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Coppersmith Briefs

Communicating with Health Care Employees about Patient COVID-19 Status

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Health care institutions are experiencing a wave of employee requests for more information about patient COVID-19 status. When does HIPAA and state law permit health care institutions to inform employees that they have been in contact with a COVID-19 positive patient? HIPAA and other confidentiality laws have not been suspended during the pandemic (in most part), and communications with employees must happen in a way that complies with HIPAA and other applicable confidentiality laws.

This alert gives you a few basic rules to follow. A discussion of government agency guidance is at the end of this alert.

Basic rules to follow in communicating with health care employees:

- Of course, health care employees involved in the direct care of a patient should have access to all information needed to treat the patient, including COVID-19 status.
    - Disclosures for treatment are permitted under HIPAA. *See* 45 C.F.R. §164.506(c)(2).
- During treatment, information about a patient's COVID-19 status may be disclosed to employees to trigger the use of additional precautions or the use of more sophisticated personal protective equipment (PPE) to prevent transmission to the employees treating the patient.
    - Disclosures necessary to prevent or minimize a "serious and imminent threat" to employees 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."

- Once employees are done treating a patient, information about a patient's COVID-19 status should be disclosed to employees only if necessary to avoid harm to the employees or those interacting with the employees. For example, if an employee was not using PPE, or if there was a failure of PPE during the treatment of a patient who later developed COVID-19, disclosure of information to the employee about the patient's COVID-19 status may trigger the employee to self-isolate to avoid transmission of the virus to others. It may not be necessary to release the identity of the patient for this purpose.
    - This would meet the serious and imminent threat standard under HIPAA, which requires the disclosure to be to a person who is in a position to prevent or lessen a serious and imminent threat to themselves or others. *See* 45 C.F.R. § 164.512(j)(1)(i) and 45 C.F.R. § 164.512(j)(4).
- Non-treating employees who were not wearing PPE and were exposed to a patient who developed COVID-19 may also be informed of the exposure. It may not be necessary to release the identity of the patient for this purpose.
    - This disclosure would meet the serious and imminent threat standard. *See* 45 C.F.R. §164.512(j)(i).
    - A provider may want to consider whether the non-treatment employee was in "close contact" with the patient. *See* CDC's definition of "close contact": https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-risk-assesment-hcp.html. Merely passing a patient's room or working nearby may not constitute "close contact" with the patient.
- If a health care institution believes an employee may be at risk of contracting or spreading COVID-19, state communicable disease statutes may permit the health care institution to disclose a patient's COVID-19 status to the employee. *See* 45 C.F.R. § 164.512(b)(1)(iv). It may not be necessary to release the identity of the patient for this purpose.
    - For example, in Arizona, a health care institution is permitted to disclose information about a patient's communicable disease to an employee who has had an occupational significant exposure risk to the patient's blood or bodily fluid. *See* A.R.S. 36-664(A)(2). However, the employee has to make a written request that documents the occurrence and information about the exposure, this request must be reviewed by a licensed health care provider, and education and counseling must be provided to the employee. Id. Because any significant exposure risk to COVID-19 would also trigger the ability to report under HIPAA's "serious and imminent" risk standard, we do not think Arizona health care institutions will need to utilize the Arizona communicable disease statute.

- HIPAA does not <u>require</u> reporting of a patient's COVID-19 status to employees. While HIPAA requires disclosures of patient information in other circumstances (*e.g.*, to patients and to the federal government in connection with an investigation), a provider is not required to disclose patient information to an employee under the HIPAA.

- Disclosures that are not for treatment and are not required by law are subject to HIPAA's minimum necessary rule. *See* 45 C.F.R. §164.502(b).

  - If a health care institution informs an employee of COVID-19 exposure under the serious and imminent threat standard or pursuant to state communicable disease reporting, the employee may not need to know the identity of the patient. Rather, the exposed employee only needs to understand that there has been an exposure and the need to take additional precautions to avoid transmission to others.

- Curiosity viewing of patient records is never permitted under HIPAA, no matter the level of anxiety among health care organization employees about the COVID-19 pandemic.

<u>The Legal Stuff</u>

HIPAA: HIPAA has <u>not</u> been suspended during the pandemic, except as follows:

- **Communications with patients and families:** On March 16, 2020, OCR issued a notice about the HHS Secretary's declaration of a public health emergency and several waivers/modifications of requirements under Section 1135 of the Social Security Act (which authorizes the Secretary to temporarily modify or waive certain Medicare, Medicaid, SCHIP, and HIPAA requirements in national emergencies), with retroactive effect to March 1, 2020. See https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx.

  - The waivers includes a waiver of sanctions and penalties arising from noncompliance with the following provisions of the HIPAA Privacy Rule – <u>but only with respect to hospitals in the designated geographic area that have disaster protocols in operation during the time the waiver is in effect</u>:

    - 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).

    - These waivers are in effect for a period of time not to exceed 72 hours from implementation of a hospital disaster protocol (ending with the period described in Section 1135(e)).

- **Telemedicine:** On March 17, 2020, OCR issued a 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. On March 20, 2020, OCR issued FAQs on Telehealth and HIPAA during the COVID-19 nationwide public health emergency: https://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf. Under these guidance documents:

    - Effective immediately, OCR stated it will exercise its enforcement discretion and 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.

    - This Notification does not affect the application of the HIPAA Rules to other areas of health care outside of telehealth during the emergency.

    - Coppersmith Brockelman will be issuing a more detailed client alert on the extensive changes related to telemedicine.

Other relevant HIPAA guidance:

- 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 addresses the prohibition on discrimination on the basis of disability.

- 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; (vi) in circumstances involving an inmate or other individual in custody.

- 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 (1) 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; (2) 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.

CDC Guidance: On March 7, 2020, the CDC issued "Interim U.S. Guidance for Risk Assessment and Public Health Management of Healthcare Personnel with Potential Exposure in a Healthcare Setting to Patients with Coronavirus Disease (COVID-19)": https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-risk-assesment-hcp.html. In that guidance, the CDC states: "Healthcare facilities, in consultation with public health authorities should use the concepts outlined in this guidance along with clinical judgement to assign risk and determine need for work restrictions." Some of these same concepts can be used in determining what type/level of exposure constitutes a serious and imminent threat to an employee.

42 C.F.R. PART 2: With respect to substance use disorder treatment records protected by 42 C.F.R. 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. 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).

Arizona State Confidentiality Laws: Arizona's state confidentiality laws have not been suspended. However, most of these laws align with HIPAA.

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