California's New Patient Health Privacy Laws Heighten Need for HIPAA Compliance (Effective January 1, 2009)

A recent investigation by the California Department of Public Health ("CDPH") revealed that medical records of dozens of Hollywood celebrities, as well as the records of hundreds of private individuals, were breached by employees at University of California, Los Angeles ("UCLA") hospitals. The celebrities include California First Lady Maria Shriver, Britney Spears, Farrah Fawcett, Tom Cruise, and many more, some of whom found significant amounts of their private information in tabloids across the country. While one woman perpetrated the majority of known breaches, UCLA confirms that more than 100 other workers have been implicated.

In light of these breaches and growing patient concern about the privacy of their medical records as hospitals move more information online and to digital databases, California Governor Arnold Schwarzenegger signed new legislation to improve patient privacy laws and address leaks of confidential health information. The new laws are Senate Bill 541 ("SB 541") and Assembly Bill 211 ("AB 211"). They give the state the ability to assess and enforce fines on individuals and entities that unlawfully access and/or leak patient information. The new legislation augments the current federal Health Insurance Portability and Accountability Act ("HIPAA"), and dramatically increases fines for violators. The bills also set new breach-disclosure standards and mandate security controls to prevent unauthorized access to patient data. The governor approved the laws Sept. 30, 2008, and they take effect Jan. 1, 2009.

Current Law

Currently, private patient records are protected under California state and federal laws. A health care provider, service plan, or contractor may not disclose medical information about a patient without patient authorization, except in limited circumstances. Existing law makes it a misdemeanor to violate these provisions. Additionally, a person or entity who unlawfully obtains, discloses or uses private medical records may be subject to administrative fines and civil penalties. However, there are no specific penalties or administrative actions available to the state to use against organizations that failed to prevent unauthorized access, use, or disclosure of private patient information.

Who Is Covered?

Existing law prohibits a health care provider, health care service plan, or contractor from disclosing medical information regarding a patient of the provider, or an enrollee or subscriber of the health service plan, without authorization. AB 211 expands this coverage. It includes "any person or entity that negligently discloses" private information; and "any person or entity" or "any licensed health care professional who knowingly or willfully obtains, discloses, or uses medical information"—including, but not limited to, use for financial gain—in violation of the statute. The statute covers "every provider of health care." It does not change the definition of "provider of health care" in sections 56.05-06 of the California Health and Safety Code, which includes any person, clinic, health dispensary, or health facility certified or licensed pursuant to Division 2 of the Health and Safety Code.

SB 541 applies to clinics, health facilities, home health agencies, and hospices licensed by the State Department of Public Health pursuant to section 1250 of the Health and Safety Code. The statute adds a section to require clinics, health facilities, home health agencies, or hospices licensed pursuant to sections 1204, 1250, 1725, and 1745 to prevent unlawful or unauthorized access to, and use or disclosure of, patients' medical information. The statute covers small and rural hospitals, primary care clinics, skilled nursing facilities, general acute care hospitals, acute psychiatric hospitals, and special hospitals, such as dental or maternity centers.

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The New Legislation Requires Health Care Organizations to Establish Safeguards to Protect Patient Information from All Unauthorized Access, Use, or Disclosure

AB 211 and SB 541 amend and add to sections of the California Health and Safety Code. Notably, they add a new requirement that health care providers take affirmative steps to prevent "unauthorized access" to patient information—not just "unlawful" access as was previously the case. Under AB 211, unauthorized access "means the inappropriate review or viewing of patient medical information without a direct need for diagnosis, treatment, or other lawful use." This means that a hospital like UCLA is liable every time a curious employee snoops through a patient's files without authorization.

"Every provider of health care" must "establish and implement appropriate administrative, technical, and physical safeguards" to protect the privacy of patient information under AB 211. The terms of the new legislation are broad; every provider must "reasonably safeguard" confidential information from "any unauthorized access or unlawful access, use, or disclosure." This will ultimately require specific restrictions to access to physical medical files, as well as stricter electronic security controls and regular monitoring of access to electronic files. SB 541 specifically requires covered businesses, including licensed clinics, health facilities, home health agencies, and hospices, to "prevent unlawful or unauthorized access to, or use or disclosure of, a patient's medical information."

The New Legislation Imposes Penalties for Unauthorized Access and Use of Medical Information, and Creates the Office of Health Information Integrity to Oversee Administrative Fines

Both AB 211 and SB 541 impose specific fines on individuals and health care providers for any unauthorized or unlawful access to patient information.

Importantly, AB 211 creates a new California Office of Health Information Integrity ("OHII") within the California Health and Human Services Agency to enforce these new safeguard and administrative penalty rules. OHII is authorized to levy administrative fines against persons and certain health care providers, issue regulations, and refer violators to the appropriate administrative board for oversight. OHII may not assess administrative penalties against clinics, health facilities, home health agencies, or hospice care facilities licensed under the California Health and Safety Code that are governed by the provisions in SB 541.

AB 211 creates a range of fines from $2,500 to $25,000 per violation for organizations that negligently disclose patient information. If an individual or organization unlawfully uses patient information for financial gain, they face fines of up to $250,000 per violation. OHII may consider mitigating factors such as the nature and seriousness of the conduct, the harm to the patient, the number of violations, the willfulness of the misconduct, the length of time over which the misconduct occurred, and the provider's financial status.

Under SB 541, the California Department of Public Health (CDPH) may impose fines of up to $25,000 for each patient whose information was accessed, used, or disclosed in an unauthorized manner. Security and information privacy violations that put patients in immediate jeopardy of injury or death carry a penalty of up to $100,000—four times the previous maximum of $25,000. The law imposes a graduated fine scale for such violations; for an immediate jeopardy violation, the fine may be up to $50,000 for the first administrative penalty, $75,000 for the second, and $100,000 for the third. Administrative penalties issued three years after the date of the last immediate jeopardy violations are considered first violations, so long as the facility has not received any other immediate jeopardy penalties and is in substantial compliance with all state and federal licensing laws and regulations. The law extends immediate jeopardy provisions that currently apply only to hospitals, to include clinics, heath facilities, home health agencies, and hospices.

SB 541 also imposes specified reporting requirements on health care providers with respect to unlawful or unauthorized access to, or use or disclosure of, patient medical information. All breaches must be reported to the CDPH and to the affected patients within five days of discovery. Providers that fail to do so will be subject to a penalty of $100 for each day that the unlawful access or disclosure is not reported to the CDPH, up to a maximum of $250,000. The licensee does have the ability to dispute a penalty determination.

AB 211 Allows Individual Legal Action for Violations

Under the new law, individuals may take legal action against any person or covered entity who negligently releases or discloses confidential information, or who knowingly and willfully obtains, discloses, or uses medical information. The patient may recover $1000 in nominal damages even if she did not suffer actual damages. She may also recover the amount of any actual damages she sustained as a result of the breach. In addition, the person or entity that illegally accessed, disclosed,

or sued the patient's information is liable for the range of administrative fines and civil penalties discussed above, regardless of the actual damages suffered by the patient.

Key Changes in the Law

Most importantly, the new law makes actionable not just information taken illegally by outside sources. Now, the misuse of patient information by those who have physical or electronic access to such information, but who do not have permission to access the information through their jobs, is also actionable. The individuals who access or use the information are liable, as well as the health care organization with which they are employed. Further, the new law holds every health care provider responsible for implementing appropriate security measures to protect patient information. The law imposes mandatory reporting requirements and allows individuals to sue. It is now more critical than ever that providers take stock of their compliance programs to address these stricter regulations. Providers must now:

AB 211

- Ensure that access-to-information policies prohibit "unauthorized access," not simply unlawful access to patient information.
- Educate employees on the meaning and consequences of privacy information violations, including provider policies and state and federal privacy laws
- Assess means of monitoring employee access to such information and implement security audits; encourage employees to report suspected violations
- Examine current administrative, technical, and physical safeguards that protect the privacy of patient medical information
- Take appropriate, documented, and immediate action should any violations occur

SB 541

- Understand state reporting laws, including the fines imposed for failure to report violations
- Take appropriate, documented, and immediate action should any violations occur
- Assess compliance with all state and federal licensing laws and regulations, and take necessary corrective measures
- Educate employees on the meaning and consequences of privacy information violations, including the meaning of all relevant terms in these new laws

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