

Privacy - MODEL Facility Policy

POLICY NAME: Prohibited Uses and Disclosures Related to Reproductive Health Care and Uses and Disclosures That Require an Attestation

DATE: (facility to insert date here)

NUMBER: (facility to insert number here)

Purpose: To facilitate compliance with the Health Insurance Portability and Accountability Act (HIPAA) Standards for Privacy of Individually Identifiable Health Information (Privacy Standards), 45 CFR Parts 160 and 164, and any and all other Federal regulations and interpretive guidelines promulgated thereunder. To establish guidelines for situations where the facility may disclose protected health information (PHI) that is potentially related to reproductive health care, as defined by the HIPAA Privacy Standards, only if it first obtains a valid attestation that the purpose of the disclosure is not prohibited by HIPAA (45 CFR §164.509).

Policy: The facility may not use or disclose PHI that is potentially related to reproductive health care for any of the prohibited purposes listed in the procedure below unless it first obtains a valid attestation from the requestor as described in the procedure below.

Some states have separate patient privacy laws that may apply additional legal requirements. Consult your Operations Counsel to identify and comply with any such additional legal mandates.

Refer to the HIPAA Privacy Standards, 45 CFR Part 160.103, 164.103, 164.501 and IP.PRI.001, the Patient Privacy Program Requirements Policy, for definitions.

Procedure:

1. **General Prohibition.** When one of the Applicable Situations (defined below) exists, the facility may not use or disclose PHI for any of the following purposes (each a “prohibited purpose” as used in this policy):
 - a. To conduct a criminal, civil, or administrative investigation into any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care,
 - b. To impose criminal, civil, or administrative liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care, or
 - c. To identify any person for any purpose described in Section 1(a) or Section 1(b) of this procedure.

As used in this policy, Applicable Situation means:

- A. the use or disclosure is in connection with any person seeking, obtaining, providing, or facilitating reproductive health care (as defined below), and

B. the facility or its business associate that received the request for PHI has reasonably determined that one or more of the following conditions exists:

1. The reproductive health care is lawful under the law of the state in which the health care was provided under the circumstances in which it was provided,
2. The reproductive health care is protected, required, or authorized by Federal law, including the United States Constitution, under the circumstances in which such health care was provided, regardless of the state in which it was provided,
3. The reproductive health care was provided by another provider (not the facility) and the care is presumed to be lawful. The facility must presume the care was lawful unless the facility has:
 - i. Actual knowledge that the reproductive health care was unlawful under the circumstances in which it was provided; or
 - ii. Factual information supplied by the requestor that demonstrates a substantial factual basis that the reproductive health care was unlawful under the specific circumstances in which it was provided.

For the purposes of this policy, “seeking, obtaining, providing, or facilitating reproductive health care” includes, but is not limited to, any of the following: expressing interest in, using, performing, furnishing, paying for, disseminating information about, arranging, insuring, administering, authorizing, providing coverage for, approving, counseling about, assisting, or otherwise taking action to engage in reproductive health care; or attempting any of the same.

2. Circumstances Requiring a Valid Attestation. The facility must receive an attestation that complies with this policy before using or disclosing PHI *potentially* related to reproductive health for any of the following purposes (each of these is a HIPAA exception to the need for an authorization):

- Health oversight activities
- Judicial and administrative proceedings
- Law enforcement
- Coroners and medical examiners.

Note: Before disclosing PHI for any of these HIPAA exceptions, the disclosure must also comply with requirements of other policies addressing these HIPAA exceptions (see Uses and Disclosures for which an Authorization or Opportunity to Agree or Object is Not Required and Uses and Disclosures Required by Law policies).

For uses and disclosures made under these HIPAA exceptions, a valid attestation is required for each request to verify that the use or disclosure is not prohibited by Section 1 of this procedure. To be valid, the attestation must meet the requirement set forth in Sections 3 through 5 below.

Note: the prohibition in Section 1 applies to all uses and disclosures (even if an attestation is not required by this policy).

3. Required Contents of a Valid Attestation. The attestation must include the following elements:
 - a. A description of the information requested that identifies the information in a specific fashion.
 - b. The name of any individual(s) whose PHI is being sought or if including the name(s) is not practical, a description of the class of individuals whose PHI is being sought.
 - c. The identity of the person(s) or class of persons being asked to disclose the PHI.
 - d. The identity of the person(s) or class of persons to whom the facility is being asked to disclose the PHI.
 - e. A clear statement that the recipient will not use or disclose the PHI for a prohibited purpose (as described in Section 1 of this procedure).
 - f. A statement that a person may be subject to criminal penalties pursuant to 42 USC 1320d-6 if that person knowingly and in violation of HIPAA obtains individually identifiable health information relating to an individual or discloses individually identifiable health information to another person.
 - g. A signature of the person requesting the PHI, which may be an electronic signature, and date. If the attestation is signed by a representative of the person requesting the information, a description of such representative's authority to act for the person must also be provided.
4. Other Attestation Requirements
 - a. The attestation must also be written in plain language.
 - b. The attestation may be electronic, if it meets the valid attestation requirements described in Section 3 above.
5. Reasonable Reliance on an Attestation. Facilities may not rely on the attestation to disclose the requested PHI if any of the following is true:
 - a. It is missing any required element or statement (as described in Section 3 of this procedure).
 - b. It contains an element or statement that is not required by Section 3 of this procedure).
 - c. It is combined with other documents, except for documents provided to support the attestation.
 - d. The facility has actual knowledge that material information in the attestation is false.
 - e. A reasonable facility in the same position would not believe the requestor's statement that the use or disclosure is not for a prohibited purpose. To determine whether reliance is reasonable, the following factors should be considered among other relevant factors:
 - (i) who is requesting the PHI;
 - (ii) the provision or permission upon which the requestor is relying (i.e. which HIPAA exception);
 - (iii) the information provided to satisfy meeting the conditions of the HIPAA exception and the attestation;
 - (iv) the PHI requested and its relationship to the purpose of the request (i.e. if the minimum necessary standard applies to the disclosure, does the request meet the minimum necessary standard?); and
 - (v) what information has the requestor provided when the health care was provided by another provider? For example, if the requestor indicates that reproductive health care provided by another provider was unlawful, what information has the requestor supplied to demonstrate a substantial factual basis proving their claim or does the facility have actual knowledge that the care was unlawful under the circumstances in

which it was provided? (see the presumption of lawfulness in the Applicable Situation definition in Section 1 above. If the presumption is not overcome, the disclosure is not permitted even with an attestation)

6. Receipt of Additional Information. If a facility relies on a facially valid attestation to use or disclose PHI and later discovers information that reasonably shows that any representation made in the attestation is materially false, leading to a use or disclosure for a prohibited purpose, the facility must stop making the requested use or disclosure.
7. Documentation Retention. The facility must maintain a completed attestation and any relevant supporting documents for at least 6 years from the date of the item's recreation or the date it was last in effect, whichever is later.

References:

1. Patient Privacy Program Requirements Policy, IP.PRI.001
2. Uses and Disclosures for which an Authorization or Opportunity to Agree or Object is Not Required Policy
3. Uses and Disclosures Required by Law Policy
4. Health Insurance Portability and Accountability Act (HIPAA), Standards for Privacy of Individually Identifiable Health Information 45 CFR Part 164

Attestation Regarding a Requested Use or Disclosure of Protected Health Information Potentially Related to Reproductive Health Care

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| <i>Instructions: The entire form must be completed for the attestation to be valid. You may not add content that is not required or combine this form with another document except where another document is needed to support your statement that the requested disclosure is not for a prohibited purpose. For example, if the requested PHI is potentially related to reproductive health care that was provided by someone other than the covered entity or business associate from whom you are requesting the PHI, you may submit a document that supplies information that demonstrates a substantial factual basis that the reproductive health care in question was not lawful under the specific circumstances in which it was provided.</i> | |
| Name of person(s) or specific identification of the class of persons to receive the requested PHI (e.g. name of investigator and/or agency making the request) | |
| | |
| Name or other specific identification of the person or class of persons from whom you are requesting the use or Disclosure (e.g., name of covered entity or business associate that maintains the PHI and/or name of their workforce member who handles requests for PHI) | |
| | |
| Description of specific PHI requested, including name(s) of individual(s), if practicable, or a description of the class of individuals, whose protected health information you are requesting (e.g., visit summary for [name of individual] on [date]; list of individuals who obtained [name of prescription medication] between [date range]) | |
| | |
| Please Note: This attestation document may be provided in electronic format, and electronically signed by the person requesting protected health information when the electronic signature is valid under applicable Federal and state law. <i>There is some level of risk that a third party could see your information without your consent when receiving unencrypted electronic media or email. We are not responsible for unauthorized access to the PHI contained in this format or any risks (e.g., virus) potentially introduced to your computer/device when receiving PHI in electronic format or email.</i> | |
| I attest that the use or disclosure of PHI that I am requesting is not for a purpose prohibited by the HIPAA Privacy Rule at 45 CFR 164.502(a)(5)(iii) because of one of the following (check one box): | |
| <input type="checkbox"/> The purpose of the use or disclosure of protected health information is not to investigate or impose liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care or to identify any person for such purposes. | |
| <input type="checkbox"/> The purpose of the use or disclosure of protected health information is to investigate or impose liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care, or to identify any person for such purposes, but the reproductive health care at issue was not lawful under the circumstances in which it was provided. | |
| Signatures | |
| I understand that I may be subject to criminal penalties pursuant to 42 U.S.C. 1320d-6 if I knowingly and in violation of HIPAA obtain individually identifiable health information relating to an individual or disclose individually identifiable health information to another person. | |
| Signature of the person requesting the PHI: | Date: |
| If you have signed as a representative of the person requesting PHI, provide a description of your authority to act for that person: | |
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Attachment to IP.PRI.001