

Tougher Privacy Rule Won't End Abortion Data Fight

By **Theresa Schliep**

Law360 (April 30, 2024, 4:11 PM EDT) -- Healthcare attorneys are praising newly enhanced federal protections for patient abortion records, saying it provides some welcome clarity in a tricky health data landscape.

But the new abortion-focused rule isn't expected to release providers from a sticky, politically fraught situation: complying with federal privacy law while potentially facing out-of-state probes into the most sensitive kinds of patient information.

"Providers may find themselves a bit between a rock and a hard place," Carmel Shachar, a Harvard Law School professor, told Law360.

The final U.S. Department of Health and Human Services **rule**, released April 22, **applies special safeguards** under the Health Insurance Portability and Accountability Act to abortion-related records, protecting in particular women in states with bans who travel out-of-state to get abortion care.

HIPAA "has real teeth for healthcare organizations that fail to protect patient privacy, so erring on the side of being privacy-protective is a good idea," Shachar said. "It is possible that we'll see some litigation trying to resolve tensions between federal law and state prosecutorial interests."

The final regulation makes changes to the privacy rule under HIPAA, which sets out standards for the use of protected health information by certain healthcare organizations.

While the law has generally treated all records the same, there are some exceptions, like enhanced protections for psychotherapy notes. The new guidance essentially applies special protections to reproductive healthcare records, barring the use or sharing of protected health information to investigate or prosecute patients or providers who have obtained or provided legal reproductive healthcare, including an abortion.

Previously, providers or other covered entities could release abortion-related records if they were ordered to by a court or were subject to a subpoena, or if disclosure was otherwise required by the law.

Citing the Supreme Court's decision in *Dobbs* that overturned the federal right to an abortion, HHS said "legal developments" increase the risk that protected health information, or PHI, will be used to investigate people who receive or provide abortions, including **those who travel out-of-state**.

Those numbers have ballooned in recent years. Around 1 in 5 patients traveled outside their home states to get abortions in the first half of 2023, according to the Guttmacher Institute, a trend spurred by the proliferation of abortion restrictions post-*Dobbs*.

The extent of the threat to abortion patient records isn't clear. Some Republican attorney generals chafe at the assertion that they'll begin pursuing prosecutions against patients or providers.

Last summer, a group of Republican state attorneys general **said in response** to the proposed rule that the Biden administration "has pushed a false narrative that states are seeking to treat pregnant women as criminals or punish medical personnel who provide lifesaving care."

"The proposed rule defies the governing statute, would unlawfully interfere with states' authority to

enforce their laws, and does not serve any legitimate need," the AGs said.

But 14 states have banned abortions with limited exceptions, and some states impose criminal liabilities on providers, with penalties including prison time and loss of medical licensure.

Moreover, the Biden administration has said that the mere possibility of investigation could "chill" patients from seeking out reproductive care, compelling it to make the HIPAA revisions.

It's a legal minefield for providers who are navigating tremendous uncertainty, including over the applicability of exceptions to abortion bans and over the potential conflict between state prohibitions and federal law governing emergency care.

It's that complex landscape that compelled HHS to update HIPAA's privacy rule.

Andrea Frey, a partner with Hooper Lundy & Bookman PC, said the HHS Office for Civil Rights, which oversees HIPAA enforcement, took a "middle of the road" approach to the guidance. It declined to create a new category of PHI for reproductive care that could have imposed some burdens on healthcare providers. The agency also didn't take other broad actions, like protecting healthcare records pertaining to illegal care.

Notably, federal officials did include in the rule a presumption that reproductive healthcare is lawful, putting the burden on prosecutors or investigators to demonstrate otherwise.

But Frey, co-chair of Hooper Lundy's reproductive health and digital health practices, agreed that providers, health plans or other covered entities may still get caught between competing interests. That's especially true for entities operating in multiple states with conflicting abortion laws.

What happens, for example, if a health plan has the PHI of someone who obtained legal reproductive care in California before returning to their home state of Arizona, where such care is illegal?

"Could there be a contempt of court issue, if law enforcement seeks those records?" Frey said. There's a "juxtaposition," she added, "between following HIPAA on the one hand, and potentially getting placed in contempt of court if you have those records requested in a judicial proceeding."

Some attorneys said that, if it comes down to complying with HIPAA or acceding to state officials, they'd pick HIPAA. But Kayte Spector-Bagdady, a lawyer and professor at the University of Michigan Medical School, said individual clinicians who fear jail time if they don't yield to state investigators might just capitulate

While HIPAA violations "focus on the hospital as a whole — the hospital gets fined, or the hospital will lose [Centers for Medicare & Medicaid Services] money," it's the individual clinicians who face criminal liability under many of the state laws, Spector-Bagdady said.

"If I'm being threatened to go to jail on the one hand, versus protecting my hospital from being fined, it would be reasonable for me to say, 'I don't want to go to jail to protect the hospital from being fined,'" she said.

Spector-Bagdady added she thinks the "rule is great, and HHS went as far as it probably could to protect reproductive health policy," but said it's unclear whether it would cause a "huge shift in practice."

Moreover, telehealth poses its own challenges, according to Harvard's Shachar, who is also the faculty director of the Health Law and Policy Clinic at the Center for Health Law and Policy Innovation.

Even under the new rule, it's not clear whether a provider in a "shield law state" — states that seek to protect providers in their borders who prescribe abortion medication through telemedicine — could lawfully furnish care through telehealth to a patient in a state with abortion restrictions.

While providers might be stuck in the middle, experts told Law360 that the rule overall gives providers and other healthcare organizations some reassurances if they're trying to provide reproductive care to patients.

"Before the final rule takes effect, there is a window of time where a state regulator or state enforcement official can try and seek the information that will soon be prohibited," said Bruce D. Armon, a Saul Ewing LLP partner and chair of its healthcare practice. "Once the final rule is effective, there will be additional levels of protections for providers."

One of those protections is an attestation requirement, under which state investigators or regulators would have to provide a covered entity a written assurance indicating they would not be using requested records for a prohibited purpose, like an investigation, according to Armon.

"The attestation gives an additional level of protection so a provider is not in a bait-and-switch situation, where they might not understand or appreciate the full context as to why somebody is asking about patient Jane Doe's care," Armon said.

Ultimately, the rule spotlights the outsize role that health data is playing in the current abortion battles. There's already tremendous scrutiny over what companies are doing with health data, and the data generated by people seeking reproductive care can prove to be the main tool of investigators or prosecutors looking to enforce state abortion laws.

"Medical records of abortions are by far the best evidence to prosecute people for getting abortions and physicians for providing them," Shachar said.

"This new rule can be really protective against these punitive prosecutions, for example, allowing people to truly have the freedom to travel to a different state for care without worry that an aggressive AG will go after them."

--Additional reporting by Hailey Konnath. Editing by Marygrace Anderson.