

The Department of Health and Human Services Issues Post-*Dobbs* HIPAA Guidance

By Claire Martin

Following the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which eliminated the constitutional right to obtain an abortion, President Biden issued an executive order wherein he tasked the Department of Health and Human Services ("HHS") to take action to protect patient access and privacy rights related to abortion. More specifically, President Biden directed HHS to consider ways to educate consumers on how to protect their privacy and to consider issuing guidance under the Health Insurance Portability and Accountability Act ("HIPAA") to strengthen protection of sensitive health information related to reproduction health care, including abortion.

In response, HHS's Office for Civil Rights ("OCR") issued new guidance under HIPAA's privacy requirements, referred to as the "Privacy Rule." The guidance acknowledges that following *Dobbs*, patients are concerned with the possibility that their health information may be disclosed or misused by persons or entities seeking to deny such individuals abortion-related care. This guidance, entitled "HIPAA Privacy Rule and Disclosures of Information Relating to Reproduction Health Care," is available here:

<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html>

The guidance primarily addresses how HIPAA's Privacy Rule limits access to an individual's private medical information, specifically with regard to disclosures that are not related to health care (e.g., disclosures required by law or to law enforcement officials).

The guidance first addresses how the Privacy Rule treats "disclosures required by law" and clarifies that HIPAA permits (but does not require) covered entities (e.g., health plans and health care providers) to disclose PHI without an individual's authorization as a "disclosure required by law" when there is "a mandate contained in law that compels an entity to make a use or disclosure of PHI and that is enforceable in a court of law" and such disclosure is limited to the relevant requirements of the law. The guidance provides the following example of this "required by law" definition in practice.

An individual goes to a hospital emergency department while experiencing complications related to a miscarriage during the tenth week of pregnancy. A hospital workforce member suspects the individual of having taken medication to end their pregnancy. State or other law prohibits abortion after six weeks of pregnancy but does not require the hospital to report individuals to law enforcement. Where state law does not expressly require such reporting, the Privacy Rule would not permit a disclosure to law enforcement under the "required by law" permission. Therefore, such a disclosure would be impermissible and constitute a breach of unsecured PHI requiring notification to HHS and the individual affected.

The guidance next addresses disclosures for law enforcement purposes and clarifies that unless there is a mandate enforceable in a court of law (e.g., court order, court-ordered warrant, subpoena, or summons), the Privacy Rule permits (but does not require) covered entities to disclose PHI for law enforcement purposes. In the absence of such a mandate, the Privacy Rule does not permit disclosure to law enforcement when a hospital or health care provider employee chooses (either on the employee's own or in response to a law enforcement request) to report an individual's abortion or other reproductive health care service. The guidance provides the following examples of this rule in operation:

A law enforcement official goes to a reproductive health care clinic and requests records of abortions performed at the clinic. If the request is not accompanied by a court order or other mandate enforceable in a court of law, the Privacy Rule would not permit the clinic to disclose PHI in response to the request. Therefore, such a disclosure would be impermissible and constitute a breach of unsecured PHI requiring notification to HHS and the individual affected.

A law enforcement official presents a reproductive health care clinic with a court order requiring the clinic to produce PHI about an individual who has obtained an abortion. Because a court order is enforceable in a court of law, the Privacy Rule would permit but not require the clinic to disclose the requested PHI. The clinic may disclose only the PHI expressly authorized by the court order.

The guidance also addresses disclosures to avert a serious threat to health or safety and confirms that the Privacy Rule permits (but does not require) a covered entity to disclose PHI if, consistent with law and standards of ethical conduct, the covered entity, in good faith, believes the use or disclosure is necessary to prevent or lessen a serious or imminent threat to the health or safety of the person or public, and disclosure would lessen this harm. The guidance explains that according to major professional societies, including the American Medical Association, disclosure of an individual's interest, intent, or experience with reproductive health care, including an abortion, for this purpose would be inconsistent with professional standards of ethical conduct.

This guidance also makes it clear that HIPAA's privacy protections do not extend to an individual's health information that may be stored and accessed through a personal electronic device, like a laptop, cell phone, or tablet, and any applications on these devices, including internet search history or geographic locations. As explained in the guidance, this is because HIPAA only applies when PHI is created, received, maintained, or transmitted by covered entities or business associates, and not individuals themselves. Notably, HHS previously issued separate guidance ("Protecting the Privacy and Security of Your Health Information When Using Your Personal Cell Phone or Tablet", [available here](#)), which provides tips for how individuals can protect their privacy with regard to this type of information. This guidance recommends individuals turn off location services on their personal devices, use strong encryption when transmitting data, use limiting

or blocking tracking tools (*e.g.*, cookies), and avoid collecting and storing personal information on such devices.

It is likely that the Biden Administration will continue to take efforts to facilitate abortion access and protect patient privacy to the extent possible through its executive branch authority. These efforts could very well come in the form of increased enforcement of HIPAA's privacy requirements, the violation of which can result in steep penalties. Accordingly, employers sponsoring health plans need to familiarize themselves with this guidance and the Privacy Rule's limits on the disclosure of PHI as it relates to reproductive health care.