Note to readers: This is the Introduction and Part I of the draft paper (approximately eleven pages) along with the Table of Contents. I am happy to provide a more complete draft to anyone who is interested.

Without Work and Medical Privacy: HIPAA’s Privacy Rule, Workers’ Compensation, and the Challenges of Federalism

Ani B. Satz

ABSTRACT

INTRODUCTION

I. HIPAA’S PRIVACY RULE AND WORKERS’ COMPENSATION
   A. Overview HIPAA Privacy Rule
   B. HIPAA Privacy Rule and Workers’ Compensation Proceedings
      1. Section 164.512(l)’s “Exclusion” for Workers’ Compensation and other Permitted Disclosures
      2. Authorized Disclosures
      3. Scope of Disclosure
         a. State Restrictions
         b. Provider Restrictions

II. FEDERALISM AND HEALTH INFORMATION PRIVACY
   A. HIPAA Privacy Rule’s Preemption Provision
   B. State Judicial Interpretation of § 164.512(l)
      1. Recognizing an Exception
      2. Reading State Workers’ Compensation Statutes “Through” HIPAA’s Privacy Rule

* © Ani B. Satz 2016. Associate Professor of Law, Emory University School of Law. J.D., 2001, University of Michigan; Ph.D., 2001, Monash University, Melbourne, Australia (completed at Princeton University). The author is grateful for support from the Georgia Legal Foundation and Emory University School of Law, and for the research assistance of Andrew Jones, Ciera Logan, and Ruchira Ray.
C. Health and Human Services’ Intent

I. Facilitating Administrative Proceedings

II. Seeking a Balanced Exchange Between Employees and Employers

III. Processing Claims and Preventing Fraud

D. State Legislative Gaps

I. State Constitutions

II. State Privacy Statutes and Workers’ Compensation Statutes

III. State Common Law

III. NATIONAL SURVEY OF STATE ACTION

A. Scope of Disclosure

B. Ex Parte Communications

C. Notice of Meeting

D. Protective Orders

IV. PROTECTING THE MEDICAL PRIVACY OF INJURED WORKERS...

A. Preempting “Contrary” State Law

I. Overbroad Disclosures

II. Ex Parte Communications

B. Amending the HIPAA Privacy Rule

I. Amending § 164.512(l)

II. Requiring “Permissive” and “Minimum Necessary” Disclosures

C. Requiring Qualified Protective Orders

D. Requiring Notice of Meeting

CONCLUSION

APPENDICES

ABSTRACT
INTRODUCTION

Injured workers do not have medical privacy if they file for workers’ compensation. At least that is the current interpretation of federal and state law. As a result, injured workers—many with severe disabilities—are denied compensation. Employers or their legal counsel have been known to speak to and to pressure treating physicians to characterize worker injuries as less severe than originally diagnosed or unrelated to workplace incidents. Medical record disclosure may not be limited in scope, allowing unrelated and possibly prejudicial medical history to be used against a worker. Worse, parts of workers’ compensation proceedings are open to the public, and entire workers’ compensation records are public in some states.

The situation is different for almost all other patients who seek medical care. Congress recognized the need to protect medical privacy federally in 1996 with the Health Insurance Portability and Accountability Act (HIPAA), as the patchwork protections afforded by state constitutions, statutes, and common law, were viewed as insufficient. By 2003, Health and Human Services (HHS), the agency tasked with developing privacy protections, had developed the HIPAA Privacy Rule (HPR) to address a number of concerns including: inappropriate disclosures and resulting stigma and discrimination, the ease and increasing use of electronic transmission of data, the growing number of health care professionals with access to health information, and the need for privacy to encourage patients to seek medical care. HHS’s language is strong: “Privacy is a fundamental right…it must be viewed differently than any ordinary economic good…it speaks to our individual and collective freedom.” Congress later provided even stronger federal protections than the HPR for genetic information, and some states afford heightened protection for genetic and HIV status.

For all of these individuals, physicians who maintain electronic health or billing records must preserve medical privacy of “protected health...
information,” or PHI. Such information includes diagnoses and even demographic information such as residential addresses, which may be used to identify a patient. The goals are to protect patients from unwanted disclosures that may be harmful and to prevent patients from failing to seek needed care. Courts have applied the federal standard in the medical malpractice context, even when a litigant waives her right to privacy for litigation purposes.\(^7\) Exceptions to federal protections exist only when information is de-identified, such as for research purposes, or disclosures are required by compelling state interest, as in the case of law enforcement.

At the root of the disparate treatment of injured workers is a story of federalism. States historically administrate workers’ compensation systems under their reserved Tenth Amendment powers. With the exception of a couple of brief periods in U.S. history, courts and legislatures have viewed federal privacy protections as conflicting with states’ rights to administrate workers’ compensation, citing efficiency concerns.\(^8\) If limits are placed on PHI disclosure, the argument goes, it will frustrate the administration of workers’ compensation claims by both imposing additional requirements on employers and slowing the process. Workers also could pressure their physicians to limit or not to disclose relevant medical information.

Meanwhile, there is no doubt that federal privacy protections apply to the states generally. Without knowing more, it may seem puzzling that privacy protections have not been extended to injured workers. But within workers’ compensation, a legal myth has been created by courts and legislatures that states provide sufficient privacy protections for injured workers through their own laws. States could in fact uphold federal-level protections with their own laws, but, to date, they have not done so. Instead of meaningful privacy protections, state workers’ compensation statutes contain requirements for authorization for disclosures or general language about disclosing only information relevant to the claim that offer no protection of PHI in practice. Workers are required to consent to disclosure in such states or forego compensation, and scope of disclosure rarely is limited.

\(^7\) See, e.g., Moreland et al. v. Austin, S08G0498, (S.Ct. Ga. Nov. 3, 2008) (“HIPAA requires a physician to protect a patient’s health information . . . . Georgia law stands in sharp contrast . . . . It follows that HIPAA is more stringent and that it governs ex parte communications between defense counsel and healthcare providers.”)

\(^8\) While for a short time Georgia and Tennessee had laws that favored privacy protections for injured workers, no such protections currently exist in the U.S.
Unpacking this myth of state privacy protection is both straightforward and complex. It is straightforward because the primary reason states have prevailed on tipping the federalism balance in their favor is an exception in the HPR promulgated under HIPAA for workers’ compensation. This provision, § 164.512(l), contains an exception for workers’ compensation intended to streamline the administration of such proceedings. It is complex because § 164.512(l) has been, with limited exception, misinterpreted by every state legislature and court in the nation to mean privacy protections do not attach to workers’ compensation proceedings. To the contrary, the HPR assumes privacy protections remain in place despite the exception, either because states enact their own protections or will appeal to the federal standard. But workers’ compensation statutes do not contain meaningful privacy protections, and other state privacy protections appear to be suspended along with HIPAA when it comes to workers’ compensation.

Compounding the problem is the fact that, depending on how state workers’ compensation statutes are worded, the scope of PHI disclosure—either through ex parte communication with a treating physician or release of a written medical record—may not be limited under federal regulations. Under the HPR, only statutes that “permit” rather than “require” disclosure of information for purposes of workers’ compensation proceedings require a “minimum necessary” disclosure. In states that “require” disclosure to enter the workers’ compensation system, no such restriction exists. While word choice is vital to protection, the choice of language often does not appear deliberate, particularly when different parts of the same workers’ compensation statute use conflicting language. Even if disclosure is limited to the “minimum necessary standard,” no guidance is provided by the HPR or other federal or state laws about what that means in the context of workers’ compensation. As a result, physicians may simply rely on the statement of defense counsel that the information they are requesting is the minimum necessary.

The implications for injured workers are significant. Physicians may engage in ex parte conversations with employers, employers’ counsel, or a representative of employers’ workers’ compensation insurance, resulting in the alteration of diagnoses. Further, the scope of the medical record disclosed may not be restricted to the minimum necessary, if disclosures are “required.” Additionally, and as a result of lack of privacy protections, employees may be subject to independent medical examinations and tests not directly related to their claim. And
administrative proceedings and other aspects of the record may be made public. Once information enters the public realm, its uses are endless.

Limiting medical privacy in workers’ compensation raises an ethical issue as well. Unlike in other countries, in the U.S., injured workers are not able to choose whether to apply for workers’ compensation or to sue their employer for damages; they are expressly prohibited from bringing suit. This places workers in a double-bind: they must forego privacy or compensation. Further, other health insurers may refuse to pay medical costs that would be covered by workers’ compensation. Work absences also may not be tolerated outside of a filed claim. Thus, true “voluntary” consent to disclose medical records—which is a defense to disclosure under statutory and common law—may be absent.

Lack of medical privacy is especially troubling in the workers’ compensation context, given the historical development of such programs. Industrialization brought an increase in workplace accidents. In an effort to prevent bankrupting employers who were compensating for such losses, or pushing the cost of accidents to society or to the injured workers themselves, workers’ compensation systems were established around the world. Under these systems, employers pay money held in a common trust to compensate such claims. In exchange for such compensation, workers forego other recourse against their employer and waive additional rights. As one commentator states, “The workers’ compensation system is the product of increased industrialization, or increasing disparity between employers and employees, and of the fundamental unfairness of injured employees having little recourse against their employers. The establishment of these programs [in the early 1900s] was justified under state police powers despite numerous constitutional objections.”

Additionally, workers’ compensation systems undeniably place workers in a different position than other citizens with the state in terms of privacy. Even if an injured worker does not file a workers’ compensation claim, details of their injury must be reported to the state under state law. For individuals who file a claim, their entire medical history may be made available to employers, insurers, and state administrators.

---

This Article is the first to address the challenges of federalism and workers’ compensation after the promulgation of the HPR and to propose legal change. Part I discusses the complex relationship between the HPR and workers’ compensation. These complexities are often misunderstood by legislatures and courts, compounding the challenges of federalism in this area. Specifically, it addresses the HPR’s § 164.512(l) exception, permitted and authorized disclosures under the rule, and the scope of such disclosures under federal, state, and professional (practice of medicine) restrictions.

Part II examines broadly federalism and health information policy. The HPR’s § 164.512(l) exception and standard preemption provisions are discussed in the context of HHS’s intentions in promulgating the Rule. Judicial interpretation of § 164.512(l) stands in stark contrast to intentions to streamline administrative proceedings, to seek a balanced exchange of information between employees and employers, and to prevent fraud. Courts have assumed § 164.512(l) is a blanket exclusion from privacy protections, rather than an exception that must be read “through” the HPR. While the HPR allows states space to develop privacy protections consistent with the Rule, states have failed to fill the legislative gaps, given the limited reach of state constitutional provisions and the routine waiver of statutory privacy protections in the context of workers’ compensation.

Part III provides the first published survey of states’ response to protecting worker privacy. It examines four areas: the scope of disclosure in workers’ compensation proceedings and whether states impose limits, the legality of ex parte communications between treating physicians and the defense counsel, requirements for notice of meeting, and requirements for protective orders for disclosing PHI. Other state requirements that bear on privacy in workers’ compensation proceedings also are addressed.

Part IV argues for legal changes to protect the privacy of injured workers. It argues that in light of notions of cooperative federalism, state laws supporting overbroad disclosures and ex parte communications could be preempted. Alternatively, § 164.512(l) could be amended to clarify HHS’s intent that not all privacy protections are waived during workers’ compensation proceedings. The HPR also could be amended to require “permissive” and “minimum necessary” disclosures. While the first two

12 For an excellent, pre-HPR article on this topic, see James Hodge, Intersection of Federal Health Information Privacy and State Administrative Law: The Protection of Individual Health Data and Workers’ Compensation, 51 ADMIN. L. REV. 117 (1999).
solutions would provide the greatest privacy protections and treat injured workers like other citizens, states also could require qualified protective orders for disclosure of PHI or notice of meeting for *ex parte* conversations to protect privacy better.

I. HIPAA Privacy Rule and Workers’ Compensation

A. Overview HIPAA Privacy Rule

The Health Insurance Portability and Accountability Act of 1996 (HIPAA)\(^\text{13}\) authorized Health and Human Services (HHS) to promulgate regulations about medical privacy protections. These regulations, often referred to as the HIPAA Privacy Rule (HPR),\(^\text{14}\) took effect in 2003 and were subsequently amended in 2009 and 2013. The HPR restricts the use of individually identifiable health information, or information that may be used to link a patient with her medical records. While there is no private right of action under HIPAA and the Secretary of HHS has enforcement power, courts have applied the federal standard of care in private litigation.\(^\text{15}\)

The HPR defines protected information and covered entities and outlines disclosures that are required, permitted, or allowed pursuant to an individual’s authorization. “Individually identifiable health information” (protected health information or “PHI”) is information, including demographic information, that “[r]elates to past, present, or future physical


or mental health or condition of an individual; the provision of care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) that identifies the individual; or (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.” 16 “Covered entities” include health care providers that maintain electronic records (i.e., individuals, including physicians and other medical practitioners who provide and bill for health care, and institutions), health care clearinghouses (i.e., firms that process health information into different formats), and health plans (i.e., providers or payors of health care). 17 Business associates, or individuals or organizations performing services on behalf of covered entities that involve disclosure of PHI, also are covered. 18 Once an entity is covered, all of its PHI is subject to the HPR, including that stored in paper files. 19

Covered entities must provide notice of the HPR and may not disclose PHI unless required, permitted, or authorized. Required disclosures are made to individuals or their representatives regarding access to or an accounting of their disclosures and for HHS enforcement purposes. Permitted disclosures include those made: to individuals or their representatives outside required disclosures; for treatment, billing, and health care operations; out of necessity to treat an incapacitated patient; incidental to a permitted use; and in the public interest, including those required by law. Permitted disclosures are limited in scope to the “minimum necessary.” Authorized disclosures may be made by an individual for release of medical records or for marketing purposes, the scope of the release to be determined by that individual. Authorized disclosures also include releases made to third parties in litigation.

B. HIPAA Privacy Rule and Workers’ Compensation Proceedings

The HPR applies to workers’ compensation proceedings, and disclosures of PHI may be permitted or authorized. Physicians treating injured workers—whether personal or employer-appointed—are covered entities, and they generate medical records containing PHI. The HPR also

9 This work in progress may not be cited, discussed, copied, or distributed without author’s permission.

16 45 C.F.R. 160.103.
17 45 C.F.R. 160.103.
18 45 C.F.R. 160.103.
19 45 C.F.R. 160.103. These services may include billing, claims processing, data analysis, and utilization review.
may apply to workers’ compensation insurers and agencies or employers, depending on whether they are otherwise a covered entity or business associate of such an entity. If the HPR contained nothing else, it would be clear that the PHI of workers in workers’ compensation proceedings was protected under federal law. But the HPR also contains an “exclusion” for PHI disclosed during workers’ compensation proceedings under state law, which is at the crux of the problem.

1. Section 164.512(l)’s “Exclusion” for Workers’ Compensation and Other Permitted Disclosures

Disclosures to facilitate the workers’ compensation process are permitted disclosures under § 164.512(l) of the HPR. Section 164.512(l) states, “[a] covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers’ compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.” This includes both state and federal workers’ compensation programs, though the focus of this article is on state programs. Section 164.512(l) has been interpreted in every state to mean that the HPR does not preempt state law governing disclosure of PHI in workers’ compensation proceedings. Another permitted disclosure of PHI in the workers’ compensation process is for payment of examining or treating physicians. While permitted disclosures are subject to the “minimum necessary” disclosure rule, as discussed below, this protection may not be afforded to disclosures made pursuant to a workers’ compensation claim that are “required” by state law.

2. Authorized Disclosures

PHI also may be disclosed in the course of a workers’ compensation claim with valid, written authorization of an individual, if the

---

20 45 C.F.R. § 164.512(l).
21 45 C.F.R. §164.502 (a)(1)(ii); 164.501 (defining “payment” to include reimbursement for physician services).
disclosure falls within one of the enumerated categories in the HPR. For example, an individual may authorize disclosure of information that exceeds the scope of what is necessary for administration of the workers’ compensation claim, such as evidence of a prior and discrete workplace injury that may or may not be related to the injury at stake, or psychotherapy records unrelated to the claim that may be useful in refuting opposition to the claim that a worker is not injured or disabled.

Authorization also may be compelled under state workers’ compensation or other laws, subject to limits of those laws. Unfortunately, as demonstrated below, HHS often uses language stating that when disclosures are authorized (or required), they are “permissible” (meaning simply “legal” or “allowed”) rather than “permitted” under §164.512(l). The agency treats these disclosures as “authorized” or “required” under statutory terms, rather than as “permitted,” for scope of disclosure purposes, however.

3. **Scope of Disclosure**

   a. **State Restrictions**

   While disclosures of PHI during workers’ compensation proceedings generally are permitted under §164.512(l), the scope of disclosure in particular instances during such proceedings is determined by state law. The scope of disclosure of PHI based on state workers’ compensation law tracks that in other areas of the HPR, meaning only permitted disclosures are subject to the “minimum necessary” standard, while required and authorized disclosures are not. But because states differ in whether some disclosures are mandatory or permissive for workers’ compensation—even for the same purpose, such as billing—the scope of disclosure varies. According to HHS, “[i]n many cases, the minimum necessary standard will not apply to disclosures made pursuant to [workers’ compensation] laws. In other cases, the minimum necessary standard applies, but permits disclosures to the full extent authorized by the workers’ compensation laws.”

---

22 45 C.F.R. §164.508.
23 45 C.F.R. §164.512(a).
In practice, this has notable consequences for both the content of and manner in which medical records are disclosed. First, it creates inconsistencies intra- and inter-state with respect to the breadth of the medical record content disclosed. For example, an entire medical record rather than only the more pertinent parts of a medical record may be released for a particular claim, depending on why the request is made and whether the state law with respect to that particular request permits or requires disclosure. Second, it affects the manner under which PHI is disclosed. In instances where the minimum necessary rule does not apply, i.e., in required or authorized disclosure situations, courts have held that employers or their legal counsel may engage in ex parte conversations with treating physicians without notice to or counsel present for the injured worker.

HHS provides examples of how scope of disclosure differences may function, even within the same state. For example, part of the Texas statute requires disclosure while another part permits disclosure, resulting in differences in the scope of the PHI provided. With respect to required disclosures, the agency provides the following examples where the scope of disclosure is not subject to the minimum necessary standard:

1. Texas workers’ compensation law requires a health care provider, upon the request of the injured employee or insurance carrier, to furnish records relating to the treatment or hospitalization for which compensation is being sought.\(^{26}\)

2. Louisiana workers’ compensation law [states that] a health care provider who has treated an employee related to a workers’ compensation claim is required to release any requested medical information and records relative to the employee’s injury to the employer or the workers’ compensation insurer.\(^{27}\)

3. Louisiana law further provides that any information relative to any other treatment or condition shall be available to the employer or workers’ compensation insurer through a written release by the claimant. Such disclosure also would be permissible and exempt from the minimum necessary standard under the Privacy Rule if the individual’s written authorization is obtained consistent with the requirements of § 164.508.\(^{28}\)

\(^{26}\) 67 Fed. Reg. 53182 (Example 1) (emphasis added).

\(^{27}\) 67 Fed. Reg. 53182 (Example 3) (emphasis added).

\(^{28}\) 67 Fed. Reg. 53182 (Example 3) (emphasis added).
According to HHS, “since such disclosure is required by law [in these instances], it is permissible under the Privacy Rule at § 164.512(a) and exempt from the minimum necessary standard.”\textsuperscript{29}

The minimum necessary standard is applied in instances where disclosure is permitted rather than required or authorized by the HPR. Here HHS provides the following example from Texas: “The Texas law further provides that a health care provider is permitted to disclose to the insurance carrier records relating to the diagnosis or treatment of the injured employee without the authorization of the injured employee to determine the amount of payment or the entitlement to payment.”\textsuperscript{30} HHS reasons that “since the disclosure only is permitted and not required by Texas law, the provisions at § 164.512(l) would govern to permit such disclosure . . . [the] minimum necessary standard would apply to the disclosure but would allow for information to be disclosed as authorized by the statute, that is, as necessary to ‘determine the amount of payment or the entitlement to payment.’”\textsuperscript{31} In other words, the disclosure is the minimum necessary, as permitted by state law. Thus, in Texas, disclosures under the same workers’ compensation law are subject to different rules about scope.

These examples are noteworthy on two fronts. First, disclosures vary based on deliberate or default word choice of state legislatures. Second, when a state statute requires disclosure of medical records to bring a workers’ compensation claim, the minimum necessary disclosure may not apply. For example, the full medical record “related to” an injury may be disclosed in both Louisiana and Texas (pursuant to requests for compensation) by virtue of an individual filing a claim.

\subsection*{b. Provider Restrictions}

An additional aspect of disclosure under §164.512(l) and the HPR generally is that the scope of permitted and authorized disclosures may be influenced by the medical provider. With respect to permitted disclosures, HHS states that “[w]here a covered entity routinely makes disclosures for workers’ compensation purposes under 45 C.F.R. §164.512(l) or for payment purposes, the covered entity may develop standard protocols as

\textsuperscript{29} 67 Fed. Reg. 53182.
\textsuperscript{30} 67 Fed. Reg. 53182 (Example 4) (emphasis added).
\textsuperscript{31} 67 Fed. Reg. 53182 (Example 2).
part of its minimum necessary policies and procedures that address the type and amount of protected health information to be disclosed for such purposes.” Thus, one physician may disclose less than another when the same injury is at stake in a workers’ compensation claim. Authorized disclosures also may be limited by a physician pursuant to their general practice protocol or based on the best interests of the patient.

34 Clay J. Countryman, HIPAA and the Practice of Law, 52 La. B.J. 103, 104 (2004). Physicians may invoke therapeutic privilege and act paternalistically to limit information a patient receives, if they believe it may be detrimental to their physical or mental health.