

Untangling HIE: Patchwork Regulations, Standards Complicate Health Information Exchange

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By Diana Warner, MS, RHIA, CHPS, FAHIMA

The Electronic Health Record (EHR) Incentive Program has dramatically increased the number of health information exchanges (HIEs) throughout the United States. An HIE is the exchange of health information electronically between providers and others with the same level of interoperability according to nationally recognized standards. In stage 1 of the program, providers must show that their EHR systems could exchange health information. The proposed rule for stage 2 involves higher expectations for HIEs, including:

- Tougher requirements for e-prescribing
- Structured laboratory results
- Expectations that providers will electronically transmit patient care summaries to support transitions

The increasingly robust expectations for HIE expected in stage 3 will support the overall goal of having information follow the patient.

The standardized exchange of data presents providers with many challenges. However, a patchwork of federal and state laws also complicates the sharing of patient information.

A Patchwork of Privacy Laws

There are many privacy, security, and confidentiality issues when it comes to sharing health information via an HIE. Federal and state laws have created a patchwork of disclosure and use requirements both within and across states that may cause legal confusion for HIEs.

The confusion stems from the organic growth of the laws, which were not developed in a uniform and coordinated manner. Further, regulations affecting confidentiality and privacy are found in a variety of state and federal sources, such as laws, rules, statutes, regulations, and even common law.

Different laws apply to different types of entities and different types of information. For example, almost every state has its own statute or regulation addressing the disclosure of information related to substance abuse treatment, mental healthcare, or other specific sensitive healthcare issues.

Federal Law

HIEs must follow HIPAA, which allows for use and disclosure of protected health information without patient consent for purposes of treatment, payment, and operations as well as public health initiatives. However, a notable exception is psychotherapy notes.

HIEs must ensure that the HIPAA minimum necessary standard is enforced. Though minimum use does not apply to disclosures for treatment purposes, it must be in place for other exchanges such as payment, healthcare operations, or other permitted purposes. Above all, HIPAA is considered the floor for privacy. HIPAA's baseline standards are often preempted by more stringent state laws.

When the federal regulation, 42 CFR Part 2 Confidentiality of Alcohol and Drug Abuse Patient Records, applies, HIEs are strictly limited in the use and disclosure of information-nearly all disclosures require direct patient consent. The law also

generally prohibits recipients from re-disclosing the information. HIEs must follow both HIPAA and CFR Part 2. This may require segmenting this type of health information in order to comply.

State Law

State laws are often stricter than HIPAA. Many states have restrictions on disclosure of information generated from the mental health commitment process and mental health inpatient care. The same laws often prohibit the redisclosure of health information from these types of facilities.

In addition, there are a variety of healthcare laws that may affect how HIEs are able to connect and share health information. These laws may address the following:

- HIV/AIDS
- Mental health and substance abuse
- Developmental disability
- Genetic testing
- Medical record content and format requirements
- Authentication requirements
- Record retention requirements
- Licensure issues for access and updating across state lines
- Redisclosure

Agreements That Lower the Barriers

The lack of standards has created challenges for connecting HIEs. In addition to laws imposed on HIE systems, industry and vendor standards may vary, making it nearly impossible for HIEs to connect within the same local area-much less across states.

Though it is not yet a law, building stronger standards into the federal Standards and Interoperability Framework may be just around the corner. Currently, having optional standards for HIEs greatly reduces the ability to share patient information when needed. Having a single standard not only improves interoperability, but it also benefits vendors and providers by lowering overall costs. The building blocks for sharing patient information need to be unambiguous.

Varying laws addressing identity verification and authority to access health information pose another obstacle. State laws may require documentation, statements, or representations from individuals requesting disclosure. A business associate agreement can cover entities sharing patient health information within the scope of the agreement, helping overcome this barrier. A data use and reciprocal support agreement, a contract that contains most of the essential legal and compliance specifications needed for a successful HIE, is also beneficial.

Building the Next Building Blocks

To address the patchwork of laws, the Office of the National Coordinator for Health IT is focusing on the next set of building blocks to accelerate health information exchange. These include:

- Directory services that allow lookup of providers by data such as name, phone number, and email address, or by a particular hospital or hospital department
- Digital certificate management and discovery to support identity authentication
- Governance, or a common set of rules of the road, to build a trusted exchange and to make the nationwide health information network more scalable¹

Most recently, Maine and five other states received grants for sharing information between behavioral healthcare organizations within the state. Patients who sign consent allow their behavioral healthcare providers to share their behavioral health information with general medical care providers.

This landmark grant may be the tipping point to allow previously restricted information to be shared appropriately across the continuum of care, thereby providing better-coordinated care, reduced medication errors, and overall better patient care.

Note

1. Mosquera, Mary. "HIE as a Verb: ONC Wants to Move Quickly on Data Exchange." Healthcare IT News, March 9, 2012. www.healthcareitnews.com/news/hie-verb-onc-wants-move-quickly-data-exchange.

Diana Warner (diana.warner@ahima.org) is a professional practice resource manager at AHIMA.

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