

# PERMITTED DISCLOSURES OF PROTECTED HEALTH INFORMATION FOR THE PURPOSE OF MONTANA WORKERS' COMPENSATION

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Presented by: Erin F. MacLean, Esq., LUXAN & MURFITT, PLLP

- I. **HIPAA** - The Health Insurance Portability and Accountability Act of 1996 (P.L.104-191).
- II. **HIPAA PRIVACY RULE** – (effective 2003) defines and limits the circumstances in which an individual's protected health information may be used or disclosed by covered entities.
  - a. **GENERALLY** - A covered entity may not use or disclose protected health information, except either: (1) as the Privacy Rule permits or requires; or (2) as the individual who is the subject of the information (or the individual's personal representative) authorizes in writing
  - b. **PROTECTED HEALTH INFORMATION** - HIPAA's privacy rule establishes regulations for the use and disclosure of Protected Health Information (PHI): PHI = information held by a covered entity which concerns health status, provision of health care, or payment for health care that can be linked to an individual.
- III. **COVERED ENTITIES SUBJECT TO HIPAA** –
  - a. Health care clearinghouses; employer sponsored health plans; health insurers; healthcare providers
  - b. **EMPLOYERS ARE NOT COVERED ENTITIES SUBJECT TO HIPAA**
- IV. **PREMPTION OF STATE LAWS** –State laws contrary to the Privacy Rule are preempted by the federal requirements.
- V. **COVERED ENTITIES, HIPAA AND WORKERS' COMPENSATION**
  - a. **GENERAL RULE:** The HIPAA Privacy Rule does not apply to entities that are either workers' compensation insurers, workers' compensation administrative agencies, or employers, except to the extent they may otherwise be covered entities:
    - i. A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault. 45 CFR 164.512(l).
- VI. **HOW THE WORKERS' COMPENSATION EXCEPTION WORKS** –
  - a. **DISCLOSURES W/O INDIVIDUAL AUTHORIZATION:** The Privacy Rule permits covered entities to disclose protected health information to workers' compensation insurers, state administrators, employers, and other persons or entities involved in workers' compensation systems, without the individual's authorization:
    - i. To the extent the disclosure is required/permitted by State or other law. The disclosure must comply with and be limited to what the law requires. See 45 CFR 164.512(a).
  - b. **DISCLOSURES W/ INDIVIDUAL AUTHORIZATION:** In addition, covered entities may disclose protected health information to workers' compensation insurers and others involved in workers' compensation systems where the individual has provided his or her authorization for the release of the information to the entity.
- VII. **DISCLOSURES LIMITED TO THE "MINIMUM NECESSARY"**
  - a. Covered entities are required reasonably to limit the amount of protected health information disclosed under 45 CFR 164.512(l) to the minimum necessary to accomplish the workers' compensation purpose.

- b. Under this requirement, protected health information may be shared for such purposes to the full extent authorized by State or other law.
- c. Also, where protected health information is requested by a state workers' compensation or other public official, covered entities are permitted to reasonably rely on the official's representations that the information requested is the minimum necessary for the intended purpose. See 45 CFR 164.514(d)(3)(iii)(A). Thus, covered entities are not required to make a minimum necessary determination when disclosing protected health information as required by State or other law, or pursuant to the individual's authorization. See 45 CFR 164.502(b).

## VIII. WHAT DOES MONTANA LAW SAY?

### a. DISCLOSURES OF HEALTH INFORMATION: MT STATUTES –

- i. **50-16-525. Disclosure by health care provider.** (1) Except as authorized in 60-16-529, 50-16-530, and 50-19-402 or as otherwise specifically provided by law or the Montana Rules of Civil Procedure, a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent or employee of a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization. A disclosure made under a patient's written authorization must conform to the authorization. (50-16-505. Limit on applicability. this section is only applicable to providers not subject to HIPAA).
- ii. **50-16-527. Patient authorization - retention - effective period - exception - communication without prior notice for workers' compensation purposes.**
  - 1. Notwithstanding subsections (2) and (3), a signed claim for workers' compensation or occupational disease benefits authorizes disclosure to the workers' compensation insurer, as defined in 39-71-116, or to the agent of a workers' compensation insurer by the health care provider. The disclosure authorized by this subsection authorizes the physician or other health care provider to disclose or release only information relevant to the claimant's condition...
  - 2. ...A signed claim for workers' compensation or occupational disease benefits or a signed release authorizes a workers' compensation insurer, as defined in 39-71-116, or the agent of the workers' compensation insurer to communicate with a physician or other health care provider about relevant health care information, as authorized in subsection (4), by telephone, letter, electronic communication, in person, or by other means, about a claim and to receive from the physician or health care provider the information authorized in subsection (4) without prior notice to the injured employee... (This section is only applicable to providers not subject to HIPAA).
- iii. **50-16-805, MCA. Disclosure of information for workers' compensation and occupational disease claims and law enforcement purposes\*** To the extent provided in 39-71-604 and 50-16-527, a signed claim for workers' compensation or occupational disease benefits authorizes disclosure to the workers' compensation insurer, as defined in 39-71-116, by the health care provider. (This section applies to those providers subject to HIPAA).
  - 1. **39-71-116. Definitions...**(14)"Insurer" means an employer bound by compensation plan No. 1, an insurance company transacting business under compensation plan No. 2, or the state fund under compensation plan No. 3.

- iv. **39-71-604. Application for compensation -- disclosure and communication without prior notice of health care information.** (Applies generally).
  - 1. ...A signed claim for workers' compensation or occupational disease benefits authorizes disclosure to the workers' compensation insurer, as defined in 39-71-116, or to the agent of a workers' compensation insurer by the health care provider. The disclosure authorized by this subsection authorizes the physician or other health care provider to disclose or release only information relevant to the claimant's condition. Health care information relevant to the claimant's condition may include past history of the complaints of or the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery...
  - 2. ...A signed claim for workers' compensation or occupational disease benefits or a signed release authorizes a workers' compensation insurer, as defined in 39-71-116, or the agent of the workers' compensation insurer to communicate with a physician or other health care provider about relevant health care information, as authorized in subsection (2), by telephone, letter, electronic communication, in person, or by other means, about a claim and to receive from the physician or health care provider the information authorized in subsection (2) without prior notice to the injured employee...
- v. **50-16-502. Legislative findings.** Subsection (4) states “persons other than health care providers obtain, use, and disclose health record information in many different contexts and for many different purposes. It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers.” (Applies to all others who are not health care providers).

b. **SYNOPSIS:**

- i. All Montana statutes allowing for the disclosure of PHI by a provider upon filing of a claim or pursuant to signed authorization address only disclosure of information from the provider to the insurer or the insurer's agent. No Montana law permits a provider to release PHI to an employer or other person or entity without the employee's prior authorization.
- ii. However, Montana law actually prevents persons not subject to HIPAA from disclosing health information disclosed to them. (See section 50-16-502, above).

c. **RELATED ADMINISTRATIVE RULES OF MONTANA:**

- i. **24.29.1404 DISPUTED MEDICAL CLAIMS** - The rule of privileged communication is waived by the injured worker seeking benefits under the Workers' Compensation or Occupational Disease acts.

**IX. SUMMARY**

- a. HIPAA permits states to implement laws that allow for the free flow of PHI within state workers' compensation systems and amongst workers' compensation players.

- b. Thus, states may pass laws that permit covered entities, such as medical providers, to disclose PHI without the prior authorization of the injured worker to those players.
- c. However, outside of the circumstance where a disputed medical claim exists, Montana law does not explicitly permit a covered entity, or a non-covered entity to provide PHI related to a worker's claim to anyone, or any entity, other than the worker's compensation insurer or the insurer's agent.
- d. The law also does not permit an employer or insurer to release health information to each other.
- e. In short, Montana law does not allow healthcare providers, insurers or employers to disclose PHI to each other, independent vocational rehabilitation contractors or other players in the workers' compensation system.

**X. APPLICABLE MONTANA CASE LAW –**

- a. *Bowen v. Super Value Stores, Inc.* (1987), 229 Mont. 84, 745 P.2d 330 - The Montana Supreme Court held that, under Montana law, the insurer was “entitled to confidential health information from the medical providers related to the compensability of the worker’s claim. The Court also stated “in order to clarify the statutes and rules, we hold that a claimant for Workers’ Compensation benefits waives any privilege of confidentiality in health care information which is relevant to the subject matter involved in his claim.”
- b. WHAT ABOUT THE PRIVACY RIGHTS CONTAINED IN THE MONTANA CONSTITUTION? ARTICLE II, SECTION 10: RIGHT OF PRIVACY: In *Thompson v. State* (2007), 338 Mont. 511, 167 P.3d 867, Workers sought a declaration that sections 39-71-604(3) and 50-16-527(5) be declared unconstitutional “because they violated the Workers’ state constitutional right to privacy...” The Workers’ Compensation Court agreed that the statutes violated the Workers’ constitutional right to privacy. The Montana Supreme Court reversed the decision and held that the Workers’ Compensation Court did not have the jurisdiction to issue a declaratory judgment on the constitutionality of those statutes.

**XI. MONTANA’S CONSTITUTIONAL RIGHT TO PRIVACY –**

- a. GENERALLY: “Montana adheres to one of the most stringent protection of its citizens' right to privacy in the country. Mont. Const. Art. II, § 10.” *State v. Burns* (1992), 253 Mont. 37, 830 P.2d 1318 “Montana's treatment of privacy rights is stricter than that offered by the Federal Constitution.” *Montana Human Rights Division v. City of Billings* (1982), 199 Mont. 434, 439, 649 P.2d 1283, 1286.
- b. The Montana Supreme Court has said that “[i]n Montana, we have adopted a two-prong test to determine whether issues of privacy are protected under our Constitution as follows:
  - i. Whether the person involved had a subjective or actual expectation of privacy; and,
  - ii. Whether society is willing to recognize that expectation as reasonable.” *State v. Burns* (1992), 253 Mont. 37, 830 P.2d 1318
- c. SUMMARY OF CONSTITUTIONAL ISSUE OF PRIVACY RIGHT - The Montana Supreme Court has not substantively addressed the Workers’ Compensation statutes regarding disclosure of healthcare information without the prior authorization of the employee under the Right of Privacy granted in the Montana Constitution.
  - i. If a Constitutional review were to be made, the Court should determine: (1) whether the worker had a subjective or actual expectation of privacy in his/her medical records light of the circumstances (here in the context of his/her workers’ compensation claim), and (2) whether society is willing to recognize that expectation as reasonable.
  - ii. THE IMPORTANT QUESTION: DO/WILL THE STATUTES PASS THIS TEST?