

ARE YOUR MEDICAL INFORMATION AUTHORIZATIONS SUFFICIENT?

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Introduction

An individual wants to obtain a life insurance policy. In order to grant that individual's desire, you, the insurance provider, must obtain certain information. So, you have the applicant complete and sign an application which contains language authorizing certain entities who may possess medical information concerning the applicant (such as physicians, hospitals, etc.) to disclose that information to the insurance company. You present the form of authorization to the entities holding the medical information expecting to receive the information in a timely manner. You assume everything is going well until you receive a response from one of the entities telling you that your authorization form does not comply with state and/or federal law requirements regarding the authorization language necessary to allow for disclosure of the type of medical information requested. The entity informs you that you will have to obtain a new, more specific authorization form from the applicant. You attempt to argue with the entity, until it responds that, if the state or federal requirements are not met, then it and/or you could be held liable for unlawful disclosure of the information.

Being able to obtain medical information is a necessity for insurance companies. Normally, to obtain the information, a company uses authorization language built into its application form or in a supplemental form. These forms are subject to various state and federal laws and regulations. Additionally, insurance companies can expect future Congressional activity and federal regulations that will further impact the form and content of these disclosure forms. This article provides an overview of the roadblocks that may arise for insurance companies as a result of the many diverse state and federal laws and regulations that affect authorization forms required for release of various kinds of medical information. It is not the intent of this article to discuss privacy issues in general nor disclosure of medical information by insurers once they have properly obtained such information.

National Association of Insurance Commissioners Model Acts

The Insurance Information and Privacy Protection Model Act (the "IIPPMA") and the Health Information Privacy Model Act (the "HIPMA") (collectively, the "NAIC Acts"), promulgated by the National Association of Insurance Commissioners ("NAIC"), exemplify the potential roadblocks an insurance company may face when gathering an applicant's medical information. IIPPMA addresses general insurance information and has been adopted by 17 states.¹ Most of the states adopted IIPPMA in the 1980's, but have since amended it a number of times. IIPPMA prevents insurance companies from collecting personal information² in connection with an insurance transaction unless the company obtains a valid authorization.³ Under IIPPMA, a valid authorization must (i) be written and dated; (ii) name the insurance institution or agent and the representatives of the insurance institution to whom the information is to be disclosed; and (iii) specify the types of persons authorized to disclose information about the individual, the nature of the information to be disclosed, the purpose for which the information is being collected and the length of time the authorization is to remain valid, which may be no more than thirty months.⁴

HIPMA, developed in 1998, has been enacted in only four states.⁵ HIPMA prevents insurance companies from collecting, using or disclosing protected health information⁶ unless a company obtains "a valid authorization from the subject of the protected health information."⁷ Under HIPMA, a valid authorization must contain the following: (i) the identity and signature of the protected individual; (ii) a description of the types of protected health information being collected and the sources from which the information will be collected; (iii) the name and address of the person to whom the protected health information is to be disclosed; (iv) the purpose and scope of the authorization and the intended use of the protected health information; (v) an authority to revoke statement; and (vi) the date of the authorization's expiration.⁸

For those who violate the provisions of the NAIC Acts, civil sanctions, criminal sanctions, attorneys fees, investigation costs, and court costs may be exacted.⁹ The civil sanctions of the NAIC Acts provide for a civil penalty for each violation, but cap the penalties in cases of multiple violations.¹⁰ The NAIC Acts also provide for criminal sanctions for violators that range from prison time of 1 to 10 years to fines ranging from \$50,000 to \$500,000, depending on whether the act is committed knowingly, maliciously or under false pretenses.¹¹

The NAIC Privacy Issues Working Group is presently drafting a new privacy regulation in response to the recently enacted federal legislation, i.e. the Gramm-Leach-Bliley Act. Initial drafts of this model included provisions regarding health information, but the most recent draft has eliminated these provisions and deals only with financial information disclosure. The NAIC is likely to consider medical information disclosure in a separate model act in the future.

Other State Laws

In addition to the NAIC-promulgated rules discussed above, insurance companies must concern themselves with state laws governing disclosure of general health information or information relating to specific diseases. Similar to the NAIC Acts, these laws impose civil sanctions in the form of compensatory damages, punitive damages, reasonable attorneys' fees, and court costs and criminal sanctions in the form of fines and prison time.¹² While not all states were researched for purposes of this article, the following discussion of the laws in California, Florida and New York illustrates some of the potential roadblocks that exist for insurance companies gathering an applicant's medical information.

California. California has enacted laws regulating the disclosure of general medical information, Human Immunodeficiency Virus ("HIV") test results, and drug treatment information. The California law regulating the disclosure of general medical information prevents health care providers from disclosing medical information unless the entity requesting such information has a valid authorization¹³ or falls within one of a few other exceptions.¹⁴ One of these "few other exceptions" applies to insurance companies that have complied with the requirements of California's version of HIPAA.¹⁵ This exception allows insurance companies to obtain all general medical information from health care providers except psychotherapy information.¹⁶ For insurance companies to receive psychotherapy information from a third party, they must send a signed, written request to the third party, with a copy to the applicant within thirty days of receipt of the information. The request must include (i) the specific information being requested and its intended use, (ii) a statement ensuring the destruction of the information and all copies in the insurance company's control, (iii) the length of time during which the information will be kept before being destroyed, and (iv) a statement limiting the use of the information.¹⁷

Insurance companies may also be affected by California's laws governing the confidentiality of HIV information. One such law dictates certain standards for insurance companies to follow when conducting HIV tests,¹⁸ and requires such companies to maintain strict confidentiality of the results.¹⁹ Another law prevents any person from disclosing the results of HIV tests unless a statute "expressly provides an exemption to this section."²⁰ Because of the presence of such an express exemption, insurance companies are not governed by the strictures of this law.²¹

Lastly, California law prevents disclosure of the treatment records of any person involved in drug abuse treatment programs that are regulated or directly or indirectly assisted by the California State Department of Alcohol and Drug Programs.²² However, with the applicant's written consent these programs may disclose otherwise confidential information, "but only to the extent, and under the circumstances, and for the purposes as clearly stated in the release of information signed by the client."²³

Florida. Similar to California, Florida has enacted laws that govern the confidentiality of general medical as well as HIV-specific information. Florida's law concerning the confidentiality of general medical information requires a "records owner"²⁴ to maintain the confidentiality of medical records and to only release these records upon "written authorization of the patient."²⁵ No specifics are mandated as to the form of required authorization, so standard language in insurance company applications should suffice.

Florida has also enacted a law governing the confidentiality of HIV-specific information. This law requires any person who knows the result of an HIV test or who has any information that identifies a person as having HIV to keep such result or information confidential.²⁶ Although insurance companies involved in the application and underwriting process are exempted from this general rule,²⁷ an insurance company requesting information from a person subject to the general rule must obtain a HIV-specific written authorization prior to obtaining a general release of medical information.²⁸ "A general release without such prior written authorization is not sufficient to release HIV [information]. . . ."²⁹

New York. New York also has enacted laws that affect insurance companies attempting to obtain medical information. One such law governs the confidentiality of HIV information and prevents those persons knowing the result of an HIV test or knowing any information that identifies a person as having HIV from disclosing such knowledge unless an

exception applies.³⁰ The law exempts insurance companies from the mandates of this general rule;³¹ however, an insurance company requesting information from a person that is subject to the general rule must secure from the applicant a dated and written authorization indicating that “health care providers, health facilities, insurance institutions, and other persons are authorized to disclose information about the protected individual, the purpose for which the information is to be disclosed and which is signed by . . . the protected individual. . . .”³² Apparently, an insurance company is not required to obtain a HIV-specific release under the HIV confidentiality law.

Another law prevents mental health facilities operated by New York’s Office of Mental Health or the Office of Mental Retardation and Developmental Disabilities from disclosing information relating to individuals participating in such facilities.³³ Under this law, as long as the disclosure is not detrimental to the patient, a facility may disclose a participant’s information if the entity requesting the information “has a demonstrable need for the information” and has obtained the consent of the patient.³⁴

Federal Laws

In addition to the laws enacted by state governments, insurance companies should also be aware of the potential roadblocks presented by federal laws and regulations. One such law governs the confidentiality of alcohol and drug abuse patient records.³⁵ The provisions of the law apply to any program or activity relating to substance abuse prevention, treatment, and rehabilitation that is directly or indirectly assisted by the federal government.³⁶ These provisions prevent any information from being disclosed that would directly or indirectly identify a patient as an alcohol or drug abuser³⁷ except where the holder of the information has obtained or been provided with a release that (i) names the patient, the program authorized to make the disclosure, and the individual to whom the disclosure is made; (ii) states the purpose of the disclosure and the type and amount of information to be disclosed; and (iii) contains the signature of the patient, the date on which the consent is signed, an authority to revoke statement and the date, event, or condition upon which the consent will expire.³⁸ The general authorization used by many insurance companies fails to satisfy the requirements imposed by this statute and its corresponding regulations.

Insurance companies need also be aware of proposed federal legislation and regulations. In response to an abundance of concerns regarding privacy, at a Congressional panel hearing in February, the Clinton Administration urged Congress to enact “‘strong national medical privacy legislation’ with federal standards, fines and criminal penalties for enforcement. . . .”³⁹ Given the current trend toward increased privacy protections, insurance companies should expect future Congressional action regarding medical privacy.

In addition, as dictated by the Health Insurance Portability and Accountability Act of 1996, the Department of Health and Human Services (“DHHS”) has proposed regulations concerning the privacy of electronically stored medical records.⁴⁰ The regulations would apply to health plans, health care clearinghouses, and health care providers⁴¹ and would prevent these entities from using or disclosing an individual’s protected health information⁴² except in limited situations, none of which appear to be applicable to insurance companies.⁴³ As with all of the other laws discussed, an entity may disclose health information when it has obtained an authorization meeting, in this case, extensive requirements. The requisite content of the authorization differs depending on whether the request is made by an individual or by an entity.⁴⁴ An entity authorization, as might be used by an insurance company, must be signed and dated and include the following: (i) a specific and meaningful description of the information to be disclosed; (ii) the name of the entity authorized to make the disclosure and to what entity such disclosure is to be made; (iii) an expiration date; (iv) a right to revoke statement; (v) a description of the purpose of the disclosure; and (vi) a statement that the information disclosed may no longer be protected by federal law, that the individual may inspect or copy the disclosed protected health information, and that the individual may refuse to sign the authorization.⁴⁵ Here again, a general authorization used by many insurance companies would not be sufficient. Accordingly, supplemental authorization forms may be necessary as possible sources of medical information are uncovered during the underwriting process.

Conclusion

In conclusion, insurance companies must abide by increasingly higher standards to gain needed medical information. If insurance companies do not meet the bar set by these standards, civil and criminal sanctions may be imposed. Discrepancies among state laws make meeting the standards even more difficult. Even with a specifically enumerated exception for insurance companies, differences exist among states as to the requirements within that exception. Under

some of the exceptions, questions could arise as to whether the exception's scope is broad enough to cover the insurance company. Furthermore, as is illustrated by the Clinton Administration's announcement, the federal regulations proposed by DHHS, and the NAIC's present work on a new Privacy Model Act, the legal landscape regarding confidentiality of information is changing. This means that the requirements as to the form of authorization an insurance company must obtain from an applicant are changing as well. Insurance companies must monitor this dynamic legal landscape to remain in compliance with state and federal law and to facilitate the efficient gathering of applicants' medical information.

Endnotes

1. Ariz. Rev. Stat. Ann. §§ 20-2101-20-2120 (1981); Cal. Ins. Code §§ 791.01-791.26 (1981/1989); Conn. Gen. Stat. §§ 38a-975- 38a-998 (1981/1983); Ga. Code Ann. §§ 33-39-1-33-39-23 (1982/1985); Haw. Rev. Stat. §§ 431:17-101-431:17-106 (1988); Ill. Comp. Stat. 5/1001-1024 (1981/1997); Kan. Stat. Ann. §§ 40-2,111 - 2,113 (1981/1986); Me. Rev. Stat. Ann. Tit. 24-A, §§ 2201-2220 (1999); Mass. Gen Laws ch. 175I, §§ 1-22 (1992); Minn. Stat. §§ 72A.49-72A.505 (1989); Mont. Code Ann. §§ 33-19-101 - 33-19-409 (1982/1999); Nev. Admin. Code ch. 679B, §§ 560-750 (1989/1997); N.J. Rev. Stat. 17:23A-1 - 17:23A-22 (1985); N.C. Gen. Stat. §§ 58-39-1 - 58-39-120 (1981); Ohio Rev. Code Ann. §§ 3904.1 - 3904.22 (Anderson 1994/1997); Or. Rev. Stat. §§ 746.600 - 746.690 (1981/1988); Va. Code §§ 38.2-600 - 38.2-620 (1986/1987).
2. *See* IIPPMA § 2(T).
3. *See* IIPPMA § 6 (1992).
4. *See Id.*
5. Haw. Rev. Stat. § 351 (Eff. 7/1/00); Me. Rev. Stat. Ann. Tit. 22, § 1711-C (1999); N.D. Cent. Code § 26.1-36-12.4 (1999); WIS. STAT. § 610.70 (1998).
6. *See* HIPMA § 3(I)(1).
7. *See Id.* § 10(A).
8. *See Id.* § 10(D)(2).
9. *See* HIPMA § 15; IIPPMA § 18.
10. *See* HIPMA § 15(A)(2)(a); IIPPMA § 18(A).
11. *See Id.* § 15; IIPPMA § 15.
12. *See* Cal. Civ. Code §§ 56.35-56.36 (West 1999); Cal. Ins. Code § 799.10 (West 1999); Fla. Stat. Ann. §§ 381.004(6), 455.667(14) (West 1999); N.Y. Pub. Health § 2783 (McKinney 1999) (allowing the Attorney General to bring an action against a violator).
13. *See* Cal. Civ. Code § 56.11.
14. *See Id.*
15. *See Id.* § 56.10(c)(11).
16. *See Id.* § 56.104(a).
17. *See Id.*
18. *See* Cal. Ins. Code §§ 799 et seq.

19. *See Id.* § 799.10.
20. *See* Cal. Health & Safety Code § 120780(a).
21. *See* Cal. Ins. Code § 799.10(a).
22. *See* Cal. Health & Safety Code § 11977.
23. *See Id.*
24. *See* Fla. Stat. Ann. § 455.667(5) (1999).
25. *See Id.* § 455.667(5).
26. *See Id.* § 381.004(3)(e), (6)(c).
27. *See Id.* § 381.004(7).
28. *See Id.* § 381.004(3)(e)(2).
29. *See Id.*
30. *See* N.Y. Pub. Health §§ 2782 et seq.
31. *See Id.* § 2784.
32. *See Id.* § 2782(1)(j).
33. *See* N.Y. Mental Hyg. § 33.13 (McKinney 1999).
34. *See Id.* § 33.13(c)(7).
35. *See* 42 U.S.C. § 290dd-2 (2000).
36. *See Id.*
37. *See Id.* § 290dd-2(a).
38. *See Id.* § 290dd-2(a)-(b); 42 C.F.R. § 2.31.
39. *See* Mary Jane Fisher, “Administration Seeks ‘Strong’ Health Privacy Legislation,” National Underwriter - Life and Health, Feb. 21, 2000.
40. *See* 45 C.F.R. §§ 160.102 et seq.
41. *See Id.* § 160.103.
42. *See Id.* § 164.504.
43. *See Id.* §§ 160.102, 164.506(a).
44. *See Id.* § 164.508(a)-(d).
45. *See Id.* § 164.508(c)-(d).

