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Coppersmith Briefs

Communicating with First Responders about Patient COVID-19 Status

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The COVID-19 pandemic is heightening the need for hospitals and other institutional providers to communicate with first responders about patient COVID-19 status. Good communication will help first responders protect themselves and others, and the Ryan White HIV/AIDS Treatment Extension Act of 2009 (the Ryan White Act) requires notice to first responders of airborne infectious disease exposure. At the same time, HIPAA and confidentiality laws have not been suspended during the pandemic (other than for certain telemedicine encounters and limited waivers relating to certain patient and family communications for hospitals that have implemented disaster protocols).

This client alert gives you a few basic rules to follow. Discussion of the laws and government agency guidance are at the end of this alert.

Basic rules to follow in communicating with first responders:

- If first responders need information about potential COVID-19 status to treat a patient, you may disclose it to them. For example, a skilled nursing facility may disclose COVID-19 status to EMS personnel to ensure adequate treatment during transport.
    - Disclosures for treatment are permitted under HIPAA. *See* 45 C.F.R. §164.506(c)(2).
- If information about a patient's COVID-19 status is necessary to prevent or minimize exposure of first responders (including EMS, fire fighters, police or volunteers)—such as the need to trigger additional precautions or the use of more sophisticated personal protective equipment (PPE) to prevent transmission—you may disclose that information. This information should be disclosed on a per-call basis, not through circulation of lists of individuals diagnosed with COVID-19.

  - Disclosures necessary to prevent or minimize a "serious and imminent" threat are permitted under HIPAA. *See* 45 C.F.R. §164.512(j)(i). There is a presumption of good faith for this type of disclosure. *See* 45 C.F.R. §164.512(j)(4). In fact, the Office for Civil Rights (OCR) recently explained: "HIPAA expressly defers to the professional judgment of health professionals in making determinations about the nature and severity of the threat to health and safety."

- If first responders transport a patient to a hospital, and the patient tests positive for COVID-19, a hospital must notify the infection control officer (ICO) of the organization that employs the first responders, within 48 hours.
  - This is required by the Ryan White Act. *See* 42 U.S.C. §300ff-132.
- If an ICO of an organization that employs first responders asks for information about whether there was a COVID-19 exposure during a particular transport, a hospital must respond to that request within 48 hours.
  - This is required by the Ryan White Act. *See* 42 U.S.C. §300ff-133.
- Limit the information to what is required by law or necessary. For a transport, the Ryan White Act requires the notice to include the date on which the patient with a positive COVID-19 diagnosis was transported to the medical facility. But patient name should not be included in Ryan White Act notices to EMS providers.
  - Other than for treatment and disclosures that are required by law, you must follow HIPAA's "minimum necessary standard." *See* 45 C.F.R. §164.502(b). *See* Ryan White Act notice requirements at 42 U.S.C. §300ff-134(a).

The Legal Stuff

OCR HIPAA Guidance:

- On March 24, 2020, OCR issued "COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities": https://www.hhs.gov/sites/default/files/covid-19-hipaa-and-first-responders-508.pdf
  - This guidance explains that a covered entity may disclose the protected health information (PHI) of an individual who has been infected with, or exposed to, COVID-19, with law enforcement,

paramedics, other first responders, and public health authorities without the individual's authorization for the following purposes: (i) treatment; (ii) when required by law; (iii) to notify a public health authority; (iv) when first responders may be at risk of infection; (v) to first responders when necessary to prevent or lesson a serious threat and imminent threat to the health and safety of a person or the public; and (vi) in circumstances involving an inmate or other individual in custody.

- HIPAA has not been suspended, except as follows:
    - Communication with patients and families—see https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx: For only 72 hours after a hospital implements its disaster protocols, the following requirements are suspended:
        - The requirement to obtain a patient's agreement to speak with family members or friends(as set forth in 45 C.F.R. § 164.510);
        - The requirement to honor a patient's request to opt out of the facility directory (as set forth in 45 C.F.R. § 164.510);
        - The requirement to distribute a notice of privacy practices (as set forth in 45 C.F.R. § 164.520); and
        - The patient's right to request privacy restrictions or confidential communications (as set forth in 45 C.F.R. § 164.522).
    - Telemedicine – see "Notification of Enforcement Discretion for Telehealth Remote Communications during the COVID-19 Nationwide Public Health Emergency": https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html; and https://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf. The Office for Civil Rights (OCR) will not impose penalties for noncompliance with the HIPAA Rules in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency, using non-public facing audio or video communication products. Coppersmith will be issuing a more detailed client alert on the extensive changes related to telemedicine.
- On February 3, 2020, OCR issued a "BULLETIN: HIPAA Privacy and Novel Coronavirus": https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf.
    - This guidance explained that entities can share patient information for:
        - Treatment;

- Public health activities (noting the CDC and a state/local health department is a public health authority);
- Disclosures to family and friends, and others involved in patient's care;
- Disclosures for notification (to disaster relief organizations); and
- Disclosures to prevent a serious and imminent threat.
    - HIPAA expressly defers to the professional judgment of health professionals in making determinations about the nature and severity of the threat to health and safety.

The guidance also reminded entities that (i) disclosures to the media or others not involved in the care of the patient may not be done without patient authorization, except in limited circumstances described elsewhere in the guidance; (ii) the minimum necessary rule applies and entities should continue to apply role-based access policies to limit access to PHI to only those workforce members who need it to carry out their duties.

- On March 28, 2020, OCR issued "BULLETIN: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19)": https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf. In this Bulletin, OCR primarily addresses the prohibition on discrimination on the basis of disability. With respect to HIPAA, OCR points to its earlier guidance documents and notices (cited above).

- With respect to substance use disorder treatment records protected by 42 CFR Part 2 (Part 2), the strict Part 2 privacy requirements have not been suspended. *See* OCR FAQs on Telehealth, https://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf; *see also* SAMHSA, COVID-19 Public Health Emergency Response and 42 CFR Part 2 Guidance, https://www.samhsa.gov/sites/default/files/covid-19-42-cfr-part-2-guidance-03192020.pdf. However, Part 2 permits disclosures to medical personnel if there is a medical emergency and the patient's consent to the disclosure cannot be obtained. 42 C.F.R. § 2.51. Moreover, Part 2 does not prohibit the disclosure of information that does not identify patient, or that would not identify the patient as having (or having had) a substance use disorder. 42 C.F.R. § 2.12(a).

Ryan White HIV/AIDS Treatment Extension Act of 2009 (42 U.S.C. §§ 300ff-131 through -140):
This law requires mandatory routine notifications and responses to requests for information from organizations that employ emergency response employees. It applies to medical facilities that receive and treat victims of an emergency or ascertain the cause of death. *See*
https://www.cdc.gov/niosh/topics/ryanwhite/pdfs/RyanWhiteActof2009.pdf;
https://www.cdc.gov/niosh/topics/ryanwhite/pdfs/FRN11-2-2011GPO.pdf.

See CDC guidance at https://www.cdc.gov/niosh/topics/ryanwhite/default.html.

- Mandatory Routine Notifications:
    - If a victim of an emergency is transported by an emergency response employee to a medical facility, and the medical facility makes a determination that the victim has an "airborne infectious disease," the medical facility must notify the "designated officer of the emergency response employees" who transported the victim to the medical facility of the determination. 42 U.S.C.A. § 300ff-132(a). This designated officer is usually the ICO.
    - The reportable "airborne infection diseases" include SARS-CoV-2, which is the virus that causes COVID-19. *See* 42 U.S.C.A. § 300ff-131(b); "Table 1: List of Potentially Life-Threatening Infectious Diseases to Which Emergency Response Employees May Be Exposed, by Exposure Type."
    - This notification must occur as soon as practicable, but not later than 48 hours after the determination is made. 42 U.S.C.A. § 300ff-132(b). The notification must include all of the following information: (i) the name of the infectious disease involved; and (ii) the date on which the victim of the emergency involved was transported by emergency response employees to the medical facility involved. 42 U.S.C.A. § 300ff-134(a).
    - See the CDC guidance cited above with more details regarding notice requirements.

- Notifications upon request:
    - At the request of an emergency response employee who believes she or he may have been exposed to an infectious disease as a result of a transport, the organization's designated officer may collect information and evaluate whether the employee may have been exposed. 42 U.S.C.A. § 300ff-133(a)-(b).
    - If the designated officer concludes that the first responder may have been exposed, the designated officer must submit a signed written request to the medical facility to get a determination as to whether the first responder was exposed. 42 U.S.C.A. § 300ff-133(c). This request must include a statement about the facts collected. *Id.*
    - A medical facility that receives such a request must evaluate the facts submitted in the request and determine whether, on the basis of the medical information possessed by the facility regarding the victim involved, the first responder was exposed. 42 U.S.C.A. § 300ff-133(d)(1).
    - The medical facility must respond in writing to the designated officer who submitted the request as soon as practicable, but not later than 48 hours after receiving the request, that the employee was exposed, not exposed, or insufficient information exists to determine exposure. If circumstances change and the medical facility later determines that the victim has an infectious

disease, the medical facility must on the basis of the information reevaluate whether the first responder was exposed and give the appropriate notification to the designated officer in writing. 42 U.S.C.A. § 300ff-133(d)-(e). If there is an exposure notification, it must include: (i) The name of the infectious disease involved; and (ii) the date on which the victim of the emergency involved was transported by the first responder to the medical facility involved. 42 U.S.C.A. § 300ff-134.

- See the CDC guidance cited above for more details.

Arizona State Confidentiality Laws: Arizona's state confidentiality laws have not been suspended during the pandemic. However, most of these laws align with HIPAA. Arizona's communicable disease confidentiality statute also expressly permits disclosure to health care workers under the following circumstances: "[A] health care provider . . . who has had an occupational significant exposure risk to the protected person's blood or bodily fluid if the health care provider . . . provides a written request that documents the occurrence and information regarding the nature of the occupational significant exposure risk and the report is reviewed and confirmed by a health care provider who is both licensed pursuant to title 32, chapter 13, 15 or 17 and competent to determine a significant exposure risk. A health care provider who releases communicable disease information pursuant to this paragraph shall provide education and counseling to the person who has had the occupational significant exposure risk." A.R.S. 36-664(A)(2).

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