



Medical Record Confidentiality & Release of Information

Presented to: California Area Indian Health Service

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Content

- The content of this presentation is not legal advice and does not reference all laws and regulations related to medical record confidentiality and release of information that may apply to Indian Health Services. Legal Counsel should be consulted for any questions related to the applicability of the materials in this presentation to Indian Health Services.

Discussion Topics

- Overview of applicable laws and regulations – COMIA/HIPAA
- Pre-emption basics
- Release without patient authorization
- Release with patient authorization
- Patient rights
- Reporting privacy incidents

Confidentiality Laws

- Multiple laws related to confidentiality of medical records
- Focus today:
 - California Confidentiality of Medical Information Act (COMIA)
 - California Civil Code Section 56 *et seq.*
 - Health Insurance Portability and Accountability Act (HIPAA)
 - CFR 164.500 *et seq.*

Application of COMIA & HIPAA

- COMIA applies to licensed health care providers, including practitioners, clinics, home health agencies, clinical laboratories, health service plans and contractors
- HIPAA applies to “covered entities” = providers who bill specified transactions electronically, health plans, and clearinghouses

Application of COMIA & HIPAA

- COMIA – Individually Identifiable Medical Information
 - Name, address, phone #, SSN, email address – alone or in combination with other public information reveals the identity of an individual
- HIPAA – Protected Health Information (PHI)

Application of COMIA & HIPAA

- PHI (Continued)
 - Any individually identifiable health information, including demographic information that is collected from an individual and is
 - Created or received by a health care provider, health plan, employer, or health care clearing house; and
 - 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
 - Identifies the individual; or
 - With respect to which there is a reasonable basis to believe the information can be used to identify the individual

Application of COMIA & HIPAA

- Both COMIA and HIPAA apply to
 - Uses = internal access
 - Disclosures = external release
 - Patients/Individuals – living and deceased
- HIPAA Exceptions (List not all inclusive)
 - State laws that are stricter
 - State laws covering disease/injury, child abuse, birth, death, public health reporting
 - State laws related to records of minors
 - Worker's compensation health plans

Application of COMIA & HIPAA

- COMIA Exceptions (List not all inclusive)
 - Alcohol or drug abuse records
 - Some psychiatric records
 - HIV antibody test results
 - Releases to law enforcement
 - Patient access
 - Attorney requests

Application of COMIA & HIPAA

- Permitted vs Mandatory Disclosures
 - HIPAA has only two “required” disclosures
 - To patients requesting access or an accounting of disclosures
 - To the Secretary of Health & Human Services investigating compliance with HIPAA
 - State law has numerous “mandatory” reporting requirements
 - These distinctions are important when evaluating which laws apply

Application of COMIA & HIPAA

- HIPAA pre-empts state law that is “contrary” – can’t comply with both
- State law pre-empts HIPAA if it provides the patient with greater privacy or greater rights of access
- Must evaluate provisions individually to determine which provisions to follow

Application of COMIA & HIPAA

- Pre-emption Examples:
 - Timeframes for allowing patient access
 - Charges to patients for copies of records
 - Content of patient authorizations
 - Requests for amendment

Release Without Patient Authorization & Opportunity to Agree or Object

- Directory Information
 - Requestor must ask for the patient by name
 - May release location/condition in general terms
 - Religious affiliation (only to clergy)
 - HIPAA pre-empts – more limited than what is allowed under California law
- May verbally inform the patient and obtain their verbal agreement

Release Without Patient Authorization & Opportunity to Agree or Object

- Disclosures to family members, close friends, other caregivers relevant to their involvement in the care of the patient or for notification purposes (location/general condition/death)
 - Obtain patient's agreement or
 - Infer from circumstances & based on professional judgment that there is no objection

Release Without Patient Authorization Opportunity To Agree/Object Not Required

- Uses & disclosures required or permitted by law
 - Treatment - providing, coordinating, or making referrals for care (minimum necessary does not apply)
 - Payment - activities to obtain reimbursement, coverage & medical necessity determinations, & utilization review (minimum necessary applies)

Release Without Patient Authorization Opportunity To Agree/Object Not Required

- Uses & disclosures required/permitted by law
 - Healthcare operations - peer review, education, quality assessment & improvement, business management & general administrative activities (minimum necessary applies) (disclosures more limited)

Release Without Patient Authorization Opportunity To Agree/Object Not Required

- Other uses & disclosures required or permitted by law – *limited to regulation requirements (List not all inclusive)*
 - Court orders/subpoenas/search warrants
 - County coroner/funeral director
 - Public Health & other mandatory reporting laws (e.g. diseases, injuries, births, deaths, child abuse, communicable diseases)

Release Without Patient Authorization Opportunity To Agree/Object Not Required

- Other uses & disclosures required or permitted by law (continued)
 - Health oversight by a governmental agency (e.g. licensure/FDA)
 - Organ procurement
 - To prevent/lessen immediate serious threat to health or safety of an identified person
 - To persons defending professional liability
 - Law enforcement

Release With Patient Authorization

- Content requirements for authorizations are dependent upon the law under which information is being released (consult legal counsel)
 - E.g. – Treatment, payment, healthcare operations have no authorization requirement – if authorization is obtained it may not need to meet all requirements of COMIA and HIPAA.

Release With Patient Authorization

- Both COMIA and HIPAA have authorization content requirements
 - In writing
 - 14 point type (COMIA)
 - Applies to authorizations signed by the patient or their personal representative under COMIA
 - Does not apply to information subject to special laws (e.g. psych, substance abuse, attorney request, patient request for access)

Release with Patient Authorization

- Authorization Content Requirements (Continued)
 - Language separate from any other language on the page (COMIA)
 - Signed in a manner that serves no other purpose (COMIA)
 - Name of the health care provider/covered entity releasing the information
 - Name or identification of the person or class of persons receiving the information

Release with Patient Authorization

- Authorization Content Requirements (Continued)
 - Description of the information to be disclosed
 - Purpose for the disclosure
 - Re-disclosure statement
 - Statement regarding conditioning provision of care or receipt of benefits on receipt of authorization
 - Statement that patient will receive a copy of the authorization form (HIPAA pre-empts CA law)

Release with Patient Authorization

- Authorization Content Requirements (Continued)
 - Statement of right to revoke authorization in writing
 - Notice of remuneration (if applicable)
 - Specific expiration date (COMIA pre-empts HIPAA)

Attorney Requests

- Release to an attorney, prior to filing of any action is covered under CA Evidence Code Section 1158.
- With a written authorization from the patient or their personal representative records must be made available for inspection or copying by the attorney or their representative.
- Provider may not copy records if a representative is employed by the attorney to do the copying.

Attorney Requests

- Records must be made available within 5 working days for inspection & copying.
- A written authorization is required
 - Content requirements dependent on legal interpretation
 - Minimum requirements: Name of attorney, description of records to be provided, name of patient, signature of patient/personal representative.
- Fees – Not to exceed \$15 plus retrieval costs for off-site records (if copied by copy service)

Patient Rights

- Both California law and HIPAA guarantee patients specific rights related to their health information
 - Pre-emption rules apply
 - Follow provisions that give the patient greater protections or greater rights of access
- In general HIPAA is more prescriptive

Patient Rights – Notice of Privacy Practices

- Written notice telling the patient how their health information will be used for treatment, payment, and healthcare operations purposes
- Should include other purposes for which their information will be used or disclosed
- Description of their rights pertaining to their health information

Patient Rights –Notice of Privacy Practices

- Available in writing, posted in a conspicuous manner, posted on provider's web site.
- Good faith effort to obtain an acknowledgement of receipt from the patient at the date of first service.
- Emergency exceptions apply

Patient Rights – Request for Amendment

- HIPAA: A patient may request “amendment” of information that is inaccurate or incomplete in the “designated record set”
 - Designated record set – medical and billing records used to make healthcare decisions
- CA Law: Patients may request that a 250 word “addendum” be included in their medical record if they believe information is inaccurate or incorrect.
 - Addendum must be released with the record

Patient Rights – Request for Amendment

- Consultation with legal counsel advised regarding pre-emption of HIPAA and CA Law
- HIPAA requires response in 60 days (30 day extension allowed with patient notification)
- If granted, amendment must be filed with the designated record set, the patient must be informed & amendment must be provided to third parties identified by the patient

Patient Rights – Request for Amendment

- Amendment may be denied if
 - Information was not created by the provider, is not part of the designated record set, or information in the record is accurate and complete
 - Patient must be informed of the basis for the denial, their right to submit a statement of disagreement, and a description of how they can submit a complaint to the provider or the Secretary of DHHS
 - If a statement of disagreement is received by the provider it must be filed with the designated record set and released with the record.

Patient Rights – Accounting of Disclosures

- Patients may request an accounting of information disclosed from their designated record set for specific purposes.
- Excludes disclosures for treatment, payment & healthcare operations, pursuant to an authorization, to patients regarding their own information, directory information, to family & friends involved in the patient's care or for notification purposes, national security, correctional institutions/law enforcement.

Patient Rights – Accounting of Disclosures

- Applies generally to disclosures required by law, subpoenas, research
- Requires a response in 60 days (30 day extension with patient notification).
- Must include date of each disclosure, name & address of the receiving person/entity, description of what was disclosed, & the purpose for the disclosure.
- Reasonable fees allowed for more than one request in a 12 month period with advance notice.

Patient Rights – Request for Restrictions

- Patient may request restriction on disclosure of facility directory information – provider must comply.
- Patient may also request restriction on the disclosure of information for treatment, payment and healthcare operations purposes.
 - Provider does not have to agree but if they do the restriction applies to the entire organization.
 - Provider or patient may terminate restriction.

Patient Rights – Confidential Communications

- Patient may request that communications be provided to them by an alternative means or at an alternative location.
- Provider must accommodate reasonable requests.

Patient Rights – Access to Medical Records

- CA law (PAHRA) applies to “patient records” maintained by licensed health care facilities, clinics, home health agencies and certain licensed health care professionals.
- HIPAA applies to “the designated record set” maintained by covered entities.
 - Special provisions for psychotherapy notes
- Title 42 applies to long term care records

Patient Rights – Access to Medical Records

- Applies to patients and personal representatives
 - Patients (competent adults and minors who could have consented to their own care)
 - Conservators/guardians of an adult
 - Attorney-in-Fact under an advanced directive
 - Parent or guardian of a minor who cannot consent to their own care
 - Executor or administrator of an estate, or beneficiary, if patient is deceased

Patient Rights – Access to Medical Records

- Right to access includes information in a provider's possession but created by another provider.
- Excludes aggregate information, information compiled for legal proceedings, disclosure of lab results directly to a patient by a laboratory (CLIA)
- Type of Access
 - Inspection within 5 days/24 hours (excluding weekends/holidays) for LTC
 - Copies within 15 calendar days/2 working days for LTC
 - Summary Report within 10 days (30 day extension if patient advised) if patient agrees in advance. Specific content requirements/reasonable fees if approved by patient in advance.

Patient Rights – Access to Medical Records

- Non-Reviewable Denials
 - Information created in anticipation of legal proceedings
 - An inmate's request if such a request jeopardizes the health, safety, custody, security or rehabilitation of other inmates or the safety of correctional staff
 - Information created or obtained by a provider in the course of research
 - Federal agencies subject to the Privacy Act

Patient Rights – Access to Medical Records

- Non-Reviewable Denials (continued)
 - Information obtained from someone other than a health care provider under a promise of confidentiality & access would likely reveal the source of the information.
- Reviewable Denials (must allow access to all records that can reasonably be provided)
 - Mental Health Records (as defined in CA law) when a licensed health care professional has determined that the access is reasonably likely to endanger the life or physical safety of the patient.

Patient Rights – Access to Medical Records

- Reviewable Denials (continued)
 - Access by a personal representative when in the judgment of a health care provider the access is reasonably likely to cause substantial harm to the patient or another person.
 - To “psychotherapy notes” as defined by HIPAA when a provider determines there is substantial risk of significant adverse consequences to a patient.

Patient Rights – Access to Medical Records

- Reviewable Denials (continued)
 - When a licensed health care professional has determined that the access requested is reasonably likely to cause substantial harm to another person (consult legal counsel)

Patient Rights – Access to Medical Records

- Informing the Patient of the Denial
 - Within 5 days
 - Provide the basis for the denial
 - If denial is reviewable inform the patient of their right to have the denial reviewed and how to exercise this right. If pursued by the patient the provider must have the request for access reviewed by a licensed healthcare provider who did not participate in the original denial decision.
 - Information on how the patient can complain to the provider or to DHHS.

Patient Rights – Access to Medical Records

- Allowable Copying Charges
 - Supplies, labor and postage
 - California law allows 25 cents/page for paper, 50 cents/page for microfilm & actual costs for x-rays or photographs
 - HIPAA does not allow cost of retrieval
 - One free copy must be provided to patients for records needed for eligibility appeal for public benefit programs (does not include attorney requests)

Reporting Privacy Incidents

- **California Health & Safety Code** (Section 1280 15 et seq.) Effective 1/1/2009
 - Applies to licensed health facilities
 - Licensed clinics, acute care hospitals, acute psychiatric hospitals, skilled nursing facilities, home health agencies, hospice
 - For inappropriate access to, and use or disclosure of patients' individually identifiable medical information
 - Reporting to patient and CDPH required in **5 business days.**

Reporting Privacy Incidents

- California Health & Safety Code (Cont'd)
 - Reports may be delayed upon written or oral request of law enforcement.
 - CDPH may refer violations to the Office of Health Information Integrity who can assess penalties to individuals & report to licensing agencies
 - Exclusions from reporting for misdirected internal paper records, email or fax transmissions.

Reporting Privacy Incidents

- HIPAA/HITECH (Effective 9/23/2009)
 - Applies to covered entities
 - Breach = acquisition, access, use, or disclosure of unsecured (unencrypted) PHI in a manner not permitted under HIPAA regulations which compromises the security and privacy of the PHI.
 - Compromises = poses a significant risk of financial, reputational, or other harm to the patient.

Reporting Privacy Incidents

- **HIPAA/HITECH** (Effective 9/23/2009)
 - Exclusions for unintentional acquisition, inadvertent disclosure within a covered entity, or unauthorized recipient who would not reasonably have been able to retain the PHI.
 - Requires a documented risk assessment.
 - Requires reports to the patient in a reasonable time not to exceed 60 days

Reporting Privacy Incidents

- **HIPAA/HITECH** (Effective 9/23/2009)
 - Report to DHHS annually for breaches involving under 500 individuals and to DHHS and the media within 60 days for breaches involving 500 or more individuals.
 - Delays allowed for law enforcement investigations.

Reporting Privacy Incidents

- California Civil Code (Section 17998.82)
 - Applies to all businesses in California
 - For unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information of CA residents
 - Personal information = name in combination with SSN, financial, insurance or medical information

Reporting Privacy Incidents

- California Civil Code (Section 17998.82)
 - Reports required as soon as reasonably feasible
 - If notification issued to 500 or more CA residents a sample notification must also be provided to the CA Attorney General.
- Evaluation of “incidents” against all applicable laws is essential

New Considerations

- Meaningful Use Regulations
 - Impact on patient access timeframes
- OCR HIPAA Audits
- Health Information Exchange
- Regulations Implementing HITECH
 - Anticipate new regs this year(??)
 - More focus on electronic health records

New Considerations

- HITECH Regulations
 - Anticipate there will be changes to
 - Breach reporting requirements
 - Accounting of disclosures (EHR)
 - Patient access/disclosure of electronic PHI
 - Requests for restrictions on disclosures to health plans (mandatory)
 - Business associate provisions
 - Notice requirements

Resource Acknowledgements

- Program Handout, CHIA Medical Record Confidentiality & Release of Information Seminar, 2010, Copyright California Health Information Association
- HIPAA Privacy and Security Rules Guide, 2008, Copyright California Health Information Association