

HIPAA During the COVID-19 Crisis: Latest Insights from HHS and Beyond

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Polsinelli COVID-19 Resources



Contact

For COVID-19 legal advice across a spectrum of issues impacting an array of industries and legal areas, our team is available and connected nationally and in the communities in which you operate.

Contact us with questions at:

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Polsinelli's cross-disciplinary COVID-19 blog provides companies tools and information needed to effectively and lawfully protect their employees and business.

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Agenda

- Social Security Act Section 1135 Waiver of Specific Provisions of the HIPAA Privacy Rule
- HHS Notice of Enforcement Discretion regarding Telehealth
- Other Federal Agencies' Telehealth Guidance
- HHS Notice of Enforcement Discretion regarding Business Associates and Public Health Disclosures
- HHS Notice of Enforcement Discretion regarding CBTS
- Disclosures to Employers under the HIPAA Privacy Rule
- Interactions with the Media and Social Media under the HIPAA Privacy Rule

Waiver? Notice? What's the Difference?

- Section 1135 HIPAA Waiver
- HHS Office for Civil Rights Notice of Enforcement Discretion
- FCC Declaratory Ruling
- Other Agencies Guidance

Section 1135 Waiver

- HIPAA is not waived!
- Limited HIPAA Privacy Rule Provisions waived for 72 hours, IF hospitals have instituted a disaster protocol:
 - Obtaining a patient's agreement to speak with family members or friends involved in the patient's care (see 45 C.F.R. § 164.510(b));
 - Honoring a request to opt out of the facility directory (see 45 C.F.R. § 164.510(a));
 - Distributing a notice of privacy practices (see 45 C.F.R. § 164.520);
 - Honoring the patient's right to request privacy restrictions (see 45 C.F.R. § 164.522(a)); and
 - Honoring the patient's right to request confidential information (see 45 C.F.R. § 164.522(b)).

HHS Notice of Enforcement Discretion regarding Telehealth

- Enforcement discretion against covered health care providers in connection with the good faith provision of telehealth to patients during the COVID-19 nationwide public health emergency.
 - Applies to telehealth provided for any reason
 - Applies to all non-public facing audio or video applications
 - Does not apply to public-facing applications
 - Does not apply to business associates
 - Should ensure all available encryption and privacy modes are enabled
 - Should provide notice of privacy risks and enter into a BAA, when possible

Other Telehealth and Cybersecurity Guidance and Considerations

- Texting and TCPA Declaratory Ruling
- FBI Guidance regarding “VTC Hijacking”
- NIST Guidance
- FTC Guidance
- DOD Special Report on Protecting Patient Health Information During the COVID-19 Pandemic

HHS Notice of Enforcement Discretion: Business Associates

- Enforcement discretion for the disclosure of PHI to public health authorities, state emergency operations centers, and health oversight agencies for public health purposes, despite terms of the relevant BAA, if:
 - Public health and health oversight disclosures are consistent with relevant sections of the Privacy Rule;
 - The use or disclosure is made in good faith; and
 - Notice is given to the relevant covered entity within 10 days of the use or disclosure.

All other Privacy, Security, and Breach Notification Rule requirements continue to apply.

HHS Notice of Enforcement Discretion: CBTS

- Enforcement discretion for Covid-19 Community-Based Testing Sites (CBTS).
 - Good faith operations
 - Only applies to the CBTS-related activities of a HIPAA health care provider or business associate
 - Compliance with the HIPAA Rules and “reasonable safeguards” are highly encouraged:

Minimum necessary (except Tx)	Use of canopies and barriers
Controlling foot and car traffic	Media “buffer zone”
Using secure technology	NPP posting or direction to online version

Disclosures to Employers under HIPAA

- HIPAA Authorization: 45 C.F.R. § 164.508
- Paid for by Employer for OSHA Compliance: 45 C.F.R. § 164.512(b)
- Serious and Imminent Threat 45 C.F.R. § 164.512(j)
- Fitness For Duty Exams 45 C.F.R. § 164.508

HIPAA and Disclosures to the Media or on Social Media

- NEVER WITHOUT A HIPAA AUTHORIZATION BEFORE DISCLOSURE
- Many settlement agreements:
 - Elite Dental Associates, Dallas (“Elite”)
 - Allergy Associates of Hartford, P.C. (Allergy Associates)
 - Boston Medical Center (BMC)
 - Brigham and Women's Hospital (BWH)
 - Massachusetts General Hospital (MGH)
 - Memorial Hermann Health System (MHHS)
 - New York Presbyterian Hospital
 - Complete P.T., Pool & Land Physical Therapy, Inc.
 - Shasta Regional Medical Center (SRMC)

HIPAA Enforcement during COVID-19

- Current Investigations
- Settlements and Civil Money Penalties

Helpful Resources

- Polsinelli Covid-19 Blog:
<https://www.covid19.polsinelli.com/blog-1>
- OCR Covid-19 Resource Page: <https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-covid19/index.html>
- OSHA Covid -19 Resource Page:
<https://www.osha.gov/SLTC/covid-19/standards.html>
- EEOC Covid-19 Resource Page:
<https://www.eeoc.gov/coronavirus/>

Questions?

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