



IMMIGRANTS AND PUBLIC HEALTH Issue Brief

Undocumented Immigrants and Patient Privacy Laws

Dear N.,

I have another family in crisis. The father was picked up by ICE on Friday. He was taken in front of his children and his wife. They are understandably traumatized. The father states that when he was picked up, part of the paperwork that the ICE officers had was from a medical clinic where he goes for diabetes treatment. He is very certain that this is what he saw. Is this legal?

We are concerned that this is going to cause families to avoid seeking medical treatment. For example, one of the children in this family has asthma, and the mother is afraid to take her child to the doctor now. Is there anything we can do?


Thank you,

M.
Local Health Department

The Network has received technical assistance requests like this one from organizations that serve immigrant communities. Whether or not medical providers have actually reported undocumented immigrants to Immigration and Customs Enforcement (“ICE”), the fear of this scenario in the immigrant community is real. This issue brief explores relevant federal and state health privacy laws and how they apply to undocumented immigrants. Its goal is to inform health care providers of their rights and responsibilities when providing health care to immigrants. Removing barriers to immigrants’ utilization of preventative and other health care services is important for public health. Immigrants live, work, and go to school in our communities; they are part of the public in “public health.” Facilitating immigrants’ willingness to seek necessary care is important to the health of immigrant families and to our communities.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA)

The federal law that governs disclosures of protected health information is the Health Insurance Portability and Accountability Act of 1996 (HIPAA). A natural first question is whether HIPAA protection extends beyond citizens to undocumented immigrants. This section summarizes HIPAA, describes what information it protects,



explains under what circumstances a HIPAA-covered entity may disclose a patient’s protected health information without consent, and describes penalties for violating HIPAA.

What is HIPAA and do its protections extend to undocumented immigrants?

HIPAA is federal legislation that requires the U.S. Department of Health and Human Services (HHS) to develop regulations to protect the privacy and security of patients’ health information. The resulting regulations are known as the HIPAA Privacy Rule.¹ HIPAA restricts covered entities from disclosing a patient’s protected health information (PHI). PHI is information that pertains to a patient’s “past, present, or future physical or mental health condition; a provision of health care; or the past, present, or future payment for the provision of healthcare to the individual, and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.”² PHI includes common identifiers such as a patient’s name, address, or unique numbers (e.g., social security number, passport number, or account number) when associated with the provision of or payment for health care. Any information included on any identification documents (including a passport or driver’s license) would be considered PHI if that information identifies—or can reasonably be used to identify—an individual.³ Immigration status or country of origin alone typically would not constitute PHI, because this information alone would not be sufficient to identify an individual person. However, such information would constitute PHI if used in combination with other identifying information, such as the patient’s name or address.

Covered entities include health plans, health care clearinghouses, and health care providers who transmit any health information in electronic form in connection with a health-related transaction.⁴ Therefore, HIPAA prohibits medical providers, except in certain circumstances, from disclosing patients’ health information to third parties without their patients’ permission. HIPAA protects the *information* and not the person, so PHI gathered and maintained about an undocumented immigrant would be protected under HIPAA. A health care provider may not disclose any patient information without the patient’s authorization unless the disclosure falls under an exception. Importantly, undocumented immigrants are not required to provide any immigration status information to a medical provider.


When are medical providers allowed to disclose a patient’s immigration status to law enforcement?

HIPAA prohibits medical providers from disclosing PHI except under certain circumstances.⁵ Three most relevant exceptions include: (1) there is a court order or court-ordered warrant, a subpoena or summons issued by a judicial officer, or a grand jury subpoena,⁶ (2) there is an administrative request,⁷ or (3) the covered entity in good faith believes the PHI to be evidence of a crime that occurred on the covered entity’s premises.⁸

Court Order

A court may issue an order to release a patient’s medical record, including any information about her or her immigration status. HHS regulations state that “a HIPAA-covered health care provider or health plan may share the PHI of a patient if it has a court order, which includes the order of an administrative tribunal.”⁹ A medical care provider must also comply with valid subpoenas issued by immigration judges.¹⁰

A warrant from ICE does not require the showing of probable cause to a neutral arbiter and thus is not the same as a subpoena, summons, warrant, or order from a court. Because an ICE warrant is distinct from a



subpoena, summons, warrant, or court order, medical providers may not have to disclose a patient's immigration status if requested in the ICE warrant. Similarly, a subpoena issued by anyone other than a judge is distinct from a court order. When a medical provider receives a court order, warrant, subpoena, or summons, he or she should verify that it is valid by checking that the document:

- (1) was signed by a judge or magistrate judge,
- (2) includes the date,
- (3) includes the address of the specific premises to be searched (for a search warrant), and
- (4) describes the specific items, information, or person being sought.

If any of these items are absent, then the medical provider has the right to refuse to comply. It is best if a medical provider seeks legal counsel to review the document for authenticity before releasing records; short of that, a provider may contact the issuing court to seek verification. All providers should be careful to provide only the documents requested, redacting any portions of the document not covered by the request. Of course, if a patient consents to disclosure, HIPAA does not restrict the release of the documents.

Reporting Crimes Committed on the Premises

Under HIPAA, a medical provider may disclose PHI to law enforcement officials if they believe in good faith that the information constitutes evidence of criminal conduct that occurred on the premises of the covered entity. A medical provider is acting with a good faith belief if he or she has an honest purpose when reporting crimes committed on the premises.¹¹ It is important to note that while it is illegal for a person to enter the country without inspection (EWI), once that person has entered the country unlawfully, that person's continued presence in the U.S. is not an ongoing crime. Thus, a medical provider should not contact ICE and disclose a patient's immigration status based solely on an undocumented immigrant's presence at a hospital or medical clinic.

Administrative Requests

HIPAA allows disclosure of information pursuant to an administrative request, which includes "an administrative subpoena or investigative demand or other written request from a law enforcement official."¹² An administrative request, subpoena, or summons is issued by a federal or state agency or law enforcement official, rather than a court of law. An administrative request may lack judicial oversight and protections that are inherent in judicial subpoenas, warrants, and summons. As such, administrative requests must be accompanied by a written statement that the information requested is relevant, material, specific, and limited in scope, and that de-identified information would be insufficient.¹³

What penalties exist for medical providers who violate HIPAA by disclosing an undocumented patient's PHI?

HHS's Office of Civil Rights (OCR) is ultimately responsible for enforcing HIPAA and is assisted by federal and state attorneys general.¹⁴ HIPAA provides civil and criminal penalties for those who disclose PHI in violation of the law. Providers may also face professional disciplinary or licensing consequences for violating HIPAA.



What remedies exist for undocumented immigrants whose PHI was wrongfully disclosed?

The fines collected for HIPAA violations go to OCR to fund ongoing HIPAA enforcement efforts, and not to the patient whose information was disclosed. In addition, several federal courts have held that HIPAA does not provide a private cause of action, meaning a patient may not sue the medical provider for a HIPAA violation.

Most state laws allow patients to sue medical providers for wrongful disclosure of PHI under state tort claims, such as invasion of privacy, breach of doctor-patient relationship, and negligence. Although HIPAA does not provide the right to sue in federal court, state courts have previously used HIPAA standards to establish liability.¹⁵ Additionally, some state medical privacy laws provide a private cause of action for patients whose information has been disclosed in violation of state law.¹⁶ However, undocumented immigrants face many barriers to bringing lawsuits, such as limited time to find affordable legal services, lack of trust of the legal system, and cultural and language barriers.


Importantly, the Supreme Court has held that removal (deportation) hearings are civil proceedings, which means that defendants cannot suppress evidence under the exclusionary rule even if subject to an unlawful arrest.¹⁷ Therefore, PHI that is disclosed to law enforcement in violation of HIPAA can still be used at a patient's deportation hearing.¹⁸

Immigration enforcement limited in health care settings by executive memorandum

Currently, two executive agency memos released by the Immigration Customs and Enforcement Agency (ICE) and U.S. Customs and Border Patrol Agency (CPB) provide additional protections for immigrants in certain locations. In 2011, ICE issued a memorandum setting forth agency policy regarding which actions ICE officers may or may not take at "sensitive locations,"¹⁹ and CPB released a similar memo in 2013.²⁰ These policies ensure that immigration enforcement officers do not perform certain law enforcement activities while at such locations without prior authorization from a supervisor. Both of these memos state that hospitals are among the locations that are considered "sensitive" and subject to restricted immigration enforcement actions.²¹ Moreover, by agency interpretation, sensitive locations include "medical treatment and health care facilities such as hospitals, doctors' offices, accredited health clinics, and emergent or urgent care facilities."²²

According to agency policy, ICE and CPB officers may not arrest, interview, search, or surveil individuals for immigration purposes at sensitive locations without prior approval from an appropriate supervisory official.²³ However, officers may perform these actions with prior approval from an appropriate supervisory official or if the enforcement actions involve exigent circumstances related to national security, terrorism, an imminent risk of destruction of evidence material to an ongoing criminal case, or an immediate arrest of a dangerous felon.²⁴

Actions that agents may take without prior approval include "obtaining records, documents, and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits, guarding or securing detainees, or participating in official functions or community meetings."²⁵ Additionally, the policy regarding sensitive locations does not apply to CBP operations that are conducted at or near the international border (including the functional equivalent of the border), or CPB operations close to the border, including smuggling interdiction efforts that result in transportation to a hospital, custodial monitoring of injured aliens in CBP custody that require hospitalization, or a "controlled delivery"²⁶ illicit drug operation from the border that concludes in close proximity to a sensitive location.²⁷



Importantly, executive agency policies lack an effective enforcement mechanism. The Supreme Court has held that deportation hearings are civil proceedings and that defendants cannot suppress evidence under the exclusionary rule even if subject to an unlawful arrest.²⁸ As such, if an officer violates the executive agency policy and unlawfully obtains information, then that information can still be legally used in a deportation hearing.

Anyone who believes that a possible violation of a sensitive location occurred can file a complaint that describes the incident and where it took place. The complaint can be filed online at the Department of Homeland Security (DHS) website²⁹ or sent through email to the Civil Liberties Division of the ICE Office of Diversity and Civil Rights.³⁰

Fourth Amendment Rights of Undocumented Immigrants

The Fourth Amendment is a constitutional right for all individuals to be free from illegal searches or seizures. Similar to the enforcement agency memos, the Fourth Amendment may limit immigration enforcement agents' activities at a hospital.

How does the Fourth Amendment limit immigration enforcement activity at hospitals and medical clinics?

ICE and CPB's power to enforce immigration laws is limited by the Fourth Amendment's protection against unreasonable search and seizure. Under the Fourth Amendment, the reasonableness of a search depends on whether a person has a reasonable expectation of privacy in the areas searched.³¹ The test for determining whether an individual has a reasonable expectation of privacy examines not only whether that person subjectively has a reason to expect privacy, but also whether there is an objective expectation of privacy.³²

It is likely that a patient at a health center has a reasonable expectation of privacy in a doctor's office or examination room because it is not a public space.³³ Law enforcement would likely need a warrant signed by a judge to search those areas.³⁴ However, a waiting area or lobby area located at a health center that is open to everyone may be afforded less protection under the Fourth Amendment.³⁵ According to the National Immigration Law Center, it may be helpful for health centers and clinics to establish a written internal policy identifying areas as private and not open to the general public.³⁶ Additionally, the Center recommends that health centers and clinics place signage explaining that certain areas are only available for patients and those accompanying them.³⁷

Again, because deportation hearings are civil proceedings, defendants cannot suppress evidence under the exclusionary rule during a deportation proceeding even if subject to an unlawful seizure or arrest.³⁸ As such, any information that an officer obtains while performing an illegal search or arrest can legally be used in a deportation proceeding.

Conclusion

Immigration status collected by a covered entity may not alone constitute PHI. However, immigration status could be considered PHI if it is disclosed along with other identifying information such as the patient's name or address and relates to the patient's health condition or payment for health care. Undocumented immigrants are not required to provide any immigration status information to a medical provider, and any information that could

be used to identify an individual person—either alone or in combination with other data—is subject to HIPAA protection. If a HIPAA violation does occur, patients do not have a personal cause of action under federal law. While patients may sue under state tort or privacy laws, undocumented immigrants face many barriers to utilizing the legal system, including access, trust, and cultural and language factors. The lack of legal recourse, and use of unlawfully obtained PHI in deportation proceedings, has an unfortunate chilling effect on undocumented immigrants and their families seeking health care services—impacting not only their health, but that of the broader community. Medical providers can help to alleviate this problem by communicating to the immigrant community that providers have stringent privacy policies in place and that these safeguards apply to everyone, including undocumented immigrants.

SUPPORTERS



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¹ 45 C.F.R. Part 160

² 45 C.F.R. § 160.103.

³ Note that the information itself need not be health-related to constitute PHI (e.g., a test result or a diagnosis), but rather information is PHI under HIPAA if it is personally identifying information collected or maintained by a covered entity with the purpose of providing or securing payment for health care.

⁴ 45 C.F.R. § 160.102 and 160.103.

⁵ 45 C.F.R. 164.512(f).

⁶ 45 CFR 164.512(f)(1)(ii)(A)-(B)

⁷ 45 CFR 164.512(f)(1)(ii)(C)

⁸ 45 CFR 164.512(f)(5)

⁹ 45 CFR 164.512(f)(1)(ii)(C)

¹⁰ However, the immigration judge (IJ) would not be able to subpoena records outside of an already existing removal (deportation) proceeding and in order to initiate proceedings, the Department of Homeland Security must, at a minimum, have proof that the person was born elsewhere or is not a US citizen. Therefore, the IJ's subpoena power probably would not give ICE the initial information necessary to start proceedings. INA §240 (b)(1), 8 U.S.C. §1229a

¹¹ Black's Law Dictionary 701 (7th ed. 1999)

¹² 45 CFR 164.512(f)(1)(ii)(C)).

¹³ *Id.*

¹⁴ *Lee-Thomas v. Lab Corp.* Civil Action No. 18-591 (RC) (D.D.C. June 15, 2018).

¹⁵ "What Can I Do After an Improper Disclosure of Medical Records?" <https://healthcare.findlaw.com/patient-rights/what-can-i-do-after-an-improper-disclosure-of-medical-records.html>

¹⁶ For example, the Maryland Confidentiality of Medical Records Act allows patients to sue medical providers who share their medical record in violation of the act for actual damages.

¹⁷ *Id.*

¹⁸ *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

¹⁹ See Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to Field Office Directors, et al., subject: *Enforcement Actions at or Focused on Sensitive Locations*, Oct. 24, 2011, <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>. (hereinafter “ICE Enforcement Actions at Sensitive Locations Memo”)

²⁰ See Memorandum from David V. Aguilar, Deputy Commissioner, U.S. Customs and Border Protection, subject: *U.S. Customs and Border Protection Enforcement Actions at or Near Certain Community Locations*, Jan. 13, 2013,

https://foiarr.cbp.gov/docs/Policies_and_Procedures/2013/826326181_1251/1302211111_CBP_Enforcement_Actions_at_or_Near_Certain_Community_Locations_%7BSigned_M.pdf (hereinafter “CPB Enforcement Actions at Certain Community Locations Memo”)

²¹ ICE Enforcement Actions at Sensitive Location Memo; CPB Enforcement Actions at Certain Community Locations Memo

²² U.S. Immigration and Customs Enforcement, *FAQ on Sensitive Locations and Courthouse Arrest*, <https://www.ice.gov/ero/enforcement/sensitive-loc#wcm-survey-target-id>

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ A “controlled delivery” is a law enforcement technique used when officials become aware of (or suspect) an attempt to transport illicit drug across the border and allow it to go forward under the control and surveillance of law enforcement in order to obtain evidence. See, e.g., *United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2004), Article 2(i) at p. 6, Available online at <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

²⁷ CPB Enforcement Actions at Certain Community Locations Memo

²⁸ *Id.*

²⁹ The website where the complaint can be filed is <https://www.ice.gov/webform/ero-contact-form>.

³⁰ The email address for the Civil Liberties Division of the ICE Office of Diversity and Civil Rights is ICE.Civil.Liberties@ice.dhs.gov.

³¹ *Katz v. United States*, 389 U.S. 347 (1967).

³² *Id.*

³³ National Immigration Law Center, *HEALTH CARE PROVIDERS AND IMMIGRATION ENFORCEMENT: Know Your Rights, Know Your Patients’ Rights*, https://www.nilc.org/issues/immigration-enforcement/healthcare-provider-and-patients-rights-imm-enf/#_ftnref12

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*