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Director and State Public Health Officer

Gavin Newsom
Governor

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Dear Local Health Officers and County Health Executives:

We are writing to address the U.S. Department of Health and Human Services' final rule issued to modify the Standards for Privacy of Individually Identifiable Health Information ("Privacy Rule") under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the Health Information Technology for Economic and Clinical Health Act of 2009.

Background

The final rule was effective on June 25, 2024, and the compliance date was December 23, 2024. The modified Privacy Rule prohibits covered entities and business associates from using or disclosing protected health information ("PHI") for the purposes of prosecution or investigation of persons merely seeking, obtaining, providing, or facilitating reproductive health care; or for identifying someone for the same. (45 Code of Federal Regulations ("CFR") section 164.502(a)(5)(iii).) Additionally, the final rule includes the requirement that covered entities and business associates "not use or disclose PHI *potentially related to reproductive health care for purposes specified in 45 CFR sections 164.512(d)-(g)(1)*, without obtaining an attestation that is valid" and verifies that the PHI will not be used for a prohibited use cited in 45 CFR section 164.502(a)(5)(iii). (45 CFR section 164.509, emphasis added.) The activities requiring an attestation under 45 CFR section 164.509 are: health oversight activities (e.g., audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; or other activities for the oversight of a health care system; government benefit program; regulatory program; or compliance with civil rights laws); judicial and administrative proceedings; law enforcement purposes; or coroners and medical examiners. (45 CFR sections 164.512(d)-(g)(1).)

Public Health Impact

In attempting to comply with this modified Privacy Rule, some covered entities are requiring local health departments ("LHDs") to submit an attestation when requesting medical records for public health purposes. 45 CFR section 160.103, 45 CFR section 164.509, and the Federal Register, 89 FR 32976, page 491 provide that public health entities are exempt from having to submit an attestation if the purpose for the request is

for “public health surveillance,” “public health investigation,” or “public health intervention” intended to prevent disease in or promote the health of populations.

While CDPH is unable to provide legal advice to LHDs, CDPH will share a few resources for LHDs to discuss with their respective county counsels when addressing attestation requests:

- Code of Federal Regulations
 - 45 CFR section 160.203(c) State law preemption for disease reporting and public health surveillance, investigation, and intervention
 - 45 CFR section 160.103 Definition of “Reproductive health care”
 - 45 CFR section 160.103 Definition of “Public Health” and how it is used in “public health surveillance,” “public health investigation,” and “public health intervention,” and these activities do not include those activities with any purposes specified in 45 CFR section 164.502(a)(5)(iii)
 - 45 CFR section 164.502(a)(5)(iii) Reproductive health care
 - 45 CFR section 164.509 Covered entity or business may use or disclose PHI potentially related to reproductive health care for purposes specified in 45 CFR sections 164.512(d), (e), (f), or (g)(1), but requires an attestation

- Federal Register, 89 FR 32976, HIPAA Privacy Rule to Support Reproductive Health Care Privacy. This is a lengthy, but very informative document, and it is recommended to search for the phrase “public health” within the document in order to find parts your counsel may deem pertinent. Here is an example:
 - [HIPAA Privacy Rule to Support Reproductive Health Care Privacy, page 491](#)
“[t]he Department does not require a public health authority to supply an attestation to a covered entity to receive PHI of an individual where that disclosure is intended to prevent disease in or promote the health of populations.”

- Network for Public Health Law Webinar
 - Webinar: <https://www.networkforphl.org/resources/final-hipaa-rule-on-reproductive-health-care-privacy-impacts-for-public-health/>
 - Slides: <https://www.networkforphl.org/wp-content/uploads/2024/05/Final-HIPAA-Rule-on-Reproductive-Health-Care-Privacy.pdf>

Sincerely,



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