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PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

University of Utah School of Medicine
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RE: Sharing Patient Data Bidirectionally Under the Health Insurance Portability and Accountability Act (HIPAA)

Page, Wolfberg & Wirth (PWW) was asked by the National EMS Information System (NEMESIS) Technical Assistance Center (TAC) to offer our legal opinion regarding the bidirectional sharing of patient information between Emergency Medical Services (EMS) and other healthcare providers under the Health Insurance Portability and Accountability Act (HIPAA). Many hospitals have raised concerns under the HIPAA about sharing of patient information with EMS. HIPAA does not restrict bidirectional sharing of patient information between hospitals and EMS agencies, and the Federal agencies that enforce HIPAA endorse the bidirectional exchange of that data.

Hospitals (and other healthcare providers) may share patient information with EMS agencies for a host of treatment and healthcare operations activities under the HIPAA Privacy Rule. Additionally, there are ample safeguards required by the HIPAA Security and Breach Notification Rules to ensure the protection and integrity of protected health information that is shared with, or accessed by, EMS agencies.

Privacy Rule

Under HIPAA, a healthcare provider – referred to as a “covered entity”¹ - can share protected health information (PHI)² with another covered entity (CE) for the treatment activities of that other provider, without patient consent or authorization.³ The Privacy Rule broadly defines “treatment” as:

“The provision, coordination, or management of health care and related services by one or more providers, including the coordination or management of health care by a provider with a third party; consultation between providers relating to a patient; or the referral of a patient for care from one provider to another.”⁴

The Office for Civil Rights (OCR) issued Guidance, making it clear that EMS practitioners are providing “treatment” within the meaning of HIPAA when exchanging healthcare information with providers involved in the patient’s care.⁵ As such, disclosures or transmissions of patient information to or from other providers are permissible without the need to obtain patient consent under HIPAA. According to Joint Guidance from the Office of the National Coordinator for Health Information Technology (ONC) and OCR, “treatment” also means prospective future treatment activities.⁶ Therefore, EMS agencies may participate in Health Information Exchanges (HIE) arrangements and utilize an HIE to exchange patient information for HIPAA-permitted activities, such as treatment.

A CE can also share PHI with another CE for the healthcare operations activities of the other CE without needing patient authorization under the Privacy Rule.⁷ Healthcare operations⁸ activities include: conducting quality assessment and

¹ A covered entity is generally any healthcare provider who transmits healthcare claims to a health plan or government payer (such as Medicare or Medicaid). 45 CFR § 160.103.

² PHI is defined as any individually identifiable health information that is transmitted or maintained in any form or medium by a covered entity. *Id.*

³ 45 CFR § 164.506(c)(2).

⁴ 45 CFR § 164.501.

⁵ When an ambulance service delivers a patient to a hospital, is it permitted to report its treatment of the patient and patient's medical history to the hospital, without the patient's authorization (2002)?

<https://www.hhs.gov/hipaa/for-professionals/faq/273/when-an-ambulance-delivers-a-patient-can-it-report-its-treatment-without-authorization/index.html#:~:text=Yes.,provider's%20treatment%20of%20the%20individual>; See also, 45 CFR 164.506.

⁶ U.S. Department of Health and Human Services, Office for Civil Rights. (2016, January). Permitted Uses and Disclosures: Exchange for Treatment. Retrieved from https://www.healthit.gov/sites/default/files/exchange_treatment.pdf.

⁷ 45 CFR 164.506(c)(4).

⁸ 45 CFR § 164.501.

improvement activities; developing clinical guidelines; conducting patient safety activities; developing protocols; conducting case management and care coordination (including care planning); and contacting health care providers and patients with information about treatment alternatives.

In 2012, the Department of Health and Human Services (HHS) Assistant Secretary for Preparedness & Response (ASPR) issued a letter to the National Association of EMS Physicians outlining that HIPAA permits the sharing of outcome data with EMS agencies. The letter states HHS's position that: "Hospital[s] may share patient health outcome information with the EMS practitioner for certain health care operations activities of the EMS practitioner, such as quality improvement activities, as long as both entities have (or have had in the past) a relationship with the patient in question."

Sharing PHI With EMS Under the Privacy Rule

When EMS practitioners and facility providers are actively treating the patient, they can communicate whatever information is necessary to coordinate healthcare for the patient. An ambulance service that delivers a patient to a hospital can share information pertaining to the care the patient received and the patient's medical history with the hospital. Similarly, the hospital may share any pertinent medical information it has concerning the patient with the ambulance service necessary to coordinate ongoing care. If the patient was being transferred to another facility, the originating facility can share treatment information with the EMS agency doing the transfer because that agency would need to know that information to properly care for the patient during the transfer.

HIPAA also permits hospitals (and other facilities) to share PHI with EMS agencies about the patient's treatment, the patient's outcome, and the discharge diagnoses or summary condition of the patient so that ambulance services can provide appropriate treatment if and when they encounter the patient in the future. EMS agencies are permitted by HIPAA to access this information if they treat the patient in the future.

Finally, when an EMS agency transports a patient to a facility, that facility may provide health information to the EMS agency for any healthcare operations of the EMS agency. For example, if the EMS agency conducts clinical quality assessment/quality improvement (QA/QI) on patients transported to a hospital, the hospital may provide outcome and disposition data to the EMS agency for the clinical QA/QI program. Both covered entities (the EMS agency and the hospital) had a relationship with the patient, and the PHI provided pertains to that relationship. Thus, the sharing of PHI is permitted by the HIPAA Privacy Rule for purposes of conducting healthcare operations.

HIPAA Security and Breach Notification Rules

EMS Agencies Must Employ the Same Security Measures as Facilities

A concern that hospitals often articulate about sharing the outcome with EMS agencies is that the information will not be properly secured by those agencies. This concern is assuaged by the fact that EMS agencies are required to employ their own safeguards under HIPAA for PHI that they create or that they receive from other healthcare providers.

All covered entities - including EMS agencies - must implement all of the standards under the HIPAA Security Rule's administrative, physical, and technical safeguards.⁹ These are the same Security Rule safeguards that hospitals are required to employ. EMS agencies are also subject to penalties from HHS if they fail to comply with the Security Rule, just like hospitals.¹⁰ Therefore, there are no greater risks for hospitals sharing PHI with EMS agencies than there are with the EMS agencies providing their PHI to the hospitals, as they routinely do when they transfer care upon arrival.

The safeguards that hospitals and EMS agencies are required to implement are designed to ensure that PHI that is shared among and between healthcare providers is secure while being created, accessed, maintained, and transmitted.

HIPAA Breaches Fall to the CE Maintaining the PHI

Moreover, hospitals are generally not responsible for data breaches of EMS agencies. The HIPAA Breach Notification Rule states that the CE maintaining the PHI (in any form) when a breach occurs is the organization that bears breach notification responsibility under HIPAA.¹¹ Therefore, once PHI is received by an EMS agency, any breach of that PHI becomes the responsibility of the EMS agency. Hospitals are generally not responsible for improper uses, disclosures, security incidents, or breaches of PHI by an EMS agency. The hospital is responsible for ensuring that it provides the PHI to the EMS agency in compliance with HIPAA (*i.e.*, securely).

PHI is defined as individually identifiable information that is created or *received* by a healthcare provider.¹² PHI received from another healthcare provider becomes PHI of the receiving provider, and the receiving provider may only use and disclose the PHI in accordance with HIPAA. This is true even if the PHI was mistakenly or

⁹ 45 CFR § 164.302.

¹⁰ 45 CFR § 160.400 et. seq.

¹¹ 45 CFR § 164.400 et. seq.

¹² 45 CFR § 160.103.

inappropriately received. Once PHI is in the possession of a HIPAA CE, the information must be protected in the same manner as PHI that the CE created.

Joint Guidance from ONC and OCR makes it clear that: (1) each healthcare provider is responsible for its uses and disclosures; and (2) a CE that compliantly discloses PHI to another CE is not responsible for subsequent uses and disclosures of the PHI it discloses. The Guidance states:

“A common question that arises is whether. . . the disclosing hospital will be held responsible under HIPAA for what the receiving provider does with the PHI once the hospital has disclosed it in a permissible way under HIPAA. For example, what if the receiving physician experiences a breach of the PHI? Under HIPAA, after the receiving physician has received the PHI in accordance with HIPAA, the receiving physician, as a CE itself, is responsible for safeguarding the PHI and otherwise complying with HIPAA, including with respect to subsequent uses or disclosures or any breaches that occur. The disclosing hospital is responsible under HIPAA for disclosing the PHI to the receiving physician in a permitted and secure manner, which includes sending the PHI securely and taking reasonable steps to send it to the right address.”¹³

If a hospital provisioned secure access to its patient database or securely transmitted PHI to an EMS agency for treatment or quality assurance activities of the EMS practitioner, the hospital would generally not be responsible for any improper uses and disclosures – including any breaches – of the PHI under the Breach Notification Rule. After the receiving EMS agency received the PHI in compliance with HIPAA, the receiving EMS agency, as a CE, is responsible for safeguarding the PHI and otherwise complying with HIPAA, including subsequent uses, disclosures or any breaches that occur. Any breach would be the responsibility of the EMS agency that received the PHI just as a breach by a hospital of its PHI – including an EMS patient care report that becomes part of the hospital’s records – would be the responsibility of the hospital.

Conclusion

While there may be obstacles that remain for bidirectional sharing of patient information, HIPAA is not one of them. Not only does HIPAA permit other healthcare providers to share PHI with EMS agencies, but Federal agencies endorse bidirectional sharing for treatment and healthcare operations. HIPAA also requires EMS agencies to

¹³ Guidance from the Office of the National Coordinator for Health Information and Technology and the U.S. Department of Health and Human Services Office for Civil Rights, Permitted Uses and Disclosures: Exchange for Treatment (January 2016), Available at https://www.healthit.gov/sites/default/files/exchange_treatment.pdf.

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safeguard the PHI that they receive from hospitals in the same way that hospitals must protect their own PHI.

Sharing patient information benefits EMS agencies and improves prehospital patient care by revealing evidence-based practices that make a difference for patients in the field.

Very truly yours,

SIGNED

The Attorneys at Page, Wolfberg & Wirth