March 30, 2020

Follow-up on Patient Confidentiality & COVID-19 Webinar on March 27, 2020

Key Takeaways:

1. The HIPAA Rules permit covered entities to use and disclose patient information for purposes of treatment, for public health activities, to notify those involved in an individual’s care, and to prevent a serious and imminent threat. OCR’s guidance provides COVID-19 specific examples of permitted disclosures to first responders (including law enforcement and paramedics) and to public health authorities.

2. The HIPAA Rules require a covered entity to execute a written agreement prior to disclosing patient information to a business associate; however, under its Notice of Enforcement Discretion, OCR will not enforce the business associate agreement requirement for covered entities providing telehealth via non-public facing remote communication platforms and texting applications during the public health emergency.

3. Under 42 CFR Part 2, a Part 2 Program or lawful holder of Part 2-protected information may disclose patient identifying information to medical personnel, without the patient’s written consent, to the extent necessary to meet a bona fide medical emergency as described under 42 CFR §2.51 and in SAMHSA’s COVID-19 and 42 CFR Part 2 guidance.

Important Updates:

- **OCR Updates**: Since our webinar on Friday, OCR:
  - Created a new webpage for HIPAA, Civil Rights and COVID-19. This webpage includes links to OCR’s guidance documents, notices, bulletins and FAQ.
  - Updated the list of non-public facing remote communication platforms that covered entities may use for telehealth to include Zoom: In the Notice of Enforcement Discretion provided during Friday’s webinar, “Zoom for Healthcare” was listed as one of the vendors that represented to OCR they provide HIPAA-compliant video communication products and would enter into a business associate agreement with a covered entity. In the updated Notice of Enforcement Discretion, Zoom is now listed along with Apple FaceTime, Facebook Messenger video chat, Google Handouts video and Skype as examples of non-public facing applications that covered entities may use to provide telehealth without risk that OCR may seek to impose a penalty for noncompliance during the COVID-19 public health emergency.
  - Issued a bulletin on Civil Rights, HIPAA and the Coronavirus Disease 2019 (COVID-19) reminding health care providers of their obligations under federal civil rights laws to ensure all segments of the community are served, including individuals with disabilities or with limited English proficiency.

- **CARES Act Amends “Confidentiality of Substance Use Disorder Patient Records” (42 U.S.C. § 290dd-2); HHS to Revise 42 CFR Part 2**: A few hours after we concluded our webinar on Friday, the President signed the Coronavirus Aid, Relief and Economic Security (CARES) Act. The CARES Act includes significant amendments to federal
confidentiality laws, including the Confidentiality of Substance Use Disorder Patient Records (42 U.S.C. § 290dd-2), and requires the Secretary of Health and Human Services (HHS) to issue revised regulations, including revisions to 42 CFR Part 2, to apply to uses and disclosures of patient information on or after March 27, 2021. Below is a summary of the key amendments under the CARES Act:

1. Consent: After signing an initial written consent, a patient’s Part 2-protected records may be used or disclosed by a Part 2 Program, covered entity or business associate for purposes of treatment, payment and health care operations as permitted by the HIPAA Rules, except that health care operations shall not include creating deidentified health information or a limited data set, or fundraising. A patient’s written consent may be given once for such future uses and disclosures, until the patient revokes their consent in writing. Patients may request an accounting of disclosures and request restrictions on the use and disclosure of their information, as permitted by the HIPAA Rules.

2. Disclosures to Public Health Authorities: De-identified information may be disclosed to public health authorities. Such information must meet the standards under 45 CFR §164.514(b) which require either: (1) an appropriately knowledgeable and experienced individual apply generally accepted statistical and scientific principles and methods to determine (and document) that the risk of reidentification is very small; or (2) the covered entity to remove the 18 identifiers listed at 45 CFR §164.514(b)(2)(i) and to have no actual knowledge that reidentification of the patient information is possible.

3. Disclosures in Criminal, Civil or Administrative Investigations, Actions or Proceedings: Disclosure of Part 2-protected records or testimony relaying information in such records for criminal, civil or administrative investigations, actions or proceedings may only be authorized by a court order or with the consent of the patient.

4. Antidiscrimination: Entities are prohibited from discriminating against an individual on the basis of Part 2-protected information received either intentionally or inadvertently in providing or providing access to health care, employment and worker’s compensation, housing, courts, or social services and benefits provided by federal, state or local governments.

5. Breaches: The HIPAA notification requirements and penalties for breaches apply to breaches of Part 2-protected information.

The CARES Act states that the Secretary of HHS is to: revise the regulations to apply to uses and disclosures of Part 2-protected information on or after March 27, 2021 (12 months after the enactment of the CARES Act) and update the notice of privacy practices requirements under 45 CFR §164.520 by no later than March 27, 2021 (one year after the enactment of the CARES Act).