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Preemption of State Health Information Privacy Laws

By John S Conniff

Hundreds of state and federal laws govern or affect access to personal health information. These laws range from the comprehensive to the narrow and specific. In some states, the state constitution creates a right to privacy. Statutes govern medical records created by health care professionals; use and disclosure of health information in legal proceedings and in workers compensation claims; use and disclosure of information relating to communicable disease; use and disclosure of health information by insurers; and restrictions on the disclosure of particular types of information such as information relating to mental health or chemical dependency treatment. More recently, states have considered and adopted laws governing the use and disclosure of health information relating to genetic testing. These examples do not begin to exhaust the number and type of laws governing or affecting health information.

The many federal laws governing privacy match the number and complexity of state laws. The new HHS health privacy regulations take their place alongside the Privacy Act of 1974, the Freedom of Information Act, the Family Educational Rights and Privacy Act, and Gramm-Leach-Bliley all of which complicate regulatory compliance and increase costs without increasing public protection. Insurers face the most conflicting standards under the new federal laws. Neither the states nor the federal government has established a comprehensive approach to privacy protection that would harmonize the many statutes and fill the gaps although there are attempts to do this. H.R. 583 recently introduced by Representative Hutchinson establishes a Privacy Commission to begin this process and is a step in the right direction. States must follow a similar path. In the meantime, stronger state health care privacy laws will dominate the weaker provisions of the new federal health privacy rules.

State Preemption under HIPAA

HIPAA preempts all state health information privacy laws that are contrary to the HHS privacy regulations unless the state law provides more stringent individual privacy protection than the federal rules. In addition, state laws that govern public health reporting and regulation of health plans are not preempted. As to other state laws, the HHS Secretary acting upon a request from anyone including a state, may determine that the state law is necessary to prevent health care fraud and abuse related to the provision of or payment for health care; to protect state insurance regulation; to ensure reporting on health care costs; to serve a compelling public need; or to regulate controlled substances. The Secretary's determination of state necessity preserves the state law from preemption.

In many instances state laws will have broader application to a greater number of persons or circumstances addressing subjects not affected by the federal privacy regulations. Even where the state law is narrow, the federal privacy rules may not apply to the transaction, may not apply

to the actor, or may be limited in scope. Preemption requires a comparison of federal versus state requirements.

Three questions must be answered before determining the application of the federal versus state health information privacy law to a particular circumstance. First, does the state law apply to a “covered entity” as defined by the federal regulations? Second, even if the state law applies to a covered entity, does the law apply to a function or activity governed by the federal regulations? Third, if the state law covers the entity and the activity, does the activity fall within one of the federal exceptions that preserve state laws?

The federal privacy rules apply only to health plans, health care clearinghouses, and health care providers who transmit health information electronically including providers on whose behalf someone has transmitted health information electronically. Many types of insurance benefits are explicitly excluded under both HIPAA and by extension, the federal privacy regulations. For example, life insurers and workers compensation insurers are not covered by the federal regulations but will be covered to some extent under various state privacy laws. Thus, a state law governing privacy practices in the sale of life insurance is not preempted by the regulations.

Even if an “entity” is covered and must obtain consent or authorization for the use of protected health information, the function may be excluded. For example, an HMO is a covered entity but a disclosure of protected health information for a state workers compensation program is excluded from the regulations. No consent or authorization is necessary for disclosure and therefore, state law will exclusively govern the use and disclosure of health information for workers compensation claims.

Finally, even if an entity is covered or a function could be covered, the federal regulations create explicit exceptions for certain state laws and activities. The two exceptions provided in HIPAA and carried over in the regulations govern state public health laws and state regulatory oversight of health plans. To provide guidance on these exceptions, HHS included specific exemptions from the consent and authorization provisions of the regulations.

Compliance Strategy

Without doubt, health plans, providers, and other organizations will face regulation of the use and disclosure of protected health information by both state and federal governments. Federal regulations will serve as a baseline with state laws filling the gaps or extending the federal standards. Affected organizations should have already reviewed and complied with relevant state law. Ironically, the publicity surrounding federal privacy regulations have alerted organizations to the need for state law compliance for the first time. Review and compliance with state law will constitute an ongoing function for health care professionals, health plans, and others because states remain free to adopt or expand health information privacy laws.

Covered entities should conduct a comprehensive review of state law and design a compliance strategy that satisfies state law then incorporate federal requirements. The federal regulations tend to be more specific in terms of process than state laws. Federal provisions like employee training, privacy officials, form and content of authorizations, etc. are unique. Specific state laws prohibiting disclosure of particular types of information, granting teenagers the right to obtain

health care in complete confidentiality, and requiring reporting of certain kinds of information will not interfere with these federal process requirements.

When uncertainty exists as to whether and how to comply with conflicting federal and state standards, covered entities should pursue an HHS determination of whether a state law is preempted. However, HHS will not determine whether a particular state health information privacy law is “more stringent” than the federal law. In those instances, covered entities should pursue state legislative and regulatory clarification prior to federal effective dates. Covered entities should encourage a comprehensive review of state law and guidance from state enforcement officials as to a state’s view of the preemption of their own laws. States should also take this opportunity to review all privacy laws to improve privacy protection while simplifying and reduce compliance costs.