HIPAA for Union Lawyers

Narendra K. Ghosh, Patterson Harkavy LLP
Dana E. Lossia, Levy Ratner, P.C.
AFL-CIO LCC Conference
April 28, 2015

Union lawyers are routinely called upon to interpret, and ensure their clientsô compliance with, the federal Health Insurance Portability and Accountability Act of 1996 (ñHIPAAò). HIPAA issues are raised by employers, members, neutrals and other third parties in the context of grievances, arbitrations, NLRB proceedings, bargaining and litigation. This paper focuses on the intersection between labor and employment law and the HIPAA ñPrivacy Rule.ò We begin with a basic primer on the Privacy Rule, including who and what are covered. We then discuss several common applications of the Privacy Rule to labor and employment practice.

I. Overview of the HIPAA Privacy Rule.

While laypersons tend to believe that HIPAA prevents *any* disclosure of health information by anyone to anyone else, in reality the Privacy Rule is far narrower. There are many exceptions to the Privacy Rule that are important for union attorneys to understand, particularly where employers are attempting to use HIPAA as a shield to evade their obligations to provide information to the union.

HIPAA was designed to: (a) prevent individuals from losing access to health insurance, (b) encourage administrative efficiency in the healthcare industry, and (c) protect the confidentiality and security of individualsô health care information. This third prong, generally referred to as the ñPrivacy Rule,ò has been implemented and interpreted by the U.S. Department of Health and Human Services (ñHHSò). It sets out standards for the use and disclosure of protected health information (ñPHIò), notice requirements, and the processes through which individuals can protect their privacy rights.

The Privacy Rule seeks to balance the needs for individual privacy against the ability of organizations to share information where necessary to provide high quality health services and otherwise protect the public. U.S. Dept. of Health and Human Services, Summary of the HIPAA Privacy Rule at 1-2 (May 2003) (ñPrivacy Summaryò).[1]

A. Covered Entities.

The Privacy Rule applies only to information maintained and transmitted by ñcovered entities,ò which are defined as: health plans, health care clearinghouses, and health care providers who transmit information in electronic form in connection with transactions. The Privacy Rule also applies to ñbusiness associates,ò i.e., the individuals and entities who conduct

[1] Online at http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf.

business on behalf of covered entities and who come into contact with PHI through those activities. 45 C.F.R. § 160.103.

B. Protected Health Information.

The Privacy Rule protects individually identifiable health information that is transmitted or maintained in any form or medium, including electronically. 45 C.F.R. § 160.103. Individually identifiable health information includes demographic information or other information that is ñcreated or received by a health care provider, health plan, employer, or health care clearinghouseò and that ñrelates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.ò 45 C.F.R. § 160.103. Information is only ñindividually identifiableò if it identifies the individual, or if it could reasonably be believed to be used to identify the individual. 45 C.F.R. § 160.103. This information might include name, address, birth date, social security number, etc. Privacy Summary at 4. De-identified health information, which neither identifies an individual nor provides a reasonable basis for identifying an individual, can be disclosed and used freely. *See* 45 C.F.R. §§ 164.502(d) and 164.514(a) and (b) for standards regarding de-identification.

HIPAA expressly excludes from its definition of PHI individually identifiable information that is contained in education records covered by the Family Educational Rights Privacy Act, 20 U.S.C. § 1232g, and records described in 20 U.S.C. § 1232g(a)(4)(B)(iv). 45 C.F.R. § 160.103.[2] It also excludes individually identifiable health information of individuals who have been deceased for fifty years. 45 C.F.R. § 160.103.

Most importantly for labor and employment lawyers, the Privacy Rule excludes individually identifiable health information contained in ñemployment records held by a covered entity in its role as employer.ò 45 C.F.R. § 160.103.

C. Mandatory and Permitted Disclosures.

Covered entities normally must disclose PHI to the individual who is the subject of the information. 45 C.F.R. § 164.502(a)(2). Individuals and their personal representatives can also authorize any use or disclosure in writing. 45 C.F.R. § 164.508. In addition, covered entities may disclose PHI in a number of other circumstances without any prior authorization.

[2] ñThe term education records does not include, ñrecords on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the studentôs choice.ò 20 U.S.C. § 1232g(a)(4)(B)(iv).

PHI may be disclosed:

(1) For the covered entityôs own treatment, payment, and health care operations purposes. 45 C.F.R. § 164.506. A covered entity also may disclose protected health information for the treatment activities of any health care provider, the payment activities of another covered entity and of any health care provider, or the health care operations of another covered entity involving either quality or competency assurance activities or fraud and abuse detection and compliance activities, if both covered entities have or had a relationship with the individual and the protected health information pertains to the relationship.

(2) after providing an opportunity for the individual to agree or object to the disclosure, 45 C.F.R. § 164.510;

(3) incidentally to an otherwise permitted disclosure, 45 C.F.R. § 164.502(a)(1)(iii);

(4) for public interest and benefit activities, including public health activities, health oversight activities, law enforcement purposes, research, and as necessary to prevent or lessen serious injury to an individual or the public, 45 C.F.R. § 164.512;

(5) and in the form of a limited data set for research, public health, or health care operation purposes. 45 C.F.R. § 164.514(2)-(3).

D. Authorizations.

A covered entity must obtain the individualôs written authorization for any use or disclosure of protected health information that is not for treatment, payment or health care operations or otherwise permitted or required by the Privacy Rule. 45 C.F.R. § 164.508. A covered entity may not condition treatment, payment, enrollment, or benefits eligibility on an individual granting an authorization, except in limited circumstances. 45 C.F.R. § 508(b)(4).

For example, an authorization is necessary before a health care provider discloses information to an employer concerning the results of a pre-employment physical or lab test. Authorizations must be in plain language and must contain specific information regarding the information to be disclosed or used, the person(s) disclosing and receiving the information, the expiration of the authorization, the right to revoke the authorization in writing, and other data.

E. Minimum Necessary Use and Disclosure.

The Privacy Rule also sets forth the principle of ñminimum necessaryò use and disclosure. Covered entities must make reasonable efforts to use, disclose, and request only the minimum amount of PHI needed to accomplish their intended purpose. 45 C.F.R. §§ 164.502(b) and 164.514(d). A covered entity must develop and implement policies and procedures to reasonably limit uses and disclosures to the minimum necessary. When the minimum necessary

standard applies to a use or disclosure, a covered entity may not use, disclose, or request the entire medical record for a particular purpose, unless it can specifically justify the whole record as the amount reasonably needed for the purpose.

F. Disclosures Related to Legal Practice.

Medical disclosures in the legal context are governed by 45 C.F.R. § 164.512. Covered entities may disclose protected health information without authorization as required by law pursuant to statute, regulation, or court order. 45 C.F.R. § 164.512(a). They also may disclose such information in judicial and administrative proceedings if the request is via court order, or an order from an administrative tribunal. 45 C.F.R. § 164.512(e)(1)(i).

Disclosure is also appropriate in response to a subpoena if certain assurances are met, including notice to the individual and a protective order. 45 C.F.R. § 164.512(e)(1)(ii). In order for information to be disclosed in response to a subpoena, discovery request, or other process unaccompanied by a judicial or administrative order, the following requirements must be met:

1. The covered entity must receive satisfactory assurance from the party seeking the information that reasonable efforts were made to give notice to the individual who is the subject of the protected health information. 45 C.F.R. § 164.512(e)(1)(ii)(A).

2. The covered entity must receive satisfactory assurance from the party seeking the information that reasonable efforts have been made to secure a qualified protective order. 45 C.F.R. § 164.512(e)(1)(ii)(B).

ñSatisfactory assuranceò means a written statement and accompanying documentation from the requesting party demonstrating (1) that there was a good faith effort to provide written notice to the individual whose information is being requested; (2) that the notice included sufficient information about the litigation or proceeding so that the individual would have had opportunity to object; and (3) that the time for the individual to raise objections has elapsed with either no objections raised, or all objections resolved consistently with the disclosures being sought. 45 C.F.R. § 164.512(e) (1)(iii).

ñQualified Protective Orderò refers to an order from the court or administrative tribunal, or a stipulation by the parties to the proceeding that prohibits the parties from using or disclosing the protected health information for any outside purpose, and requires that the protected health information be destroyed or returned to the covered entity when litigation or proceeding has concluded. 45 C.F.R. § 164.512(e) (1)(v).

G. Health Care Employers and Employee Health Information.

HIPAA does not protect employee health information that covered entities possess in their role as employers. Protected Health Information does not include ñemployment records held by a covered entity in its role as employer.ò 45 C.F.R. § 160.103.

II. Disclosure of Confidential Information by Employees.

1. HIPAA is a procedural statute for obtaining medical information, and does not create evidentiary privileges.

Despite some surface appeal to the idea, HIPAA does not create any type of evidentiary privilege. When an employee files a lawsuit that places a medical condition at issue, the employee typically waives any physician-patient privilege. Attempts to transform HIPAA into another evidentiary privilege have been uniformly unavailing; the act is better characterized as having a ñpurely procedural character.ò *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004); *see also Bailey v. City of Daytona Beach Shores*, 560 F. Appôx 867, 869-70 (11th Cir. 2014) (unpublished) (holding HIPAA ñdoes not bar a defendant in a non-HIPPA lawsuit from using the plaintiffôs personal health information to defend against that lawsuit.ò).

HIPAA does not make a plaintiffôs medical information undiscoverable. It simply provides processes through which parties can go about accessing confidential information.

2. HIPAA preempts state laws that allow parties to more easily obtain medical information.

As a matter of procedure, HIPAA does set a floor for privacy requirements. HIPAA and its related regulations expressly supersede contrary provisions of state law, with minor exceptions. *See* 42 U.S.C. § 1320d-7(a)(1). When jurisdictions create more liberal processes through which medical information can be obtained, and those processes are inconsistent with the procedures established by HIPAA, the state procedures should be unavailable. *See Law v. Zuckerman*, 307 F. Supp. 2d 705, 709-10 (D. Md. 2004) (Maryland provision establishing that a health care provider ñ*shall* disclose a medical record without authorization from the patientò was preempted by HIPAAôs provision establishing that a health care provider ñ*may* disclose patient records after using certain proceduresò); *United States v. Louisiana Clinic*, No. Civ-A-99-1767, 2002 WL 31819130, at *5 (E.D. La. Dec. 12, 2002) (unpublished) (Louisiana statute that ñprovide[d] a way of negating the need for [patient] permissionò was preempted by HIPAA).

HIPAA excludes from preemption state provisions that ñrelate[] to the privacy of individually identifiable health information,ò 42 U.S.C. § 1320dï 7(a)(2), and are ñmore stringentò than HIPAAôs standard, 45 C.F.R. § 160.203(b). Courts typically view a state law as ñmore stringentò than HIPAA if it ñafford[s] patients *more* control over their medical records.ò *Law*, 307 F. Supp. 2d at 709-10 (citing 45 C.F.R. § 160.202 and collecting cases).

Therefore, if a state provides greater protections for confidential medical information than the processes created by HIPAA, the stateôs extra protections should still be given effect. *See In re Antonia E.*, 838 N.Y.S.2d 872, 878 (N.Y. Fam. Ct. 2007) (holding HIPAA did not preempt stateôs more stringent protections for medical records in its physician-patient privilege). However, these state privilegeôs such as New Yorkôs should only apply to state causes of action because ñHIPAA regulations do not impose state evidentiary privileges on suits to enforce federal law.ò *Nw. Mem'l Hosp.*, 362 F.3d at 925; *accord In re Grand Jury Proceedings*, 450 F.

Supp. 2d 115, 118 (D. Me. 2006); *Nat'l Abortion Fed'n v. Ashcroft*, No. 03-Civ-8695, 2004 WL 555701, at *5 (S.D.N.Y. Mar. 19, 2004) (unpublished).

3. HIPAA may expand discovery obligations for employees.

HIPAA may expand the amount of medical information an employee is required to produce in discovery. Because it provides procedures through which patients have the right to access their medical records, HIPAA affects the amount of information a patient has the right to access. Depending on discovery rules, this could increase a plaintiffôs discovery obligations.

For example, the North Carolina Rules of Civil Procedure permit a party to request that any other party produce documents ñwithin the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.ò N.C. Gen. Stat. § 1Aï 1, Rule 34(a). North Carolina Courts have stated that ñdocuments are deemed to be within the possession, custody or control of a partyò if the party ñhas the legal right to obtain the documents on demand.ò *Lowd v. Reynolds*, 695 S.E.2d 479, 484 (N.C. Ct. App. 2010). Because an injured individual ñhas the right to obtain his medical records upon request pursuant to [HIPAA],ò when an opposing party requests that such medical records be produced, the plaintiff has the obligation to obtain and produce those medical records even if ñaccessing records may be difficult[.]ò *Id.*

4. Medical information for workersô compensation claims.

HIPAA permits any covered entity to ñdisclose protected health information as authorized by and to the extent necessary to comply with laws relating to workersô compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.ò 45 C.F.R. § 164.512(l).

Therefore, in workersô compensation cases, the communication of medical information will be governed by the workersô compensation laws. Typically, there is a specific workersô compensation provision addressing what medical information for workers can be disclosed. *See, e.g.*, N.C. Gen. Stat. § 97-25.6 (defining ñrelevant medical informationò and establishing that an employer or its insurer ñis entitled, without the express authorization of the employee, to obtain the employeeôs medical records containing relevant medical information from the employeeôs health care providersò).

5. Medical releases in the employment application process.

As part of the application process, employers may require applicants to sign a HIPAA release. According to HHS, ñnothing in [the Privacy] Rule prevents an employer . . . from making an employeeôs agreement to disclose health records a condition of employment.ò Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182, 53193 (Aug. 14, 2002).

Obtaining medical information during the application process raises issues, however, under the ADA. Before a job offer is made, employers may not ask questions that are likely to

elicit a response relating to an individualôs disability or the possible presence of a disability, but they may inquire about an applicantôs ability to perform essential job functions. 42 U.S.C. § 12112(d)(2)(B). Post-offer entrance medical examinations are permitted, but can only be used to exclude an applicant if the exclusionary criteria is job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(3); *see* 29 C.F.R. § 1630.14. Similarly, medical examinations and inquiries of current employees, including fitness-for-duty exams, are only acceptable when both necessary and job-related. 42 U.S.C. § 12112(d)(4)(A).

One court to examine the issue concluded that requiring a job applicant to sign a medical release ï without more ï did not violate the ADA. *Green v. Joy Cone Co.*, 278 F. Supp. 2d 526, 542 (W.D. Pa. 2003) *aff'd on other grounds*, 107 F. Appôx 278 (3d Cir. 2004). The court concluded that the release itself did not constitute a prohibited ñmedical injuryò under the ADA. *Id.* at 540. While the court was troubled by the potential abuse of the release, there would not be ña violation of the ADA unless and until an applicantôs medical records are requested prematurely.ò *Id.* at 542.

6. Request for medical information when seeking ADA reasonable accommodations.

When an employee is attempting to secure a reasonable accommodation under the ADA, employers may request a HIPAA release of medical information related to that disability. Employees who decline to sign such a release risk forfeiting their right to a reasonable accommodation.

Courts consistently find that disabled employees seeking an accommodation are obligated to provide medical information necessary to the interactive process. Failure to provide such information on request can ñpreclude[] [an employee] from claiming that the employer violated the ADA by failing to provide a reasonable accommodation.ò *Templeton v. Neodata Servs., Inc.*, 162 F.3d 617, 619 (10th Cir.1998); *see also Beck v. Univ. of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996). A disabled employee who fails to return a requested HIPAA release could therefore be found responsible for a breakdown in the interactive process. *See Monterroso v. Sullivan & Cromwell, LLP*, 591 F. Supp. 2d 567, 580-81 (S.D.N.Y. 2008) (whether plaintiffôs failure to authorize HIPAA release proved she failed to engage in the interactive process was a disputed question of fact where HIPAA release may have been unnecessary).

7. Request for medical information when seeking FMLA leave.

The FMLA only permits an employer to request limited medical information related to an employeeôs medical leave or fitness to return to duty. *See, e.g.*, 29 C.F.R. §§ 825.307(a), 825.312(b). In at least one case, an employer who sent a plaintiff an overly broad HIPAA authorization form was found to have ñinterfered with his FMLA rights by seeking to obtain more information about his health than the regulations allow.ò *Jordan v. Beltway Rail Co. of Chicago*, No. 06-C-6024, 2009 WL 537053, at *6-*7 (N.D. Ill. Mar. 4, 2009) (unpublished).

III. Disclosure of Confidential Information by Employers.

In most labor and employment disputes, HIPAA does not provide a barrier to the discovery of confidential information possessed by the employer because most employers are not covered entities. However, to the extent that covered entities are themselves employers, HIPAA obligations may become relevant.

1. Employment disputes involving third partiesô confidential information.

Employment disputes at covered entities may require the disclosure of third partiesô confidential information. For example, a nurse could be discharged for providing negligent care, or a hospital office manager could be terminated for mismanaging medical files. To disprove the employerôs purported rationale for an adverse employment action, the employee may need access to confidential information related to the incidents at issue. HIPAA should not be a barrier in such situations. Although HIPAA generally prohibits the unauthorized acquisition or disclosure of ñindividually identifiable health information relating to an individual,ò 42 U.S.C. § 1320dï 6(a), that prohibition is qualified to ensure that workers with employment disputes have access to necessary confidential information, without requiring the consent of the individuals to whom the information relates.

The Privacy Rule allows covered entities to disclose protected information to carry out ñhealth care operations.ò 45 C.F.R. § 164.506(c)(1). ñHealth care operationsò are defined to include the ñ[r]esolution of internal grievances.ò 45 C.F.R. § 164.501(6)(3). In interpretative guidance, HHS explained that the resolution of internal grievances ñinclude[s] disclosure to an employee and/or employee representative, for example when the employee needs protected health information to demonstrate that the employerôs allegations of improper conduct are untrue.ò Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,452, 82,491 (Dec. 28, 2000). When a union or an employee of a covered entity requires access to confidential information in order to resolve an employment dispute, HIPAA should therefore not be a barrier.

The Privacy Rule also creates a procedural scheme for the disclosure of medical records for ñjudicial or administrative proceedings.ò 45 C.F.R. § 164.512(e). This provision contemplates not only disclosure pursuant to a formal order from a court or administrative tribunal, but also disclosure in response to ña subpoena, discovery request, or other lawful process,ò as long as certain reasonable efforts are taken to protect the confidentiality of the information. 45 C.F.R. § 164.512(e)(ii); *see* Section I.F, *supra*.

The NLRB addressed this issue in an Advice Memorandum. *See Bayonne Medical Center*, 35 NLRB Advice Mem. Rep. 107, No. 22-CA-26145 (May 20, 2004). The underlying case involved a hospital employee who was purportedly discharged for improperly accessing confidential patient computer files. The hospital, citing HIPAA, had refused to provide her the names of the patients whose files she purportedly accessed. The NLRB concluded that the Privacy Ruleôs exception for grievance resolution prevented it from barring disclosure. It cited the procedures established for disclosure in administrative proceedings as evidence that disclosure was permitted as long as the appropriate reasonable efforts were made to protect

patientsô confidential information. The NLRB ultimately found that, by refusing to bargain over a mutually satisfactory protective arrangement that accommodated the unionôs need for patient names, the employer violated its duty to bargain in good faith.

2. Union access to membersô information for collective bargaining.

At times, a union may wish to access information about its members ï for example, which health plan options employees have chosen. Generally, HIPAA will not inform these disputes because most employers are not ñcovered entitiesò under the act. *See, e.g.*, *Burton v. Niagara Frontier Transp. Auth.*, No. 08-CV-093A, 2008 WL 4107188, at *5 (W.D.N.Y. Aug. 28, 2008) (unpublished) (ñHIPAA was enacted to protect the confidentiality of protected health information maintained by covered entities. Covered entities include health plans, health care clearinghouses, and health care providers who transmit health information in electronic format. . . . By contrast, the NFTA, as plaintiffôs employer, is not covered.ò).

However, even when an employer is also a covered entity, HIPAA should not preclude disclosure of information it possesses in its capacity as an employer because employment records are excluded from the definition of ñprotected health information.ò *See* 45 C.F.R. § 160.103 (ñ(2) Protected health information excludes individually identifiable health information in: [é] (iii) Employment records held by a covered entity in its role as employer.ò). ñFor example, information in hospital personnel files about a nursesô sick leave is not protected health information under this rule.ò Standards for Privacy, 65 Fed. Reg. at 82,612.

Finally, even if the employer is a covered entity and the information at issue is protected information, disclosure is permitted under HIPAA if required by the NLRA. ñA covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.ò 45 C.F.R. § 164.512; *see* § 164.103 (ñRequired by law means a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law.ò).

HHS explained that the Privacy Rule ñdoes not prohibit disclosures that covered entities must make pursuant to other laws.ò Standards for Privacy, 65 Fed. Reg. at 82,598. ñTo the extent a covered entity is required by law to disclose protected health information to collective bargaining representatives under the NLRA, it may [do] so without an authorization.ò *Id.*

IV. Remedies for HIPAA Violations.

1. HIPAA does not provide a private right of action.

It is well established that HIPAA does not contain a private cause of action, express or implied. *See Acara v. Banks*, 470 F.3d 569, 571 (5th Cir. 2006); *Dodd v. Jones*, 623 F.3d 563, 569 (8th Cir. 2010); *Wilkerson v. Shinseki*, 606 F.3d 1256, 1267 n.4 (10th Cir. 2010). Congress has instead provided for administrative enforcement by the Secretary of Health and Human

Services, *see* 42 U.S.C. §§ 1320dï 5, 1320dï 6, and by State Attorneys General, *see* 42 U.S.C. § 1320dï 5(d).

2. Subpoenas that are not HIPAA-compliant can be quashed.

When a partyôs subpoena of confidential information does not comply with HIPAA, it can be quashed. *See, e.g.*, *Tate v. NC Pepsi–Cola Bottling Co. of Charlotte, Inc.*, No. 3:09-CV-36, 2009 WL 3242117, at *1 (W.D.N.C. Oct.5, 2009) (unpublished) (quashing plaintiffôs subpoena for his own medical records because no HIPAA-compliant authorization was provided). However, the relief this provides to an employee is minimal ï the information is not made undiscoverable, and courts quashing such subpoenas have consistently permitted the moving party to refile a proper subpoena. *See Hodge v. City of Long Beach*, No. CV-02-5851, 2006 WL 1211725, at *2-*3 (E.D.N.Y. May 4, 2006) (quashing defendantôs subpoena of plaintiffôs medical records because plaintiff had not authorized the disclosure, but noting that defendant ñis free to serve [plaintiffôs doctor] with a new subpoena that is HIPAA-compliant,ò and noting that plaintiff had to choose between consenting to the disclosure of his psychiatric records or ñwithdrawing his claims for emotional distress damagesò).

3. Unlawfully obtained information, however, cannot be suppressed.

Courts have almost uniformly declined to suppress medical information that was obtained through means that did not comply with HIPAA. *See, e.g.*, *Heilman v. Vojkufka*, No. Civ-S-08-2788, 2011 WL 677877, at *3-*4 (E.D. Cal. Feb.17, 2011) *report and rec. adopted*, 2011 WL 3881023 (E.D. Cal. Sept. 2, 2011) (unpublished) (ñplaintiff may not privately enforce any rights he may possess under HIPAA by obtaining an order prohibiting defendant from using his records in this action or sanctioning defense counselò); *Smith v. Daniels*, No. 1:07-CV-2166, 2010 WL 4882950, at * 6 (N.D. Ga. Nov. 24, 2010) (unpublished) (denying plaintiffôs request to strike medical information submitted by defendants because HIPAA provides no private right of action); *State v. Carter*, 23 So. 3d 798, 801 (Fla. Dist. Ct. App. 2009) (ñEven where evidence is disclosed by a covered entity in violation of HIPAA standards, suppression of the records is not provided for by HIPAA and is thus not a proper remedy.ò). The only remedy available to a plaintiff whose medical information was improperly obtained may be a protective order consistent with HIPAAôs provisions. *See Heilman*, 2011 WL 677877, at *4.

One of the only opinions ï if not the only opinion ï allowing for suppression is *Miguel M. v. Barron*, 950 N.E.2d 107 (N.Y. 2011). However, that opinion addressed a singular situation with few parallels in the employment context: a motion to compel a patient to accept mental health treatment. And in granting the patientôs motion to suppress medical records that had been obtained without his consent, the court recognized that ña HIPAA or Privacy Rule violation does not always require the suppression of evidence.ò *Id.* at 112. The courtôs holding was based on the fact that ñto use the records themselves é in a proceeding to subject to unwanted medical treatment a patient who is accused of no wrongdoing é directly impairs, without adequate justification, the interest protected by HIPAA and the Privacy Rule: the interest in keeping oneôs own medical condition private.ò *Id.* This interest certainly does not come into play in cases where an employee places his medical condition at issue.

4. Individuals injured by HIPAA violations may have claims for negligence.

A covered entityôs HIPAA violation can sometimes provide the foundation for a negligence claim. Many jurisdictions recognize common law negligence claims based on the wrongful disclosure of medical information. *See, e.g.*, *Biddle v. Warren Gen. Hosp.*, 715 N.E.2d 518, 523 (Ohio 1999) (holding that ñin Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationshipò and collecting cases).

Several jurisdictions have recognized that HIPAA can inform or provide the relevant standard of care for negligence suits. *See Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, 102 A.3d 32, 49 (Conn. 2014) (ñto the extent it has become the common practice for Connecticut health care providers to follow the procedures required under HIPAA in rendering services to their patients, HIPAA and its implementing regulations may be utilized to inform the standard of care applicable to such claims arising from allegations of negligence in the disclosure of patientsô medical records pursuant to a subpoena.ò); *Bonney v. Stephens Mem'l Hosp.*, 17 A.3d 123, 128 (Me. 2011) (HIPAA standards ñadmissible to establish the standard of care associated with a state tort claimò); *Acosta v. Byrum*, 638 S.E.2d 246, 253 (N.C. Ct. App. 2006) (plaintiff permitted to ñcite[] to HIPAA as evidence of the appropriate standard of care, a necessary element of negligenceò). Such claims are not preempted by HIPPA because they ñsupport at least one of HIPAAôs goals by establishing another disincentive to wrongfully disclose a patient's health care record.ò *Byrne*, 102 A.3d at 49; *see also R.K. v. St. Mary's Med. Ctr., Inc.*, 735 S.E.2d 715, 723-24 (W. Va. 2012) (collecting cases discussing negligence suits premised on HIPAA violations, and finding that any state common law claim for wrongful disclosure of medical or personal health information was not preempted by HIPAA).

Some jurisdictions have at least contemplated the possibility that HIPAA violations could constitute negligence *per se*. *See Baum v. Keystone Mercy Health Plan*, 826 F. Supp. 2d 718, 721 (E.D. Pa. 2011) (remanding to state court a case asserting negligence and negligence *per se* claims based on HIPAA violations); *I.S. v. Washington Univ.*, No. 4:11-CV-235SNLJ, 2011 WL 2433585, at *5 (E.D. Mo. June 14, 2011) (unpublished) (remanding to state court a negligence per se claim based on HIPAA violations); *but see Young v. Carran*, 289 S.W.3d 586, 589 (Ky. Ct. App. 2008) (HIPAA violations cannot provide the basis for negligence *per se* because such claims must be based on a state statute under Kentucky law).

V. Retaliation for Reporting HIPAA Violations.

Employees who are terminated for reporting HIPAA violations may have wrongful discharge claims under state law. For example, in *Glandon v. Keokuk Cnty. Health Ctr.*, 408 F. Supp. 2d 759 (S.D. Iowa 2005), the plaintiff learned that a form containing confidential patient information was left lying face-up in a public space. He notified his hospital employer about that fact and was subsequently terminated, in part because of the ñharsh toneò he used when reporting the potential HIPAA violation. *Id.* at 765. The court denied summary judgment on his claim for retaliatory discharge under Iowa state law, with HIPAA acting as a ñclearly defined public policyò that protected his speech. *Id.* at 770-71.

Similar claims have been recognized in a number of jurisdictions. *See, e.g.*, *Kusgen v. Lake Reg'l Health Sys.*, No. 2:11-CV-4255, 2012 WL 2119975, at *2 (W.D. Mo. June 11, 2012) (unpublished) (plaintiff terminated for reporting HIPAA violation ñstated a claim for wrongful discharge under [Missouriôs] whistle-blowing exception to the employment-at-will doctrine.ò); *DePaolo v. Triad Healthcare*, No. UWYCV136019051S, 2013 WL 6671551, at *6 (Conn. Super. Ct. Nov. 26, 2013) (unpublished) (terminating an employee for complaining about a HIPAA violation ñgives rise to a cause of action for retaliatory dischargeò under Connecticut law); *Cutler v. Dike*, No. B210624, 2010 WL 3341663, at *10 (Cal. Ct. App. Aug. 26, 2010) (unpublished) (defendant could be liable for terminating employee for reporting his suspicions of a HIPAA violation under California Labor Code section 1102.5). Courts, however, may be less amenable to such suits when the HIPAA violation is premised on more ambiguous obligations. *See Surprise v. Innovation Grp., Inc. / First Notice Sys., Inc.*, 925 F. Supp. 2d 134, 149 (D. Mass. 2013) (finding that ñrequirements for disposal of HIPAA-protected materials was [not] a well-defined public policy, such that an at-will employee cannot be terminated in violation of that policyò under Massachusetts law).

At least one court has treated as cognizable a federal retaliation claim for reporting HIPAA violations. *See Clark v. Arkansas Health Grp.*, No. 4:08-CV-336, 2009 WL 763547 (E.D. Ark. Mar. 19, 2009) (unpublished) (ultimately dismissing claim for lack of causation). But this case appears to be an anomaly. *See Lundell v. Reg'l*, No. 3:10-CV-013, 2013 WL 633319, at *3 (N.D. Ind. Feb. 20, 2013) (unpublished) (dismissing a HIPAA retaliation claim, discounting *Clark*, and noting ñthat retaliation claims have been construed as not arising under HIPAA, but rather as wrongful discharge claims in violation of state lawò).

When a covered entity is operated by the state, discharged whistleblowers have at times attempted to fashion First Amendment retaliation claims. These claims are challenging. First Amendment retaliation claims require that the protected speech at issue to be speech ñas a private citizen on a matter of public concern,ò but an employeeôs speech reporting HIPAA violations will often be speech ñas an employee on a matter related to her employment[.]ò *See Alberti v. Carlo-Izquierdo*, 548 Fed. Appôx 625, 638 (1st Cir. 2013) (dismissing First Amendment retaliation claim based on report of HIPAA violation); *see also Norton v. Breslin*, 565 F. Appôx 31, 34 (2d Cir. 2014) (rejecting First Amendment retaliation claim because plaintiffôs statements reminding her employer about HIPAA requirements only reflected a ñgeneralized public interest in the fair or proper treatment of public employeesò); *Glandon*, 408 F. Supp. 2d at 767-70 (rejecting First Amendment claim because the alleged protected speech adversely affected hospital operations).

VI. Conclusion.

The HIPAA Privacy Rule has very limited effects on the disclosure of medical information in the employment context. Nonetheless, it can provide some protection for employee privacy, particularly in conjunction with the ADA and FMLA.