

Issue Brief #4

HJR 21 - Study of Personal Information Ownership

*For the State Administration and Veterans' Affairs Interim Committee
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Health Information: HIPAA, Other States, and Certain Issues Regarding Montana's Laws

Purpose and Scope

This issue brief responds to the State Administration and Veterans' Affairs Interim Committee's Feb. 10, 2016, request for further research about states with laws that are more stringent than HIPAA and certain other issues regarding Montana's health information laws.

This brief covers:

- HIPAA Privacy Rule
- Other states with more stringent laws than HIPAA
 - ▶ limited to pharmacy information.
- Montana laws - specifically the Montana Health Information law in Title 50, chapter 16 as follows:
 - ▶ Part 5 - entities in Montana not covered by HIPAA
 - ▶ Part 6 - government health care information
 - ▶ Part 8 - section 50-16-811, MCA, method of compulsory process

HIPAA Privacy Rule

HIPAA is the Health Insurance Portability and Accountability Act of 1996. The U.S. Department of Health and Human Services was required to implement the act. To cover the privacy provisions of the act, HHS adopted what is referred to as the Privacy Rule.

The HHS website summarizes the Privacy Rule as follows:

The HIPAA Privacy Rule establishes national standards to protect individuals' medical records and other personal health information and applies to health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically. The Rule requires appropriate safeguards to protect the privacy of personal health information, and sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization. The Rule also gives patients rights over their health information, including rights to examine and obtain a copy of their health records, and to request corrections.

<http://www.hhs.gov/hipaa/for-professionals/privacy/index.html>

A summary of the key provisions of the Privacy Rule is available online at <http://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html>

(Attachment A)

Also attached is additional information provided by HHS about the use of information for marketing.

<http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/marketing/>

(Attachment B)

Other States With Laws Stricter Than HIPAA

Pharmacy Information

States with health information laws applicable to pharmacies that are, in certain cases, stricter than HIPAA:

- Alabama
- Arizona
- California
- Connecticut
- Florida
- Georgia
- Hawaii
- Idaho
- Indiana
- Iowa
- Kentucky
- Maine
- Massachusetts
- Michigan
- Missouri
- Montana
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Carolina
- North Dakota
- Ohio
- Oklahoma
- Pennsylvania
- Puerto Rico
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Washington
- West Virginia
- Wisconsin
- Wyoming

See Walmart's State-by-State Privacy Law Supplement.

<http://corporate.walmart.com/privacy-security/notices/pharmacy-privacy-practices-state-law-supplement>

(Attachment C)

California

California has a special law limiting the disclosure of medical information for marketing purposes.

(Attachment D)

Montana Laws

Montana laws concerning health information are codified under Montana Health Information in Title 50, chapter 16, MCA. Specific issues raised by Erin MacLean, chair of the Montana State Bar, Health Law Section, are summarized below.

Part 5 - Uniform Health Care Information Act

Uniform Act

Part 5 is a uniform act, meaning it was based on a model proposed by the National Conference of Commissioners on Uniform State Laws. This commission consists of attorneys from the states. The uniform acts are laws that all states are encouraged to adopt. Montana enacted this uniform law in 1987, before HIPAA. The act was amended in 2003 to limit the applicability of the act to those entities not covered by HIPAA. This amendment provided that HIPAA-covered entities no longer had to comply with HIPAA and the more stringent statutes contained in Part 5.

Entities in Montana not covered by HIPAA

Part 5 contains the statutes that govern health care information held by entities that are not covered by HIPAA.

The following table outlines which entities ARE covered by HIPAA.

A Health Care Provider	A Health Plan	A Health Care Clearinghouse
This includes providers such as: Doctors Clinics Psychologists Dentists Chiropractors Nursing Homes Pharmacies ...but only if they transmit any information in an electronic form in connection with a transaction for which HHS has adopted a standard.	This includes: Health insurance companies HMOs Company health plans Government programs that pay for health care, such as Medicare, Medicaid, and the military and veterans health care programs	This includes entities that process nonstandard health information they receive from another entity into a standard (i.e., standard electronic format or data content), or vice versa.

Source: HHS.gov

<http://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html>

Further Study Would Be Needed

Staff did not have time to examine Part 5 statutes and compare them with HIPAA. Such an examination would require a major investment of time and several meetings with stakeholders familiar with these laws.

Part 6 - Government Health Care Information

Dual Applicability?

This part of Montana's health information laws seems to cover both those entities covered by HIPAA and those who are covered by HIPAA.

However, section 50-16-606, MCA, states:

50-16-606. Correlation with Uniform Health Care Information Act. Health care information in the possession of a local board, local health officer, or the department because a health care provider employed by any of these entities provided health care to a patient, either individually or at a public health center or other publicly owned health care facility, is subject to the Uniform Health Care Information Act and not subject to this part.

Further Study Would Be Needed

Staff did not have time to examine Part 6 statutes and compare them Part 5 and with HIPAA. Such an examination would require a major investment of time and several meetings with stakeholders familiar with these laws.

Part 8 - Section 50-16-811, MCA, method of compulsory process

Notice Related to Seeking Information

Part 8 covers entities that are covered by HIPAA.

The issue raised to the committee relates to section 50-16-811(1) and (2), MCA, concerning how a person seeking health information through a compulsory process notifies the entity that has the information. The concern is that the subsection references highlighted below do not encompass all of the laws under which disclosure of health information may be compelled.

The subsections and internal references in question state:

50-16-812. Method of compulsory process. (1) Unless the court for good cause shown determines that the notification should be waived or modified, if health care information is sought under 50-16-811 **(1)(b), (1)(d), or (1)(e)** or in a civil proceeding or investigation under 50-16-811 **(1)(h)**, the person seeking compulsory process or discovery shall mail a notice by first-class mail to the patient or the patient's attorney of record of the compulsory process or discovery request at least 10 days before presenting the certificate required under subsection (2) of this section to the health care provider.

(2) Service of compulsory process or discovery requests upon a health care provider must be accompanied by a written certification, signed by the person seeking to obtain health care information or by the person's authorized representative, identifying at least one subsection of 50-16-811 under which compulsory process or discovery is being sought. The certification must also state, in the case of information sought under 50-16-811 **(1)(b), (1)(d), or (1)(e)** or in a civil proceeding under 50-16-811 **(1)(h)**, that the requirements of subsection (1) of this section for notice have been met. A person may sign the certification only if the person reasonably believes that the subsection of 50-16-811 identified in the certification provides an appropriate basis for the use of compulsory process or discovery. Unless otherwise ordered by the court, the health care provider shall maintain a copy of the process and the written certification as a permanent part of the patient's health care information.

The referenced subsections in section 50-16-811, MCA, state:

- 50-16-811. When health care information available by compulsory process.** (1) Health care information may not be disclosed by a health care provider pursuant to compulsory legal process or discovery in any judicial, legislative, or administrative proceeding unless:
- (a) the patient has authorized in writing the release of the health care information in response to compulsory process or a discovery request;
 - (b) the patient has waived the right to claim confidentiality for the health care information sought;**
 - (c) the patient is a party to the proceeding and has placed the patient's physical or mental condition in issue;
 - (d) the patient's physical or mental condition is relevant to the execution or witnessing of a will or other document;**
 - (e) the physical or mental condition of a deceased patient is placed in issue by any person claiming or defending through or as a beneficiary of the patient;**
 - (f) a patient's health care information is to be used in the patient's commitment proceeding;
 - (g) the health care information is for use in any law enforcement proceeding or investigation in which a health care provider is the subject or a party, except that health care information so obtained may not be used in any proceeding against the patient unless the matter relates to payment for the patient's health care or unless authorized under subsection (1)(i);
 - (h) a court has determined that particular health care information is subject to compulsory legal process or discovery because the party seeking the information has demonstrated that there is a compelling state interest that outweighs the patient's privacy interest; or**
 - (i) the health care information is requested pursuant to an investigative subpoena issued under 46-4-301 or similar federal law.
- (2) This part does not authorize the disclosure of health care information by compulsory legal process or discovery in any judicial, legislative, or administrative proceeding where disclosure is otherwise prohibited by law.

Further Study Would Be Needed

Staff did not have time to further examine these Part 8 statutes or meet with stakeholders familiar with these laws.