



The Network
for Public Health Law

Ideas. Experience. Practical Answers.

COVID-19: Data Sharing for Public Health Surveillance, Investigation and Intervention

September 16, 2020 | 2:30pm ET

Moderator



Carrie Waggoner, Senior Attorney, the Network for Public Health Law – Mid-States Region Office

- J.D., Michigan State University College of Law
- Research interests/areas of expertise:
 - Public Health Data & Information Sharing
 - Public Health Authority

Presenter



Sallie Milam, Deputy Director, the Network for Public Health Law – Mid-States Region Office

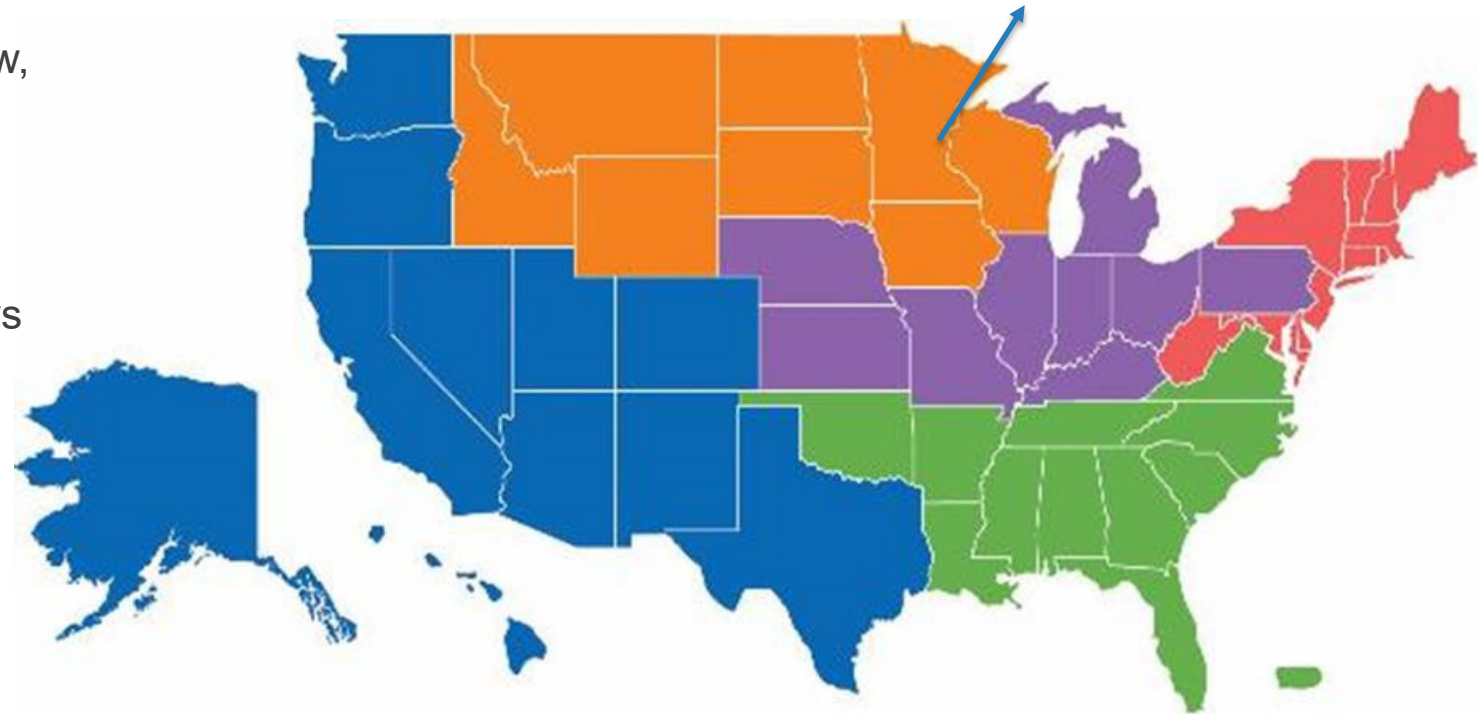
- J.D., University of Richmond School of Law
- C.I.P.P./U.S./G., International Association of Privacy Professionals
- Research interests/areas of expertise:
 - HIPAA Privacy Laws
 - Health Information and Data Sharing
 - De-identification

National Reach

Experts in public health law, our leadership team is comprised of a National Director and five Regional Office Directors who lead teams of Network attorneys across the U.S.

Eastern Region
Mid-States Region
Northern Region
Southeastern Region
Western Region

The Network's National Office is located in Edina, Minnesota



We Can Expand Your Capacity to Do More

- find answers to specific legal questions
- use law to strengthen your public health programs and policies, and address emerging public health issues
- find resources, such as legal briefs, fact sheets, surveys of laws in all 50 states, or other available data
- benefit from the best practices of others
- connect with additional experts in public health law, including attorneys in the Network's other regions

Services provided by the Network are provided at no cost!
Contracts for larger projects are available.

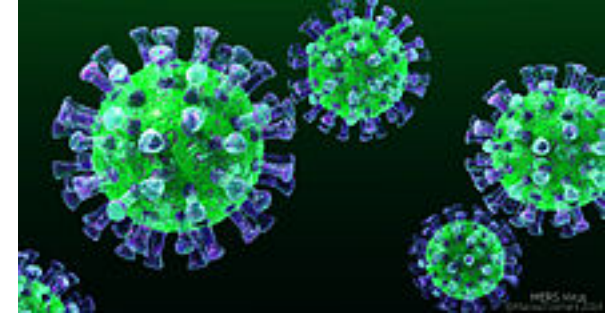


The Fine Print

This presentation is for informational purposes only. It is not intended as a legal position or advice from the presenters or their employers.

For legal advice, attendees should consult with their own counsel.

Agenda



- **HIPAA Basics**
- **HIPAA's Application to Public Health**
- **Other Federal and State Law Considerations**
- **COVID-19 Frequently Asked Questions**

HIPAA Basics

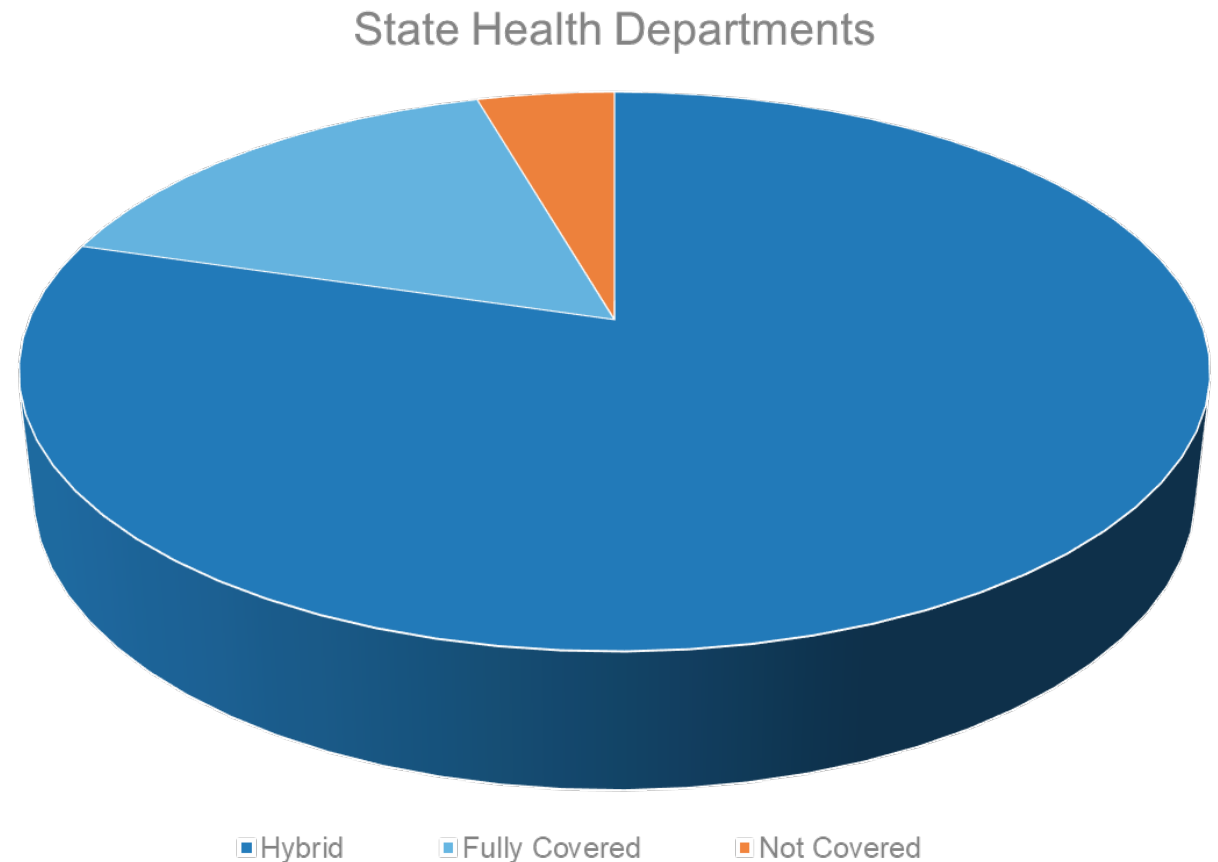
- » Sets minimum national standards for privacy and security
- » Gives patients rights regarding their health information
- » Applies to most health care providers and to health plans (“covered entities”)
- » Covered entities are prohibited from using or disclosing identifiable health information unless required or allowed by HIPAA privacy rule

To whom does HIPAA apply?

- Covered entities
 - Certain (most) health care providers, **but** only if they transmit information in electronic form in connection with an electronic standard transaction that HHS has adopted a standard
 - Health plans
 - Health care clearinghouses
- Business Associates

Does HIPAA apply to:

- » All of the health department?
- » Some of the health department?
- » None of the health department?



2018 HIPAA Coverage Classification



Health departments juggle multiple roles and competing interests

- » Manage and improve population health AND provider of primary health care
- » Protecting individual privacy
- » Protecting the public
- » Informing the public
- » Maintaining the public's trust

Keep in mind with every data disclosure question...

1. Does HIPAA apply?
2. If HIPAA applies, is state law more stringent? If so, what does state law require?
3. If HIPAA does not apply, follow state law.
4. What other federal laws apply? Consider 42 CFR Part 2 which regulates substance use disorder information.



What are examples of HIPAA covered COVID-19 Protected Health Information (PHI)

- Specific tests, test results or details of a patient's illness
- Information about the patient's employer, such as name of employer or street address
- *Aggregate reports of COVID-19 case counts or deaths by county or any geographic subdivision smaller than a state, except for areas comprised of the initial 3 digits of a zip code that contain 20K+ people
- *Aggregate reports of COVID-19 case counts or deaths by state for any time period less than one year

*Except where de-identification is performed in accordance with the HIPAA Privacy Rule's expert determination method.

***Caveat for all disclosure questions – check state and other federal law**

If a health department's communicable disease program is covered by HIPAA, to whom may it share COVID-19 PHI without patient authorization under the *public health exception*?

- To a public health authority, such as a state or local health department authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury or disability
- At the direction of a public health authority, to a foreign government working with the public health authority
- To persons at risk of infection or spreading disease, if authorized under other law, such as state law
- To prevent or lessen a serious and imminent threat to the health and safety of a person or the public

If a health department's communicable disease program is covered by HIPAA, may it release COVID-19 county level or school level case information (number of COVID-19 cases by county) to the press?

- HIPAA's safe harbor method is not helpful
- Evaluate utilizing HIPAA's expert method
- Evaluate novel, emerging legal theory that is plausible, but not yet supported in OCR guidance: Certain areas of law, such as the conduct of public health surveillance, investigation and intervention are *not* preempted by HIPAA and only subject to state and local law
- Where authorized by law, evaluate whether disclosure of clusters within schools is necessary to inform the public to prevent COVID's spread, under HIPAA's public health exception

If a health department's communicable disease program is **NOT** covered by HIPAA, may it release COVID-19 county level case information (number of COVID-19 cases by county) to the press?

- Most state health department's disease prevention and control programs are *not* covered by HIPAA.
- State law and other applicable federal law, such as 42 CFR Part 2 (SUD) control.
- Law may provide broad discretion to public health. Considerations:
 - Release as much as possible, as allowed by law
 - Withhold only when there is a clear justification, such as privacy, and explain rationale.
 - Explain all legal reasoning and provide citation.
 - These considerations as well as recommendations on data release come from [Guidance](#) developed by ASTHO, NACCHO and the Assoc. of Health Care Journalists

If a health department receives a request for personally identifiable COVID-19 information under the applicable state Freedom of Information Act or other open records law, how should it respond?

- Health departments must comply with both applicable open records law as well as state and federal confidentiality and privacy law as they respond to requests for personally identifiable COVID-19 information.
- The Reporters Committee for Freedom of the Press provides an [Open Government Guide](#) which offers a compendium of each state's open records laws.
- For those health departments that are fully covered by HIPAA, they may only release PHI that is required to be released by applicable state public records law

What information may be shared by a public health agency with a COVID-19 patient's friends or family?

- The HIPAA Privacy Rule specifically permits covered entities to share information that is directly relevant to the involvement of a spouse, family members, friends, or other persons identified by a patient.
- The Privacy Rule permits covered entities to disclose *minimum necessary* PHI without individual authorization to persons at risk of contracting or spreading a disease if other law, such as state law, authorizes the covered entity to notify such persons to prevent or control the spread of the disease or carry out public health interventions or investigations.

In contact tracing, is it appropriate for public health agencies to share protected health information of an employee with other employees at the same place of work during the COVID-19 crisis?

- The Privacy Rule permits a covered entity that is also a public health authority to use PHI for the purpose of preventing or controlling disease, including the reporting of disease and the conduct of public health surveillance, public health investigations, and public health interventions.
- The Privacy Rule permits covered entities to disclose necessary PHI without individual authorization to persons at risk of contracting or spreading a disease if other law, such as state law, authorizes the covered entity to notify such persons to prevent or control the spread of the disease or carry out public health interventions or investigations.
- Apply minimum necessary. Disclosure of individual's name, age or job title is usually not necessary.
- If the employer is the health department, employment records are not covered by HIPAA
- Even without HIPAA, health departments do not generally share infected individual's identity when contact tracing

May a HIPAA covered health department release the results of a COVID test to an individual's employer without individual authorization?

Yes, in very limited circumstances:

1. Where the health department tests the individual at the request of the individual's employer or as a member of the employer's workforce.
2. The COVID test must relate to the medical surveillance of the workplace or an evaluation to determine whether the individual has a work-related illness or injury.
3. Law must require the employer to test its workforce for COVID-19.
4. The employer provides written notice that the test will be disclosed to the individual's employer, such as posting a notice at the work site if the test is given there.

Note: HIPAA does not prohibit employers from conditioning employment upon an individual providing an authorization for disclosure of the test results.

May a health department release information about COVID-19 outbreaks to schools?

- If HIPAA does not apply, review state law. Evaluate sharing de-identified data.
- Does HIPAA apply?
 - If so, de-identification at the county level is not possible without using the expert method of de-identification. Look to other HIPAA exceptions.
 - HIPAA allows disclosure of COVID-19 test results without authorization where others such as students and school personnel may be at risk of infection, as authorized by state law.
 - Remember, minimum necessary.

May a school release information about COVID-19 case(s) to a health department?

- Yes. Family Educational Rights and Privacy Act (FERPA) has an exception to its parental consent requirement for a “health or safety emergency”
- A school may share a student’s positive COVID-19 test information where it is necessary to protect the health or safety of students or other individuals
- Limited in time to the emergency

Resources

Network for Public Health Law [COVID-19 Resources](#)

Network for Public Health Law [Federal Privacy Law Snapshots](#)

Data Across Sectors for Health and Network for Public Health Law
[Legal Bibliography](#)

[Health Information & the Law](#) (great resource for state data sharing laws)

Questions?

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