

# Catching Up with HIPAA: Managing Noncompliance

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*by Abner E. Weintraub*

With the April 14 HIPAA privacy deadline behind us, many covered entities are still struggling to become compliant. Limited budgets and staff, conflicting advice, and unforeseen delays have all conspired to keep many covered entities from meeting the deadline.

What do you tell patients and other constituents when you're behind with compliance? How do you manage media inquiries, legal challenges, and business associates when you're not quite ready to do HIPAA right? This article provides practical guidance to minimize the damage that being out of compliance could cause while you put the final pieces of your HIPAA compliance program in place.

## What Went Wrong?

You planned, you intended, you tried, but somehow the HIPAA privacy deadline passed and your organization is still not ready. Many factors may have hindered your efforts, but now is not the time to analyze what went wrong. You have more important things to do.

HIPAA presents a unique problem. Unlike most other federal healthcare laws, patients and consumers actually know about HIPAA and their new HIPAA rights. The public is learning about HIPAA through media reports in television, radio, and print. We are also telling patients about HIPAA with our notice of privacy practices and getting signatures affirming its receipt. There is no hiding HIPAA. It's time to manage your organization's compliance.

## Should You Be Concerned?

Absolutely. Lack of compliance with or violations of HIPAA's privacy rule could result in many problems, such as:

- fines and other sanctions under HIPAA law
- legal actions from patients under state and (non-HIPAA) federal law
- problems with the Joint Commission, National Committee for Quality Assurance, and other accrediting bodies
- media exposure resulting in loss of reputation, credibility, and patients
- higher insurance premiums

HIPAA's privacy rule is enforced by the Office for Civil Rights (OCR) of the US Department of Health and Human Services. OCR's enforcement will be primarily "complaint driven," meaning few, if any, surprise inspections for privacy compliance. But these inspections should be the least of your worries.

While patients do not have a clear right to a private "Cause Of Action" under HIPAA, plaintiffs may sue under state tort laws such as "right to privacy." The federal statutes will allege to be the standard of care that the covered entity fell below. And if a breach of the rules and subsequent damages result, all the elements for a tort claim (action brought about when one party believes another has caused harm through wrongful conduct and the party bringing action is seeking compensation for that harm) will be met. To be safe, you must understand the difference between non-compliance and actual violations of HIPAA's privacy rule.

## Noncompliance versus Violations

Just being out of compliance with the privacy rule could be seen as a violation itself. But noncompliance and rule violations are not the same. HIPAA's privacy rule is all about protecting confidential patient information known as protected health

information (PHI). A quick look at HIPAA's fines and sanctions reveals a little recognized, but very important fact: the smaller penalties are for "failure to comply," while the serious penalties are for "wrongful disclosures" of PHI.

Your organization's biggest risk as you complete compliance is not what could happen if your noncompliance is discovered. Rather, it is that you or your employees might accidentally or willfully cause serious privacy violations and suffer serious consequences.

## What to Do Now

If you are still working on privacy compliance, the following suggestions can help you minimize problems:

Make elements that are visible to patients and outsiders your top priority. Your notice of privacy practices, privacy complaint form, and patients' rights request forms are the most visible symbols of HIPAA compliance. Be certain these are done first, along with the systems and processes to support them.

Train yourself and your employees properly. HIPAA requires training for all employees but does not specify the type of training or how it should be delivered. Because behavior can create the most serious HIPAA violations, employees are your greatest vulnerability, and effective training is your best insurance against HIPAA violations.

Create clear policies and procedures. These are essential to understanding daily life under HIPAA for employees. Consider saving time by purchasing and customizing model policies.

Remind patients their health privacy is paramount. Create privacy awareness by frequently reminding patients that your organization is very careful about protecting their privacy. Show this in the careful way that doctors or staff discuss confidential matters with patients, lower their voices, or move to more private areas (HIPAA's "reasonable precautions") to show they are serious about protecting patient privacy.

Be ready to document your compliance status. If challenged by patients, business associates, the courts, or the media before you're fully compliant, be ready to clearly state why you're behind and what you're doing about it. It's more difficult to argue with a latecomer who is working overtime to finish than with one who appears to be complacent.

Continue your compliance efforts aggressively. If your temporary noncompliance is discovered, you may have to prepare an explanatory statement or pay a small fine. But if you or your employees commit serious violations of the privacy rule, even accidentally, the consequences could be catastrophic.

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