

# *Medical Practice Newsletter*

February 4, 2016

## **Modification – HIPAA Privacy Rule**

*DEPARTMENT OF HEALTH AND HUMAN SERVICES Office of the Secretary 45 CFR Part 164 Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS)  
AGENCY: Office for Civil Rights, Department of Health and Human Services.*



On January 6, as part of President Obama's executive action to combat gun violence, HHS announced a final regulation modifying the HIPAA Privacy Rule to allow certain HIPAA covered entities to disclose limited information to the National Instant Criminal Background Check System (NICS). The modification allows certain covered entities to disclose the identities of individuals, known as "prohibitors" who, for mental health reasons, are already prohibited by Federal law from having, shipping, transporting, or possessing a firearm. The permitted disclosure applies to covered entities that maintain information relevant to the federal mental health prohibitor on behalf of a State or are responsible for ordering involuntary commitments or the decisions that would make someone subject to the prohibitor.

Historically, the HIPAA Privacy Rule standards placed strict limitations on the information covered entities could release and how the information could be used, as well as providing standards for individuals to understand their rights and to control how their health information is used. With one main exception, HIPAA Privacy Laws applied to mental health the same as other health care. Because they contain especially sensitive information, psychotherapy notes have been treated differently. "Psychotherapy notes are treated differently from other mental health information both because they contain particularly sensitive information and because they are the personal notes of the therapist that typically are not required or useful for treatment, payment, or health care operations purposes, other than by the mental health professional who created the notes. Therefore, with few exceptions, the Privacy Rule requires a covered entity to obtain a patient's authorization prior to a disclosure of psychotherapy notes for any reason, including a disclosure for treatment purposes to a health care provider other than the originator of the notes." See 45 CFR 164.508(a)(2). A notable exception exists for disclosures required by other law, such as for mandatory reporting of abuse, and mandatory "duty to warn" situations regarding threats of serious and imminent harm made by the patient (State laws vary as to whether such a warning is mandatory or permissible)." (Department of Health & Human Services)

When the Executive Actions were announced in 2013, some states expressed concerns that HIPAA laws would restrict them from sharing relevant mental health information on people who were prohibited from owning guns for mental health reasons. The Administration's announcement on January 4, 2016 addressed these concerns by allowing providers to report Federal prohibitors (individuals who are Federally prohibited from owning or transporting guns) to the National Instant Criminal Background System (NICS) under HIPAA. When making such a report, only basic identifying information about the individual should be reported, such as name, social security number, and date of birth. Additionally, the Office of Civil Rights would request the name of the submitting agency and an indication of which of the ten prohibited categories is applicable to the individual:

- 1) *Has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.*
- 2) *Is a fugitive from justice.*
- 3) *Is an unlawful user of or addicted to any controlled substance.*
- 4) *Has been adjudicated as a mental defective or committed to a mental institution*
- 5) *Is illegally or unlawfully in the United States.*
- 6) *Has been discharged from the Armed Forces under dishonorable conditions.*
- 7) *Having been a citizen of the United States, has renounced U.S. citizenship.*
- 8) *Is subject to a court order that restrains the person from harassing, stalking, or threatening an intimate partner or child of such intimate partner.*
- 9) *Has been convicted in any court of a misdemeanor crime of domestic violence.*
- 10) *Is under indictment/information for a crime punishable by imprisonment for a term exceeding one year.*  
*(FBI)*

Questions? Call our Medical Practice Services Team – (276) 466-5248.

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