Hawaii’s HIPAA Harmonization Act

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Introduction

• Speaker
• Agenda
  ☐ Hawaii’s Harmonization Act
  ☐ State Laws Beyond HIPAA
  ☐ Hawaii’s State Constitution
  ☐ Questions
• Purpose: Help point you in the right direction
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PRIOR TO HAWAII’S HARMONIZATION ACT

Before HIPAA rules enacted

- Hawaii Privacy of Health Care Information Act in 1999
- Lieutenant Governor's Office requested a blanket exemption
- Repealed in 2001
Hawaii’s Health Care Privacy Harmonization Act in 2012

- Patient interests paramount
- HIPAA was comprehensive
- Hawaii had > 50 laws or rules governing health care privacy

CHAPTER 232B HAWAII’S HARMONIZATION ACT

Haw. Rev. Stat. §§ 323B-1 to 323B-4

- Haw. Rev. Stat. § 323B-1 Applicability
- Haw. Rev. Stat. § 323B-2 Definitions
- Haw. Rev. Stat. § 323B-3 Privacy of individually identifiable health information
- Haw. Rev. Stat. § 323B-4 Relationship to other laws
This chapter shall apply, unless amended by specific reference to this chapter or any section thereof.

All terms in Haw. Rev. Stat. § 323B-2 are defined by HIPAA

- 45 CFR §§ 160.103 or 164.402
- Terms include:
  - Breach
  - Business associate
  - Covered entity
  - Disclosure
  - Health Information
  - Individually identifiable health information
  - Unsecured protected health information
  - Use
Despite any law to the contrary:

(a) Use or disclosure of individually identifiable health information (IIHI) permitted by 45 CFR Part 164, Subpart E is deemed to comply with all Hawaii laws relating to use, disclosure or confidentiality.

Examples provided in the Act’s purpose:
- HRS 334-5
- HRS 333E-6
- HRS 325-101

(b) An authorization for release of IIHI complying with 45 CFR § 164.508 is deemed to comply with Hawaii laws for individual authorization.

Examples of Hawaii laws:
- HRS 325-123
Despite any law to the contrary:

(a) Use or disclosure of IIHI permitted by 45 CFR Part 164, Subpart E is deemed to comply with all Hawaii laws relating to use, disclosure or confidentiality

(b) An authorization for release of IIHI complying with 45 CFR § 164.508 is deemed to comply with Hawaii laws for individual authorization

(c) Any notice of breach of unsecured PHI that complies with 45 CFR Part 164, Subpart D is deemed to comply with Hawaii laws relating to notice

Chapter 323B is not construed to:

1) Authorize disclosure of IIHI if not allowed by federal/state law
2) Compel disclosure of IIHI if not required by law
3) Require a written authorization of IIHI or de-identified info if HIPAA does not require
4) Limit state laws requiring reporting or public health investigations
5) Limit health plan reporting
6) Limit/affect evidentiary privilege, discovery, confidentiality protection by state law, decision, order re: IIHI sought/used/produced in any judicial or administrative proceeding
Examples

- Chapter 577 titled “Children”
- HRS § 325-16.5 (b) re: court ordered HIV tests
- HRS § 622-57 (c)-(h) re: deceased persons
- Peer review or quality assurance activities
- Registries re: donor, tumor, vital statistics
- Child abuse records

Examples

- Chapter 487J titled “Personal Information Protection”
- Chapter 431 of the Insurance Code, Article 3A titled “Privacy of Consumer Financial Information”
- Hawaii State Constitution Article I, § 6
Article I, Section 6

The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

ARTICLE I
SECTION 6
BACKGROUND

Constitutional Convention of Hawaii 1978

➢ relates to privacy in the informational and personal autonomy sense
➢ ability of a person to control the privacy of information about himself, such as unauthorized public disclosure of embarrassing or personal facts about himself
➢ concerns the possible abuses in the use of highly personal and intimate information in the hands of government or private parties
The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.

What is obvious about Hawaii’s Constitutional Right to Privacy?

- Basic personal right to privacy
- Very broad, beyond health records includes any private information
- Goes beyond HIPAA
- The state must have a compelling interest to infringe upon privacy right
- No guidelines, like administrative, etc.
- No penalties indicated
- Other ideas
Hawaii judiciary recognizes Article 1 § 6 provides more protection over patient medical records than does HIPAA

**Cohan v. Ayabe,** 132 Hawaii 408 (2014)

- Plaintiff in tort litigation in which his medical condition and treatment at issue

**Cohan holding**

- Medical information cannot be used outside the litigation even if de-identified

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**Naipo v. Border,** 125 Hawaii 31 (2011)

- Naipo was not a party to the litigation
- Subpoena duces tecum issued to hospital for Naipo’s medical records

**Naipo holding**

- Cannot compel confidential patient medical records in litigation where the patient is not a party & where no compelling state interest has been shown
**EFFECT OF HAWAII CASE LAW**

Consider subpoena for a non-party to litigation

- No confidential patient medical information should be released for litigation purposes if the patient is not a party to the litigation *(Naipo)*

- The redaction or de-identification of medical information for a patient not a party to the litigation is likely not sufficient to allow release of the records *(extension of Cohan)*

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**EXAMPLE OF EFFECT ON BUSINESS ASSOCIATE AGREEMENT**

- Potential issue if BAA allows
  - business associate to disclose PHI if not a HIPAA violation
  - PHI disclosure if required by law

- Above allows parties to litigation to release de-identified records

- Instead require BA to notify covered entity providing the PHI if
  - BA is subpoenaed for patients’ PHI and/or
  - require BA to relinquish control over subpoenas to the covered entity
Privacy Issues

- Check entity’s policy and procedures
- Check HIPAA
- Check state laws
- Check Hawaii case law
- Call your attorney

Thank you for your time and participation!

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