BENEFIT INDEMNITY CORPORATION

HHS Finalizes HIPAA Privacy Reproductive Health Care Regulation Changes

Will Require Updates to Policies and Notice of Privacy Practices

What was the change and why?

The US Department of Health and Human Services, Office for Civil Rights (OCR), just published its Final Rule titled HIPAA Privacy Rule to Support Reproductive Health Care Privacy. The Agency also issued a Press Release, Fact Sheet, and Message from the Director of OCR. HHS developed this rule after the U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215 (2022) giving states the right to restrict access to reproductive health services, including abortion. Since the issuance of this decision, states have constructed a web of abortion laws and regulations that restrict or support whether, when and under what circumstances providers can offer abortion care and a pregnant individual can obtain an abortion. The most restrictive states may impose criminal penalties for accessing abortion services inside or outside the state of residence. The OCR is concerned that individuals seeking health care services may fear that their right to protect their private health information may no longer be secure. Individuals may fear that law enforcement agencies may request and use PHI to identify persons who seek, obtain, offer, or facilitate lawful reproductive healthcare, and take legal action against them. The concerns expressed by HHS extend to individuals who travel out-of-state where restrictions exist to obtain lawful reproductive healthcare in a state where it remains legal. These individuals may be reluctant to disclose information for lawful healthcare purposes if they are uncertain whether law enforcement from their home state will also have access to the same information.

What are the key takeaways:

1. **Prohibited Use and Disclosure of PHI Related to Reproductive Health Care -** Covered entities and business associates cannot use or disclose PHI where the information is sought to investigate or impose liability on individuals, health care providers, or others who seek, obtain, provide, or facilitate reproductive health care that is lawful under the circumstances in which such health care is provided, or to identify persons for such activities. The prohibition applies only in situations where a covered entity or business associate receives a request for PHI connected to reproductive health care and determines that one of the following circumstances applies:

    - The reproductive health care provided is lawful under the law of the state and under the circumstances in which the entity is providing it.
    - Reproductive health care is lawful under state law, required, or authorized by federal law, including the US Constitution, under the circumstances, regardless of the state provided.
    - The reproductive health care was not provided by the covered entity or business associate, unless the covered entity or business associate has (1) actual knowledge that the reproductive health care was not lawful or (2) factual information provided by the person requesting the information that demonstrates a substantial factual basis that the reproductive health care was not lawful under the specific circumstances in which it was provided; this is referred to as the "presumption" under the Final Rule.

Covered entities and business associates remain permitted to disclose PHI related to reproductive health care with authorization from the individual or their personal representative.

However, the Final Rule permits covered entities to decline to disclose PHI to a person claiming to be an individual's personal representative if the individual has been or may be subjected to domestic violence, abuse, or neglect or if the covered entity reasonably believes that disclosure to the personal representative could endanger the individual.

2. **Attestation Required for Certain Uses and Disclosures -** A covered entity or business associate must receive a valid attestation before using or disclosing PHI, potentially related to reproductive health care, if the PHI is for any of the following purposes:

   - Health oversight activities
   - Judicial and administrative proceedings
   - Law enforcement
   - Coroners and medical examiners

   The attestation, including the following elements, are necessary for PHI:

   - A description of the information requested.
   - The name of any individual(s) or a description of the class of individuals whose PHI within the request.
   - The identity of the person(s) or class of persons requested to disclose PHI.
   - The identity of the person(s) or class of persons asking for the PHI
   - A clear statement that the recipient will not use or disclose the PHI for a prohibited purpose.
   - A statement that a person may be subject to penalties pursuant to 42 USC 1320d-6 if that person knowingly and in violation of HIPAA obtains individually identifiable health information relating to an individual or discloses individually identifiable health information to another person.

   The attestation must be in plain language and not combined with any other document, such as a general authorization form.

   The Final Rule requires strict compliance with the attestation rules. An attestation may be invalid if it fails to include the information required. OCR notes that it intends to publish a model attestation form prior to the Final Rule's compliance date.

3. **Notice of Privacy Practices -** Covered entities must revise their Notice of Privacy Practices to include, among other things, information regarding the types of uses and disclosures prohibited by the Final Rule, as well as the scenarios when disclosures can occur only after receipt of a sign attestation. Covered entities have until **February 16, 2026**, to comply with the updated Notice of Privacy Practices requirements.

Action Items for Group Health Plan Sponsors

The Final Rule requires covered entities to do the following:

1. Update HIPAA Privacy Policies and Procedures to comply with the Final Rule by the compliance date of **December 22, 2024.**

2. Update HIPAA Notice of Privacy Practice to comply with the Final Rule and the recent 42 CFR Part 2 regulations addressing substance use disorder benefits by the compliance date of **February 16, 2026.**

3. Provide updated workforce training by the compliance date of **December 22, 2024.**

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