

# FSA 2021 Compliance and Risk Management Conference

## HIPAA RIGHT OF ACCESS

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# HIPAA

## What Is This About?



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# What will be covered today?

- HIPAA Overview
- HIPAA Right of Access
- Recent OCR Settlements
- Proposed Changes to HIPAA
- Quiz!



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## HIPAA Overview

The Health Insurance Portability and Accountability Act (HIPAA) was enacted in 1996.

- Congress enacted the Health Information Technology for Economic and Clinical Health (HITECH) Act as part of the American Recovery and Reinvestment Act of 2009, which made changes to the HIPAA Rules, including a new breach notification requirement. HITECH regulations have been in effect since 2013.



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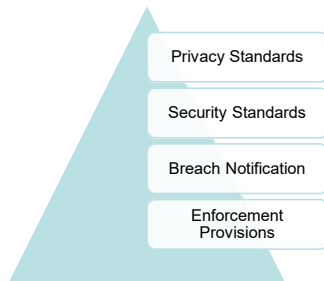
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## Key HIPAA Components



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## What is the Privacy Rule?

- Sets national standards to protect the privacy of individuals' Protected Health Information (PHI)
- Applies to "covered entities"



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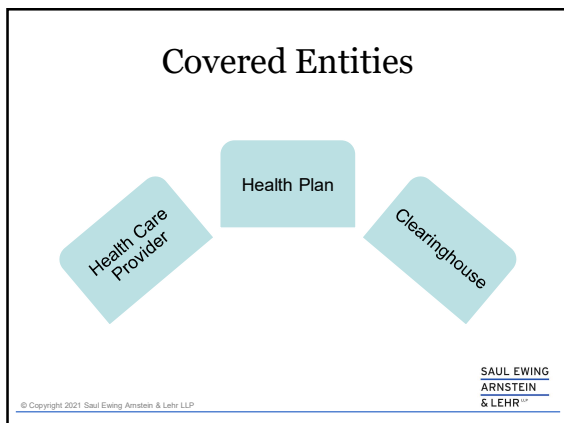
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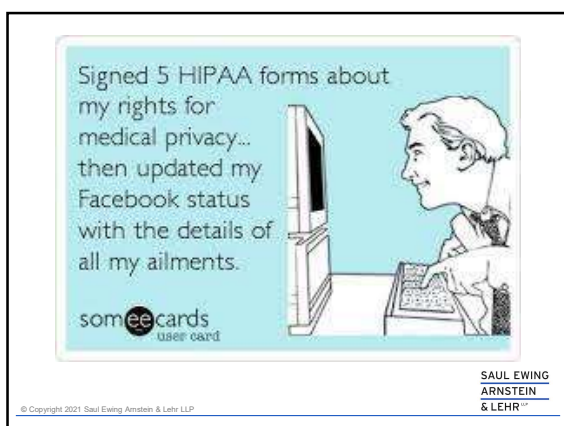
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## What is Protected Health Information?

- Health information that identifies an individual or there is a reasonable basis to believe it could identify an individual and that is transmitted or maintained in electronic or any other form or medium

\*According to your HIPAA release form  
I can't share anything with you.\*

- Limited exceptions.

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## What is Health Information?

- Any information (including genetic), oral or recorded, in any form, that:
  - Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
  - 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.



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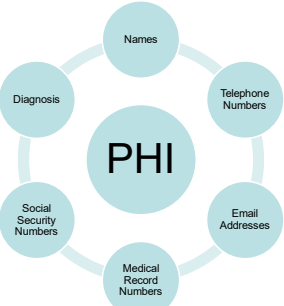
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## Examples of PHI



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## Individual Rights Under HIPAA

- Accounting of Disclosures
- Amend PHI
- Request Restrictions
- Receive communications of PHI by alternative means or at alternative locations
- Receive a Notice of Privacy Practices (NPP)
- Individual Right of Access**



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## HIPAA Right of Access

- Privacy Rule requires covered entities to provide individuals with access to PHI
  - Designated Record Set
  - Within 30 days of receipt
- Right to
  - Inspect
  - Obtain a copy
  - Direct covered entity to transmit a copy to someone/somewhere else



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## HIPAA Right of Access

- Reasonable cost
- Form and format requested
- As long as the information is maintained by a CE
  - Regardless of date information was created
- Whether maintained in paper, electronically
  - Onsite or remote
- Regardless of where PHI originated
  - From the patient, another provider, *etc.*



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## Designated Record Set

- Medical records and billing records
- Enrollment, payment, claims adjudication, and case or medical management records
- Other records used to make decisions about individuals
  - Includes records used to make decisions about any individuals, whether or not the records have been used to make a decision about the particular individual requesting access

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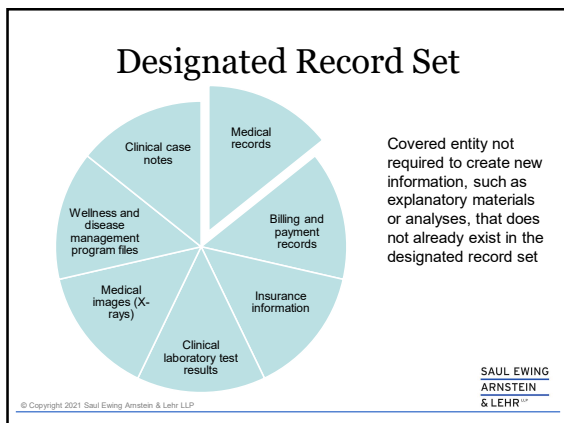
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### What is not included?

- Information not used to make decisions about individuals
  - Practitioner or provider performance valuations
  - Quality control records
- Psychotherapy notes
- Information compiled in anticipation of legal action/proceeding

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### Who can access?

- Individual
- Personal representative
  - Has authority under State law to make health care decisions for the individual
- Attorney with valid HIPAA authorization
- Another person as directed by the individual



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## How is the information requested?

- CE may require request in writing
  - Must inform individuals of this requirement
- Can be done electronically (email patient portal)
- CE may require individual use CE's own form
  - Must make form easily accessible



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## Identity Verification

- CE must verify the identity of the individual
  - Type and manner of the verification at CE's discretion
- Cannot create barriers to or unreasonably delay access to PHI



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## Form, Format, and Manner

- CE must provide records in the "form" and "format" requested
  - If not readily processible, in hard copy
- Manner: Convenient time and place to pick up a copy or inspect the PHI
  - Emailed or transmitted

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## Timeliness

- Provide access within 30 days
  - HHS encourages response ASAP
- Extension for additional 30 days
  - Inform individual within first 30 days of reason for delay and date of access



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## Reasonable Fees

Acceptable Fees	<ul style="list-style-type: none"> <li>• Labor</li> <li>• Supplies (CD or USB drive)</li> <li>• Postage</li> <li>• Preparation for explanation/summary (when agreed to)</li> </ul>
Unacceptable Fees	<ul style="list-style-type: none"> <li>• Verification</li> <li>• Documentation</li> <li>• Searching for and retrieving PHI</li> <li>• Costs for data access, storage, infrastructure</li> </ul>

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## Denial of Access

- Grounds for Denial: Unreviewable
  - Psychotherapy notes
  - Information compiled in anticipation of legal proceeding
  - Inmate requests a copy of PHI
  - PHI is part of a research study
  - Privacy Act protected records
  - PHI obtained by someone other than a health care provider



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## Denial of Access

- Grounds for Denial: Reviewable
  - Access is reasonably likely to endanger the life/physical safety of the individual or another
  - Access is reasonably likely to cause substantial harm to a person referenced in the PHI
  - Access to a personal representative is reasonably likely to cause substantial harm to the individual or another

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## Carrying Out the Denial

- Provide a denial in writing within 30 days
- Denial must:
  - Be plain language
  - Describe basis for denial
  - Describe right to have decision reviewed and how to request
  - Describe how to submit complaint to HHS OCR

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## Review of Denial

- If reviewable, covered entity must refer their request to the designated reviewing official
- Reviewing official determines whether to affirm or reverse denial
- Covered entity must promptly provide written notice to individual of determination

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## Right of Access Enforcement Actions

- 20 Right of Access Initiative Enforcement Actions
- Common themes:
  - Individual (patient, family member, third party) request for records
  - Lengthy (often several months) before responding to requests
  - OCR investigates and still covered entity does not provide access
- No CE or BA is too small!

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## Recent OCR Settlements

- Diabetes, Endocrinology & Lipidology Center, Inc., (DELC) agreed to pay \$5,000
    - DELC is a health care provider, only office in Martinsburg, West Virginia
  - July 2019: Parent requested minor child's PHI
  - August 2019: Complaint filed
  - October 2019: OCR investigated
  - May 2021: DELC provided records
- Corrective Action Plan with 2 years of monitoring

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## Recent OCR Settlements

- Riverside Psychiatric Medical Group (Riverside) agreed to pay \$25,000
    - Group Practice in Riverside, CA
    - Child and adolescent psychiatry, geriatric psychiatry, psychology
  - February 2019: Patient requested copy of medical record
  - March 2019: OCR received complaint
    - OCR provided technical assistance
  - April 2019: second complaint
  - October 2020: Riverside provided requested records
- Corrective Action Plan with 2 years of monitoring

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## Recent OCR Settlements

- Peter Wrobel, M.D., P.C. d/b/a Elite Primary Care ("Elite") agreed to pay \$36,000
    - Primary care provider in Georgia
  - Patient requested records sent to new provider
  - April 2019: OCR received complaint
    - OCR provided technical assistance
  - October 2019: OCR received second complaint
  - May 2020: Elite provided records
- Corrective Action Plan with 2 years of monitoring

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## Proposed Changes to the HIPAA Privacy Rule

- Shorten covered entity response time for Right of Access requests to **15 days**
  - **One-time 15 day extension**
- Prohibit covered entity from imposing unreasonable measures on an individual
  - Such as requiring the use of a form that requests extension information unnecessary to fulfill request

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## HIPAA Right of Access Interactive Quiz

Should a Covered Entity provide a Designated Record Set to an individual's attorney?

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### HIPAA Right of Access Interactive Quiz

Can a Covered Entity require a Right of Access Request be in writing?

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### HIPAA Right of Access Interactive Quiz

Can a Covered Entity charge an individual for putting records on a CD or USB drive?

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### HIPAA Right of Access Interactive Quiz

How long does a Covered Entity have to respond to a Right of Access request (providing records, extension, or denial)?

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For participants in the health care industry, protecting individuals' health information is a critical responsibility governed by federal regulations—including the Health Insurance Portability and Accountability Act (HIPAA)—as well as state laws and regulations. Entities that handle protected health information must safeguard this information and follow strict rules when breaches occur to avoid hefty penalties and significant reputational damage. Saul Ewing Arnstein & Lehr's Health Care Group provides HIPAA resources on this page that include:

- A database of recent alerts our attorneys have published on HIPAA violation settlements that parties have reached with the U.S. Health & Human Services (HHS) Office for Civil Rights (OCR) categorized by (1) type of entity, (2) size of health care provider, and (3) monetary penalty

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## Practical Suggestions

- Put a policy and procedure in place and follow up!
  - Training
  - Evaluation of process and staff
- Address challenging requests immediately
- Ensure timely access to off-site records
- Follow changes to HIPAA in coming months
  - Update policies accordingly

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## Questions?



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