

January 23, 2017

**TO:** CHA Members and Users of the *California Health Information Privacy Manual*

**FROM:** Lois J. Richardson, Vice President, Privacy and Legal Publications/Education

**SUBJECT:** Notable Changes in Privacy Law – 2017

### **Summary**

This memorandum highlights major changes in state and federal health information privacy laws since the last edition of the *California Health Information Privacy Manual* was published in 2014. Each new law or revision, or judicial decision, is discussed in detail in the 2017 *California Health Information Privacy Manual*. In addition, this year's edition includes new discussions of subjects related to patient privacy including the Telephone Consumer Protection Act (TCPA), photographing and filming patients, searching patients and their belongings, police body cameras, Google Glass, audio-recording confidential communications, observers present in the facility, and patient safety organizations. This edition also incorporates the information formerly found in the preemption analyses charts in the back of chapters 4, 5 and 6 into the main body of these respective chapters so that all information about a particular use or disclosure of medical information is found in one place. Finally, the manual contains many changes in the law of lesser significance; changes in websites; additional resources; and clarifications that are too numerous to list. Because laws often change after publication of the manual, CHA advises hospitals to consult their attorney when legal questions arise.

This memorandum should be kept with the 2017 *California Health Information Privacy Manual* for convenient reference. In addition, CHA recommends that a copy of this memorandum be routed to your hospital's privacy officer, security officer and in-house legal counsel so they are aware of the changes in the law that may affect their areas of responsibility.

The included CD contains all of the forms and appendixes found in the manual. Files are formatted as Adobe Acrobat PDFs. Both English and Spanish forms are available on the CD; the Spanish forms are not printed in the manual.

### **New/Revised Statutes and Regulations**

A brief description of significant new laws, revisions to current law, and new topics in the manual are included in this memorandum. Each new law, revision or topic is in effect now unless otherwise noted. For details about the requirements of each law, see the 2017 *California Health Information Privacy Manual*.

Changes have been made to several of the model forms in the manual. You can tell if a form has been changed by referring to the date that appears on the bottom, outside corner of the page.

The following is a summary of major changes since the last edition of the manual was published in 2014.

- A discussion of the Telephone Consumer Protection Act (TCPA) has been added. (*See chapter 1.*)

- A discussion of the patient privacy provisions of the Centers for Medicare & Medicaid Services Condition of Participation for patient’s rights has been added. (*See chapter 1.*)
- The U.S. Department of Health and Human Services, Office for Civil Rights (OCR) released FAQs addressing fees that may be charged to patients for copies of their health information and patients’ right to have information sent directly to a third party. Information from this guidance has been included in the manual. (*See chapter 3.*)
- Information about photographing and filming patients, searching patients and their belongings, police body cameras, Google Glass, audio-recording confidential communications, observers present in the facility, and patient safety organizations has been added to the manual. (*See chapter 4.*)
- Several appellate court decisions since 2014 have narrowed the definition of “medical information” under the Confidentiality of Medical Information Act. The effect of this narrowing is to allow the release of specified demographic information, and to confirm that the release of that demographic information does not constitute a breach. (*See chapters 5 and 13.*)
- Evidence Code Section 1158 has been revised to create a standardized authorization form for medical records requests from attorneys prior to the filing of a lawsuit. Hospitals must accept this form. In addition, the law requires health care providers to give the attorney the records electronically upon request if they are maintained electronically. (*See chapter 5 and new CHA Form 16-11.*)
- State law now permits health care providers to release health information to foster care public health nurses. (*See chapters 5 and 6.*)
- State law now permits hospitals to disclose patient-identifiable information to the state Emergency Medical Services Authority and Local Emergency Medical Services Agencies for quality assessment and performance improvement (QAPI) purposes. The law also allows hospitals to provide patient-identifiable information to emergency services providers, such as ambulance companies, about patients they have in common for QAPI. (*See chapters 5 and 6.*)
- State law now permits (and in some cases, requires) health care providers to disclose patient-identifiable medical information to medical examiners and forensic pathologists, in addition to coroners as currently required. (*See chapters 5 and 6.*)
- HIPAA has been amended to permit certain covered entities to provide information to the FBI’s National Instant Criminal Background Check System to prevent dangerous individuals from purchasing a firearm. State law implications of this amendment are described in the manual. (*See chapter 6.*)
- Readers should be aware that on Jan. 18, 2017, the U.S. Department of Health and Human Services (DHHS), Substance Abuse and Mental Health Services Administration (SAMHSA) published a final rule updating the confidentiality regulations described in this chapter [82 Fed. Reg. 6052 (Jan. 18, 2017)]. The updated federal substance abuse regulations were set to take effect on Feb. 17, 2017. However, on Jan. 20, 2017, the Trump administration delayed the effective date of all rules that had been published in the Federal Register but not yet in effect.

This delay gives the Trump administration time to review the rules and determine whether to stop them, revise them, or approve them. At the time of publication of this manual, the position of the Trump administration on the substance use disorder confidentiality regulations was unknown. (See chapter 7.)

- Confidentiality provisions governing employee medical information collected under the Americans with Disabilities Act and the Family and Medical Leave Act are discussed. (See chapter 9.)
- Amendments to the Genetic Information Nondiscrimination Act relating to employer wellness programs are included in the manual. (See chapter 9.)
- Information about the OCR guidance on ransomware attacks has been added. (See chapters 10 and 12.)
- A reference to OCR’s recent guidance on the use of cloud computing solutions has been added. (See chapter 11.)
- State law regarding the breach of unencrypted computerized data has been amended to address situations where encrypted data and the encryption key are concurrently breached, and to address automated license plate recognition systems. In addition, information about the state law standardized form for breach notification — which is optional for HIPAA-covered entities — has been added. (See chapter 12 and Appendix PR 12-A, “Federal and State Breach Notification Laws for California” chart.)
- The California Department of Public Health has created an optional form for health facilities to report breaches. (See chapter 12.)
- The civil money penalties for violation of a HIPAA requirement have been increased. (See chapter 13.)
- Information about the current phase of OCR’s HIPAA audit program is discussed. (See chapter 13.)

### **Revised HIPAA/HITECH Regulations Coming**

Although OCR has published most of its pending revisions to HIPAA and the HITECH Act, further revisions will be forthcoming. OCR has not yet finalized its May 31, 2011 proposed rule regarding the accounting of disclosures from an electronic health record. In addition, OCR was required by the HITECH Act to issue guidance by Aug. 18, 2010, better defining what constitutes “minimum necessary” uses and disclosures. This guidance has not yet been published. Finally, OCR is still working on a regulation to apportion to complainants some of the penalties OCR collects from covered entities.

CHA members with questions regarding this memorandum or the content of the *California Health Information Privacy Manual* may contact me at (916) 552-7611 or lrichardson@calhospital.org.

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