

The document was developed to assist the state agencies of Ohio in understanding the obligations imposed by the Health Insurance Portability and Accountability Act (HIPAA). The State of Ohio provides no guarantee of accuracy or warranties of any kind. Utilization of this information is at the sole risk of the user. As with any matter of law, independent legal counsel should be consulted

HIPAA Consent/Authorization/Notice

The three types of documents described below relate to the use or disclosure of protected health information (PHI) under the HIPAA privacy regulations. Samples of the documents are appended:

NOTICE OF PRIVACY PRACTICES/PRIVACY NOTICE [45 CFR 164.520]

General Rule: An individual must be given adequate notice of the uses and disclosures of PHI that may be made by the Covered Entity (CE) and of the individual's rights, and the CE's duties, with respect to PHI.

Exceptions:

- An inmate has no right to such a notice, and a correctional facility has no obligation to provide such a notice.

- Special rules and exceptions apply to group health plans.

Content of Notice: The notice must be written in plain language and include the following required and, if applicable, optional elements:

I. Required Elements

- 1) ***Specific Statement***
Specific wording for header or otherwise prominently displayed: "THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT YOU MAY BE USED AND DISCLOSED AND HOW YOU CAN GET ACCESS TO THIS INFORMATION. PLEASE REVIEW IT CAREFULLY."

- 2) ***Descriptions***

Note - descriptions of uses or disclosures must reflect any more stringent state or other federal law, if applicable and must contain sufficient detail to place individual on notice of the uses or disclosures permitted or required

- Description, including at least one example, of types of uses and disclosures CE is permitted to make for treatment, payment or operations (TPO) purposes
 - Description of each other purpose for which CE may make use or disclosure of PHI without consent or authorization
 - Statement that other uses or disclosures will be made only with the individual's written authorization, and that authorization may be revoked
- 3) ***Certain Uses/Disclosures-*** *If the CE intends to engage in any of the following activities, the notice must contain a **separate statement** that:*
- CE may contact the individual for appointment reminders or with information about treatment alternatives or other health related benefits and services
 - The CE may contact the individual to raise funds for the CE
 - A group health plan, or health insurance issuer or HMO with respect to the group health plan, may disclose PHI to the plan sponsor
- 4) ***Individual's Rights-****Statement of individual's rights with respect to PHI and description of how to exercise those rights*
- Right to request restrictions on CE's uses or disclosures of PHI, and notice that CE is not required to agree to requested restriction
 - Right to request, **of providers**, receipt of confidential communications by alternative means or at alternative locations, and to have the request reasonably accommodated; right to request same, **of health plans**, if individual clearly states that disclosure could endanger the individual, and to have the request reasonably accommodated
 - Right to inspect and copy PHI as permitted under the regulations
 - Right to request amendment of PHI as permitted under the regulations
 - Right to receive an accounting of disclosures of PHI as permitted under the regulations

- Right to receive paper copy of notice
- 5) ***Covered Entity's Duties-***
- Statement that CE is required to maintain privacy of PHI and provide individuals with notice of its legal duties and its privacy practices
 - Statement that CE is required to abide by terms of Privacy Notice currently in effect
 - In order for CE to apply change in Privacy Notice to earlier collected PHI, a statement that CE reserves the right to change the terms of the Privacy Notice and apply the new policy to all PHI, and description of how revised notice will be made available
- 6) ***Complaints-***
- Statement that individuals may complain to the CE and to the Secretary of the U.S. Department of Health and Human Services regarding a violation of privacy rights
 - Description of how individual may file complaint with CE
 - Statement that individual will not be retaliated against for filing complaint
- 7) ***Contact-***
- Name or title and telephone number of a person or office to contact for further information relating to the Privacy Notice
- 8) ***Effective Date-***
- First effective date of notice must be included, but must not be earlier than date notice is printed or otherwise published

II. Optional Elements:

- If CE elects to limit the uses/disclosures it is permitted to make, the CE may describe its more limited uses/disclosures in the notice, but may not include any limitation affecting its right to make use/disclosure required by law or to avert a serious threat to health or safety

- Same requirements for reservation of right to change privacy practices in Privacy Notice as stated above apply with regard to change in these limited privacy practices

Revisions to Notice:

- CE must promptly revise and distribute Privacy Notice whenever there is a material change in any element of the content or in the CE's privacy practices
- Except when required by law, no material change to any term of the notice may be implemented prior to the effective date of the revised notice

Other Requirements:

- See regulations relating to requirements and time lines for provision of Privacy Notice and any revisions thereto See 45 CFR 164.520(c)
- See regulations for details relating to use of joint notice by separate CEs that participate in organized health care arrangements See 45 CFR 164.520(d)
- See regulations for details relating to documentation and retention See 45 CFR 164.520(e)

CONSENT [45 CFR 164.506]

General Rule: A covered health care provider must obtain individual's consent prior to using or disclosing PHI to carry out treatment, payment or health care operations (TPO).

Note: In regards to use or disclosure of psychotherapy notes refer to the following section entitled "Authorization."

Exceptions:

- Consent not required for use/disclosure of PHI to carry out TPO if provider has indirect treatment relationship with individual or the provider created or received the PHI in course of providing treatment to inmate
- Provider may use or disclose PHI, without prior consent, for TPO:
Note: provider must document attempts to obtain consent and reason for failure to obtain
 - For emergency treatment, if provider attempts to obtain consent as soon as practicable after delivery of treatment

- If provider is required by law to treat the individual and has attempted and failed to obtain consent
- If provider attempts to obtain consent, but cannot due to substantial communication barriers and, in exercise of professional judgment, determines that consent is clearly inferred from the circumstances

Other Specifications or Requirements:

- Covered health care provider may condition treatment on individual's provision of consent
- Health plan may condition enrollment in the plan on individual's provision of consent
- Consent may be combined with other types of written legal permission, except privacy notice, from the individual if consent is visually separate and separately signed and dated; may be combined with research authorization that includes treatment of individual
- See regulations for details relating to documentation and retention See 45 CFR 164.506(b)(6).

Content Requirements: The consent must be written in plain language and:

- Inform individual that PHI may be used or disclosed for TPO
- Refer individual to Privacy Notice and state that individual has right to review the Privacy Notice prior to signing consent
- If CE has reserved right to revise its privacy practices per the Privacy Notice, state that the terms of the notice may change and explain how to obtain copy of revised notice
- State that individual has right to request restrictions on use/disclosure of PHI for TPO, that CE does not have to agree to such restriction, but if CE agrees to restriction, it must abide by the restriction
- State that individual has right to revoke consent in writing, except to extent that CE has taken action in reliance on it
- Be signed by individual and dated

Conflicts between Consent and other Legal Permissions:

- If there is a conflict between the terms of a consent and any other legal permission from the individual relating to the use/disclosure of PHI for TPO, the more restrictive terms are binding
- CE may resolve conflict in terms by either obtaining a new consent or by written or oral communication with the individual to determine preference re: use/disclosure of PHI (must act in accordance with expressed preference and must document oral communications relating to preference)

Joint Consents:

- CEs participating in an organized health care arrangement and having a joint notice may comply by obtaining a joint consent
- Joint Consent must identify CEs or classes of CEs to which joint consent applies, and otherwise meet requirements for consent; if individual revokes joint consent, CE that receives revocation must so inform other entities covered by the joint consent as soon as practicable

AUTHORIZATION [164.508]

I. General Rule: Except as otherwise permitted or required under the HIPAA privacy regulations, CE may not use or disclose PHI other than as consistent with a valid authorization.

II. Limitations re: Psychotherapy Notes: CE must obtain authorization for any use or disclosure of psychotherapy notes except:

- To carry out TPO consistent with consent requirements, only for: (i) use by the originator of the notes for treatment; (ii) use or disclosure in supervised counseling training programs, or; (iii) use or disclosure to defend legal or other action brought by the individual
- Use or disclosure: (i) required to be made to the Secretary of Health and Human Services regarding compliance; (ii) as otherwise required by law; (iii) as permitted for health oversight activities with respect to oversight of the originator of the notes; (iv) as permitted to coroners and medical examiners, and; (v) as permitted to avert serious threat to health and safety

III. General Requirements:

- Must contain core and any additional required elements
- May contain additional elements that are not inconsistent with required elements

- An authorization is defective and, therefore, invalid if: (i) expired; (ii) missing required information or element; (iii) known by CE to have been revoked; (iv) combined with another document other than as authorized below, or (v) known to contain false information
- See regulations for details relating to documentation and retention See 45 CFR 164.508(b)(6).

IV. Compound Authorization: Authorization may not be combined with another document to create a compound authorization except as follows:

- Authorization re: PHI created for research that includes treatment of the individual may be combined in the same document with a consent to participate in the research, consent for the use/disclosure of PHI for TPO, or the Privacy Notice
- Authorization for the use/disclosure of psychotherapy notes may be combined only with another authorization for the use/disclosure of psychotherapy notes
- Authorization other than for use/disclosure of psychotherapy notes may be combined with any other authorization except where CE has conditioned treatment, payment, enrollment in health plan or eligibility for benefits on provision of one of the authorizations

V. Prohibition on Conditioning of Authorizations: CE may not condition treatment, payment, enrollment in health plan or eligibility for benefits on provision of authorization except:

- Covered health care provider may condition provision of research related treatment on provision of authorization for use/disclosure of PHI created for research that includes treatment of the individual
- Health plan may condition enrollment in plan or eligibility for benefits on provision of authorization if authorization is sought for enrollment/eligibility determinations relating to the individual or for underwriting or risk rating determinations and is not for psychotherapy notes
- Health plan may condition payment of claim for specified benefits on provision of authorization if disclosure is necessary to determine payment of the claim and is not for psychotherapy notes

- CE may condition provision of health care that is solely for purpose of creating PHI for disclosure to third party on provision of authorization for disclosure to third party

VI. Revocation: Individual may revoke authorization at any time, in writing, except to the extent that CE has taken action in reliance upon authorization or where authorization was provided as condition of obtaining insurance coverage and other law provides insurer the right to contest a claim under the policy

VII. Core Elements/Requirements: Must be written in plain language and include:

- Description of information to be used/disclosed, with sufficient specificity
- Identification of person, or class of persons, authorized to make requested use/disclosure
- Identification of person, or class of persons, to whom CE is authorized to make requested use/disclosure
- Expiration date or event related to individual or purpose of use/disclosure
- Statement of individual's right to revoke, noting exceptions and describing how to revoke
- Statement that information used/disclosed may be subject to redisclosure
- Signature of individual, and date
- If signed by personal representative, description of representative's authority to act for individual

VIII. Additional Requirements for Authorizations Requested by CE for its own

Use/Disclosure: In addition to meeting core requirements:

- For authorizations not permitted to be conditioned (Section V. Prohibition on Conditioning Authorizations above), statement that CE will not condition treatment, payment, enrollment in health plan or eligibility for benefits on provision of authorization
- Description of each purpose of requested use/disclosure
- Statement that individual may inspect or copy PHI to be used/disclosed and may refuse to sign the authorization

- Statement of remuneration to CE as result of use/disclosure, if applicable
- Copy of signed authorization must be provided to individual

IX. Additional Requirements for Authorizations Requested by CE for Disclosures by Others: In addition to meeting core requirements:

- Description of each purpose of requested disclosure
- Except for authorization on which payment may be conditioned, statement that CE will not condition treatment, payment, enrollment in health plan or eligibility for benefits on provision of authorization
- Statement that individual may refuse to sign authorization
- Copy of signed authorization must be provided to individual

X. Additional Requirements for Authorizations for Use/Disclosure of PHI Created for Research that Includes Treatment of the Individual: Except as otherwise permitted under the HIPAA regulations, a CE that creates PHI for purpose, in whole or in part, of research that includes treatment of the individual must obtain authorization for use/disclosure of such information. Such authorizations must:

- For uses/disclosures not otherwise permitted or required under the regulations, contain core elements and meet requirements listed for CE requesting authorization for its own use/disclosure
- Contain description of: (i) extent to which PHI will be used/disclosed for TPO and; (ii) PHI that will not be used/disclosed (though cannot limit use/disclosure required by law or permitted to avert serious threat to health or safety)
- If CE has/will obtain consent, or has/will provide Privacy Notice, refer to those documents and state that statements made pursuant to this section are binding
- This authorization may be in the same document as: consent to participate in research; consent to use of PHI for TPO, or Privacy Notice