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Issue One

Network Contracting to Address Health-Related Social Needs

CONSIDERATIONS FOR HIPAA COMPLIANCE



Health Law Lab

Innovating to address the social determinants of health



**CENTER for HEALTH LAW
and POLICY INNOVATION**

HARVARD LAW SCHOOL

ABOUT THIS RESOURCE

As opportunities to address health-related social needs (HRSN) as part of health care continue to grow, many states, health care organizations, and community-based organizations (CBOs) providing social care supports are looking to networked HRSN service delivery. Specifics vary, but this approach generally (1) involves coordination and collaboration between CBOs to perform under one or more contracts with health care organizations, and (2) utilizes a hub-and-spoke design in which certain responsibilities, technologies, and processes are situated in a central organization (a “hub”) that supports participating service providers (each a “spoke”). Network contracting may be driven by a range of goals including:

- Scaling effective interventions;
- Improving care coordination and reducing fragmentation;
- Minimizing administrative and other “back-end” operations-related responsibilities of CBOs on the front line;
- Streamlining and otherwise simplifying contracting for health care organizations; and
- Centralizing infrastructure investments (e.g., billing capabilities, referral platforms) to minimize duplication of efforts.

This resource was developed to aid organizations in identifying and navigating unique legal and regulatory considerations for network-based models of social care integration with health care.

The focus of this particular issue brief is the primary federal patient data privacy law, HIPAA.

Why zoom in on HIPAA? Challenges navigating HIPAA are often front-and-center in conversations between health care and CBOs interested in partnering to improve health and well-being. Many common questions about HIPAA come up: Under what circumstances can a health care organization share patient information with a CBO? Is the CBO subject to HIPAA? What privacy policies and protocols are expected of the CBO? In many instances, the answers to these questions exist in a “gray area,” meaning the answers are not clear; the “right” way forward is subject to interpretation.

Network contracting may make analysis even more complicated or confusing for CBOs by adding parties and layers of information sharing into the picture. It is important to think carefully about how a CBO network will approach compliance with HIPAA requirements and for everyone involved to understand their respective obligations under the law.

Caution: The resource does not and should not be construed as providing legal advice—organizations are encouraged to conduct and document their own analyses through the lens of their own specific facts and circumstances. For specific legal questions, please consult an attorney.

ABOUT HIPAA

The major federal patient privacy laws are the Health Insurance Portability and Accountability Act of 1996, the Health Information Technology for Economic and Clinical Health Act, and associated implementing regulations (referred to collectively as “HIPAA”).

This section introduces some common terms and key provisions of HIPAA in place to protect patient privacy. It is not a comprehensive primer on HIPAA. For additional resources on HIPAA written for CBOs developing programming with health care systems, contracting with health plans, and otherwise integrating into health care, visit www.healthlawlab.org.

What information is protected under HIPAA? Protected Health Information.

HIPAA protections apply to a particular subset of information: health information created, used, or maintained by an organization subject to HIPAA requirements in any medium (e.g., on paper, electronically, orally) that identifies or can reasonably be tied back to an individual.¹ This information is called Protected Health Information or PHI. PHI, as defined by HIPAA, consists of categories of information (called identifiers) paired with information about an individual’s physical or mental health, the provision of health care to an individual, or future payment for the provision of health care to an individual.² Once a data set containing PHI is created, the data continue to be PHI even if the health-related information about individuals is removed and only their demographic information remains.

Who is subject to HIPAA? Covered entities and their business associates.

Covered entities are specific categories of individuals or organizations subject to HIPAA requirements.³ Doctors, community health centers, hospitals, and other health care providers that transmit PHI electronically for purposes of conducting transactions regulated under HIPAA (such as claims processing), as well as health plans, are covered entities. A business associate is a person or entity that provides certain services to or performs certain activities on behalf of a covered entity that require access to the covered entity’s PHI.⁴ Business associates are subject to certain HIPAA requirements, which are laid out in a business associate agreement. Also, a business associate can have business associates of their own—i.e., subcontractors that create, receive, maintain, or transmit PHI on behalf of a business associate. Subcontractor business associates must agree to the same restrictions and conditions that apply to the original business associate with respect to PHI.

What does HIPAA require?

The development and ongoing monitoring and implementation of a compliance program.

HIPAA rules address standards, policies and procedures to protect the privacy and security of Protected Health Information (PHI). These rules are organized into three parts: the Privacy Rule, the Security Rule, and the Breach Notification Rule.

Privacy Rule



Governs disclosures of PHI (mandatory and permissive) - how and under what circumstances information is shared

Security Rule



Sets physical, technical, and administrative standards to protect the security, integrity, and confidentiality of PHI

Breach Notification Rule



Sets out when and to whom a covered entity must report data breaches

SEVEN CONSIDERATIONS FOR NAVIGATING HIPAA IN A NETWORK CONTRACTING ARRANGEMENT

Organizations pursuing a network contracting model should take into account the following as they work to address the implications of HIPAA on their arrangements.

What does CBO network participation mean for my relationship to HIPAA?

1.

Relying on a hub-and-spoke model does not necessarily impact whether any single participating organization meets the definition of a HIPAA covered entity or business associate. Organizations in the arrangement should be individually evaluated for their status under HIPAA.

Example 1: CBO A hires an attorney who helps them conclude that the organization meets HIPAA's broad definition of a health care provider and, because CBO A submits claims or encounter data electronically to health plans for services provided to members (a HIPAA-regulated transaction), CBO A is a covered entity. Sometime later, a new entity, Hub A, forms to coordinate referrals between health care systems and community organizations in CBO A's area. CBO A joins Hub A's network so that it is part of the referral system. If CBO A still meets HIPAA's broad definition of a health care provider because it still submits claims electronically to health plans for services provided to their members, CBO A is still a covered entity.

Example 2: Instead of joining up with Hub A, CBO A partners up with a different entity: Hub B. Hub B contracts with health plans to coordinate and provide HRSN supports to plan members. Hub B handles many associated services, including eligibility verification and claims management, while subcontracting with CBOs to actually furnish the HRSN supports. If CBO A submits claims or encounter data to Hub B, which then submits the claims to a health plan on CBO A's behalf, CBO A is still submitting claims electronically in a way that meets HIPAA's definition of a covered entity.

2.

An organization can be a covered entity in one context, and a business associate in another.

Example 3: CBO B is a covered entity because it provides health care directly to individuals and conducts regulated transactions electronically. Given its expertise working with hospitals and health plans, CBO B also takes on the role of hub in the community. CBO X, another covered entity, pays a monthly fee to CBO B to manage various operational aspects of the network, such as contract negotiation and billing. CBO B, acting as the hub, may be a business associate of CBO X, in which case the parties should have a business associate agreement between them.

3.

Because it is common for health care partners to insist that a CBO sign a business associate agreement in order to receive PHI, questions may come up about second-level data sharing—i.e., whether and when that CBO network member may share associated PHI with other network members. All parties should be on the same page about whether other network members are subcontractor business associates.

Example 4: Hub B is preparing to sign a new business associate agreement with Hospital D, a HIPAA covered entity. Before they finalize the agreement, Hub B explains that, per its policies and procedures, Hub B has individuals sign a HIPAA authorization to share their information with spokes; Hub B does not enter into subcontractor business associate agreements with spokes. Hospital D is satisfied by the protocols in place and agrees to move forward with this understanding in mind.

- 4.** In general, individuals must give written HIPAA authorization for their PHI to be shared or disclosure of their information must otherwise be permitted or required under HIPAA. An authorization can be designed to allow for network-wide information-sharing or to release information to one or more specific CBO members.

Example 5: In North Carolina, Medicaid beneficiaries sign a HIPAA-compliant authorization form in order to participate in the Healthy Opportunities Pilot.⁵ This consent allows beneficiary information to be shared with organizations within the NCCARE360 network* for the purposes of coordinating or providing pilot services and support, subject to the platform's privacy and security requirements.

**NCCARE360 is a statewide technology platform that enables health care providers to screen for unmet HRSN, send and receive electronic referrals to CBO providers, and track outcomes.*



HIPAA Permitted Disclosures: Treatment, Payment, and Operations

HIPAA allows a covered entity and its business associates to share PHI with other parties for treatment, payment, and health care operations. An exchange of PHI with and between CBOs might be a disclosure for treatment purposes. It is also possible that disclosures to and between CBOs are for care management purposes, in which case the disclosure might fall under the definition of health care operations.

Implications of these provisions for CBOs is subject to pending rulemaking, initiated in January 2021, by the U.S. Department of Health and Human Services Office for Civil Rights.⁶

- 5.** Business associate agreements govern permissible uses and disclosures of PHI by the business associate. If a business associate relationship exists between network members, the parties should ensure that they execute and abide by a HIPAA-compliant business associate agreement.

What are the legal rights, risks, and responsibilities of network members?

6. Data sharing agreements help ensure that organizations participating in the network understand clearly their rights and responsibilities. A data sharing agreement is a legal document that lays out data-related components of the arrangement such as: which types of data will be exchanged, who has access to what information, limitations on uses of data, requirements relating to privacy and security, and the liability of each organization for any privacy or security failures.

7. In general, a covered entity is not liable for the HIPAA violations of a business associate unless the covered entity knew about the violation and failed to demand a cure or terminate the business associate agreement. Members of a network are generally not liable for the HIPAA violations of other members unless that liability is imposed by contract.

Example 6: Network contracts may contain cross-indemnification provisions so that, for example if one participating CBO's security failure results in the breach of another network member's PHI, the member whose PHI was breached can make a claim against the member with the security failure. But, again, this is based on contracts or common law, not any regulation.

CONCLUSION

Navigating HIPAA as a CBO network warrants careful consideration of each party's relationship to the law independently and within the arrangement. Incorporating these analyses into the development of the model, its policies, and procedures will help ensure a feasible, meaningful, and legally compliant approach to privacy.

Endnotes

- 1 45 C.F.R. § 160.103.
- 2 45 C.F.R. § 160.103; 45 C.F.R. § 164.514(b)(2)(i).
- 3 45 C.F.R. § 106.103.
- 4 45 C.F.R. § 106.103; see also 45 C.F.R. § 164.502(3); 45 C.F.R. § 164.504(e); 45 C.F.R. § 164.532(d)-(e).
- 5 See, e.g., N.C. Dep't of Health and Human Servs., Consent Form for NC Medicaid Coverage of Healthy Opportunities Pilot Services, <https://www.ncdhhs.gov/healthy-opportunities-pilot-member-consent-form/open>.
- 6 Proposed Modifications to the HIPAA Privacy Rule To Support, and Remove Barriers to, Coordinated Care and Individual Engagement, 86 Fed. Reg. 12 (Jan. 21, 2021).

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