

# State Law Ambiguities Confronting Health Database Holders

*A Few Practical Pointers*

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*Member, Kansas Health Information Exchange Initiative*
- FDA Contract - 50 State Privacy Law Survey
  - “Critical Action Matrix” – Preemption Analysis Tab
  - Report Appendix Contains 50 State Overview



# Problem for Database Holders

- State law “tort,” “statutory” and “breach” dual liability
  - **Tort:** 4 common law torts (case law)
    - Appropriating the plaintiff's identity for the defendant's benefit
    - Placing the plaintiff in a false light in the public eye
    - Publicly disclosing private facts about the plaintiff
    - Unreasonably intruding upon the seclusion or solitude of the plaintiff
  - Statutory: Many state statutes prohibit release of “confidential health information” (mental health, HIV, genetic info) with requirements greater than HIPAA
  - Breach: Notification requirements (2005 Choicepoint)
    - 45 states have breach notification laws since 2005
    - Choicepoint cost for inadvertent disclosure of 163,000 records
    - Over \$50 mil in 2005 (FTC \$15 mil fine + other costs)



# HIPAA Preemption Analysis

- HIPAA Privacy Rule *preempts* state law unless:
  1. Specific “determination” made by HHS Secretary;
  2. State law “relates to privacy of individually; identifiable health information” and “more stringent;”
  3. State law authorizes public health reporting; or
  4. State law requires health plans to report or provide access to certain information

4. 45 CFR 160.201 - 160.205



# The Privacy Dilemma

- Which databases subject to state law?
  - Health Insurance/Claims Data (Private)
  - Government Agency Databases
  - Hospital/Health Institution/Medical Professionals
- Difficult to determine whether state privacy laws are “more stringent”
- Health Insurance Association of America provides non-members with a \$51,200 “HIPAA Preemption Analysis” (Study Cost – approx. \$1 million)
- Numerous other studies have been undertaken



# Some Inconsistent Sources of State Law

- Statutes on Criminal Procedure/Law Enforcement
- State Department of Aging
- State Board of Behavioral Sciences
- State Board of Healing Arts
- State Board of Nursing
- State Board of Optometry
- State Board of Pharmacy
- State Dental Board
- State Department of Health & Environment (hospitals, ambulatory surgery centers,  
home health, hospices, adult care homes and labs)
- State Emergency Services Board
- State Insurance Commission
- State Social Rehabilitation Services (Medicaid regs/manuals)
- Workers Compensation



# “Critical Action” Matrix Tool

- E.g., Excel Spreadsheet (e-mail me!)
- Over 200 state law privacy fields analyzed in HIPAA preemption tab
- Identified approximately 20 grey areas with HIPAA
  - Genetic information, donor databases, medical records resulting from arrest, data stored without court orders, data stored without State permission



# Some Grey Areas

## “More Stringent” State Regulation

- Alabama – “Controlled substances” Code of Ala. § 20-2-215 (2009)
- Hawaii – “Birth defect studies” HRS § 324-43 (2009)
- Idaho – “Individual pharmaceutical records” Idaho Code § 54-1727 (2009)
  - *Need permission from Dept. of Health & Human Welfare (many states have similar statutes)*
- Wyoming – Medical records ‘directly or indirectly’ identifying patients. Wyo. Stat. § 25-10-122 (2009)





# Practical Pointers

- Know where data is held versus where it is disclosed
- Secure proactive consents from government agencies
- Complete federal-state preemption analysis/audit for every database  
*E.g., “Critical Action Matrix (Kansas)”*
- Know breach notification obligations under applicable state and federal (they are sometimes different)
- Data breach insurance



# Thank you

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