HIPAA RESPONDS TO DOBBS

GRETCHEN LUSSO, J.D.
Member of the Health Law Practice Group
Koley Jessen Attorneys at Law

On Dec. 23, 2024, the HIPAA Privacy Rule to Support Reproductive Health Care Privacy went into effect. The U.S. Department of Health and Human Services Office for Civil Rights ("OCR") published the new rule in an effort to protect reproductive health privacy in the wake of Dobbs v. Jackson Women's Health Organization. The new rule represents the first time in over a decade that OCR has made substantive changes to the HIPAA Privacy Rule.

Among those substantive changes is the new defined term "reproductive health care." The term is intentionally broad, encompassing any health care that affects an individual's health in all matters relating to the reproductive system and its functions and processes. Examples include services typically considered within the ambit of reproductive health, such as pregnancy-related and prenatal care, fertility treatments, contraception, and abortion. However, the term also encompasses care more tangentially affecting the reproductive system, such as mammography, and care related to sexual health, such as STI treatment and erectile dysfunction medication.

Due to the broad definition of "reproductive health care," the universe of health records that contain reproductive health information might, in some cases, be quite expansive. The plain language of these regulations suggests that any and all health records containing information related to an individual's reproductive health are subject to the rule. By way of example, any health record that mentions a patient's past or current pregnancy, use of certain medications (e.g., birth control or erectile dysfunction medications), or even a patient's history of certain cancers, such as urological, cervical, or breast cancers, contains protected health information ("PHI") that could reasonably be said to relate to that person's reproductive health care. Even a patient intake form that asks "are you pregnant or planning to become pregnant" would constitute a record that contains reproductive health information.

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As far as substantive changes go, this new definition is just the start. Under the new rules, if a HIPAA-regulated health care provider receives a request for medical records that expressly asks for, or that is otherwise broad enough to possibly encompass, reproductive health care PHI, and if the records are being sought for certain purposes, then the provider must obtain an attestation from the requestor before disclosing those records. An attestation is required when the reason for the medical records request relates to health oversight activities, judicial or administrative proceedings (e.g., subpoenas for records), law enforcement activities, or, if regarding a decedent, a disclosure to a coroner or medical examiner.

The attestation must meet certain conditions. Providers can create their own attestations or use OCR's model attestation, a copy of which is online at hhs.gov/sites/default/files/model-attestation.pdf. In either case, providers should verify that the attestation they received from a requestor contains all information required by the regulations. For example, the attestation must identify the person making the request and describe the specific PHI requested. Most importantly, the attestation must include a clear statement from the requestor that the PHI will not be used or disclosed for a prohibited purpose. So, what is a "prohibited purpose?"

Summarily, the new rule prohibits health care providers from disclosing PHI to persons or entities involved in conducting a criminal, civil, or administrative investigation into any person, or imposing liability on any such person, for the mere act of seeking, obtaining, providing, or facilitating lawful reproductive health care. The prohibition also extends to disclosures of PHI to persons or entities involved in identifying any person in connection with the foregoing. The prohibition applies whenever the reproductive health care at issue was lawful under the circumstances in which it was provided. Notably, reproductive health care performed by another provider is presumed lawful, subject to limited exceptions.

The attestation requirement is intended to give health care providers a way to verify that they are not disclosing PHI in violation of HIPAA's new limitations on disclosing reproductive health care PHI. According to OCR, another purpose behind the attestation requirement is to put requestors of PHI on notice of the potential penalties for those who knowingly and in violation of HIPAA obtain or disclose reproductive health care PHI. Crucially, however, the onus is squarely on providers to get the attestation. It is the health care provider, not the requestor, who will be subject to punishment for failure to comply with the attestation requirement.

The outer bounds of these new requirements are presently unknown. Given that the genesis of the new rule was the Dobbs decision as opposed to, say, a need to apply stronger confidentiality protections to routine prenatal appointments or a testicular cancer diagnosis, it remains to be seen where OCR will focus its attention in terms of enforcement priorities. Only time will tell how rigorously the new rule is actually applied and enforced. In the meantime, however, risk-averse providers should assume that the rule will be applied and enforced as broadly as it was drafted.