

COMPLIANCE ALERT

OCR Issues Regulation on Reproductive Healthcare Privacy; Requires Updates to HIPAA Policies

May 8, 2024

Action Required:

- Employers and plan sponsors should discuss these requirements with their broker and review and update all HIPAA policies to remain in compliance.

On April 26, 2024, the U.S. Department of Health and Human Services' Office of Civil Rights (OCR) issued a [final regulation](#) ("Final Rule") designed to support reproductive healthcare privacy. The Final Rule was issued in response to the U.S. Supreme Court's ruling in [Dobbs v. Jackson Women's Health Organization](#) (see our eAlert [here](#)), which overturned *Roe v. Wade* and concluded that states may restrict or ban abortion. OCR also issued a [Fact Sheet](#) providing additional guidance on the new Final Rule.

What Should Employers and Plan Sponsors Do Next?

Given that compliance with most of the Final Rule's new obligations is required by the end of 2024, Regulated Entities, including sponsors and plan administrators of group health plans responsible for updating HIPAA policies, training programs and privacy assessments, must act quickly, and should discuss these requirements with their trusted advisors, including their Account Management Team at Corporate Synergies. ■

OCR Issues Regulation on Reproductive Healthcare Privacy; Requires Updates to HIPAA Policies

On April 26, 2024, the U.S. Department of Health and Human Services' Office of Civil Rights (OCR) issued a [final regulation](#) ("Final Rule") designed to support reproductive healthcare privacy. The Final Rule was issued in response to the U.S. Supreme Court's ruling in [Dobbs v. Jackson Women's Health Organization](#) (see our eAlert [here](#)), which overturned *Roe v. Wade* and concluded that states may restrict or ban abortion. OCR also issued a [Fact Sheet](#) providing additional guidance on the new Final Rule.

How Does the Final Rule Change the Law?

The Final Rule modifies the Privacy Rule under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to better ensure privacy of protected health information (PHI) in reproductive healthcare matters and requires that sponsors of health plans update their HIPAA policies and protocols accordingly.

The Final Rule is also consistent with, and in support of, President Biden's Executive Orders (EOs) on protecting access to reproductive healthcare. Specifically, under [EO 14076](#), President Biden directed HHS to consider taking additional actions, including under HIPAA, to better protect information related to reproductive healthcare and to bolster patient-provider confidentiality.

How Does the Final Rule Ensure Greater Healthcare Privacy?

The Final Rule expressly prohibits the use or disclosure of PHI by a covered healthcare provider, health plan, or healthcare clearinghouse—or their business associate—for either of the following activities (the "Prohibition"):

- To conduct a criminal, civil, or administrative investigation into or impose criminal, civil, or administrative liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive healthcare, where such healthcare is lawful under the circumstances in which it is provided.
- The identification of any person for the purpose of conducting such investigation or imposing such liability.

Under the Final Rule, the Prohibition applies where covered healthcare providers, health plans, or healthcare clearinghouses (covered entities) or business associates (collectively, "Regulated Entities") have reasonably determined that one or more of the following conditions exists:

- The reproductive healthcare is lawful under the laws of the state in which such healthcare is provided, and under the circumstances in which it is provided. For example, if a resident of one state traveled to another state to receive reproductive healthcare, such as an abortion, that is lawful in the state where such healthcare was provided.
- The reproductive healthcare is protected, required, or authorized by federal law, including the U.S. Constitution, regardless of the state in which such healthcare is provided. For example, if use of the reproductive health care, such as contraception, is protected by the Constitution.
- The reproductive healthcare was provided by a person other than the covered healthcare provider, health plan, or health care clearinghouse (or business associate) that receives the request for PHI and such healthcare was lawfully provided.
- It should be noted that the rules above include a presumption that the reproductive healthcare at issue is presumed to be lawful unless the regulated entity has actual or factual knowledge that it was unlawful.

What follows is a summary of some of the other key provisions of the Final Rule:

- **Attestation:** When a Regulated Entity receives a request for PHI relating to health oversight activities, judicial or administrative proceedings, law enforcement purposes, or disclosures to coroners or medical examiners, and the PHI is potentially related to reproductive healthcare, the Regulated Entity must obtain a signed attestation. The content and distribution requirements for the attestation, as well as the specifics of what makes the attestation valid or defective, are explained in more detail in the Final Rule. OCR intends to publish a model attestation prior to the Final Rule's compliance date.

- **Notice of Privacy Practices:** A Regulated Entity's Notice of Privacy Practices ("NPP") must be revised to reflect these rules on reproductive healthcare privacy and to update provisions on confidentiality of medical records relating to individuals with substance use disorders. Corporate Synergies will be updating its model NPP for the required changes and will have it available for all clients in advance of open enrollment for 2025. It should be noted, however, that the deadline for providing the new NPP is not until February 16, 2026.
- **Disclosure to Law Enforcement:** Disclosure to law enforcement is only permitted when Regulated Entities suspect an individual of obtaining reproductive healthcare where the disclosure is not subject to the Prohibition, is required by law, and meets all applicable conditions of the HIPAA Privacy Rule's requirements to allow use or disclosure of the PHI.
- **New Definitions:** The Final Rule expands the definition of "health care" to include "reproductive health care," which is care that affects the health of the individual in all matters related to the reproductive system and to its functions and processes. New definitions of "person" and "public health" are also included in the Final Rule. Employers and plan sponsors should update their other HIPAA policies and procedures, training programs and assessment protocols (that is, in addition to the NPP) to account for these new definitions and requirements in the Final Rule.

When Does the Final Rule Go into Effect?

Compliance with the Final Rule's new requirements will be required as of December 22, 2024, except that the Final Rule's requirement to update NPP provisions will not be required until February 16, 2026.

What Should Employers and Plan Sponsors do Next?

Given that compliance with most of the Final Rule's new obligations is required by the end of 2024, Regulated Entities, including sponsors and plan administrators of group health plans responsible for updating HIPAA policies, training programs and privacy assessments, must act quickly, and should discuss these requirements with their trusted advisors, including their Account Management Team at Corporate Synergies. ■

**If you have any additional questions,
please call your Corporate Synergies
Account Manager or 866.CSG.1719.**