

VACCINE INFORMATION: CONFIDENTIALITY



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WRITTEN MATERIALS

- OCR, *HIPAA, COVID-19 Vaccination, and the Workplace*, <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html>
- OCR, *HIPAA Privacy and Novel Coronavirus*, <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>
- Stanger, *Employee Vaccine Information: Privacy Concerns*, <https://www.hollandhart.com/employee-vaccine-information-privacy-concerns>

OVERVIEW

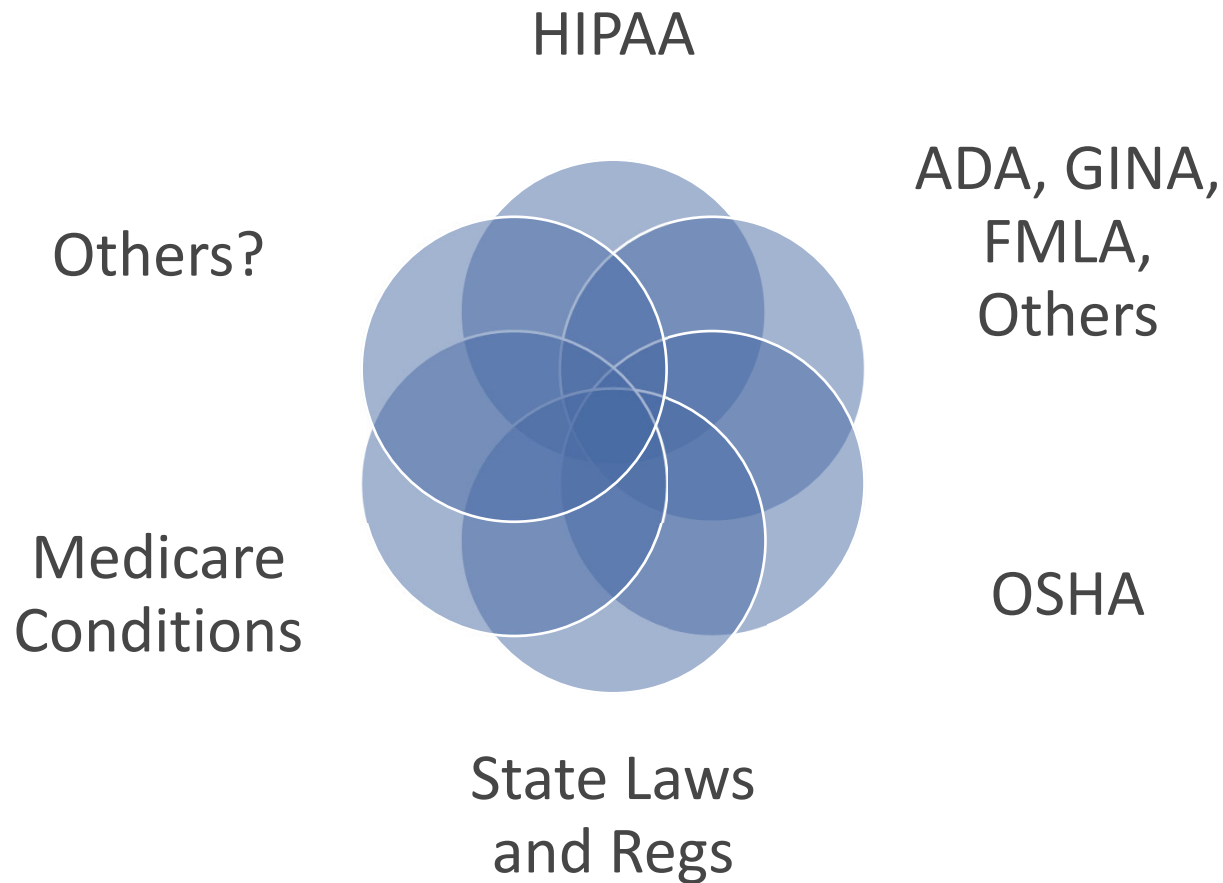
Patient Confidentiality

- HIPAA
 - General rules
 - Permissible disclosures
 - Treatment, payment and operations
 - Family, friends and others involved in care
 - Avert serious threat of harm
 - Law requires disclosure
 - Public health activities

Employee Confidentiality

- HIPAA
 - Employer obtains info as healthcare provider
 - Employer obtains info solely as employer
- ADA, FMLA, GINA
- OSHA
- Others?

CONSIDER OVERLAPPING OR CONFLICTING LAWS



HIPAA AND PATIENTS



HIPAA STILL APPLIES DESPITE COVID

“Does the HIPAA Privacy Rule prohibit a doctor’s office from disclosing an individual’s protected health information (PHI), including whether they have received a COVID-19 vaccine, to the individual’s employer or other parties?”

“Generally, yes. The Privacy Rule prohibits covered entities and their business associates from using or disclosing an individual’s PHI (e.g., information about whether the individual has received a vaccine, such as a COVID-19 vaccine; the individual’s medical history or demographic information) except with [1] the individual’s authorization or [2] as otherwise expressly permitted or required by the Privacy Rule.”

<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html>

HIPAA STILL APPLIES DESPITE COVID

- Generally need patient's HIPAA-compliant authorization.
- Potentially relevant HIPAA exceptions:
 - Treatment, payment or healthcare operations.
 - For public health activities.
 - To family, friends and others involved in patient's care.
 - To avert serious and imminent threat of harm
 - Required by law.
 - To public health agency.
 - Employer's medical surveillance of workplace if certain conditions met.

<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html>

EMPLOYEE HEALTH INFO



HIPAA AND EMPLOYEES

HIPAA applies

- Covered entities
 - Healthcare providers who engage in certain e-transactions
 - Health plans, including employee benefit plans
 - Healthcare clearinghouses
- Business associates of covered entities

(45 CFR 164.502)

HIPAA does not apply

- Other entities
- Covered entity acting solely in its capacity as a healthcare employer.

(45 CFR 160.103)

WHETHER HIPAA APPLIES DEPENDS ON EMPLOYER STATUS

- Did the employer render the relevant healthcare to the employee?
 - If yes, HIPAA applies to info.
 - Must have employee/patient's authorization or HIPAA exception to use or disclose the info, including for employment-related actions.
- Did the employer get the info through its employee benefit plan?
 - If yes, HIPAA applies to info.
 - Must have employee/patient's authorization or HIPAA exception to disclose.
- Did the employer get the info solely from its capacity as an employer?
 - If yes, HIPAA does not apply to info.
 - Other laws protecting patient privacy may apply, e.g., ADA, FMLA, GINA, state laws.

EMPLOYER ACTING AS PROVIDER OR EMPLOYER?

“[A] covered entity must remain cognizant of its dual roles as an employer and as a health care provider [or] health plan Individually identifiable health information created, received, or maintained by a covered entity in its health care capacity is [PHI]. It does not matter if the individual is a member of the covered entity's workforce or not. Thus, the medical record of a hospital employee who is receiving treatment at the hospital is protected health information and is covered by [HIPAA], just as the medical record of any other patient of that hospital is protected health information and covered by the Rule. The hospital may use that information only as permitted by the Privacy Rule, and in most cases will need the employee's authorization to access or use the medical information for employment purposes.”

(67 FR 53191)

EMPLOYER ACTING AS PROVIDER OR EMPLOYER?

“For example,

- “drug screening test results will be [PHI] when the provider administers the test to the employee, but will not be [PHI] when, pursuant to the employee's authorization, the test results are provided to the provider acting as employer and placed in the employee's employment record.
- “fitness for duty exam will be [PHI] when the provider administers the test to one of its employees, but will not be [PHI] when the results of the fitness for duty exam are turned over to the provider as employer pursuant to the employee's authorization.”

(67 FR 53191)

HOSPITAL ACCESSING EMPLOYEE'S VACCINATION INFO

- Generally need patient's HIPAA-compliant authorization.
- Potentially relevant HIPAA exceptions:
 - Treatment, payment or healthcare operations (e.g., qualifications of members, compliance, etc.).
 - For public health activities.
 - To family, friends and others involved in patient's care.
 - To avert serious and imminent threat of harm.
 - Required by law.
 - To public health agency.
 - Employer's medical surveillance of workplace if certain conditions met, including surveillance required by OSHA and written notice to employee.

<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html>

ASKING EMPLOYEES ABOUT VACCINATION STATUS

“If my employer requires proof of my COVID-19 vaccination status, does that violate my rights under HIPAA?”

“In general, the HIPAA Rules do not apply to employers or employment records. HIPAA only applies to HIPAA covered entities – health care providers, health plans, and health care clearinghouses – and, to some extent, to their business associates. If an employer asks an employee to provide proof that they have been vaccinated, that is not a HIPAA violation, and employees may decide whether to provide that information to their employer.”

<https://www.hhs.gov/answers/if-my-employer-requires-proof-of-my-covid-19-vaccination-status/index.html>

REQUIRING EMPLOYEES TO DISCLOSE VACCINATION STATUS

“Does the HIPAA Privacy Rule prohibit a covered entity or business associate from requiring its workforce members to disclose to their employers or other parties whether the workforce members have received a COVID-19 vaccine?”

“No. The Privacy Rule does not apply to employment records, including employment records held by covered entities ... acting in their capacity as employers. Thus, the Privacy Rule generally does not regulate what information can be requested from employees as part of the terms and conditions of employment that a covered entity ... may impose on its workforce, such as the ability of a covered entity ... to require its workforce members to provide documentation of their vaccination against COVID-19 or to disclose whether they have been vaccinated to their employer, other workforce members, patients, or members of the public.

<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html>

REQUIRING EMPLOYEES TO DISCLOSE VACCINATION STATUS

“For example, the Privacy Rule **does not prohibit** a covered entity ... from requiring or requesting each workforce member to:

- “Provide documentation of their COVID-19 ... vaccination to their current or prospective employer.
- “Sign a HIPAA authorization for a covered health care provider to disclose the workforce member’s COVID-19 ... vaccination record to their employer.

...

- “Disclose whether they have received a COVID-19 vaccine in response to queries from current or prospective patients.”


<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html>

REQUIRING EMPLOYEES TO DISCLOSE VACCINATION STATUS

- But beware other laws (e.g., ADA, GINA, FMLA, state laws).
- “Other federal or state laws address whether an employer may require a workforce member to obtain any vaccinations as a condition of employment and provide documentation or other confirmation of vaccination. These laws also address how employers must treat medical information that they obtain from employees. For example, documentation or other confirmation of vaccination must be kept confidential and stored separately from the employee’s personnel files under Title I of the Americans with Disabilities Act (ADA).”


<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html>

[HTTPS://WWW.EEOC.GOV/WYSK/WHAT-YOU-SHOULD-KNOW-ABOUT-COVID-19-AND-ADA-REHABILITATION-ACT-AND-OTHER-EEO-LAWS](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eo-laws)

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What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws



What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Technical Assistance Questions and Answers - Updated on May 28, 2021.

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• All EEOC materials related to COVID-19 are collected at

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ADA AND EMPLOYEE CONFIDENTIALITY

Under ADA:

- Employer may follow current CDC and local health dept guidelines in responding to COVID, including requiring vaccinations subject to reasonable accommodation for:
 - Sincerely held religious believes.
 - Disability.
- Employer may ask whether employee has been tested for COVID, is vaccinated, or is experiencing symptoms.
 - Not a disability-related question.
 - Do not ask follow up questions.

(29 CFR 1630.14; EEOC Guidance (5/21))

ADA AND EMPLOYEE CONFIDENTIALITY

Under ADA:

- Employer must keep employee health info confidential, including vaccination status.
 - Store separately from medical file.
 - May disclose to supervisors or managers to allow necessary accommodations.
 - May require those who are not vaccinated to wear a mask subject to reasonable accommodation.

(29 CFR 1630.14; EEOC Guidance (5/21))

- Maybe allow employee to display something confirming that they may work without a mask but do not require notice of vaccination status.
- Maybe allow voluntary vaccination stickers.

➤ *Check local laws.*

OSHA AND PATIENT CONFIDENTIALITY

Under the OSHA ETS


- Detailed guidance for healthcare workers, including PPE.
- If employer learns employee is COVID positive, employer must within 24 hours:
 - Notify other employees who were not wearing PPE that employee was in close contact with someone with COVID and date of contact.
 - Notify others in well-defined portion (e.g. a particular floor).
 - Do not included infected employee's name, contact info, or occupation.
- Must maintain COVID log.
(OSHA ETS 1910.502(I)(3) (6/21/21))

[HTTPS://WWW.HHS.GOV/HIPAA/FOR-PROFESSIONALS/SPECIAL-TOPICS/HIPAA-COVID19/INDEX.HTML](https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-covid19/index.html)

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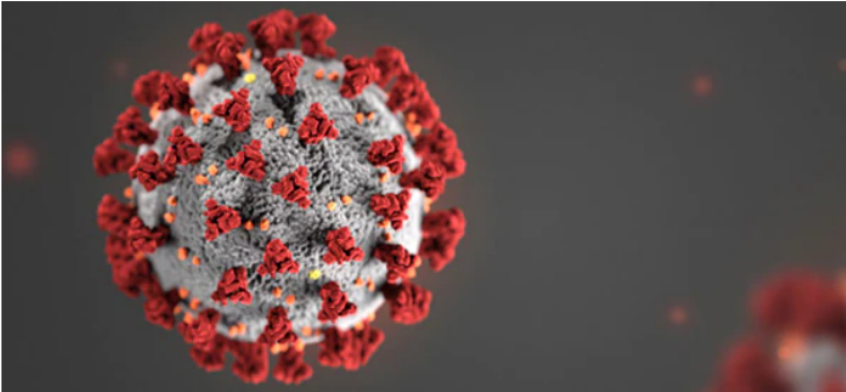
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Coronavirus Disease (COVID-19) / COVID-19 Healthcare ETS

⚠ Alert: Due to routine maintenance on the OSHA website, some pages may be temporarily unavailable. To report an emergency, file a complaint with OSHA or ask a safety and health question, call 1-800-321-6742 (OSHA).

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COVID-19 Healthcare ETS



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