

OREGON STATE BAR
Legislative Proposal

RE: Disclosures of protected health information concerning decedents and incapable persons

FROM: OSB Health Law Section

Legislative Contact: Gwen Dayton
Phone: (503) 636-2204
Fax: (503) 636-8310
E-mail: gdayton@oahhs.org

This bill would amend ORS chapter 192.

1. PROBLEM PRESENTED

The HIPAA privacy rule restricts disclosure of protected health information (“PHI”) by covered entities absent the subject individual’s authorization of such disclosure. A number of exceptions to the authorization requirement exist. However, these exceptions do not address a number of reoccurring circumstances involving decedents and incapacitated persons. The silence of state law in these areas frustrates legitimate requests for the PHI of decedents, family members, and perhaps others.

2. SOLUTION

The section recommends the adoption of a prioritized list of persons to whom disclosure is required in specified circumstances. Such laws would exploit the “required by law” exception to the HIPAA authorization exception. Appropriate circumstances for requiring disclosure might involve an intestate decedent or a testator whose estate has been closed and personal representative discharged, or disclosures to a cohabiting spouse when the subject spouse is incapable of providing authorization. Other possible circumstances might involve disclosures to the parents or guardians of minors with the power of informed consent where Oregon law does not already permit disclosure. *See* ORS chapter 109.

3. PUBLIC POLICY IMPLICATION

Oregon law was modified in 2003 to incorporate some of the basic precepts and vocabulary of the HIPAA privacy rule. Our evolving experience with HIPAA makes clear that privacy issues left to state regulation need to be developed in order to adapt responsibly to the combined federal-state scheme of medical privacy protections. Family members in particular have legitimate need of PHI in circumstances where the individual has passed away, is incapable, or is a minor with the power of informed consent.

4. PROPOSED AMENDMENTS

SECTION 1. Amend ORS 192.519 as follows:

| 192.519 Definitions for ORS 192.518 to 192.524. As used in ORS 192.518 to ~~192.524~~ 192.525:

(1) “Authorization” means a document written in plain language that contains at least the following:

- (a) A description of the information to be used or disclosed that identifies the information in a specific and meaningful way;
- (b) The name or other specific identification of the person or persons authorized to make the requested use or disclosure;
- (c) The name or other specific identification of the person or persons to whom the covered entity may make the requested use or disclosure;
- (d) A description of each purpose of the requested use or disclosure, including but not limited to a statement that the use or disclosure is at the request of the individual;
- (e) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure;
- (f) The signature of the individual or personal representative of the individual and the date;
- (g) A description of the authority of the personal representative, if applicable; and
- (h) Statements adequate to place the individual on notice of the following:
 - (A) The individual’s right to revoke the authorization in writing;
 - (B) The exceptions to the right to revoke the authorization;
 - (C) The ability or inability to condition treatment, payment, enrollment or eligibility for benefits on whether the individual signs the authorization; and
 - (D) The potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer protected.

(2) “Covered entity” means:

- (a) A state health plan;
- (b) A health insurer;
- (c) A health care provider that transmits any health information in electronic form to carry out financial or administrative activities in connection with a transaction covered by ORS 192.518 to 192.524; or
- (d) A health care clearinghouse.

(3) “Health care” means care, services or supplies related to the health of an individual.

(4) “Health care operations” includes but is not limited to:

- (a) Quality assessment, accreditation, auditing and improvement activities;
- (b) Case management and care coordination;
- (c) Reviewing the competence, qualifications or performance of health care providers or health insurers;
- (d) Underwriting activities;
- (e) Arranging for legal services;
- (f) Business planning;
- (g) Customer services;
- (h) Resolving internal grievances;
- (i) Creating de-identified information; and
- (j) Fundraising.

(5) “Health care provider” includes but is not limited to:

- (a) A psychologist, occupational therapist, clinical social worker, professional counselor or marriage and family therapist licensed under ORS chapter 675 or an employee of the psychologist, occupational therapist, clinical social worker, professional counselor or marriage and family therapist;
 - (b) A physician, podiatric physician and surgeon, physician assistant or acupuncturist licensed under ORS chapter 677 or an employee of the physician, podiatric physician and surgeon, physician assistant or acupuncturist;
 - (c) A nurse or nursing home administrator licensed under ORS chapter 678 or an employee of the nurse or nursing home administrator;
 - (d) A dentist licensed under ORS chapter 679 or an employee of the dentist;
 - (e) A dental hygienist or denturist licensed under ORS chapter 680 or an employee of the dental hygienist or denturist;
 - (f) A speech-language pathologist or audiologist licensed under ORS chapter 681 or an employee of the speech-language pathologist or audiologist;
 - (g) An emergency medical technician certified under ORS chapter 682;
 - (h) An optometrist licensed under ORS chapter 683 or an employee of the optometrist;
 - (i) A chiropractic physician licensed under ORS chapter 684 or an employee of the chiropractic physician;
 - (j) A naturopathic physician licensed under ORS chapter 685 or an employee of the naturopathic physician;
 - (k) A massage therapist licensed under ORS 687.011 to 687.250 or an employee of the massage therapist;
 - (L) A direct entry midwife licensed under ORS 687.405 to 687.495 or an employee of the direct entry midwife;
 - (m) A physical therapist licensed under ORS 688.010 to 688.220 or an employee of the physical therapist;
 - (n) A radiologic technologist licensed under ORS 688.405 to 688.605 or an employee of the radiologic technologist;
 - (o) A respiratory care practitioner licensed under ORS 688.800 to 688.840 or an employee of the respiratory care practitioner;
 - (p) A pharmacist licensed under ORS chapter 689 or an employee of the pharmacist;
 - (q) A dietitian licensed under ORS 691.405 to 691.585 or an employee of the dietitian;
 - (r) A funeral service practitioner licensed under ORS chapter 692 or an employee of the funeral service practitioner;
 - (s) A health care facility as defined in ORS 442.015;
 - (t) A home health agency as defined in ORS 443.005;
 - (u) A hospice program as defined in ORS 443.850;
 - (v) A clinical laboratory as defined in ORS 438.010;
 - (w) A pharmacy as defined in ORS 689.005;
 - (x) A diabetes self-management program as defined in ORS 743.694; and
 - (y) Any other person or entity that furnishes, bills for or is paid for health care in the normal course of business.
- (6) "Health information" means any oral or written information in any form or medium that:
- (a) Is created or received by a covered entity, a public health authority, an employer, a life insurer, a school, a university or a health care provider that is not a covered entity; and
 - (b) Relates to:

- (A) The past, present or future physical or mental health or condition of an individual;
 - (B) The provision of health care to an individual; or
 - (C) The past, present or future payment for the provision of health care to an individual.
- (7) “Health insurer” means:
- (a) An insurer as defined in ORS 731.106 who offers:
 - (A) A health benefit plan as defined in ORS 743.730;
 - (B) A short term health insurance policy, the duration of which does not exceed six months including renewals;
 - (C) A student health insurance policy;
 - (D) A Medicare supplemental policy; or
 - (E) A dental only policy.
 - (b) The Oregon Medical Insurance Pool operated by the Oregon Medical Insurance Pool Board under ORS 735.600 to 735.650.
- (8) “Individually identifiable health information” means any oral or written health information in any form or medium that is:
- (a) Created or received by a covered entity, an employer or a health care provider that is not a covered entity; and
 - (b) Identifiable to an individual, including demographic information that identifies the individual, or for which there is a reasonable basis to believe the information can be used to identify an individual, and that relates to:
 - (A) The past, present or future physical or mental health or condition of an individual;
 - (B) The provision of health care to an individual; or
 - (C) The past, present or future payment for the provision of health care to an individual.
- (9) “Payment” includes but is not limited to:
- (a) Efforts to obtain premiums or reimbursement;
 - (b) Determining eligibility or coverage;
 - (c) Billing activities;
 - (d) Claims management;
 - (e) Reviewing health care to determine medical necessity;
 - (f) Utilization review; and
 - (g) Disclosures to consumer reporting agencies.
- (10) “Personal representative” includes but is not limited to:
- (a) A person appointed as a guardian under ORS 125.305, 419B.370, 419C.481 or 419C.555 with authority to make medical and health care decisions;
 - (b) A person appointed as a health care representative under ORS 127.505 to 127.660 or a representative under ORS 127.700 to 127.737 to make health care decisions or mental health treatment decisions; and
 - (c) A person appointed as a personal representative under ORS chapter 113.
 - (d) A person designated a personal representative in ORS 192.525.
- (11)(a) “Protected health information” means individually identifiable health information that is maintained or transmitted in any form of electronic or other medium by a covered entity.
- (b) “Protected health information” does not mean individually identifiable health information in:
- (A) Education records covered by the federal Family Educational Rights and Privacy Act (20 U.S.C. 1232g);
 - (B) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv); or
 - (C) Employment records held by a covered entity in its role as employer.

(12) “State health plan” means:

- (a) The state Medicaid program;
- (b) The Oregon State Children’s Health Insurance Program; or
- (c) The Family Health Insurance Assistance Program established in ORS 735.720 to 735.740.

(13) “Treatment” includes but is not limited to:

- (a) The provision, coordination or management of health care; and
- (b) Consultations and referrals between health care providers.

SECTION 2. Add a new ORS 192.525 as follows:

(1) A covered entity is required to disclose protected health information to a personal representative designated by this section.

(2) If an individual dies intestate, or if an individual’s estate has been closed and its personal representative discharged, and there is no other personal representative of an individual, then the individual’s personal representative shall be the first of the following, in the following order, who can be located with reasonable effort by the covered entity and who is willing to serve as the personal representative:

- (a) A guardian of the individual who, at the time of the individual’s death, was authorized to make health care decisions for the individual;
- (b) The individual’s surviving spouse;
- (c) Either parent of the individual, or an individual standing in loco parentis to the individual;
- (d) An adult designated by the others listed in this subsection, if no person listed in this subsection objects to the designation;
- (e) The individual’s closest adult relation.

(3) If an individual is an unemancipated or unmarried minor with the power of informed consent under ORS 109.610 to 109.675, then the individual’s personal representative shall be either parent of the individual or a person standing in loco parentis to the individual except to the extent that the minor has sought diagnosis or treatment for:

- (a) venereal disease;
- (b) birth control; or
- (c) a mental or emotional disorder or chemical dependence, excluding methadone maintenance.

(4) Nothing in subsection (3) shall:

- (a) compel the disclosure of protected health information to a personal representative if such disclosure is contrary to the provisions of ORS 109.610 to 109.675 or to the discretion reserved thereby to the exercise of professional judgment; or
- (b) alter or effect the privileges and immunities bestowed on covered entities, minors, parents, or legal guardians by ORS 109.610 to 109.690.