

04/25/24 Alert 2024-02

Employee Benefits Compliance

Final Rule Amends HIPAA to Protect Reproductive Health Care Information

Introduction

On April 22, 2024, the Department of Health and Human Services (HHS) released a [Final Rule](#) amending the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule to Support Reproductive Health Care Privacy. This release comes just over one year after HHS issued a [Notice of Proposed Rulemaking](#) addressing the privacy of reproductive health care information. (See [Alert 2023-04](#)) The Final Rule adopts most of the Proposed Rule's changes, including a rule that prohibits providers and other covered entities (including group health plans) from disclosing Protected Health Information (PHI) sought for the purposes of criminal, civil, or administrative investigations or proceedings related to seeking, obtaining, providing, or facilitating reproductive health care that is otherwise lawful. Before any such disclosure is made, the covered entity must obtain an attestation from the requesting individual or entity, providing that the use or disclosure is not for a prohibited purpose. These changes were deemed necessary in response to the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* and the subsequent proliferation of state laws that imposed criminal, civil, or administrative liability for, or created private rights of action against, individuals who obtain or provide certain reproductive health care.

Covered entities, including self-funded group health plans, will need to amend their existing HIPAA Policies and Procedures and train any employees with access to personal health information (PHI) on these new updates, including how to respond for any such requests. An amended Notice of Privacy Practices is also required. HHS plans to release a revised model Notice of Privacy Practices that will also address protections for medical records of patients with substance use disorders (SUDs). In addition, this guidance may require covered entities to update the language in their business associate agreements (BAAs) to comply with the new prohibitions. The Final Rule is effective on June 25, 2024, 60 days after publication, which is expected on April 26. However, covered entities must comply with the applicable requirements of the Final Rule by December 22, 2024, within 240 days of publication. Lastly, covered entities must use a fully updated Notice of Privacy Practices by February 16, 2026.

Final Rule Amendments

Prohibited Disclosures

The Final Rule amends HIPAA to prohibit a covered entity from using or disclosing an individual's PHI:

- (1) To conduct a criminal, civil, or administrative investigation into any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care.
- (2) To impose criminal, civil, or administrative liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care.
- (3) To identify any person for any purpose described in (1) or (2) above.

This prohibition only applies if the reproductive health care is lawful under the law of the state in which the health care was provided and under the circumstances in which it was provided, or if the reproductive health care was protected, required, or authorized by Federal law, including the United States Constitution, regardless of the state in which it is provided. Importantly, the Final Rule includes a presumption that the reproductive health care is lawful under the circumstances in which it was provided when the care is provided by a person other than the entity receiving the request for PHI. The presumption can be overcome if the entity receiving the request for PHI has actual knowledge that the care was not lawful or "factual information" supplied by the requestor, demonstrating a "substantial factual basis" that the care was not lawful under the circumstances provided. The Final Rule also clarifies that providing or facilitating access to reproductive health care, provided in a lawful manner, is not abuse, neglect, or domestic violence under the existing Privacy Rule that permits (but does not require) the reporting of abuse, neglect, or domestic violence under certain conditions.

Required Attestation

Under the Final Rule, a covered entity or business associate must ascertain the purpose behind a request through an attestation. An attestation is required when a third-party requests reproductive health information for health oversight activities, judicial and administrative proceedings, law enforcement purposes, or disclosures to coroners and medical examiners. An attestation can be written or electronic, must be in plain language, but may not be combined with other documents (e.g., a subpoena). If, during the course of using or disclosing PHI in reasonable reliance on a facially valid attestation, a covered entity or business associate discovers information reasonably showing that any representation made in the attestation was materially false, they cannot complete the disclosure. A disclosure made in violation of the Final Rule would subject the covered entity or business associate to potential investigation and civil monetary penalties. HHS has indicated it will publish a model attestation prior to the compliance date.

Definitions

The Final Rule includes the three new definitions from the Proposed Rule with minor changes. Those definitions are:

(1) *Person*, which means a natural person (meaning a human being who is born alive), trust or estate, partnership, corporation, professional association or corporation, or other entity, public or private.

(2) *Public health* (as used in the terms public health surveillance, public health investigation, and public health intervention), which means population-level activities to prevent disease and promote health of populations. Such activities include identifying, monitoring, preventing, or mitigating ongoing or prospective threats to the health or safety of a population, which may involve the collection of protected health information. Such activities do not include uses and disclosures for the criminal, civil, or administrative investigation into or proceeding against a person in connection with obtaining, providing, or facilitating reproductive health care, to impose criminal, civil, or administrative liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care or for the identification of any person in connection with these activities.

(3) *Reproductive health care*, which means care, services, or supplies related to the reproductive health of the individual.

Conclusion

The Final Rule is the first substantive amendment to HIPAA in a decade and will most significantly impact self-funded group health plans. As is the case for HIPAA Privacy and Security requirements generally, the insurance carrier will largely be responsible for compliance with these new requirements on behalf of fully insured medical plans. As noted above, covered entities, including self-funded group health plans, will need to amend their existing HIPAA Policies and Procedures, train any employees with access to personal health information (PHI), and potentially update BAAs by December 22, 2024. Although an amended Notice of Privacy Practices is also required, covered entities have until February 16, 2026, to implement changes to their Notice of Privacy Practices to reflect protections of both reproductive health care information and substance use disorder records. Employer plan sponsors should engage with their advisors on making these changes. In addition, although anecdotally we have not heard of employer plan sponsors receiving such requests, they should understand how to respond, including potentially seeking protective orders, on behalf of participants in connection with state court orders and subpoenas requesting medical records related to abortion and reproductive services.

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