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Employee Benefits Compliance

Proposed HIPAA Amendments Protect Reproductive Healthcare Information

Introduction

On April 12, 2023, the Department of Health and Human Services (HHS) issued a [Notice of Proposed Rulemaking](#) that would modify the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule to prohibit providers and other covered entities (including group health plans) from disclosing Protected Health Information (PHI) sought for the purposes of criminal, civil, or administrative investigations or proceedings related to seeking, obtaining, providing, or facilitating reproductive health care that is otherwise lawful. The proposed amendment is in response to the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* and the subsequent proliferation of state laws that imposed criminal, civil, or administrative liability for, or created private rights of action against, individuals who obtain certain reproductive health care. Under the proposed rule, before any such disclosure is made, the covered entity must obtain an attestation from the requesting individual or entity providing that the use or disclosure is not for a purpose prohibited under the amendment. The proposed rule does not have an effective date, but requests comments be submitted within 60 days of publication, which is on or about June 16, 2023. After a review of any comments and incorporating possible amendments, HHS will issue a final rule that will be effective 60 days after publication. We will continue to closely monitor the rulemaking process.

Background

On June 24, 2022, the Supreme Court in *Dobbs v. Jackson Women's Health Organization* overruled *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), holding the United States Constitution does not confer any right to abortion, leaving the issue to the states. Several states passed laws criminalizing abortion services but certain state laws (in Texas and Oklahoma) created considerable litigation risk for employer/plan sponsors, individuals, and healthcare providers. Specifically, [Texas SB 8](#) restricts abortion after the detection of a fetal heartbeat and can be enforced through private civil actions, which means that anyone can bring a suit against a person or entity they allege to have violated the law, and automatically awards \$10,000+ in damages per abortion procedure plus costs and attorney's fees, which can strongly incentivize litigation. Liability attaches for anyone who "knowingly engages in conduct that aids or abets the performance or inducement of an abortion,

including paying for or reimbursing the costs of an abortion through insurance or otherwise[.]” Any litigant can generally subpoena documents, including medical records, from anyone involved at any stage of the provision of abortion services or their payment or administration. Notably, HIPAA would not protect medical records related to abortion and reproductive services in the event of an administrative or judicial proceeding, including a civil action for aiding and abetting abortion.

Although HIPAA generally protects PHI, which includes abortion-related and reproductive services, a covered entity *may* disclose PHI in the course of any judicial or administrative proceeding, including: (a) in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the PHI expressly authorized by such order; or (b) in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if there is evidence that there were reasonable efforts to notify the person who is the subject of the information about the request, so the person has a chance to object to the disclosure, or seek a protective order from the court. This is considered a HIPAA “permitted” disclosure.

This proposed rule recognizes that the increased risk of litigation and the high probability that these medical records would be disclosed as part of routine discovery would affect how individuals sought reproductive healthcare, what they would disclose to medical providers, and their degree of trust in the medical profession, which could compromise health outcomes.

Proposed Amendments

The proposed rule would modify HIPAA to prohibit a covered entity from using or disclosing an individual's PHI for the purpose of conducting a criminal, civil, or administrative investigation into or proceeding against the individual, a health care provider, or other person in connection with seeking, obtaining, providing, or facilitating reproductive health care that: (1) is provided outside of the state where the investigation or proceeding is authorized and such health care is *lawful in the state in which it is provided*; (2) is protected, required, or authorized by Federal law e.g., the Emergency Medical Treatment and Active Labor Act), regardless of the state in which such health care is provided; or (3) is provided in the state in which the investigation or proceeding is authorized and that is permitted by the law of that state. Citing *Dobbs*, the proposed rule notes that under the Constitution an individual cannot be barred from traveling from one state to another to obtain reproductive health care. It also provides that a criminal, civil, or administrative investigation includes a civil suit brought by a person exercising a private right of action under state law against an individual or health care provider who obtained, provided, or facilitated a lawful abortion, or a law enforcement investigation into a health care provider for lawfully providing or facilitating abortion services.

Under the proposed rule, a covered entity must ascertain the purpose behind a request through an attestation. An attestation is required when a third-party requests reproductive health information for health oversight activities, judicial and administrative proceedings, law enforcement purposes, or disclosures to coroners and medical examiners. Although HHS has indicated it will likely create a model attestation, the proposed rule specifies that an attestation can be written or electronic, must be in plain language, must not be combined with other documents (e.g., a subpoena). A disclosure made in violation of the proposed rule would subject the covered entity to potential investigation and civil monetary penalties.

The proposed rule also includes three new definitions. *Person* means a natural person (meaning a human being who is born alive), trust or estate, partnership, corporation, professional association or corporation, or other entity, public or private. *Public health* (as used in the terms public health surveillance, public health investigation, and public health intervention), means population-level activities to prevent disease and promote health of populations. Such activities do not include uses and disclosures for the criminal, civil, or administrative investigation into or proceeding against a person in connection with obtaining, providing, or facilitating reproductive health care, or for the identification of any person in connection with a criminal, civil, or administrative investigation into or proceeding against a person in connection with obtaining, providing, or facilitating reproductive health care. *Reproductive health care* means care, services, or supplies related to the reproductive health of the individual.

Lastly, the proposed rule, once final, will require updates to the notices of privacy practices (NPP) used by covered entities. HHS will update its Model NPP to reflect these changes.

Conclusion

The proposed rule is the first substantive amendment to HIPAA in almost a decade. Although finalizing the regulatory process often takes a year or more, covered entities should understand that these changes, once final, will require amendments to existing HIPAA policies and procedures. Covered entities will also need to modify their processes in responding to requests for disclosure. In the meantime, employer plan sponsors may want to implement additional procedures to seek protective orders on behalf of participants in connection with state court orders and subpoenas requesting medical records related to abortion and reproductive services.

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