

Know your rights for medical record access in post-Roe landscape

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Effective Aug 11, 2022
Published Aug 15, 2022
Last Reviewed Aug 11, 2022

Compliance

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Editor's note: In the July 18, 2022, issue, Part B News discussed the implications of the Dobbs decision allowing state abortion bans on cross-border prescribing and treatment of abortion-related drugs and services (*PBN 7/18/22*). In the second segment below, you'll discover how much protection you have if you choose not to share medical records with prosecutors looking for evidence that your patient has sought or obtained such drugs and services, and what the recent HHS guidance on related emergency services and medication means for your practice.

It is expected that prosecutors will seek medical records to support charges against patients they suspect of violating new statutes against abortion, either as evidence of illegal treatment or to determine from notes that the patient sought such services. HIPAA offers some limited protection to practices that don't want to give them up, and case law suggests the Privacy Law actually prohibits the surrender of protected health information (PHI) in some circumstances (*PBN 1/28/19*).

However, if you find yourself in this position, it is vital that you talk to your lawyer, because HIPAA is not a blanket get-out-of-providing-records card.

"When there's a qualifying court order, HIPAA falls away as a relevant law, because the Privacy Rule basically allows for the disclosure of protected health information where required by law," says David Quinn Gacoch, partner with McDermott Will & Emery LLP in Boston.

"There are a lot of misconceptions out there that HIPAA is going to protect [your patient data] 100%," says Bethany A. Corbin, Esq., senior counsel at Nixon Gwilt Law and expert on digital health and "femtech" issues. "HIPAA allows providers to disclose your data if the [request to do so] meets one of the 'permissible disclosure' exceptions" — that is, the provider is allowed to disclose PHI under HIPAA but is not required to do so, as with a request from law enforcement.

Gacoch notes a recipient of such a subpoena "could seek to quash or get a protective order against that subpoena based upon lack of jurisdiction over the recipient, undue burden" or other factors. And some state laws, such as one signed by Massachusetts governor Charlie Baker on July 29, may offer protection from a subpoena from another state regarding an abortion legally performed in yours.

Revisit policies and procedures

You will want to have policies and procedures (P&P) in place, as HIPAA compliance requires, that explain when and how disclosures should and should not be made, both in informing staff reactions to such requests and in defending your actions in the event of a challenge.

"Say you get a subpoena," Corbin says. "Your P&P might say, 'escalate it to the legal department,' to make sure [your decision] is not arbitrary and capricious. It should include a process that can be applied fairly across-the-board."

Corbin adds that it's acceptable to have different criteria for the types of data you're going to disclose. "For instance," she says, "if it involves reproductive health data, the company may have a policy that says it will not disclose that type of data. The companies should have policies and procedures that are consistent — meaning that if they say they won't disclose reproductive health data, they then don't disclose it for some individuals while withholding it for others."

Stacey L. Callaghan, a partner with McDermott Will & Emery LLP in Chicago, encourages practices to revisit their P&P now to "make sure that everyone knows what's going on, do a quick training on it. And make sure they all know how to follow your organization's rules if a request comes in."

You might also want to warn patients who seek abortion care rendered illegal by new laws that not only their HIPAA-covered medical records, but their own digital records of health inquiries and activities — such as what may be contained in emails or pregnancy tracking app data on their phone — may be fair game, and these enjoy no HIPAA protection at all.

Corbin cites the 2017 Mississippi case of Latice Fisher, who was charged with second-degree murder for the death of her fetus. "As part of the case, prosecutors reviewed Ms. Fisher's cell phone data and found internet searches related to the

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purchase of abortion pills," Corbin says. "The data was used to help prove her intent to receive an abortion."

Also relevant is a recent Nebraska case in which prosecutors obtained private Facebook messages to bolster an abortion-related case. Facebook parent Meta claimed in an Aug. 9 statement they were responding to "valid legal warrants from local law enforcement" and that "the warrants did not mention abortion at all."

Fed action, small difference

The *Dobbs* decision led to a presidential press conference and several statements from the Biden administration. The most consequential of these for provider purposes are thought to be two HHS guidance documents on patients' Emergency Medical Treatment & Labor Act (EMTALA) rights as they relate to abortion services, issued July 11; and "Guidance to Nation's Retail Pharmacies: Obligations under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services," issued July 14.

Caroline Reigney, partner with McDermott Will & Emery in Washington, D.C., notes that this guidance mainly interprets existing law and regulation and doesn't change either.

"I think that the federal government under the current administration is trying to do what they can do based on existing federal laws and regulations," Reigney says. "They're searching for any creative arguments they can put out there for providers to hold on to."

The former guidance asserts the primacy of EMTALA as a federal statute over state law when it comes to health care decisions under circumstances in which the "physician believes that a pregnant patient presenting at an emergency department, including certain labor and delivery departments, is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician must provide that treatment." This, HHS says, takes precedence over contradictory state law.

On August 2, the U.S. Department of Justice brought suit against the state of Idaho on the grounds that its abortion law conflicts with that interpretation of EMTALA.

Given that EMTALA applies only to covered hospitals with emergency services, it has little relevance to physician practices. The pharmacy guidance, however, could impact your patients when it comes to drugs you may prescribe that are associated with abortion if pharmacies hesitate to dispense on those grounds, even if they are prescribed for something else. The guidance tells pharmacists that failing to dispense under those circumstances may be considered discriminatory under federal law.

For example, HHS specifically cites methotrexate as a drug that may be used to end an ectopic pregnancy, which may be interpreted by some pharmacists as illegal, notwithstanding its clinical necessity. "If a pharmacy refuses to fill the prescription because it will halt the growing of cells and end the pregnancy," the guidance says, "it may be discriminating on the basis of sex."

If the drug is prescribed for rheumatoid arthritis but the pharmacist withholds under the same reasoning, as Alice V. Harris of the Nexsen Pruet law firm in Columbia, S.C., says she's seen reported, HHS warns it may be discriminating on the basis of disability.

"The conundrum is that state law may ban certain drugs outright or as a means to induce an abortion, but the failure to fill the same prescription may violate federal law," Harris says. But note: "While some federal laws may provide a defense during prosecution, the HHS guidance isn't a bar to state prosecution," Harris adds. She expects the current conflicts to be worked out in court — and that could take years.

Resources

Executive Order 14076, "Protecting Access to Reproductive Healthcare Services," July 13, 2022:

www.federalregister.gov/documents/2022/07/13/2022-15138/protecting-access-to-reproductive-healthcare-services

HHS Secretary letter to health care provider re: EMTALA, July 11, 2022: www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf

HHS, "Guidance to Nation's Retail Pharmacies: Obligations under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services," July 14, 2022: www.hhs.gov/civil-rights/for-individuals/special-topics/reproductive-healthcare/pharmacies-guidance/index.html



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