



1899 L Street, NW, Suite 1200
Washington, DC 20036

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

MEMORANDUM

October 13, 2021

To: Tribal Health Clients

From: Hobbs, Straus, Dean & Walker, LLP

Re: *OCR Issues Guidance on HIPAA, COVID-19 Vaccination, and the Workplace*

On September 30, 2021, the U.S. Department of Health and Human Services' (HHS) Office for Civil Rights (OCR) issued [guidance](#) on when the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule applies to requests for and disclosures of information related to a person's COVID-19 vaccination status.

The Privacy Rule sets limits and conditions on when and how "covered entities" and their "business associates" may use or disclose protected health information (PHI) without patient authorization. Covered entities include health plans (defined to include the Indian Health Service program) and health care providers who transmit any health information "in electronic form in connection with a transaction covered [under the Privacy Rule]." A business associate, generally, is a person or entity (excluding a member of the covered entity's workforce) that performs certain functions or activities that involve the use or disclosure of PHI on behalf of, or provides services to, a covered entity. PHI is defined as "individually identifiable health information" that is transmitted or maintained in electronic media, or that is transmitted or maintained in any other form or medium, and, thus, can include a person's vaccination status.

While OCR's guidance is directed toward COVID-19 vaccinations, it applies "to all vaccinations regardless of the disease or condition being addressed or whether the vaccine has been fully approved or authorized via an emergency use authorization." OCR's guidance does not supplant or supersede applicable Tribal, federal, or state anti-discrimination laws that may govern the disclosure of a person's vaccination status, the maintenance of employee vaccination records, or vaccination exemptions.

Requests for Vaccination Status

The Privacy Rule does not apply to individuals or businesses that fall outside the scope of the Privacy Rule's definition of "covered entity" or "business associate." Thus, for the purposes of HIPAA, individuals may ask another individual or a service provider whether they are vaccinated; an individual may ask whether a covered entity's or business associate's workforce is vaccinated; and employers may ask their employees about their vaccination status.

Further, covered entities or their business associates may ask their patients or visitors if they are vaccinated against COVID-19. The Privacy Rule regulates “how and when covered entities and business associates are permitted to use and disclose . . . [PHI]” they “create, receive, maintain, or transmit.” But it “does not prohibit a covered entity . . . or business associate from asking whether an individual has received a particular vaccine.” However, covered entities and business associates must still adhere to the Privacy Rule’s standards and breach notification protocols when using or disclosing a person’s vaccination status, because it is PHI.

Thus, schools, individuals, and businesses like restaurants or entertainment venues (and including HIPAA covered entities and business associates), may ask whether their customers or clients have received a COVID-19 vaccine.

Individual Disclosure of Vaccination Status

Individuals may share their vaccination status with any person or entity. The Privacy Rule “does not prevent any individual from disclosing whether that individual has been vaccinated against COVID-19 or any other disease” because the Rule only applies to covered entities and their business associates.

Requiring Workforce Members to Disclose Vaccination Status

Employers, including covered entities or business associates in their capacities as employers, may also require their workforce members to disclose their vaccination status to the employer, clients, and other parties and to provide vaccine-related documentation. The Privacy Rule “does not apply to employment records, including employment records held by covered entities or business associates in their capacity as employers.” The Privacy Rule “does not regulate what information can be requested from employees as part of the terms and conditions of employment that a covered entity or business associate may impose on its workforce.” Thus, covered entities and business associates may require or request their workforce members to:

- Provide documentation of their vaccination status to their current or prospective employer;
- Sign a HIPAA authorization for a covered health care provider to disclose their vaccination record to their employer;
- Disclose whether they have received a COVID-19 vaccine in response to queries from current or prospective patients.

As noted above, some anti-discrimination laws also address work-related vaccination requirements, such as the requirement to keep any documentation or confirmation of an employee’s vaccination status confidential and store such information

separately from the employee's personnel files. Please let us know if you would like additional research on this issue.

Disclosure of Vaccination Status to Employers or Third Parties

The Privacy Rule generally prohibits covered entities and business associates, including a doctor's office, from disclosing a person's vaccination status to their employer or other parties absent that person's authorization. There is one exception: where such use or disclosure is expressly permitted or required by the Privacy Rule.

Covered entities and business associates may disclose a person's vaccination status where such disclosure "is reasonably necessary to accomplish the stated purpose for the disclosure." For example, covered physicians may disclose a person's vaccination status to that person's health plan when necessary to obtain payment for the administration of a COVID-19 vaccine. Covered pharmacies may disclose PHI related to a person's vaccination status to public health authorities (*e.g.*, state or local public health agencies). Covered nurse practitioners may provide PHI relating to a person's vaccination status to that person.

Further, covered hospitals may disclose PHI related to a person's vaccination status to that person's employer if the employer is "conduct[ing] an evaluation relating to medical surveillance of the workplace or . . . evaluat[ing] whether the individual has a work-related illness" so long as all of the following conditions are met:

- The covered hospital is providing the health care service to the person at the request of the person's employer or as a member of the employer's workforce;
- The PHI disclosed consists of findings concerning work-related illness or workplace-related medical surveillance;
- The employer needs the findings to comply with its obligations under applicable federal or state legal authorities; and
- The covered health care provider provides written notice to the person that the PHI related to the medical surveillance of the workplace and work-related illnesses will be disclosed to the employer.

Conclusion

If you have any questions or would like further information on the topics raised during this call, please contact Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745) or Starla Roels (sroels@hobbsstrauss.com or 503-242-1745), or Elliott Milhollin (emilhollin@hobbsstrauss.com or 202-822-8282).