

## Coppersmith Briefs

# Suspension of HIPAA Enforcement for COVID-19 Community-Based Testing Sites

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The Office for Civil Rights (OCR) has issued another notice that it will suspend HIPAA enforcement for activities related to the COVID-19 pandemic. On April 9, 2020, OCR explained that it would not impose penalties for violations of the HIPAA Privacy Rule, Security Rule, or Breach Notification Rule for “good faith participation” in the operation of COVID-19 Community-Based Testing Sites during the COVID-19 nationwide public health emergency. See <https://www.hhs.gov/sites/default/files/notification-enforcement-discretion-community-based-testing-sites.pdf>.

This “exercise of enforcement discretion” is limited, as usual. This one applies only to COVID-19 testing activities by health care providers and their business associates with Community-Based Testing Sites (CBTS). The Department of Health and Human Services (HHS) and the Federal Emergency Management Agency (FEMA) established the CBTS for CDC-prioritized locations across the country. The CBTS are being transitioned to state control, with continued support from the federal government. See <https://www.fema.gov/news-release/2020/04/09/option-transition-federal-community-based-testing-sites-state-management>.

The suspension of HIPAA penalties is limited in that it applies only to “mobile, drive-through, or walk-up sites that only provide COVID-19 specimen collection or testing services to the public” (emphasis added). It will not apply to other activities of a health care provider or business associate.

The suspension also applies only to providers and business associates in connection with the “good faith participation” in the operation of a CBTS. OCR does not explain what “good faith participation” means. However, OCR “encourages” a CBTS to implement reasonable safeguards to protect the privacy and security of protected health information (PHI). Specifically, OCR lists the following as reasonable safeguards:

- Using and disclosing only the minimum PHI necessary except when disclosing PHI for treatment.

- Setting up canopies or similar opaque barriers at a CBTS to provide some privacy to individuals during the collection of samples.
- Controlling foot and car traffic to create adequate distancing at the point of service to minimize the ability of persons to see or overhear screening interactions at a CBTS. (A six foot distance would serve this purpose as well as supporting recommended social distancing measures to minimize the risk of spreading COVID-19.)
- Establishing a “buffer zone” to prevent members of the media or public from observing or filming individuals who approach a CBTS, and posting signs prohibiting filming.
- Using secure technology at a CBTS to record and transmit electronic PHI.
- Posting a Notice of Privacy Practices (NPP), or information about how to find the NPP online, if applicable, in a place that is readily viewable by individuals who approach a CBTS.

While these safeguards are “encouraged,” it is unclear whether OCR will expect these safeguards to be followed to qualify as “good faith participation” in the program.

The suspension does not apply to non-CBTS related activities—including the handling of COVID-19 testing outside of the operation of a CBTS. For example, laboratory processing of the COVID-19 tests is still subject to HIPAA enforcement, as is a health care provider’s electronic health record system that stores COVID-19 tests. In essence, the OCR’s notice makes it easier for a CBTS to operate efficiently in the *collection* of specimens, but the impact will be limited.

The suspension of HIPAA penalties is retroactive to March 13, 2020, and will remain in effect until the HHS Secretary declares the public health emergency over.

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