



# RECONCILING STATE LAW with the **HIPAA** REGULATIONS

by Annette Miller  
Chief Compliance Officer, HIPAAAnswers  
Eden Prairie, MN

As employer-sponsored health plans, providers, clearinghouses and business associates prepare to comply with the HIPAA requirements, they are also faced with determining that state laws must be followed. The HIPAA Administrative Simplification Act provided a sweeping new set of federal individual rights relating to the use and disclosure of an individual's protected health information. This area was previously regulated primarily at the state level. In some cases, the existing state laws already provided greater privacy protections to individuals. HIPAA states that the law that provides greater privacy protection to the individual will control.

However, in other cases, HIPAA conflicts with the existing state privacy laws and covered entities must decide which provision provides the individual with greater privacy protection. While HIPAA provides for a "federal floor" for the protection of an individual's health information, it still allows state laws to stand if certain circumstances are met.

This article will provide an understanding of when to follow state law instead of HIPAA.

## General Rule

The first question covered entities and business associates must consider is when to follow HIPAA. The general rule under HIPAA is that covered entities are required to comply with both the state and HIPAA when possible. However, if the state law is “contrary” to HIPAA, the state law is preempted and HIPAA must be followed.

Preemption is an important concept to understand. Essentially, preemption means that certain matters are of such a national importance that the federal law takes precedence over the state law. A state law will be considered “contrary” if:

- The covered entity finds it impossible to comply with both the state law and federal law or
- The state law is an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA.

It is important to understand that state law is broadly defined under HIPAA. State laws include a constitution, statute, regulation, rule, common law or other state action having the force and effect of law. Therefore, a covered entity and business associate may not only need to review statutes and regulations, but also court decisions in their state.

## Exceptions to the General Rule

In an effort to allow states to maintain their autonomy regarding their privacy laws, HIPAA provides for three major exceptions to allow state laws to be followed. Once the covered entity or business associate has determined that it cannot follow both HIPAA and state law, the next step is to determine if the state law meets one of these exceptions.

HIPAA allows covered entities to follow state laws even if the state law is “contrary” if one of the following exceptions is met.

- State laws are more stringent
- The secretary of Health and Human Services makes a determination that a state law stands
- HIPAA specifically excludes state laws from preemption (i.e., state child abuse laws or mandatory reporting of births and deaths).

### ***When State Law is “More Stringent”***

If a state law provision is considered more stringent than the requirements under HIPAA, the state law will not be preempted. In this case, the covered entity would be required to follow the state law

provision. So what does “more stringent” really mean?

A state law is considered more stringent if it falls into one of the following categories:

- The state law prohibits the use or disclosure of protected health information that would be permitted under HIPAA.
- The state law provides greater rights to an individual to access or make amendments to the individual’s protected health information.
- The state law allows greater information to be provided to an individual regarding the use, disclosure, rights and remedies of her protected health information.
- The state law has a more narrow scope or duration, increases privacy protections afforded to an individual, or reduces the coercive effect of the circumstance involving the form, substance or need for authorization or consent from an individual before the use or disclosure of protected health information.
- The state law requires a longer period of retention, reporting of more detailed information, or a longer period for accounting of disclosures.
- The state law provides greater privacy protection for the individual who is the subject of the protected health information.

### ***Determinations Made by HHS***

The second exception involves a written determination made by HHS that the state law should stand. Usually, based on a review of the state law, it would ordinarily be deemed “contrary” to HIPAA. However, a state official believes the law needs to stand for a specified purpose. Upon written request made by the state official, the secretary of HHS will make a determination on whether to exempt a state law from preemption. HIPAA must continue to be followed until such time that the secretary has issued a determination to the state official. The secretary will only provide exceptions for state laws deemed necessary or state laws regulating controlled substances.

- The secretary may deem a state law is necessary if it:
  - Prevents fraud and abuse
  - Ensures appropriate state regulation of insurance and health plans expressly authorized by statute or regulation
  - Reports health care delivery costs or

- Serves a compelling need related to public health, safety or welfare.

If the secretary determines that a state law's principal purpose is to regulate the manufacture, registration, distribution, dispensing or other control of any controlled substance or what is deemed a controlled substance by state law, then the state law will be exempt from preemption.

Once the secretary makes an exception, the exception will stay in effect until the HIPAA provision or state law that provided the basis of the exception is materially changed so that the ground for the exception no longer exists or the secretary revokes the exception.

### **State Laws Specifically Excluded**

The last exceptions are those state laws that were specifically "carved out" of HIPAA.

There are two categories of state laws that have been excluded from the HIPAA preemption. These laws do not have to be more stringent than HIPAA, nor do they need to go through the determination process with HHS.

The first category is those state laws dealing with mandatory reporting. If the state law deals with reporting of disease or injury, child abuse, birth or death, or the conduct of public health surveillance, investigation or intervention, then the state law is followed.

The second category deals with health plan reporting requirements and licensing. If the state law requires a health plan to report or to provide access or information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals, then the state law is followed.

### **Consequences of the Preemption Analysis**

As covered entities continue their HIPAA compliance efforts, they must face the task of analyzing their state laws with HIPAA and determining what must be done. In many cases, a covered entity may find that its Notice of Privacy Practices, authorization or consent forms will need to be more detailed due to state laws. Additionally, state laws may allow shorter times to respond to individuals requesting access to their protected health information. Also, covered entities may be required

to maintain more detailed accounting of disclosures than what is set forth in HIPAA. The task of finding a way to comply with HIPAA and the appropriate state laws will not be simple. However, here are some steps to follow in determining the preemption process:

1. Determine the state and federal laws that apply to the covered entity or business associate and the services that it provides. Think about the states where health benefits or benefits services are provided.

2. Determine whether the organization can comply with both HIPAA and the state law provision.

3. Determine if the state law meets one of the exceptions under preemption.

4. Incorporate the state law requirements (if meets the preemption exceptions) into the organization's forms and policies and procedures.

5. Develop a system to monitor any changes in the state laws or HIPAA.

6. Update policies and procedures or forms as changes occur in the state laws and HIPAA.

### **Summary**

Determining whether state law applies can be onerous, overwhelming and expensive if a business hires expensive outside help. Many CD-ROM programs or books only cover the HIPAA requirements and do not advise entities of their state law requirements. Or they may claim to cover all of state preemption at once, which is impossible given the conflicting regulations.

One approach that makes sense for any covered entity or business associate is using a Web-based service, such as that offered by [www.HIPAAanswers.com](http://www.HIPAAanswers.com). This offers state-by-state preemption analysis and instructs the covered entity or business associate to follow HIPAA or the state law. It also provides an easy method to receive timely updates when state laws change. ■

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*Annette Miller has more than 15 years experience in the health insurance industry. She graduated cum laude from William Mitchell College of Law and holds a master's degree in public administration, with a minor in health care administration, from Drake University. She can be reached at [Annette\\_Miller@hipaanswers.com](mailto:Annette_Miller@hipaanswers.com) or 952-400-1100.*

