

**HOW TO HANDLE REQUESTS FOR PATIENT INFORMATION
FOR WORKERS' COMPENSATION PURPOSES -
THE IMPACT OF HIPAA'S PRIVACY RULE ON COVERED AND
NON-COVERED PROVIDERS**

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Providers, regardless of whether or not they are covered by (required to comply with) the Privacy Rule under the Health Insurance Portability and Accountability Act (HIPAA), are well aware of their duty to protect the confidentiality of patient health information. This duty exists even when disclosing information to entities that are not required to comply with HIPAA, such as workers' compensation / life / disability / automobile insurance carriers. With the advent of the Privacy Rule, it is important to explore what, if any, impact the complexities of the new federal Privacy Rule have on the decision to release patient information in various situations and to various entities.

The focus of this article is on the disclosure of information about *patients*, with whom there is or has been a provider-patient treatment relationship, who are seeking workers' compensation benefits. It does not address issues raised when individuals are seen for independent medical examinations where there is no treatment relationship established. This article addresses the requirements for proper disclosure of protected health information by covered providers (those required to comply with HIPAA's Privacy Rule) and provides general risk management recommendations for all providers, even those not required to comply with the Rule, when requested to release patient information for workers' compensation purposes.

HIPAA Does Apply to Workers' Compensation Disclosures

Under the Administrative Simplification regulations required by HIPAA, entities that provide benefits for workers' compensation are excluded from the definition of "covered entities" and therefore, are not required to comply with any of HIPAA's Administrative Simplification regulations, such as the Privacy Rule. These entities, however, may request the release of patient information for workers' compensation purposes from providers who are covered providers and who must comply with the Privacy Rule. *The purpose for which protected health information is created or released is not relevant in determining the applicability of the Privacy Rule.* It is the provider's status as a covered provider that is the determinative factor of the Privacy Rule's applicability. Once a provider is a covered provider under HIPAA, the Privacy Rule applies to all disclosures, regardless of the recipient's status under HIPAA.

Unfortunately, the Privacy Rule is a complex regulation that is confusing not only to covered providers, but also to attorneys. Providers should anticipate workers' compensation attorneys to assert the false proposition that "HIPAA does not apply to workers' compensation" when requesting or subpoenaing records. There may also be misinterpretation issues with state and federal workers' compensation agencies and workers' compensation insurance carriers. However, the responsibility for protecting the confidentiality of all patient information, including that which may be requested for workers' compensation purposes, remains with the provider.

HIPAA Is Not the Only Relevant Law

When deciding whether to disclose a patient’s protected health information for workers’ compensation purposes, federal confidentiality laws, as well as state confidentiality laws and state workers’ compensation laws must be considered.

Federal confidentiality law. In addition to HIPAA, other applicable federal confidentiality laws must be complied with. One example is 42 CFR Part 2 (“Confidentiality of Drug and Alcohol Abuse Treatment Records”), which allows only very limited releases of information under very limited circumstances.

State confidentiality law. State law that is more stringent, or more protective of confidentiality, will not be preempted by the federal Privacy Rule. Therefore, state laws that are either 1) more protective of confidentiality or 2) allow the patient greater access than under the Privacy Rule must be complied with.

State and federal workers’ compensation law. Each state (as well as the federal government for its employees) is responsible for the administration of its own workers’ compensation program. The Privacy Rule acknowledges this and specifically permits disclosure of information for workers’ compensation purposes. The Department of Health and Human Services (HHS) has stated the following:

The new § 164.512(l) permits covered entities to disclose protected health information as authorized by and to the extent necessary to comply with workers’ compensation or other similar programs established by law that provide benefits for work-related injuries or illnesses without regard to fault. We also note that where a state or other law requires a use or disclosure of protected health information under a workers’ compensation or similar scheme, the disclosure would be permitted under Sec. 164.512(a).(1)

The preceding excerpt from the Preamble to the Privacy Rule has led some to incorrectly conclude that HIPAA allows all disclosures, without limitation, if the disclosure is for workers’ compensation purposes. However, just because a disclosure is “permitted” does not, in and of itself, mean that records must be released. Consistent with the excerpt above, determining state law requirements for disclosures is the starting point when determining whether or not to disclose protected health information; however, in addition to state law and other federal law requirements, providers must also ensure that applicable Privacy Rule requirements are met.

For example, under some states’ law, a subpoena alone may be sufficient to compel the release of records for workers’ compensation purposes. Before a covered provider in one of those states may disclose records pursuant to that subpoena, the provider must assure that the specific subpoena requirements of the Privacy Rule are also met, or risk violation of the Privacy Rule. As discussed below, bare subpoenas are insufficient to compel the release of records, *even if* such a release would be allowed under state law.

Conflicts between the various relevant laws. How do covered providers determine which law to follow when the various applicable laws and regulations appear to conflict? Under the Privacy Rule, there are only two instances in which it is mandatory for protected health information to be released – 1) to the patient and 2) to HHS for enforcement of the Privacy Rule. All other disclosures are permissive, thus covered providers must continue to exercise their

professional judgment about whether to disclose information in light of their own policies, ethical principles, and other applicable state and federal law.

Due to the permissive nature of the Privacy Rule, there should be few instances where another law actually conflicts with the Privacy Rule. If another statute or regulation permits a covered provider to disclose protected health information, and the Privacy Rule permits such a disclosure – there is no conflict – the covered provider would comply with both laws by choosing whether or not to disclose. If another statute or regulation permits disclosure, but the Privacy Rule prohibits disclosure without patient authorization, there is no conflict because the covered entity would comply with both by getting an authorization prior to disclosure. And finally, if another law prohibited a disclosure, then not disclosing a permitted - but not mandatory - disclosure would not constitute a violation of the Privacy Rule.

Rights of Workers' Compensation Patients Under the Privacy Rule

With few exceptions, patients whose protected health information is at issue for workers' compensation purposes are entitled to the same rights under the Privacy Rule as any other patient, including the right to:

Receive the provider's Notice of Privacy Practices. Covered providers should include a discussion of disclosures of protected health information for workers' compensation purposes in their Notice of Privacy Practices.

Authorize the release of information for purposes other than treatment, payment, or health care operations. See below for a discussion of authorizations for workers' compensation disclosures.

Request restrictions on disclosures. There is a relevant exception to this right – patients do not have the right to request that a covered provider restrict a disclosure of protected health information for workers' compensation purposes when that disclosure is required by law or authorized by, and necessary to comply with, a workers' compensation or similar law.(2)

Access the record. There are only two mandatory disclosures of protected health information required by the Privacy Rule – 1) to the patient and 2) to HHS for enforcement. Since patient access is mandatory, and there is no exception for workers' compensation information, any state law denying patient access would likely be preempted by the Privacy Rule.

Request amendment of the record. As always, providers are not required to grant the patient's request if the record is reasonably complete and accurate. Providers should also keep in mind that changing the record could have serious implications in a subsequent malpractice action.

Request an accounting of disclosures. Disclosures for workers' compensation purposes, other than disclosures made pursuant to patient authorization or made for payment purposes, treatment, or health care operations, need to be included in the accounting. However, accounting for disclosures for payment, treatment, and health care operations may be required under state law. *See Table 1 for accounting requirements.*

Have “psychotherapy notes” protected. Providers who keep psychotherapy notes, *as defined by the Privacy Rule*,⁽³⁾ must remember that these notes are not to be released except in very limited circumstances and, with few exceptions, are not to be released without a separate authorization.

Have only the minimum necessary information disclosed. See discussion below.

File a complaint about privacy violations with HHS and with the covered provider.

Disclosing Protected Health Information (PHI) for Workers' Compensation Purposes

Two issues must be addressed when evaluating whether or not to release protected health information for workers' compensation purposes. The first issue is the basis, or legal authority, for the disclosure of protected health information; once the basis has been determined, the second issue is how much protected health information can be properly disclosed. Table 1 presents a summary of the following information.

Issue One: The Basis for Disclosure

Under the Privacy Rule, patient “consent” for the release of information for payment, treatment, or health care operations is optional; patient “authorization” is required for disclosures other than for payment, treatment, or health care operations.

Disclosing workers' compensation protected health information for payment purposes. Under the Privacy Rule, protected health information may be disclosed without patient consent for workers' compensation payment purposes, including claims payment and preauthorization / precertification activities. Such disclosures are permitted only if these workers' compensation disclosures are discussed in the covered provider's Notice of Privacy Practices.

Risk management recommendation for all providers: Providers are encouraged to exceed the Privacy Rule's minimum confidentiality protections by obtaining the patient's written consent for the release of medical information for payment purposes.

Disclosing workers' compensation protected health information without patient authorization. Sec. 164.512(l) of the Privacy Rule permits covered providers to disclose protected health information “as authorized by and to the extent necessary to comply with [state and other] laws relating to workers' compensation.” So, if a state law requires workers' compensation disclosures without patient authorization, such disclosures are permitted under the Privacy Rule. Providers must determine what releases are required under their state workers' compensation laws. The best place to get this information may be the state workers' compensation agency. Many states have issued bulletins, position statements, and other guidance to help providers understand the release of workers' compensation information under HIPAA. Unfortunately, however, not all states that have addressed the issue have considered all of the implications (in part because of the newness and complexity of the Privacy Rule), and therefore, the position statements and guidance documents of some states may be misleading.

Providers need to pay attention to the scope of the information that is to be released, as providers are limited to releasing only what the law specifically requires. For example, if a state law requires all medical information to be released, does that include mental health information? Some state laws are very specific and specify that mental health records are to be disclosed.

Also, which records are to be released? States often require the release only of records related to the workers' compensation injury.

In addition to state mental health laws, other laws may govern the release of information in the provider's chart, such as the federal regulations about substance abuse treatment information, and state laws related to disclosure of HIV information.

Risk management advice for all providers: Providers are encouraged to have patients sign a written authorization for the release of information, even if it is not required by law. If this is not possible, the provider may want to consult with his professional liability insurance carrier or personal attorney.

Disclosing workers' compensation protected health information with patient authorization. Under some state workers' compensation laws, patients are required to sign a release so that records can be disclosed. Covered providers must ensure that the release signed by the patient complies with the requirements for authorizations under the Privacy Rule, as well as any requirements under state law. Many, but not all, state workers' compensation agencies are aware that the covered providers' release of workers' compensation protected health information is governed by the Privacy Rule and have developed HIPAA-compliant authorization forms.

Disclosing workers' compensation protected health information pursuant to valid administrative or judicial orders. Providers are encouraged to notify the patient of the order so that the patient can discuss any questions or concerns about the release with his/her attorney.

Risk management advice for all providers: Providers must always limit the disclosure to that information which is specifically identified in an administrative or judicial order. For example, if the order indicates that all information related to the workers' compensation injury is to be released, and the patient was seen for treatment related to that injury, but the record includes in the history note a reference to sexually transmitted disease unrelated to the workers' compensation injury, then it may not be proper to disclose the information related to the sexually transmitted disease.

Subpoenas for release of protected health information for workers' compensation purposes. Patient records may be disclosed for workers' compensation purposes pursuant to a valid subpoena or other lawful process that complies with the Privacy Rule's requirements at Sec. 164.512. Specifically, covered providers are permitted to release workers' compensation protected health information in response to a subpoena, discovery request, or other lawful purpose if:

1. the covered provider receives satisfactory assurances (which the Privacy Rule requires to be in writing and consisting of specific written statements with accompanying documentation) from the entity seeking the information that
 - a. it has made reasonable efforts to ensure that the individual whose protected health information is being requested has been given notice of the request, OR
 - b. it has made reasonable efforts to secure a qualified protective order that is HIPAA-compliant, OR
2. the covered provider makes reasonable efforts to provide notice to the individual or seek a qualified protective order (with the same requirements for written statements with accompanying documentation).

So, subpoenas that are not accompanied by such “reasonable assurances” (or authorization or court order) are not HIPAA-compliant and are insufficient to compel the disclosure of protected health information. Moreover, if state law or other federal confidentiality law has additional requirements for disclosure of protected health information pursuant to a subpoena, more protective of confidentiality (such as requiring subpoenas for records to be accompanied by a written authorization signed by the patient), then that law(s) would also have to be complied with.

Risk management advice for all providers: Since subpoenas for patients’ protected health information are frequently issued without the patient’s knowledge, providers are encouraged to contact the patient upon receipt of any subpoena, so that the patient can discuss the subpoena with his/her attorney. If there is no authorization accompanying the subpoena, the provider should ask the patient for one. The patient will probably need to consult with his/her attorney on the issue. The attorney may advise the patient to sign an authorization or the attorney may make a motion in court to have the subpoena quashed. In any case, the response from the patient and/or his attorney must be obtained in a timely manner. A provider should not delay his own response unreasonably because of the inactions of a patient or the patient’s attorney. If the patient refuses to provide authorization or cannot be reached, the provider should contact his professional liability insurance carrier or personal attorney for guidance about the proper response to a subpoena.

Issue Two: Limitations on What Is to be Disclosed - The "Minimum Necessary" Standard

Sec. 164.514(d)(3) of the Privacy Rule requires covered providers to limit the amount of protected health information disclosed to the minimum necessary to accomplish the workers’ compensation purpose, unless an exception to the minimum necessary requirement applies. Under Sec. 164.502(b), the minimum necessary provisions do not apply to the following:

- **Disclosures required by law** – including if a state or other law requires the disclosure of protected health information for workers’ compensation purposes,
- **Disclosures made pursuant to patient authorization** – including if the authorization is for release for workers’ compensation purposes,
- **Disclosures made to the patient,**
- **Disclosures made to a provider for treatment, and**
- **Disclosures made to HHS.**

In all other situations, the covered provider is required to limit the use or disclosure of protected health information to only that which is necessary to accomplish the purpose of the use or disclosure.

The minimum necessary standard does not apply to workers’ compensation disclosures required by law. However, providers must still limit the scope of disclosure to that which is required by law, for example, only those records related to the workers’ compensation injury. HHS has provided the following comments about the minimum necessary requirement and workers’ compensation disclosures:

In many cases, the minimum necessary standard will not apply to disclosures made

pursuant to such [workers' compensation] laws. In other cases, the minimum necessary standard applies, but permits disclosures to the full extent authorized by the workers' compensation laws. For example, Texas workers' compensation law requires a health care provider, upon the request of the injured employee or insurance carrier, to furnish records relating to the treatment or hospitalization for which compensation is being sought. Since such disclosure is required by law, it also is permissible under the Privacy Rule at Sec. 164.512(a) and exempt from the minimum necessary standard. The Texas law further provides that a health care provider is permitted to disclose to the insurance carrier records relating to the diagnosis or treatment of the injured employee without the authorization of the injured employee to determine the amount of payment or the entitlement to payment. Since the disclosure is only permitted and not required by Texas law, the provisions at Sec. 164.512(l) would govern to permit such disclosure but would allow for information to be disclosed as authorized by the statute, that is, necessary to "determine the amount of payment or the entitlement to payment."

As another example, under Louisiana's 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 Sec. 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 Sec. 164.508.(4)

The minimum necessary standard does apply to workers' compensation disclosures not required by law. If state law does not require a disclosure that is requested for a workers' compensation purpose, covered providers must determine what is the minimum necessary for that workers' compensation purpose. Covered entities are *permitted* to rely on representations by a public official, such as a state workers' compensation official, that the information requested is the minimum necessary for the intended purpose. HHS has stated "the Rule does not require such reliance, however, and the covered entity always retains discretion to make its own minimum necessary determination for disclosures to which the [minimum necessary] standard applies."⁽⁵⁾ HHS points out the following:

Where the law is silent, the workers' compensation carrier and covered health care provider will need to discuss what information is necessary for the carrier to administer the claim, and the health care provider may disclose that information. We note that if the workers' compensation insurer has secured an authorization from the individual for the release of the protected health information, the covered entity may release the protected health information described in the authorization.⁽⁶⁾

To further complicate matters, if the minimum necessary standard applies, the Privacy Rule requires justification for release of the entire record. Sec. 164.514(d)(5) states, "a covered entity may not use, disclose, or request the entire medical record, except when the entire medical record is specifically justified as the amount that is reasonably necessary to accomplish the purpose of the use, disclosure, or request."

HHS is aware of the complexity of this minimum necessary standard as applied to workers' compensation disclosures and the resulting confusion. HHS has indicated that the Privacy Rule may have to be modified to clarify the minimum necessary standard's application to disclosures for workers' compensation purposes.

Use Caution When Disclosing Protected Health Information for Workers' Compensation Purposes

Risk management advice for all providers: As with the release of any medical information,

- privacy and confidentiality are crucial to successful treatment,
- providers have always been ethically required to maintain strict confidentiality,
- while only covered providers are subject to HHS' enforcement for violations of the Privacy Rule, violations of the Privacy Rule could lead to breach of confidentiality litigation against both covered and non-covered providers under state law, and
- the Privacy Rule's floor of minimum confidentiality protections may be viewed as standard which all providers may be held to.

Conclusion: Patient Involvement Is Critical

As has historically been true, all providers are encouraged to notify the patient of all requests for release of medical information. This is especially important in workers' compensation cases where a provider's unjustified refusal to release patient information for workers' compensation purposes could result in the denial of benefits for the patient. The best way to minimize the risks associated with the release of medical information is to obtain the patient's informed permission for the release and have that permission documented on an authorization form. When this is not possible, providers may want to consult with their professional liability insurance carrier or their personal attorney.

Endnotes:

- (1) Federal Register: December 28, 2000 (Vol. 65, No. 250, p. 82708)
- (2) Office of Civil Rights' FAQs (Answer ID #323) at www.hhs.gov/ocr/hipaa
- (3) Privacy Rule defines "psychotherapy notes" as "Notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record; excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date." 45 C.F.R. § 164.501
- (4) Federal Register: August 14, 2002 (Vol. 67, No. 157, p. 53199)

- (5) Office of Civil Rights Guidance Document, December 3, 2002, p. 23 at www.hhs.gov/ocr/hipaa
- (6) Federal Register: December 28, 2000 (Vol. 65, No. 250, p. 82708)