Minor Consent & HIPAA Do's, Don't's and You Did What?!?

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Minors May Consent To:

- STD/ STI
- Mental Health
- Substance & Alcohol Abuse
- Victim Medical & Mental Health Services

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Minors May Consent **But**

- Contraceptive Services
  - Consent must be in writing
- HIV / AIDS
  - Consent must be in writing
  - The minor must be informed prior to testing that if the test result is positive, the minor's parent or guardian will be notified.
    - Different process for pregnant minors
- Donating Blood
  - Must be voluntary and not for compensation
    - 17 years of age – May consent
    - 16 years of age – If written permission from parent or guardian
- Abortion
  - 48 hour prior notification must be provided to a parent (unless this process is waived)

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Minor Consent Laws and Payment

- Minors often forget their parent or legal guardian may become aware of a certain medical service received by the minor through the minor's insurance.
  - Inform the minor that he or she can avoid this by paying for the medical service

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PRIVACY OF TREATMENT

HIPAA Section 164.522, if an individual requests privacy regarding certain treatment and pays for that treatment out-of-pocket, you must respect that request and may not provide that information even to the insurer.

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SECTION 164.510

- Allows a covered entity to disclose information to "family" members or others who are involved in care regarding the circumstances of the resident/patient's death **unless** this has been prohibited by the resident/patient's prior expressly stated wishes.

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TREATMENT, PAYMENT AND OPERATIONS

- TPO does not normally require consent or authorization for the use of PHI

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Treatment

- Continuity of care, referral to specialist, internal consult. Can't share two psychotherapy notes.

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Payment

- Data to insurance providers, data for payment, contract review, collection actions.
- Be careful of minimum necessary standard.
- Be careful of self-pay segregation under HIPAA.

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Operations

- Peer review, utilization review, statistical analysis and reporting

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Law Enforcement-Limited Exception

- Name, date of birth, general condition, social security number, contact data-all ok

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Law Enforcement

- Test results for substances, genetics, HIV/AIDS, blood tests – not ok
- Watch for Wounds of Violence Issues

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Custody by Law Enforcement

- The issues are different if someone is in custody or jailed/incarcerated than for investigation. Custody presumes payment by law enforcement.

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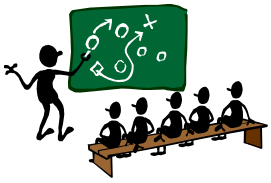
Mental Health

- Complicated by Tarasoff and Ed Thomas Law.
- Iowa Code Chapters 228 and 229



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Public Health Exception

- Consent not required for HIV/AIDS reporting, vaccination reporting and other communicable disease reporting

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Research

- Certain uses are allowed without consent for research

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Marketing

- Consent required as well as clear opt out

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Attorney Use

- Valid consent required or court order.
- HIV/AIDS, Mental Health, Substance Abuse, Genetics, special categories

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NOTE

- Subpoena alone not enough for the "BIG FOUR"

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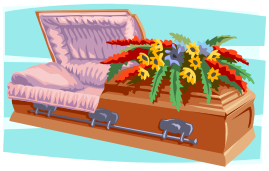
Work Comp-Chapter 88

- Not covered by HIPAA but pre-conception to post death requests can be overbroad.



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REGZILLA

HIPAA/HITECH Omnibus Rule was issued on January 25, 2013.

Dates to be aware of:

March 26, 2013-Compliance date.
September 23, 2013-Enforcement.

BA-last chance September 22, 2014.

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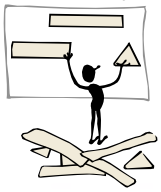
CHANGES

There are a number of significant changes to the Rule which can be broken down in various ways:



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HITECH, LOW TECH, NO TECH-ITS PEOPLE THAT CAUSE THE PROBLEM

Recent questions answered:

Nurse tells the mother of a patient,

"Oh aren't you glad to be a grandma again?"

Another nurse sees the patient out with her older child and says, "How do you like your new sister?"

ONLY PROBLEM, NO ONE ELSE WAS AWARE OF THE PREGNANCY AND THE CHILD WAS INTENDED FOR ADOPTION.

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NEW KEY LEGAL TERMS

- MENS REA-State of mind, what did you know, what was your intent, what were you thinking?
- CONSTRUCTIVE KNOWLEDGE-Did you know or should you have known that something was a breach?

NOTE: each of these terms places a significant emphasis on being aware of what it going on in your facility and heading off problems before they become significant issues.

Also note, reasonable cause, reasonable diligence and willful neglect, See 160.404.

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SECTION 160.102

Makes HIPAA provisions, particularly security and reporting provisions, applicable to Business Associates.

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YOU SAY TOMATO, I SAY TOMHATO

- Who exactly is a Business Associate?
  - A Business Associate is a person or entity who performs work on behalf of the covered entity and is not a member of its workforce. Such work or services must involve the use or disclosure of PHI.

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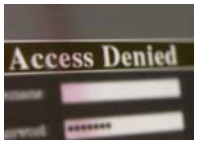
DON'T FORGET

- Non BA may have access to information. Contracts with non BA should also specify security protocols and indemnification.
- You must minimize the non BA's ability to access such data.



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FILING COMPLAINTS

These regulations also allow patients and others affected by HITECH/HIPAA issues to file a complaint directly with the secretary of HHS or State AG regarding a CE, Business Associate or Subcontractor. This includes complaints of retaliation.

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SECTION 164.508

Changes regarding marketing have occurred pursuant to 164.508. If you have or will receive financial payment or in kind payment, patient authorization must be received for use of PHI.

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WHAT IS NOT MARKETING

1) REFILL REMINDERS
   - UNLESS YOU GET PAID TO SEND THE REMINDERS MORE THAN IT COSTS YOU TO SEND THEM BY THE PHARMACEUTICAL COMPANY
   - FOR TREATMENT, CASE MANAGEMENT, CARE COORDINATION
   - TO RECOMMEND ALTERNATIVE TREATMENTS, THERAPIES AND PROVIDERS
   - TO DESCRIBE A HEALTH RELATED PRODUCT OR SERVICE (HEALTH PLAN).
   - **UNLESS YOU GET PAID TO DO IT IN A DIRECT OR INDIRECT WAY**

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SECTION 164.514(F)(1)

Marketing-(Foundations)

Business Associate/Institutionally related foundation may use:

a) Demographic information (name, address, contact information, age, gender, date of birth);
b) Dates of healthcare provided;
c) Department of Service information;
d) Treating physician;
e) Outcome information; and
f) Health insurance status.

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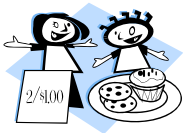
FUNDRAISING

Fundraising must be listed in your Notice of Privacy Practices

With <u>each</u> fundraising communication you must provide the individual with an easy opt out.



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BREACH

Major changes have occurred in how a breach is identified. The prior rule states that a breach occurred when there was reputational or other specific harm including potential identity theft.

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GUILTY UNTIL PROVEN INNOCENT - BURDEN OF PROOF

The burden of proof has shifted from showing that something such as identify theft was not likely to a heavier burden of proof on the entity to show that the information was not in fact compromised.

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NEW STANDARD

Breach now means an assessment of

1) The nature and extent of the PHI involved, including identifiers and likelihood of re-identification;
2) Who may have had access to the PHI or to whom disclosure was made;
3) Was the PHI actually acquired or viewed; and
4) To what extent has the risk of disclosure been mitigated.

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COMMON BREACH ISSUES

1) X-ray shipped to wrong doctor office.

   No-covered entity.
   Maybe-covered entity
   but how to remedy
2) Fed Ex packet lost with records being shipped.

   Yes
   Yes but no liability to Fed Ex
3) Laptop computer lost/stolen.

   Encryption?
   If encrypted-no
   Depends on encryption and who could access.
4) Internal records which are "lost."
   No
   Yes

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ENCRYPTION

- Individuals generally must be notified if "unsecured" protected health information is breached.
- "Unsecured" protected health information is information not secured through the use of technology or methodology specified by the Department of Health and Human Services as rendering the information "unusable, unreadable or indecipherable to unauthorized individuals."

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THE HURRICANE EXCEPTION

IN CASE OF AN EMERGENCY IF CONSISTENT WITH PRIOR EXPRESSED PREFERENCE OF THE INDIVIDUAL AND IN THE INDIVIDUAL'S BEST INTEREST.

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JACKSON HEALTH SYSTEM

- North Miami Beach

  Loverson Gelmine volunteered at Jackson Memorial North and stole more than 556 patient records by photographing their paper records using a cell phone camera, the thief was discovered in a local McDonald's parking lot, attempting to use the restaurant's WIFI to file fraudulent tax returns. Jackson has now banned smart phones in patient areas.

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Parkview Health System Fort Wayne, Indiana

- 71 cardboard boxes of documents were "dumped" on Dr. Christine Hamilton's Drive.

- Fine $800,000 – 1 Year CAP

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Rhode Island Women's & Infant's Hospital

- Disappearance of unencrypted back up tapes of ultrasounds

- FINE-$150,000 Settlement CAP with outside auditor

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MINIMUM NECESSARY BREACHES

- OCR DOES NOT "BELIEVE THAT ALL MINIMUM NECESSARY VIOLATIONS PRESENT A LOW PROBABILITY THAT THE PROTECTED HEALTH INFORMATION HAS BEEN COMPROMISED." SECTION 164.502(B) AND 164.514(D).

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HOSPITAL TELEPHONE MESSAGE

Hospital employee left a telephone message on a patient's home number detailing diagnosis and treatment.

- Patient had asked for use of work number
- Too much information was left

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DENTAL RED FLAG

Dental practice physically flagged files with a red sticker "AIDS" and other patients could see the files. All stickers moved to inside cover and the practice met with the effected patient to apologize.

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A Security Culture

- Do you lock your car door?

- What about your house?

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How Do You Remember Your Passwords?

- Write them down?
- Where?

- Use same one for everything?
- Just remember them?

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MOST COMMON TYPE COMPLAINT

- Impermissible use and disclosure
- Lack of safeguards
- Lack of patient access
- More than minimum necessary information released
- Lack of administrative safeguards

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Social Media Policy: Non Negotiable Terms

1. **Keep Confidential Information Confidential:**
   - Protected company information should not be shared outside the company.
   - Patient information should not be posted online or shared in any way.
2. **Be Respectful**
   - Do not post defamatory content about others for any reason.
   - Make it clear that views expressed online are yours alone, and do not represent the views of your employer.
3. **Do Not Break the Law**
   - Do not post pictures or other information about your participation in illegal activities, or that imply you engage in such conduct.

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4. **Protect Privacy Rights of Yourself and Others**
   - Be cautious about how you share personal information.
   - Do not post pictures of or personal details about co-workers that may be considered an invasion of privacy without express permission.
   - Stay mindful of privacy laws such as HIPAA.
   - Do not destroy, even personal media, without approval if it has been used to create, transmit or store work-related data.
5. **Standards of Conduct Still Apply**
   - Any conduct that would be grounds for dismissal at work will be grounds for dismissal if done online.
   - What belongs in the medical record goes in the medical record.

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Thank you

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