

HIPAA AND LANGUAGE SERVICES IN HEALTH CARE¹

In 1996, the Health Insurance Portability and Accountability Act (HIPAA) became law and began to reshape how patients and healthcare providers think about the privacy of patient information. For interpreters who work in health care settings, it is important to understand how the patient privacy requirements of HIPAA affect their work and conduct.

It was not until April, 2003, that the regulations outlining health privacy protections became fully operational. The “privacy rule” provides a set of minimum national standards that limit the ways that health plans, pharmacies, hospitals, clinicians, and others (called “covered entities”) can use patients’ personal medical information. As stated by the Department of Health and Human Services, “A major goal of the Privacy Rule is to assure that individuals’ health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public’s health and well being.”²

The regulations protect medical records and other individually identifiable health information, whether it is on paper, in computers or communicated orally. The responsibility to abide by HIPAA binds the covered entity not only to ensure that its own staff protect patient privacy but also that anyone who it “controls” (such as volunteers) and with whom it contracts (called “business associates”) follows these regulations. Thus interpreters who work in health care settings – whether as an employee, independent contractor or volunteer – are generally required to uphold the HIPAA privacy regulations.

The purpose of this memo is to explain HIPAA and its application to interpretation provided in health care settings.

1. Who is covered by the HIPAA privacy rule?

HIPAA regulates the conduct of covered entities. The nature and extent of an individual’s obligations under HIPAA depend on the person’s relationship to the covered entity. An interpreter in a health care setting may be:

- a “member of the workforce” of a covered entity;
- a “business associate” of a covered entity; or
- a person approved by the patient – neither of the above but approved by the patient to interpret.

As different situations arise, the nature of the interpreter’s relationship to a covered entity becomes increasingly important. While some overlap exists, different HIPAA expectations attach to members of the covered entity’s workforce, business associates, and a “person approved by the patient.” It is likely that an interpreter may be subject to different rules at different times, varying as the interpreter provides services for a variety of health care providers.

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Member of the workforce. The HIPAA privacy rule applies directly only to “covered entities”.³ Covered entities include health plans,⁴ health care clearinghouses,⁵ and certain health care providers.⁶ All members of a covered entity’s “workforce” are required to abide by the HIPAA privacy rule. Being a member of the “workforce” is not limited to employees but also includes volunteers and trainees. Basically, any person whose conduct, when performing work for a covered entity, is under the direct control of the entity is subject to the privacy rule. It does not matter whether a person is actually paid by the covered entity.⁷ This would include, for example, interpreters employed (full or part-time) by a hospital or other health care provider, volunteer interpreters coordinated through a covered entity’s volunteer program, and other interpreters who are under the “control” of the covered entity.

Business Associates. In general, a “business associate” is a person or organization that performs functions for, or provides services to, a covered entity that involve the use or disclosure of individually identifiable health information.⁸ The privacy rule requires that the covered entity ensure that its contract or other arrangement⁹ with the business associate include specified written safeguards to protect individually identifiable health information used by, or disclosed to, its business associates. In addition, a covered entity may not authorize its business associates to make any use or disclosure of protected health information that would violate the privacy rule.

The business associate must ensure that all of its agents, including subcontractors who have access to protected information, agree to implement reasonable and appropriate safeguards to protect it. A business associate would include, for example, both a language agency and an individual interpreter who contracts directly with a covered entity. For the language agency, each of its agents – the interpreters themselves – would be bound to uphold the privacy rule through their relationship with the business associate.

Person approved by the patient. The privacy rule allows other individuals to have access to a patient’s health information *with the patient’s consent*. This includes a family member, other relative, or a close personal friend of the individual, or any other person identified by the individual. To these “persons approved by the patient,” the covered entity may disclose protected health information directly relevant to the person’s involvement with the patient’s care or payment related to the patient’s health care if the covered entity: obtains the individual’s agreement; *or* provides the individual with the opportunity to object to the disclosure and the individual does not express an objection; *or* reasonably infers from the circumstances, based on the exercise of professional judgment, that the individual does not object to the disclosure.

Thus an interpreter brought by a patient to a clinical visit would be allowed to interpret and have access to a patient’s protected health information even if not a member of a covered entity’s workforce or acting as a business associate. The “person approved by the patient” category could also include, but only if the patient consents, an *ad hoc* interpreter such as another patient or person in the facility (who is not a member of the workforce or a business associate). Because in this situation the patient has consented and the interpreter is neither a member of the covered entity’s workforce nor a business associate, the interpreter is not bound by the privacy rule. But if the patient is concerned about disclosing certain information to an *ad hoc* interpreter, the patient has the right not to consent. If the patient does not object, the covered entity may reasonably believe consent has been given and disclose the patient’s information. The patient may ask the covered entity to provide an interpreter who would be subject to the protections of the HIPAA privacy rule.

2. How do I know if the “member of the workforce” or “business associate” rules apply to me?

It depends on the situation and it can be difficult to determine whether someone is a member of a covered entity’s workforce or a business associate. In practical terms, the HIPAA rules must be observed by both members of the workforce (since the rules must be enforced by the covered entity) and business associates (through their contract with the covered entity). The only practical difference relates to HIPAA-required training – a covered entity is responsible for training all members of its workforce about HIPAA requirements. A business associate does not have the same responsibility (unless required by the contract between the covered entity and business associate).

Since payment is not the deciding factor (see definition of “member of the workforce” in Q.1 above), determining whether someone is a member of the workforce depends in part on the nature of the interpreter’s work at the covered entity. If the interpreter is under the regular control of the covered entity, then she is a member of the workforce. For example, if a language agency sends the same interpreter to the same covered entity on a regular basis (for example, the same two days each week for the same hours) and the covered entity controls the interpreter’s work conditions (e.g. assigning where the interpreter works, when breaks are taken, etc.), the interpreter is more likely to be considered a member of the workforce than if the interpreter worked at a different covered entity each day with hours and responsibilities more closely controlled by the business associate.

It is likely that only a retrospective review would determine that an interpreter should be considered a member of the workforce. This might occur, for example, pursuant to a complaint investigation by HHS’ Office for Civil Rights. If OCR determined the interpreter was a member of the workforce, the interpreter should have received training from the covered entity. If no training was provided, the interpreter would not be subject to any penalties but the covered entity might be found in violation of HIPAA.

3. What patient information is protected under HIPAA?

An interpreter who is a member of a covered entity’s workforce or a business associate must abide by the privacy rule and not disclose certain protected information about a patient. Generally, the privacy rule protects all “individually identifiable health information” held or transmitted by a covered entity or its business associate. It does not matter what format the information is in – electronic, paper, or oral. “Individually identifiable health information” is information created or received by a covered entity, including demographic data, which identifies the individual (or could reasonably be thought to identify the individual) and relates to:

- the individual’s past, present or future physical or mental health or condition;
- the provision of health care to the individual; or
- the past, present, or future payment for the provision of health care to the individual.¹⁰

Individually identifiable health information includes many common identifiers such as name, address, birth date, and Social Security Number. This information is protected and may only be disclosed in certain circumstances (see Q. 4 below).

There are no restrictions on the use or disclosure of “de-identified” health information. De-identified health information neither identifies nor provides a reasonable basis for believing it could identify an individual.

In certain circumstances, a person’s primary language may constitute individually identifiable health information and be prohibited from disclosure. For example, if there are a relatively small number of foreign language speakers in a community, disclosing a person’s language and one other characteristic (such as age) might be sufficient to identify that person and thus disclosure would be prohibited.

4. When can an interpreter disclose protected patient information?

A major purpose of the privacy rule is to define and limit the circumstances in which an individual’s protected health information may be used or disclosed.

Member of the workforce. Interpreters who are members of a covered entity’s workforce may not use or disclose protected health information, except:

- as the privacy rule permits or requires; or
- as the individual who is the subject of the information (or the individual’s personal representative) authorizes in writing.

A member of the workforce should consult the privacy policy of the covered entity to determine the interpreter’s role in disclosing information. While a covered entity must disclose information in certain circumstances, and may disclose information in others, the covered entity may restrict the persons who can make the disclosure. For example, the covered entity may not allow the interpreter to provide the information before obtaining clearance or may only allow certain individuals to disclose this information.

If a covered entity’s privacy policy permits the interpreter to disclose this information, these are the rules that apply. A covered entity *must* disclose protected health information in only two situations:

- to individuals (or their personal representatives) when they request access to, or an accounting of disclosures of, their protected health information; and
- to the federal Department of Health and Human Services when it is undertaking a compliance investigation or review or enforcement action.

A covered entity *may* – but is not required to – disclose protected health information in the following circumstances¹¹:

- in connection with treatment, payment, and health care operations¹²;
- if the individual gave “informal permission”, that is the individual had an opportunity to object to the disclosure and did not;¹³

- incident to an otherwise permitted use and disclosure – as long as the covered entity has adopted reasonable safeguards as required by the privacy rule, and the information being shared is limited to the “minimum necessary”;
- public interest and benefit activities – there are specific recognized activities¹⁴ such as when required by law or for public health activities; and
- providing a limited data set for the purposes of research, public health or health care operations – limited protected health information may be provided to researchers without a patient’s permission.

If an emergency or an individual’s incapacity prevents a patient from agreeing or objecting to the use or disclosure, the covered entity may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the individual. If so, the entity may disclose only the protected health information that is directly relevant to the person's involvement with the individual's health care.

Whenever possible, a patient should be asked prior to disclosing information. But if this is impossible or impractical, whether an interpreter can disclose patient information depends on a number of factors. If the disclosed information is health information, and germane to the person’s care, then it can be disclosed (unless the patient said otherwise), assuming the interpreter is viewed as part of the health team (which should be the case). This is allowed under the provision above that allows disclosure “in conjunction with treatment.” If the information is not germane to treatment then it should not be disclosed at all. How the information was obtained from or about the client should not matter.

Business Associate. The contract between a covered entity and a business associate may not permit the business associate to disclose any information that a covered entity may not. Thus, a business associate and its agents are subject to the same requirements as a covered entity. An interpreter should review the covered entity’s privacy policy to understand any limits placed on the interpreters’ disclosure of information (see above under “member of the workforce” for more information on what must and may be disclosed). The contract between the covered entity and business associate may also impose additional requirements on the business associate, so it may be important for the interpreter to review those requirements as well.

Person approved by the patient. An interpreter who is neither a member of a covered entity’s workforce nor working for a business associate is not bound by the privacy rule. However, the interpreter may have independent ethical and confidentiality responsibilities – pursuant to either a Code of Ethics or other governing law or principles – that prohibit an interpreter from disclosing confidential or personal information about a patient.

5. Can an interpreter disclose information the patient discloses related to child/elder abuse or threatened violence to him/herself?

Any time an interpreter learns of this type of information in the course of interpreting, it is the interpreter’s responsibility to interpret the information (just as any other information provided by the client would be interpreted). The provider should then address the situation and may be required to report the information pursuant to state mandatory reporting laws. If the interpreter learned of the information outside of the interpreting encounter (for example, while speaking with the client in the waiting room), whether the interpreter must disclose this

information to the provider or others depends on state law¹⁵ and the applicable interpreter's code of conduct, regardless of HIPAA.

6. What information should patients receive about the HIPAA privacy rule?

An interpreter may be asked to explain a HIPAA “privacy notice” to a patient. This notice generally explains a covered entity's privacy practices. A covered entity should give it to a patient the first time a patient is seen. If the patient receives health care services from an organized health care arrangement – such as a managed care organization or group practice – she may receive a single notice of the policies that apply throughout the system.

Member of the workforce. A covered entity that has a “direct treatment relationship” (such as a hospital or individual physician, but not a laboratory) with an individual must make a good faith effort to obtain written acknowledgement from her of receipt of the privacy practices notice. If a translation of the privacy notice is not available, an interpreter who is a member of the workforce likely will be responsible for providing a sight translation of the document and requesting written acknowledgement.

It is questionable whether providing an English privacy notice to an LEP individual would constitute “good faith” on the part of the covered entity. The determination will probably depend on the circumstances, but this would certainly not be a preferred practice.

Business Associate. The business associate does not have a responsibility to distribute a privacy notice to patients. The contract between the covered entity and business associate may require the business associate and its agents to provide a sight translation of a privacy notice to assist the covered entity in meeting its HIPAA obligations.

Person approved by the patient. These interpreters do not have a responsibility to provide any notice but may be asked by the covered entity to provide a sight translation of a privacy notice.

7. Are all interpreters required to attend HIPAA training? If so, who is responsible for providing the training?

Member of the workforce. Yes. The privacy rule requires covered entities to train all workforce members on its privacy policies and procedures, as necessary and appropriate for them to carry out their functions.¹⁶ Because knowledge of what information can and cannot be disclosed is integral to the function of an interpreter, training would be necessary. Thus, for an interpreter who is a member of a covered entity's workforce, the covered entity must provide HIPAA training. If an interpreter does not receive training, the covered entity could be found in violation of HIPAA.

Business Associate. Not by law. The privacy rule does not impose specific requirements on business associates regarding training of its agents. The covered entity could, however, include a provision in its contract with a business associate to require training of the interpreters. Or the business associate could have its own internal policy to train its agents regarding HIPAA since its contract with the covered entity must include written safeguards to protect individually identifiable health information used by, or disclosed to, the business associates.

Person approved by the patient. No requirements exist for a covered entity to train other interpreters. Since the patient had to consent to the other person serving as an interpreter, the covered entity does not have any responsibility to ensure this interpreter maintains the patient's confidentiality according to the privacy rule.

8. What are the implications of the HIPAA privacy rule on the use of interpreters who have not signed an agreement of confidentiality with either the interpreter agency that sent them or the covered entity where they are interpreting?

Member of the workforce. A covered entity may require its staff to sign an agreement of confidentiality or may require compliance with HIPAA as a condition of employment.

Business Associate. A covered entity must sign a contract with a business associate that ensures confidentiality as required by the privacy rule. If the business associate (either an interpreter who has a direct relationship/contract with a covered entity or a language agency) refuses to sign, the covered entity would be violating HIPAA and should not use the interpreter/agency. A business associate may also be required, pursuant to its contract with a covered entity, to have its agents – the interpreters – sign a confidentiality agreement. If no requirement is included in the contract, the business associate is not required to do so by HIPAA. The business associate may have its own internal requirement for its agents to sign confidentiality and/or other agreements.

Persons approved by the patient. HIPAA does not address these interpreters. Interpreters who provide services through a community based organization or other resource may have independent requirements addressing confidentiality.

9. If an interpreter believes that the privacy rules are being violated, is it the interpreter's responsibility to mention it to the health care provider or otherwise report the violation?

An interpreter would only have to report a suspected violation if a specific policy applying to the interpreter requires it. However, an interpreter may affirmatively *choose* to report a violation to the covered entity and/or the HHS Office for Civil Rights.

Member of the workforce. Reporting would depend on the policies of the covered entity. The interpreter should review the entity's written HIPAA policy and proceed accordingly.

Business Associate. There is no requirement for a business associate to report possible violations (unless the contract with the covered entity requires it). The covered entity must ensure that a business associate does not materially breach its contract. If a material violation does occur, the covered entity must take reasonable steps to cure the breach or terminate the contract with the business associate. The business associate may have its own internal procedures that require reporting.

Person approved by the patient. There is no responsibility to report suspected violations.

10. Often interpreters are asked to call patients to provide information about appointments, medications, or lab results. Is it a HIPAA violation to leave a message on an answering machine or with a family member?

No, it is not a violation of the privacy rule to leave a message on an answering machine or with a family member *unless* the patient has requested a restriction on the communication of information. Even then, a covered entity does not have to agree to any restriction on the otherwise permissible communication of information. However, if it does agree to a restriction, it cannot violate the restriction except in an emergency where the restricted protected health information is needed to provide emergency treatment. A business associate would be required to uphold any restriction agreed to by the covered entity.

An interpreter who works for a covered entity or business associate should check whether the patient requested a limitation (which should be noted in the patient's record).

11. Does HIPAA require that health care providers provide language services or, for larger entities, have a Language Services Department?

No. The requirement to provide language services arises from Title VI of the Civil Rights Act of 1964. However, the privacy rule requires that covered entities distribute a privacy notice to their patients and make a good faith effort to obtain written acknowledgement from patients of receipt of the notice. It is difficult to imagine how a covered entity could meet this requirement without providing a limited English proficient individual with either a translated privacy notice or an oral interpretation of it.

12. Does monitoring of interpreting for quality assurance purposes violate HIPAA?

Generally the answer is no. If the covered entity hires a quality assessor to evaluate either members of its workforce or business associates, it would have to ensure the assessor abides by HIPAA, just like any other business associate. If a covered entity's business associate (such as a language agency or interpreter) conducts its own quality assessment, the business associate must ensure all of its agents as well as secondary business associates uphold its privacy requirements (pursuant to its contract with the covered entity). Thus if the quality assessment monitor is employed by the language agency or working pursuant to a contract with the language agency, the monitor is bound to uphold HIPAA and there is no violation.

The only situation where a violation could occur is if an interpreter who is a business associate of a covered entity submits to quality monitoring requested by a third party (not the covered entity or a business associate) that does not have an obligation to abide by HIPAA. For example, an interpreter may be asked to undergo third party monitoring by a language agency for whom the interpreter works part-time. If the entity requesting monitoring does not have its own responsibility to uphold HIPAA, any monitor hired by the language agency would not be subject to HIPAA and could release a patient's protected information. An interpreter should ensure that any monitoring of her work is conducted by a person or entity which is also obligated to keep patient information confidential pursuant to HIPAA.

13. Many interpreters keep detailed appointment books or schedules that include patient information (e.g. patient name, phone number, medical record number, date of birth, physician’s name). Is this a HIPAA violation?

No, keeping records does not violate HIPAA. This is allowed because the interpreter – either a member of a covered entity’s workforce or a business associate – is collecting this information so that it can perform services on behalf of a covered entity. But the interpreter must be careful to keep the information confidential as required by HIPAA.

14. Some interpreters must report patient information about an interpretation session to obtain payment. However, patients are never told that this information is being collected or reported. Is this practice in compliance with HIPAA?

Yes, this complies with HIPAA because the interpreter is using the information for a management and administrative purpose of receiving payment for her services.¹⁷ However, the covered entity or business associate must obtain reasonable assurances from those processing the information that the information will be kept confidential and will not be further disclosed unless required by law.

15. What if a state’s privacy law is different than HIPAA?

In general, state laws that are contrary to the privacy rule are preempted by the federal requirements, which means that the federal requirements will apply.¹⁸ “Contrary” means that it would be impossible for a covered entity to comply with both the state and federal requirements, or that the provision of state law impedes accomplishing the full purpose of HIPAA.¹⁹

But the privacy rule provides exceptions to the general rule of federal preemption. Thus, contrary state laws remain in effect if they:

- relate to the privacy of individually identifiable health information and provide *greater* privacy protections or rights with respect to such information;
- provide for the reporting of disease or injury, child abuse, birth, or death, or for public health surveillance, investigation, or intervention; or
- require certain health plan reporting, such as for management or financial audits.

States may also, in certain circumstances, apply to HHS for an exception.²⁰

¹ This report was made possible through the generous support of The California Endowment.

² HHS Office for Civil Rights, *OCR Privacy Brief: Summary of the HIPAA Privacy Rule*, at 1, available at <http://www.hhs.gov/ocr/privacysummary.pdf>.

³ 45 C.F.R. § 106.103.

⁴ Health plans include: a group health plan as defined in the Public Health Service Act (PHSA) if the plan has 50 or more participants or is administered by an entity other than the employer who established and maintains the plan; a health insurance issuer as defined in the PHSA; a health maintenance organization as defined in the PHSA; Part A or Part B of Medicare and Medicare supplemental policies; Medicaid; a long-term care policy, including most nursing home fixed indemnity policies; an employee welfare

benefit plan covering two or more employers; the health care program for active military personnel and the Civilian Health and Medical Program of the Uniformed Services; the veterans health care program; the Indian Health Service program; and the Federal Employees Health Benefit Plan. 42 U.S.C. § 1171(5), *see also* 45 C.F.R. § 106.103.

⁵ Health care clearinghouses are defined as public or private entities that process or facilitate the processing of nonstandard data elements of health information into standard data elements. 42 U.S.C. § 1320d, Social Security Act (SSA) § 1171, *see also* 45 C.F.R. § 106.103.

⁶ Health care providers are only covered if they electronically transmit health information in connection with certain transactions, like claims. Health care providers are defined as including providers of services (hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, or for limited purposes regarding services provided in a teaching facility, a fund), providers of medical or other health services (defined in 42 U.S.C. § 1395x(s), SSA § 1861) and any other person furnishing health care services or supplies. *See* 45 C.F.R. § 106.103.

⁷ 45 C.F.R. § 160.103.

⁸ *Id.*

⁹ The rule requires a covered entity to have a contract or “other arrangement” with a business associate to ensure compliance with the privacy rule. It remains unclear, however, what would constitute an allowable “other arrangement.” 45 C.F.R. §§ 164.502, 162.504.

¹⁰ 45 C.F.R. § 160.103.

¹¹ The privacy rule contains much more detailed information describing these reasons. *See* 45 C.F.R. § 164.502(a)(1).

¹² These terms are defined in the privacy rule.

¹³ Informal permission may be obtained by asking the individual outright, or by circumstances that clearly give the individual the opportunity to agree, acquiesce, or object (where the individual is incapacitated, in an emergency situation, or not available, covered entities generally use their professional judgment to determine if the use and disclosure is in the best interests of the individual). 45 C.F.R. §§ 164.510, 164.512.

¹⁴ *See* 45 C.F.R. § 164.512.

¹⁵ For more information on whether interpreters are mandated to report child abuse, *see* National Health Law Program, *Health Care Interpreters: When Are They Mandated to Report Child Abuse?*, available at <http://www.healthlaw.org/pubs/200312.interpreter.html>. For information on state reporting requirements on domestic violence, *see* Family Violence Prevention Fund, *National Consensus Guidelines on Identifying and Responding to Domestic Violence Victimization in Health Care Settings*, Appendix J, available at <http://endabuse.org/programs/healthcare/files/Consensus.pdf>.

¹⁶ 45 C.F.R. § 164.530.

¹⁷ 45 C.F.R. §§ 164.501 (defining “payment”), 164.506(c).

¹⁸ 45 C.F.R. § 160.203.

¹⁹ 45 C.F.R. § 160.202.

²⁰ 45 C.F.R. §§ 160.203-205.