Confidentiality and Privacy in the time of COVID-19

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Setting the Scene

- Constant struggle between privacy, information flow and employer monitoring
  - Covid-19 pandemic has only magnified the complexities of these interests

- **Threshold Questions**
  - Constitutional rights vs. state statutes vs. HIPAA, etc.
  - Rights of the Employer
  - Quarantine Leave
  - Coworker Exposure
  - Screening Issues
  - Accommodations

HIPPA – The Privacy Rule

The Privacy Rule protects the Personal Health Information and medical records of individuals, with limits and conditions on the various uses and disclosures that can and cannot be made *without patient authorization.* This rule also gives every patient the right to inspect and obtain a copy of their records and request corrections to their file.

HIPAA – Covered Entities

- HIPAA applies only to "covered entities," which are defined as: (1) health plans; (2) healthcare clearinghouses; and (3) healthcare providers that electronically transmit certain health information (and certain "business associates" of covered entities).
- Employers who send or receive health information to a health care plan may be a "covered entity."
- Employers who do not fall into one of those categories are not "covered entities" and therefore not subject to the privacy restrictions under HIPAA.

HIPAA – Protected Health Information

- 45 C.F.R. § 160.103- The Privacy Rule
  - defines ““protected health information” as individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium
  - defines “individually identifiable health information” as information that is a subset of health information, including demographic information collected from an individual, and:
    - (1)Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
    - (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
      - *(i) That identifies the individual; or*
      - *(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual*.
  - “health care” is defined as “care, services, or supplies related to the health of an individual.

HIPAA- Covered Entities and Employment Records

- Even if an employer is a "covered entity," HIPAA still *does not* apply to health information contained "in employment records held by a covered entity in its role as an employer."
- HIPAA may apply to an *employer's request* for health information from a covered entity.

HIPAA- Public Health Exception

- Covered entities may, if directed by a Public Health Authority, disclose PHI for the purpose of preventing and controlling disease, injury or disability. *See* 45 CFR 164.512(b)(1)(i).
- Authorized measures include:
  - Reporting of disease or injury;
  - Reporting vital events (death tolls)
  - Conducting investigations and interventions

HIPPA – The Security Rule

The security rule defines and regulates the standards, methods and procedures related to the protection of electronic PHI on storage, accessibility and transmission. There are three safeguard levels of security.

- The Administrative safeguards deal with the assignment of a HIPAA security compliance team;
- Technical safeguards deal with the encryption and authentication methods used to have control over data access,
- Physical safeguards deal with the protection of any electronic system, data or equipment within your facility and organization. The risk analysis and risk management protocols for hardware, software and transmission fall under this rule.

HIPAA- Pro Tips

- Covered entities cannot disclose information to an employer without an authorization from the employee.
- When assessing requests for Catastrophic Leave, Disability Leave (Especially under 143) or requests for accommodation, have the employee execute an authorization to release information to the employer for the purposes of the inquiry.
- Segregate PHI into a confidential section of the personnel file and store the file in an encrypted or physically secure environment.
- Assess subpoenas under the authorization standard and determine if an objection to the request has been filed.

Privacy Requirements in Other Law- Texas Medical Privacy Act

- Texas Medical Privacy Act
  - The Texas Medical Privacy Act is more restrictive of marketing than HIPAA and prohibits the release of PHI for marketing purposes without consent or authorization from the individual.
  - An individual *may not be re-identified* from de-identified health information without obtaining the individual's consent. (Wellness program information/COVID- reporting requirements)
  - Has an embedded training requirement for individuals charged with handling PHI- Must be completed within 90 days of start date.
  - Fines are assessed on a per violation basis

Privacy Requirements in Other Law- ADA

- American with Disabilities Act (ADA)
  - Employers are required to secure PHI and treat the information as confidential
  - Confidential information includes:
    - Medical diagnosis
    - Prescribed treatments
    - That the employee has requested or is receiving a reasonable accommodation

Privacy Requirements in Other Law- ADA

- American with Disabilities Act (ADA)
  - Employers are required to secure PHI and treat the information as confidential
  - EEOC affirms that COVID-19 is “sometimes” a disability under the ADA
  - Exceptions to Confidentiality Rule
    - Supervisors and Managers may be informed regarding work restrictions and accommodations
    - First Aid and Safety Personnel may be informed when appropriate (when the disability may require emergency treatment)
    - Government Officials investigating compliance

Privacy Requirements in Other Law- ADA

- American with Disabilities Act (ADA)
- Exceptions to Confidentiality Rule
  - Information disclosed voluntarily by the employee is not subject to confidentiality under the ADA.
  - Disclosure is not “voluntary” if the employer solicited the information by making a medical inquiry or exam for the purposes of determining fitness for duty or assessing an accommodation request.
  - General inquiries are not medical inquiries unless the employer has pre-existing knowledge of a medical condition

Privacy Requirements in Other Law- ADA

- American with Disabilities Act (ADA)
- Improper Disclosures – Examples from case law
  - Employer shared the results of a medical exam with another employee who had no supervisory authority over the plaintiff
  - An employer who merged employees' medical records with personnel files upon termination
  - An employer who left a doctor's letter concerning plaintiff's reasonable accommodation request uncovered on a desk where other employees could see it
  - Employer who allowed the results of a drug screen to be leaked to the press

Privacy Requirements in Other Law- GINA

- Genetic Information Nondiscrimination Act (GINA)
  - An employer may never use genetic information to make an employment decision
  - It is unlawful for employers to *REQUEST, REQUIRE OR PURCHASE* an applicant or employee's genetic information unless
    - the information is "commercially and publicly available." (Genealogy websites?)
    - The employee receives voluntary health or genetic services that an employer offers
    - The employee's genetic information is inadvertently shared or shared pursuant to the FMLA.

Privacy Requirements in Other Law – Electronic Communication Privacy Act

- The ECPA protects wire, oral and electronic communications while those communications are being made, are in transit, and when they are stored on computers.
- The act applies to email, telephone conversations, and data stored electronically.
- The statute bars wiretapping and electronic eavesdropping, possession of wiretapping or electronic eavesdropping equipment, and the use or disclosure of information unlawfully obtained through wiretapping or electronic eavesdropping.

Privacy Requirements in Other Law – Stored Communications Act- Title II (ECPA)

- Stored Communication Act controls how governmental entities can access stored account information from private entities, including:
    - Internet Service Providers
    - Social Media Companies
    - Hosted email services
    - Communication stored on a cloud device
- SCA provides criminal penalties for anyone who intentionally accesses *without authorization* a facility through which an electronic communication service is provided or intentionally exceeds an authorization to access that facility and thereby obtains, alters, *or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system.*

Privacy Requirements in Other Law – Stored Communications Act- Title II (ECPA)

- Exceptions: An ISP may provide contents of a communication:
  - To a person employed or authorized or whose facilities are used to forward such communication to its destination.
  - To a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure immediately of communications relating to the emergency.

- NON-Public social media posts are protected by the SCA, but not posts obtained through the poster's contacts (*Frenemy Rule*)

Privacy Requirements in Other Law – Stored Communications Act- Title II (ECPA)

SCA- Pro Tips

- **Obtain User Consent**. The SCA authorizes disclosure with the consent of the user, customer, or subscriber. If practicable, obtain *user consent* before requesting data. But note, an employer may not be able to consent to the release of its employees' data. (Hiring paperwork)
- **Request Data from the User**. Request data (*e.g.*, social media information) directly from the user, rather than from the provider.
- **Request Non-Content Information**. Requesting non-content information may help you to identify other parties to the communication at issue who may be willing to consent to its release.

Privacy Requirements in Other Law- Data Breach

- Texas Data Breach Notification Law (Identity Theft Enforcement and Protection Act)
- Protects "Sensitive Personal Information"
  - The physical or mental health or condition of the individual
  - The provision of health care to the individual
  - Payment for the provision of health care to [illegible]vidual

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Privacy Requirements in Other Law- Data Breach

Texas Data Breach Notification Law (Identity Theft Enforcement and Protection Act)

- Under the Texas data breach notification law, businesses must implement and maintain reasonable procedures, including taking any appropriate *corrective action*, to protect sensitive personal information from unlawful use or disclosure. This Texas data breach notification law component is Texas' equivalent of a HIPAA Security Rule standard.
- An entity must disclose any breach of system security within 60 days of determining a breach has occurred.
- Entities required to *provide notification* of a data breach of at least 250 Texas residents must also notify the Texas Attorney General with specific details about the breach, including how many people were affected and what measures the entity has taken regarding the breach.

Privacy Requirements in Other Law – Health and Safety Code

- Section 81.046
  - (f) - Reports, records, and information relating to cases or suspected cases of diseases or health conditions may be released to the extent necessary during a public health disaster, including an outbreak of a communicable disease, to law enforcement personnel and first responders solely for the purpose of protecting the health or life of a first responder or the person identified in the report, record, or information. Only the minimum necessary information may be released under this subsection, as determined by the health authority, the local health department, or the department
- Section 161.0213
  - Reports, records, and information furnished to the commissioner or the commissioner's designee or the Texas Commission on Environmental Quality that relate to an epidemiologic or toxicologic investigation of human illnesses or conditions and of environmental exposures that are harmful or believed to be harmful to the public health are not public information under Chapter 552, Government Code, and are subject to the same confidentiality requirements as described by Section 81.046.

Privacy Requirements in Other Law – Texas Public Information Act

- Medical information is not considered public information under the Public Information Act.
    - *Under 552.002(d),* Public Information excludes protected health information as defined by Section 181.006 of the Health and Safety Code.
        - Open Records Decision No. 577 (1990)
            - any information acquired or created during an investigation under chapter 81 of the Health and Safety Code is confidential and may not be released unless an exception in the statute applies

Privacy Requirements in Other Law– Texas Public Information Act

- Section 552.101 of Government Code – Common Law Privacy
  - excepts from public disclosure "information considered to be confidential by … judicial decision."
  - This section encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public.
    - *Indus. Found. v. Tex. Indus. Accident Bd.,* 540 S.W.2d 668, 685 (Tex. 1976).
  - The type of information considered highly intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs.
    - Has excepted medical conditions prior- Texas Attorney General rulings

Background – Fair Credit Reporting Act

- Prohibits the unauthorized release of “medical information” in a consumer report
- Medical-related information includes medical information, an individualized list or description based on payment transactions for medical products or services, or an aggregate list of identified consumers based on payment transactions for medical products or services.

Privacy oriented Case Law

- *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11 (1905)
  - "the board of health of a city or town, if, in its opinion, it is necessary for public health or safety, shall require and enforce the vaccination and revaccination of all inhabitant thereof, and shall provide them with the means of a free vaccination."
  - The Court struck down Defendant's 14th Amendment claim

- *Katz v. United States,* 389 U.S. 367, 350 (1967)
  - There are personal privacy origins in numerous constitutional amendments

The Right to Privacy – Constitutional Rights

- 1st Amendment – Freedom of Association
- 4th Amendment – Freedom from unreasonable search and seizure
- 14th Amendment - Due Process Clause prevents states from abridging the privileges or immunities of citizens

Pro tips: What can an employer ask?

Employers may ask employees to provide:

- The outcome of a test result or diagnosis with a transmittable disease (Like Covid-19)
- Information related to symptoms of illness such as fever, chills, or cough
- Information to support a request for accommodation (religious or health based)

Pro tips: Can an employer require vaccination proof?

- Texas = NO
  - *Executive Order GA-40*, which prohibits any entity in Texas from requiring any individual to get a COVID-19 vaccine if they have an objection. But order does not include any restrictions on testing for COVID-19.
- Federal = YES
  - EEOC - Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19 and ask if they have been tested for COVID-19.
    - ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity."

Thank you!

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