served; or

(2) Has as its principal purpose the regulation of the manufacture, registration, distribution, dispensing, or other control of any controlled substances (as defined in 21 U.S.C. 802), or that is deemed a controlled substance by State law.

(b) The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.

(c) The provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention.

(d) The provision of State law requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals.

## Consent

### LAC 48: 9363. Confidentiality

The hospital shall ensure the confidentiality of patient records, including information in a computerized medical record system. Information from or copies of records may be released only to authorized individuals, and the hospital must ensure that unauthorized individuals cannot gain access to or alter patient records. Original medical records shall not be released outside the hospital unless under court order or subpoena or in order to safeguard the record in the event of a physical plant emergency or natural disaster.

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### § 164.506 Uses or disclosures to carry out treatment, payment, or health care operations.

(a) *Standard: Permitted uses and disclosures.* Except with respect to uses or disclosures that require an authorization under § 164.508(a)(2)<sup>1</sup> and (3)<sup>2</sup>, a covered entity may use or disclose protected health information for treatment, payment, or health care operations as set forth in paragraph (c) of this section, provided that such use or disclosure is consistent with other applicable requirements of this subpart.<sup>3</sup>

(b) *Standard: Consent for uses and disclosures permitted.*<sup>4</sup>

(1) A covered entity may obtain consent of the individual to use or disclose protected health information to carry out treatment, payment, or health care operations.

(2) Consent, under paragraph (b) of this section, shall not be effective to permit a use or disclosure of protected health information when an authorization, under § 164.508, is required or when another condition must be met for such use or disclosure to be permissible under this subpart.

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<sup>1</sup> Requires an authorization for the use or disclosure of psychotherapy notes with limited exceptions.

<sup>2</sup> Requires an authorization to use or disclose PHI for marketing (defined in 45 CFR §164.501) with limited exceptions.

<sup>3</sup> “Although covered entities will not be required to obtain an individual’s consent, any uses or disclosures of protected health information for treatment, payment, or health care operations must still be consistent with the covered entity’s notice of privacy practices.” August 14, 2002 Revisions, 67 Fed. Reg. 53211.

<sup>4</sup> “The Privacy Rule does not weaken the operation of State laws that require consent to use or disclose health information.” August 14, 2002 Revisions, 67 Fed. Reg. 53213.

## Authorizations

### § 164.508 Uses and disclosures for which an authorization is required.

#### (a) Standard: authorizations for uses and disclosures.

(1) Authorization required: general rule. Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization.<sup>5</sup>

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#### (b) Implementation specifications: general requirements.

##### (1) Valid authorizations.

(i) A valid authorization is a document that meets the requirements in paragraphs (a)(3)(ii), (c)(1), and (c)(2) of this section, as applicable.

(ii) A valid authorization may contain elements or information in addition to the elements required by this section, provided that such additional elements or information are not inconsistent with the elements required by this section.

(2) Defective authorizations. An authorization is not valid, if the document submitted has any of the following defects:

(i) The expiration date has passed or the expiration event is known by the covered entity to have occurred;

(ii) The authorization has not been filled out completely, with respect to an element described by paragraph (c) of this section, if applicable;

(iii) The authorization is known by the covered entity to have been revoked;

(iv) The authorization violates paragraph (b)(3) or (4) of this section, if applicable;

(v) Any material information in the authorization is known by the covered entity to be false.

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#### (c) Implementation specifications: Core elements and requirements.

(1) Core elements. A valid authorization under this section must contain at least the following elements<sup>6</sup>:

(i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion<sup>7</sup>.

(ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.

<sup>5</sup> “[A] voluntary consent document will not constitute a valid permission to use or disclose protected health information for a purpose that requires an authorization under the Rule.” August 14, 2002 Revisions, 67 Fed. Reg. 53220.

<sup>6</sup> “Covered entities may use one authorization form for all purposes. ... The Department intends for the authorization process to provide individuals with the opportunity to know and understand the circumstances surrounding a requested authorization.” August 14, 2002 Revisions, 67 Fed. Reg. 53221.

<sup>7</sup> Minimum necessary restrictions do not apply to releases pursuant to an authorization. See 45 CFR 164.502(b)(2)(iii).

- (iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
- (iv) A description of each purpose of the requested use or disclosure. The statement Aat the request of the individual@ is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.
- (v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement “end of the research study,” “none,” or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.
- (vi) Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative=s authority to act for the individual must also be provided.

(2) Required statements. In addition to the core elements,<sup>8</sup> the authorization must contain statements adequate to place the individual on notice of all of the following:

- (i) The individual=s right to revoke the authorization in writing, and either:
  - (A) The exceptions to the right to revoke and a description of how the individual may revoke the authorization; or
  - (B) To the extent that the information in paragraph (c)(2)(i)(A) of this section is included in the notice required by ' 164.520, a reference to the covered entity=s notice.
- (ii) The ability or inability to condition treatment, payment, enrollment or eligibility for benefits on the authorization, by stating either:
  - (A) The covered entity may not condition treatment, payment, enrollment or eligibility for benefits on whether the individual signs the authorization when the prohibition on conditioning of authorizations in paragraph (b)(4) of this section applies; or
  - (B) The consequences to the individual of a refusal to sign the authorization when, in accordance with paragraph (b)(4) of this section, the covered entity can condition treatment, enrollment in the health plan, or eligibility for benefits on failure to obtain such authorization.
- (iii) The potential<sup>9</sup> for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer be protected by this rule.

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<sup>8</sup> “Although the notification statements are not included in the paragraph on core elements an authorization is not valid unless it contains both the required core elements, and all of the required statements. This is the minimum information the Department believes is needed to ensure individuals are fully informed of their rights with respect to an authorization and to understand the consequences of authorizing the use or disclosure.” August 14, 2002 Revisions, 67 Fed. Reg. 53221.

<sup>9</sup> “[T]he Department clarifies that the statement regarding the potential for redisclosure does not require an analysis of the risk for redisclosure, but may be a general statement that the health information may no longer be protected by the Privacy Rule once it is disclosed by the covered entity. ... while a general statement would suffice, a covered entity has the discretion to provide a more definitive statement where appropriate. Thus, the covered entity requesting an authorization for its own use of protected health information may provide assurances that the information will remain subject to the Privacy Rule. Similarly, if a third party, such as a researcher, is seeking an authorization for research, the statement may refer to the privacy protections that the researcher will provide for the data.” August 14, 2002 Revisions, 67 Fed. Reg. 53221-2.

**R.S. 22:213.7. Prohibited discrimination; genetic information; disclosure requirements; definitions**

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C. (1) No insurer shall obtain genetic information from an insured or enrollee, or from their DNA sample, without first obtaining written informed consent from the insured, enrollee, or their representative.

(2) To be valid, an authorization for disclosure of genetic information shall:

(a) Be in writing, signed by the individual and dated on the date of such signature.

(b) Identify the person permitted to make the disclosure.

(c) Describe the specific genetic information to be disclosed.

(d) Identify the person to whom the information is to be disclosed.

(e) Describe with specificity the purpose for which the disclosure is being made.

(f) State the date upon which the authorization will expire, which in no event shall be more than sixty days after the date of the authorization.

(g) Include a statement that the authorization is subject to revocation at any time before the disclosure is actually made or the individual is made aware of the details of the genetic information.

(h) Include a statement that the authorization shall be invalid if used for any purpose other than the described purpose for which the disclosure is made.

(3) A copy of the authorization shall be provided to the individual.

(4) An individual may revoke or amend the authorization, in whole or in part, at any time.

(5) A general authorization for the release of medical records or medical information shall not be construed as an authorization for disclosure of genetic information. With respect to medical records that contain genetic information, the requirements for disclosure of genetic information under this Section must be complied with.

D. The requirements of this Section shall not apply to the genetic information obtained:

(1) By a state, parish, municipal, or federal law enforcement agency for the purposes of establishing the identity of a person in the course of a criminal investigation or prosecution.

(2) To determine paternity.

(3) To determine the identity of deceased individuals.

(4) For anonymous research where the identity of the subject will not be released.

(5) Pursuant to newborn screening requirements established by state or federal law.

(6) As authorized by federal law for the identification of persons.

(7) By the Department of Social Services or by a court having juvenile jurisdiction as set forth in Children's Code Article 302 for the purposes of child protection investigations or neglect proceedings.

## Access and Copy Costs

### § 164.524 Access of individuals to protected health information.

#### (a) Standard: access to protected health information.

(1) Right of access. Except as otherwise provided in paragraph (a)(2) or (a)(3) of this section, an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set<sup>10</sup>, for as long as the protected health information is maintained in the designated record set, except for:

(i) Psychotherapy notes;

(ii) Information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding<sup>11</sup>; and

(iii) Protected health information maintained by a covered entity that is:

(A) Subject to the Clinical Laboratory Improvements Amendments of 1988, 42 U.S.C. 263a<sup>12</sup>, to the extent the provision of access to the individual would be prohibited by law<sup>13</sup>; or

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<sup>10</sup> "Under the revised definition, individuals have a right of access to any protected health information that is used, in whole or in part, to make decisions about individuals. This information includes, for example, information used to make health care decisions or information used to determine whether an insurance claim will be paid. Covered entities often incorporate the same protected health information into a variety of different data systems, not all of which will be utilized to make decisions about individuals. For example, information systems that are used for quality control or peer review analyses may not be used to make decisions about individuals. In that case, the information systems would not fall within the definition of designated record set. We do not require entities to grant an individual access to protected health information maintained in these types of information systems." Preamble, page 82554.

<sup>11</sup> "Under this exception, the covered entity may deny access to any information that relates specifically to legal preparations but may not deny access to the individual's underlying health information. We do not intend to require covered entities to provide access to documents protected by attorney work-product privilege nor do we intend to alter rules of discovery." Preamble, page 82554.

<sup>12</sup> Sec. 263a. - Certification of laboratories

(a) "Laboratory" or "clinical laboratory" defined . As used in this section, the term "laboratory" or

"clinical laboratory" means a facility for the biological, microbiological, serological, chemical,

immuno-hematological, hematological, biophysical, cytological, pathological, or other examination of

materials derived from the human body for the purpose of providing information for the diagnosis,

prevention, or treatment of any disease or impairment of, or the assessment of the health of, human

beings.

(b) Certificate requirement No person may solicit or accept materials derived from the human body for laboratory examination or other procedure unless there is in effect for the laboratory a certificate issued by the Secretary under this section applicable to the category of examinations or procedures which includes such examination or procedure.

<sup>13</sup> "CLIA states that clinical laboratories may provide clinical laboratory test records and reports only to "authorized persons," as defined primarily by state law. The individual who is the subject of the information is not always included in

(B) Exempt from the Clinical Laboratory Improvements Amendments of 1988, pursuant to 42 CFR 493.3(a)(2)<sup>14</sup>.

(2) Unreviewable grounds for denial. A covered entity may<sup>15</sup> deny an individual access without providing the individual an opportunity for review, in the following circumstances.

(i) The protected health information is excepted from the right of access by paragraph (a)(1) of this section.

(ii) A covered entity that is a correctional institution or a covered health care provider acting under the direction of the correctional institution may deny, in whole or in part, an inmate's request to obtain a copy<sup>16</sup> of protected health information, if obtaining such copy would jeopardize the health, safety, security, custody, or rehabilitation of the individual or of other inmates, or the safety of any officer, employee, or other person at the correctional institution or responsible for the transporting of the inmate.

(iii) An individual's access to protected health information created or obtained by a covered health care provider in the course of research that includes treatment may be temporarily suspended for as long as the research is in progress<sup>17</sup>, provided that the individual has agreed to the denial of access when consenting to participate in the research that includes treatment, and the covered health care provider has informed the individual that the right of access will be reinstated upon completion of the research.

(iv) An individual's access to protected health information that is contained in records that are subject to the Privacy Act, 5 U.S.C. § 552a, may be denied, if the denial of access under the Privacy Act would meet the requirements of that law.

(v) An individual's access may be denied if the protected health information was obtained from someone other than a health care provider under a promise of confidentiality<sup>18</sup> and the access requested would be reasonably likely to reveal the source of the information.

(3) Reviewable grounds for denial<sup>19</sup>. A covered entity may deny an individual access, provided that the individual is given a right to have such denials reviewed, as required by paragraph (a)(4) of this section, in the following circumstances:

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this set of authorized persons. When an individual is not an authorized person, this restriction effectively prohibits the clinical laboratory from providing an individual access to this information." Preamble, page 82554.

<sup>14</sup> "Research laboratories that test human specimens but do not report patient specific results for the diagnosis, prevention or treatment of any disease or impairment of, or the assessment of the health of individual patients".

<sup>15</sup> "... covered entities are not required to deny access ...." Preamble, page 82555.

<sup>16</sup> "This ground for denial is restricted to an inmate's request to obtain a copy of protected health information. If an inmate requests inspection of protected health information, the request must be granted unless one of the other grounds for denial applies." Preamble, page 82555.

<sup>17</sup> "In all cases, the individual has the right to inspect and copy the information after the research is complete." Preamble, page 82555.

<sup>18</sup> "This provision is intended to preserve a covered entity's ability to maintain an implicit or explicit promise of confidentiality." Preamble, page 82555.

<sup>19</sup> "We do not intend these provisions to create a legal duty for the covered entity to review all of the relevant protected health information before releasing it. Rather, we are preserving the flexibility and judgment of covered entities to deny access under appropriate circumstances. Denials are not mandatory; covered entities may always elect to provide requested health information to the individual. For each request by an individual, the covered entity may provide all of the information requested or evaluate the requested information, consider the circumstances surrounding the individual's request, and make a determination as to whether that request should be granted or denied, in whole or in part, in accordance with one of the reasons for denial under this rule." Preamble, page 82556.

(i) A licensed health care professional has determined, in the exercise of professional judgment, that the access requested is reasonably likely to endanger the life or physical safety of the individual or another person<sup>20</sup>;

(ii) The protected health information makes reference to another person<sup>21</sup> (unless such other person is a health care provider) and a licensed health care professional has determined, in the exercise of professional judgment, that the access requested is reasonably likely to cause substantial harm<sup>22</sup> to such other person; or

(iii) The request for access is made by the individual's personal representative and a licensed health care professional has determined, in the exercise of professional judgment, that the provision of access to such personal representative is reasonably likely to cause substantial harm<sup>23</sup> to the individual or another person.

(4) Review of a denial of access. If access is denied on a ground permitted under paragraph (a)(3) of this section, the individual has the right to have the denial reviewed by a licensed health care professional<sup>24</sup> who is designated by the covered entity to act as a reviewing official and who did not participate in the original decision to deny. The covered entity must provide or deny access in accordance with the determination of the reviewing official under paragraph (d)(4) of this section.

(b) Implementation specifications: requests for access and timely action.

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(2) Timely action by the covered entity.

(i) Except as provided in paragraph (b)(2)(ii) of this section, the covered entity must act on a request for access no later than 30 days after receipt of the request as follows.

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(c) Implementation specifications: provision of access. If the covered entity provides an individual with access, in whole or in part, to protected health information, the covered entity must comply with the following requirements.

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<sup>20</sup> "The most commonly cited example is when an individual exhibits suicidal or homicidal tendencies. If a licensed health care professional determines that an individual exhibits such tendencies and that permitting inspection or copying of some of the individual's protected health information is reasonably likely to result in the individual committing suicide, murder, or other physical violence, then the health care professional may deny the individual access to that information. Under this reason for denial, covered entities may not deny access on the basis of the sensitivity of the health information or the potential for causing emotional or psychological harm." Preamble, page 82555.

<sup>21</sup> "... such as information from group therapy sessions and information about illnesses with a genetic component " Preamble, page 82555.

<sup>22</sup> "... substantial physical, emotional, or psychological harm " Preamble, page 82556.

<sup>23</sup> "The health care professional need not have a reasonable belief that the personal representative has abused or neglected the individuals and the harm that is likely to result need not be limited to the individual who is the subject of the requested protected health information. Therefore, a covered entity can recognize a person as a personal representative but deny such person access to protected health information as a personal representative." Preamble, page .82556

<sup>24</sup> "... such as a physician, physician's assistant, or nurse ...." Preamble, page 82555.

(4) Fees. If the individual requests a copy of the protected health information or agrees to a summary or explanation of such information, the covered entity may impose a reasonable, cost-based fee<sup>25</sup>, provided that the fee includes only the cost of:

- (i) Copying, including the cost of supplies for and labor of copying, the protected health information requested by the individual;
- (ii) Postage, when the individual has requested the copy, or the summary or explanation, be mailed; and
- (iii) Preparing an explanation or summary of the protected health information, if agreed to by the individual as required by paragraph (c)(2)(ii) of this section.

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**R.S. 40:1300.14 Confidentiality of HIV test result; Disclosure**

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F. A physician may choose, notwithstanding any other provision of law to the contrary, not to disclose the results of a confidential HIV test to a person upon whom such a test has been performed when in the medical opinion of the physician the disclosure of such results would be medically contraindicated.

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**R.S. 40:1299.96. Health care information; records**

- A. (1) Each health care provider shall furnish each patient, upon request of the patient, a copy of any information related in any way to the patient which the health care provider has transmitted to any company, or any public or private agency, or any person.
- (2) (a) Medical records of a patient maintained in a health care provider's office are the property and business records of the health care provider.
- (b) Except as provided in R.S. 44:17, a patient or his legal representative, or in the case of a deceased patient, the executor of his will, the administrator of his estate, the surviving spouse, the parents, or the children of the deceased patient, seeking any medical, hospital, or other record relating to the patient's medical treatment, history, or condition, either personally or through an attorney, shall have a right to obtain a copy of such record upon furnishing a signed authorization and upon payment of a reasonable copying charge, not to exceed one dollar per page for the first twenty-five pages, fifty cents per page for twenty-six to five hundred pages, and twenty-five cents per page thereafter, a handling charge not to exceed fifteen dollars for hospitals and seven dollars and fifty cents for other health care providers, and actual postage. The individuals named herein shall also have the right to obtain copies of patient X-rays, microfilm, and electronic and imaging media, upon payment of reasonable reproduction costs and a handling charge of twenty dollars for hospitals and ten dollars for other health care providers. In the

<sup>25</sup> "Covered entities may not charge any fees for retrieving or handling the information or for processing the request.... Fees for copying and postage provided under state law, but not for other costs excluded under this rule, are presumed reasonable. If such per page costs include the cost of retrieving or handling the information, such costs are not acceptable under this rule.... We do not intend to affect the fees that covered entities charge for providing protected health information to anyone other than the individual. " Preamble, page 82557.

event a hospital record is not complete, the copy of the records furnished hereunder may indicate, through a stamp, coversheet, or otherwise, that the record is incomplete.

(c) If a copy of the record is not provided within a reasonable period of time, not to exceed fifteen days following the receipt of the request and written authorization, and production of the record is obtained through a court order or subpoena duces tecum, the health care provider shall be liable for reasonable attorney fees and expenses incurred in obtaining the court order or subpoena duces tecum. Such sanctions shall not be imposed unless the person requesting the copy of the record has by certified mail notified the health care provider of his failure to comply with the original request, by referring to the sanctions available, and the health care provider fails to furnish the requested copies within five days from receipt of such notice. Except for their own gross negligence, such health care providers shall not otherwise be held liable in damages by reason of their compliance with such request or their inability to fulfill the request.

(d) A health care provider may deny access to a record if the health care provider reasonably concludes that knowledge of the information contained in the record would be injurious to the health or welfare of the patient or could reasonably be expected to endanger the life or safety of any other person.

(e) Nothing in this Section shall be construed to limit or prohibit access to the information contained in the records of a patient maintained by a health care provider in any legally permissible manner other than those delineated pursuant to R.S. 22:213.2 and in this Section, subject to the provisions of R.S. 13:3734.

(3) (a) Medical and dental records shall be retained by a physician or dentist in the original, microfilmed, or similarly reproduced form for a minimum period of six years from the date a patient is last treated by a physician or dentist.

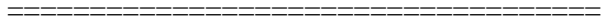
(b) Graphic matter, images, X-ray films, and like matter that were necessary to produce a diagnostic or therapeutic report shall be retained, preserved and properly stored by a physician or dentist in the original, microfilmed or similarly reproduced form for a minimum period of three years from the date a patient is last treated by the physician or dentist. Such graphic matter, images, X-ray film, and like matter shall be retained for a longer period when requested in writing by the patient.

B. As used in this Section:

(1) "Health care provider" means a "health care provider" as defined in R.S. 40:1299.41 or a "state health care provider" as defined in R.S. 40:1299.39.

(2) "Patient" means a natural person who receives or should have received health care from a licensed health care provider, under a contract, express or implied.

C. The provisions of this Section shall not be applicable to a health care provider who has evaluated or examined a patient at the request of any agency of the state or federal government in charge of the administration of any of the assistance or entitlement programs under the Social Security Act. The records of such evaluation or examination shall be retained for ninety days after mailing or upon proof of receipt of the records, whichever period is shorter. Nothing herein shall be construed as limiting or prohibiting the access to health care information and records of a patient that are retained by the Social Security Administration in any legally permissible manner under state law that is not contrary to federal law or regulation.



**LAC 40:5123. Copies of Records and Reports**

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B. Health care providers are entitled to recover a reasonable amount, not to exceed \$1.00 per page, to cover the cost of copying documents which have been requested by the carrier.

1. Certain procedure code descriptors require the submission of records and/or reports with the claim form. There is no reimbursement of copy charges to the provider for these required records and reports.
2. Documentation which is submitted by the provider, but was not specifically requested by the carrier, is not allowed a copy charge.

C. Health care providers must furnish an injured employee copies of his records and reports at the same time as copies are being furnished to the employer or carrier, at no expense to the employee. If additional copies are requested by claimant or his attorney, the copy charge to the employee or his attorney may not exceed \$0.50 per page.

## Workers' Compensation

### **§ 164.512 Uses and disclosures for which an authorization, or opportunity to agree or object is not required.**<sup>26</sup>

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in § 164.508, or the opportunity for the individual to agree or object as described in § 164.510, in the situations covered by this section, subject to the applicable requirements of this section<sup>27</sup>. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

#### (a) Standard: uses and disclosures required by law.

(1) A covered entity may<sup>28</sup> use or disclose protected health information to the extent that such use or disclosure is required<sup>29</sup> by law<sup>30</sup> and the use or disclosure complies with and is limited to<sup>31</sup> the relevant requirements of such law.<sup>32</sup>

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<sup>26</sup> “[W]e have distinguished between laws that mandate uses or disclosures and laws that merely permit them. In the former case, jurisdictions have determined that public policy purposes cannot be achieved absent the use of certain protected health information, and we have chosen in general not to disturb their judgments. On the other hand, where jurisdictions have determined that certain protected health information is not necessary to achieve a public policy purpose, and only have permitted its use or disclosure, we do not believe that those judgments reflect an interest in use or disclosure strong enough to override the Congressional goal of protecting privacy rights.” Comments, page 82667-8.

<sup>27</sup> The Preamble makes three important points regarding “the applicable requirements of the section.” First, it is clear that, in situations where more than one exception could potentially apply, as long as the use or disclosure meets the requirements of one of those exceptions, it is irrelevant that it fails to meet the requirements of any other that might apply. See Preamble, page 82524.

Secondly, the preamble adds the additional, implicit requirement of §164.514 that “covered entities verify the identity and authority of persons to whom they made disclosure under the section.” Preamble, page 8254.

Thirdly, the Preamble notes that the patient's right to request restrictions under § 164.522 and the consent requirements of § 164.506 can't be used by the patient to prevent uses and disclosures under this section. Preamble, page 82524

<sup>28</sup> “The final rule does not create any new duty or obligation to disclose protected health information.” “The rule's approach is simply intended to avoid any obstruction to the health plan or covered health care provider's ability to comply with its existing legal obligations.” Comments, page 82666, 82668.

<sup>29</sup> Examples listed in the Comments include “topics addressing national security (uses and disclosures to obtain security clearances), to public health (reporting of communicable diseases), to law enforcement (disclosures of gun shot wounds).” Comments, page 82667.

<sup>30</sup> “[L]aw” is intended to be read broadly to include the full array of binding legal authority, such as constitutions, statutes, rules, regulations, common law, or other governmental actions having the effect of law. However, for the purposes of § 164.512(a), law is not limited to state action; rather, it encompasses federal, state or local actions with legally binding effect, as well as those by territorial and tribal governments.” Comments, page 82668.

“Required by law” is defined in §164.501, Rules, page 82805.

<sup>31</sup> “We note that the minimum necessary requirements of § 164.514(d) do not apply to disclosures made under this paragraph.” – BUT – “Uses and disclosures permitted under this paragraph must be limited to the protected health information necessary to meet the requirements of the law that compels the use or disclosure.” Preamble, page 82525.

<sup>32</sup> “[N]othing in the final rule provides authority for a covered entity to restrict or refuse to make a use or disclosure mandated by other law.” Preamble, page 82524.

(2) A covered entity must meet the requirements described in paragraph (c)<sup>33</sup>, (e)<sup>34</sup>, or (f)<sup>35</sup> of this section for uses or disclosures required by law.

\* \* \*

(l) Standard: disclosures for workers' compensation.<sup>36</sup> A covered entity may disclose<sup>37</sup> protected health information<sup>38</sup> as authorized by<sup>39</sup> and to the extent necessary to comply<sup>40</sup> with laws relating to workers' compensation or other similar programs<sup>41</sup>, established by law, that provide benefits for work-related injuries or illness without regard to fault.

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### **R.S. 23:1127. Release of medical records and information**

<sup>33</sup> "Disclosures about victims of abuse, neglect or domestic violence", Rules, page 82814. The provisions §164.512(c) supersede the provisions of this paragraph "to the extent that those provisions address the subject matter" §164.512(c) ("Victims of Abuse, Neglect or Domestic Violence"). Preamble, page 82527.

<sup>34</sup> "Disclosures for judicial and administrative proceedings", Rules, page 82814.

<sup>35</sup> "Disclosures for law enforcement purposes", Rules, page 82815.

<sup>36</sup> "Under HIPAA, workers' compensation and certain other forms of insurance (such as automobile or disability insurance) are 'excepted benefits.'" Preamble, page 82542.

<sup>37</sup> "[A] covered entity may disclose protected health information regarding an individual to a party responsible for payment of workers' compensation benefits to the individual, and to an agency responsible for administering and /or adjudicating the individual's claim for workers' compensation benefits." Preamble, page 82542.

<sup>38</sup> "We note that the minimum necessary standard applies to disclosures under this paragraph." Preamble, page 82542.

<sup>39</sup> As another example, under Louisiana workers' compensation law, a health care provider who has treated an employee related to a workers' compensation claim is required to release any requested medical information and records relative to the employee's injury to the employer or the workers' compensation insurer. Again, since such disclosure is required by law, it is permissible under the Privacy Rule at §164.512(a) and exempt from the minimum necessary standard. The Louisiana law further provides that any information relative to any other treatment or condition shall be available to the employer or workers' compensation insurer through a written release by the claimant. Such disclosure also would be permissible and exempt from the minimum necessary standard under the Privacy Rule if the individual's written authorization is obtained consistent with the requirements of §164.508." Preamble to final revisions, 67 FR 53199.

<sup>40</sup> "If the disclosure is required by a law relating to workers' compensation, a covered entity may disclose protected health information as authorized by and to the extent necessary to comply with that law under § 164.512(l). If the request for protected health information in connection with a workers' compensation claim is part of an administrative proceeding, a covered entity must meet the requirements set forth in § 164.512(e), and discussed above, before disclosing the information. As noted, one permissible manner by which a covered entity may disclose protected health information under § 164.512(e) is if the party seeking the disclosure makes reasonable efforts to provide notice to the individual as required by this provision. Under this method, the less formal process noted by the commenter would not be disturbed. Covered entity may disclose protected health information in response to other types of requests only as permitted by this regulation." Comments, page 82678.

<sup>41</sup> "For purposes of this paragraph, workers' compensation benefits include benefits under programs such as the Black Lung Benefits Act, the federal Employees' Compensation Act, the Longshore and Harbor Workers' Compensation Act, and the Energy Employees' Occupational Illness Compensation Program Act." Preamble, page 82542.

- A. It is the policy for the efficient administration of the workers' compensation system that there be reasonable access to medical information for all parties to coordinate and manage the care for the injured worker and to facilitate his return to work.
- B. (1) In any claim for compensation, a health care provider who has at any time treated the employee related to the compensation claim shall release any requested medical information and records relative to the employee's injury, to any of the following persons:
- (a) The employee, his agent, or representative.
  - (b) A licensed and approved vocational rehabilitation counselor assigned to the employee's claim.
  - (c) Another health care provider examining the employee.
  - (d) The employer, his agent, or representatives.
  - (e) The employer's workers' compensation insurer or its agent or representative.
- (2) Any information relative to any other treatment or condition shall be available to the employer or his workers' compensation insurer by subpoena or through a written release by the claimant.
- C. (1) Consistent with the policy of reasonable access to medical information for all parties and notwithstanding the provisions of Article 510 of the Louisiana Code of Evidence or any other law to the contrary, a health care provider, without the necessity of a subpoena or other discovery device, shall verbally discuss medical information regarding the injured employee with another health care provider examining the employee, a case manager, or a vocational rehabilitation counselor assigned to provide rehabilitation for that insured worker. No health care provider or his employee or agent shall be held civilly or criminally liable for disclosure of the medical information conveyed pursuant to this Section. This Paragraph shall not apply to examinations conducted by medical examiners appointed by the director pursuant to R.S. 23:1123.
- (2) In any verbal communication or personal conference between the vocational rehabilitation counselor and any health care provider, for the purpose of providing rehabilitation services, the employee or his agent or representative shall cooperate in scheduling a reasonable date and time for such communication or conference and the employee or his agent or representative shall be given fifteen days notice of any such communication or conference, and shall be given the opportunity to attend or participate in the communication or conference.
- (3) In addition to any other duty or responsibility provided by law, a case manager or vocational rehabilitation counselor who is a party to a verbal communication with the health care provider regarding an employee, as authorized by Paragraph (1) of this Subsection, shall, within five working days of the communication, mail a written summary of the communication and any work restrictions or modifications required for the employee's reasonable return to employment to the employee, his representative, and the health care provider. The summary shall be mailed by certified mail, return receipt requested, to the employee or his representative. It shall include a narration of any diagnosis or opinion given or discussed, any conclusions reached concerning the vocational rehabilitation plan, any return to work opportunities discussed consistent with the vocational rehabilitation plan, and the medical evaluation of the health care provider.

(4) Any medical information released in writing shall be furnished to the employee at no cost to him simultaneously with it being furnished to the employer, its insurer, agent, or representative. Any such records or information furnished to the employer or insurer or any other party pursuant to this Section shall be held confidential by them and the employer or insurer or any other party shall be liable to the employee for any actual damages sustained by him as a result of a breach of this confidence up to a maximum of one thousand dollars, plus all reasonable attorney fees necessary to recover such damages. An exception to this breach of confidentiality shall be any introduction or use of such information in a court of law, or before the Office of Workers' Compensation Administration or the Louisiana Workers' Compensation Second Injury Board.

D. Nothing in this Section shall be construed to authorize any case manager, vocational rehabilitation counselor assigned to provide rehabilitation services for the injured employee, or agent of the employer who is not treating the injured employee for his injuries to attend the injured employee's medical examinations.

## Personal Representatives

### § 164.502 Uses and disclosures of protected health information: general rules.

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(g) (1) *Standard: Personal representatives.* As specified in this paragraph, a covered entity must, except as provided in paragraphs (g)(3) and (g)(5) of this section, treat a personal representative as the individual for purposes of this subchapter.

(2) *Implementation specification: adults and emancipated minors.* If under applicable law a person has authority to act on behalf of an individual who is an adult or an emancipated minor in making decisions related to health care, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

(3) *Implementation specification: unemancipated minors*<sup>42</sup>.

(i) If under applicable law a parent, guardian, or other person acting *in loco parentis* has authority to act on behalf of an individual who is an unemancipated minor in making decisions related to health care, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation, except that such person may not be a personal representative of an unemancipated minor, and the minor has the authority to act as an individual, with respect to protected health information pertaining to a health care service, if:

(A) The minor consents to such health care service; no other consent to such health care service is required by law, regardless of whether the consent of another person has also been obtained; and the minor has not requested that such person be treated as the personal representative;

(B) The minor may lawfully obtain such health care service without the consent of a parent, guardian, or other person acting *in loco parentis*, and the minor, a court, or another person authorized by law consents to such health care service; or

(C) A parent, guardian, or other person acting *in loco parentis* assents to an agreement of confidentiality between a covered health care provider and the minor with respect to such health care service.

(ii) Notwithstanding the provisions of paragraph (g)(3)(i) of this section<sup>43</sup>:

(A) If, and to the extent, permitted or required by an applicable provision of State or other law, including applicable case law, a covered entity may disclose, or provide access in accordance with § 164.524 to, protected health information about an unemancipated minor to a parent, guardian, or other person acting in *loco parentis*;

(B) If, and to the extent, prohibited by an applicable provision of State or other law, including applicable case law, a covered entity may not disclose, or provide access in accordance with § 164.524 to, protected health information about an unemancipated minor to a parent, guardian, or other person acting in *loco parentis*; and

<sup>42</sup> “[T]he Department assumes that the current practices of health care providers with respect to access by parents and confidentiality of minor’s records are consistent with State and other applicable law, and, therefore, can continue under the Privacy Rule. ... However, this new standard would not permit activity that would be impermissible under State law.” Preamble to final revisions, 67 FR 53201-2.

<sup>43</sup> “The addition of paragraphs (g)(3)(ii)(A) and (B) of ‘164.502, clarify that State and other applicable law governs when such law explicitly requires, permits, or prohibits disclosure of protected health information to a parent.” Preamble to final revisions, 67 FR 53201.

(C) Where the parent, guardian, or other person acting in *loco parentis*, is not the personal representative under paragraph (g)(3)(i)(A), (B), or (C) of this section and where there is no applicable access provision under State or other law, including case law, a covered entity may provide or deny access under § 164.524 to a parent, guardian, or other person acting in *loco parentis*, if such action is consistent with State or other applicable law, provided that such decision must be made by a licensed health care professional<sup>44</sup>, in the exercise of professional judgment.

(4) *Implementation specification: Deceased individuals.* If under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual's estate, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

(5) *Implementation specification: Abuse, neglect, endangerment situations.* Notwithstanding a State law or any requirement of this paragraph to the contrary, a covered entity may elect not to treat a person as the personal representative of an individual if:

(i) The covered entity has a reasonable belief that:

(A) The individual has been or may be subjected to domestic violence, abuse, or neglect by such person; or

(B) Treating such person as the personal representative could endanger the individual; and

(ii) The covered entity, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat the person as the individual's personal representative.

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**R.S. 40: 1065.1. Minor's consent for treatment of venereal diseases**

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C. Upon the advice and direction of a treating physician, or, in the case of a medical staff, any one of them, a physician or member of a medical staff may, but shall not be obligated to, inform the spouse, parent or guardian of any such minor as to the treatment given or needed, and such information may be given to, or withheld from the spouse, parent or guardian without the consent and over the express objection of the minor.

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**R. S. 40:1095. Medical Treatment (Minor's Consent to Treatment)**

A. (1) Consent to the provision of medical or surgical care or services by a hospital or public clinic, or to the performance of medical or surgical care or services by a physician, licensed to practice medicine in this

<sup>44</sup> This decision should be made by a health care professional, who is accustomed to exercising professional judgment. A health plan may also exercise such discretion if the decision is made by a licensed health care provider. Preamble to final revisions, 67 FR 53201.

state, when executed by a minor who is or believes himself to be afflicted with an illness or disease, shall be valid and binding as if the minor had achieved his majority. Any such consent shall not be subject to a later disaffirmance by reason of his minority.

(2) A minor may consent to medical care or the administration of medication by a hospital licensed to provide hospital services or by a physician licensed to practice medicine in this state for the purpose of alleviating or reducing pain, discomfort, or distress of and during labor and childbirth. The manner of administration of medications includes but is not limited to intravenous, intramuscular, epidural, and spinal. This consent shall be valid and binding as if the minor had achieved her majority, and shall not be subject to a later disaffirmance by reason of her minority.

B. The consent of a spouse, parent, guardian or any other person standing in a fiduciary capacity to the minor shall not be necessary in order to authorize such hospital care or services or medical or surgical care or services, or administration of drugs to be provided by a physician licensed to practice medicine to such a minor.

C. Upon the advice and direction of a treating physician, or, in the case of a medical staff, any one of them, a physician or member of a medical staff may, but shall not be obligated to, inform the spouse, parent or guardian of any such minor as to the treatment given or needed, and such information may be given to, or withheld from the spouse, parent or guardian without the consent and over the express objection of the minor.

D. No hospital and no physician licensed to practice medicine in this state shall incur civil or criminal liability in connection with any examination, diagnosis and treatment authorized by this section except for negligence.

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**R.S. 40:1096 (Consent to Minors) Treatment for Drug Abuse**

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C. Upon the advice and direction of a treating physician, or, in the case of a medical staff, any one of them, a physician or member of a medical staff may, but shall not be obligated to, inform the spouse, parent or guardian of any such minor as to the treatment given or needed, and such information may be given to, or withheld from the spouse, parent or guardian without the consent and over the express objection of the minor.

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