

Primerus

# Professional Liability and Practice Group

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# Patients and Practitioners Beware: Mandatory Electronic Medical Records and What You Need to Know

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HITECH Expands Enforcement and Increases Penalties for Violations

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## Lots of Government Money

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- The 2009 “Stimulus Package” earmarked \$19.2 billion for Health Information Technology (“HIT”).
- Title XIII (Section 13001) of that legislation is termed “Health Information Technology for Economic and Clinical Health” (“HITECH”).

# HIPAA Violations Civil Penalties (42 USC § 1320d-5)

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- HITECH established a tiered penalty structure for HIPAA violations.
- The Secretary of the Department of Health and Human Services (HHS) may determine the amount of the penalty based on the nature and extent of the harm resulting from the violation.
- The Secretary is prohibited from imposing civil penalties (except in cases of willful neglect) if the violation is corrected within 30 days.

## **HIPAA Violations Civil Penalties (42 USC § 1320d-5)**

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- Individual did not know (and by exercising reasonable diligence would not have known) that he/she violated HIPAA:
- Minimum Penalty = \$100 per violation, with an annual maximum of \$25,000 for repeat violations;
- Maximum Penalty = \$50,000 per violation, with an annual maximum of \$1.5 million

# HIPAA Violations Civil Penalties

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- HIPAA violation due to reasonable cause and not due to willful neglect:
- Minimum Penalty = \$1,000 per violation, with an annual maximum of \$100,000 for repeat violations;
- Maximum Penalty = \$50,000 per violation, with an annual maximum of \$1.5 million

# HIPAA Violations Civil Penalties

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- HIPAA violation due to willful neglect but violation is corrected within the required time period:
- Minimum Penalty = \$10,000 per violation, with an annual maximum of \$250,000 for repeat violations;
- Maximum Penalty = \$50,000 per violation, with an annual maximum of \$1.5 million

# HIPAA Violations Civil Penalties

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- HIPAA violation is due to willful neglect and is not corrected:
- Minimum Penalty = \$50,000 per violation, with an annual maximum of \$1.5 million;
- Maximum Penalty = \$50,000 per violation, with an annual maximum of \$1.5 million

## **Criminal Penalties (42 USC § 1320d-6)** U.S. Department of Justice (DOJ) enforced

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“Covered entities” and “specified individuals” whom “knowingly” obtain or disclose individually identifiable health information face a fine of up to \$50,000, as well as imprisonment up to one year.

# **Criminal Penalties (42 USC § 1320d-6)** U.S. Department of Justice (DOJ) enforced

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Offenses committed under false pretenses allow penalties to be increased to a \$100,000 fine, with up to five years in prison.

## **Criminal Penalties (42 USC § 1320d-6)** U.S. Department of Justice (DOJ) enforced

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Offenses committed with the intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain or malicious harm permit fines of \$250,000, and imprisonment for up to ten years.

## **Criminal Penalties (42 USC § 1320d-6)** U.S. Department of Justice (DOJ) enforced

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Offenses committed with the intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain or malicious harm permit fines of \$250,000, and imprisonment for up to ten years.

## “Covered Entities” subject to the HIPAA Criminal Penalties

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Includes health plans, health care clearinghouses, health care providers who transmit claims in electronic form, and Medicare prescription drug card sponsors.

Individuals such as directors, employees, or officers of the covered entity may also be directly criminally liable under HIPAA in accordance with principles of “corporate criminal liability.”

Individuals can also be charged with conspiracy or aiding and abetting.

## Enforcing Agencies

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The DHHS Office of Civil Rights (OCR) enforces the privacy standards.

The Centers for Medicare & Medicaid (CMS) enforces both the transaction and code set standards and the security standards.

Enforcement of the civil monetary provisions is tasked to OCR.

## Private Causes of Action

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While HIPAA protects the health information of individuals, it did not create a private cause of action for those aggrieved.

Effective February 17, 2009, HITECH authorized each state A.G. to pursue civil actions for HIPAA privacy and security violations that have adversely affected a citizen.

Attorneys' fees are also allowed to be collected by an AG for pursuing civil actions for HIPAA privacy and security violations.

## Warning Signs of a Government Investigation

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Employee complaints of improper conduct should not be ignored. The employee's next step may be to call law enforcement.

Unguarded statements by government auditors may provide a tip.

The results of an audit or inspection may reveal a discrepancy.

Contact by a government investigator.

## Government Right of Access of Documents

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By directly participating in a government health care program, the health care provider is subject to a host of a record-keeping and reporting requirements, and most of the providers' records are available to government regulatory agencies without compulsory process.

Whoever receives the demand for access should request from the government investigator an opportunity to consult with legal counsel before complying. Ordinarily, such requests will be granted.

## Government Right of Access of Documents

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The right to immediate access does not give the government the right to take the originals of records (although that can be done under a search warrant). All records responsive to the request for immediate access should be made available for inspection, except that communications with an attorney are privileged and should not be produced.

If copies of records are made by or for the investigator, a separate copy should be made and retained in a separate file by the Compliance Officer.

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## Government Right of Access of Documents

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In the event a search warrant is served, examine the search warrant carefully and direct the investigator to where the requested records are maintained. (Under a search warrant, the government will take the original records). Contact counsel by telephone and connect counsel to the lead investigator. Do not fail to disclose where responsive records are kept. Monitor the investigators closely and inform counsel if privileged records or records that are outside the scope of the search warrant are taken. Do not under any circumstances attempt to physically prevent the removal of records.

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## Retention of Outside Counsel

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A healthcare entity facing an investigation needs the advice and counsel of an attorney with extensive experience in corporate criminal matters as well as regulatory law and civil litigation. In order to be protected from future disclosures to the government, fact finding must be conducted by counsel for purposes of legal representation. In considering outside counsel, corporations should consider not only the representation for itself, but also separate legal representation for one or more of its employees.

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