

2017 West Virginia Health Care Privacy Regulations and HIPAA Preemption Analysis

This chart provides an overview of the West Virginia health care privacy related regulations and an analysis of the preemption issues arising under the Privacy, Security, Breach Notification, and Enforcement Rules (45 C.F.R Parts 160, 162, and 164) of the Health Insurance Portability and Accountability Act of 1996, as amended by and including the regulations issued by the Department of Health and Human Services by the Health Information Technology for Economic and Clinical Health Act, Subtitle D- Privacy (§§ 13400 – 13424) (HIPAA). To assist healthcare providers and other entities in the complicated task of determining whether West Virginia state regulations have been preempted by HIPAA. This legal advisory chart was a new addition to the 2014 preemption analysis of applicable West Virginia state law provisions which appear to implicate HIPAA; therefore, this chart will be updated with applicable West Virginia state regulations on a going forward basis as they are implemented by the legislature. Please note that this is not a comprehensive list of all applicable West Virginia regulations which may implicate a HIPAA analysis.

This survey is in a matrix consisting of seven columns. The first column is a general reference to the subject matter of the regulation. The second column is the specific West Virginia Code of State Rules citation or citations, which include embedded links to the complete regulatory language located on the West Virginia Secretary of State's website. The third column discusses the impact of each state regulation upon the privacy or security of protected health information as defined in HIPAA. In the fourth column is the corresponding HIPAA citation. The fifth column states whether HIPAA has preempted this state regulation. If the answer is yes, the extent to which the state regulation is preempted is sometimes described in the "Comments" column, along with other general comments regarding the law. The sixth column indicates whether the state regulation is more stringent or more detailed or whether HIPAA is more stringent or more detailed.

Covered entities, as defined under HIPAA, should generally follow the law that is more stringent, but may have to comply with both laws in some cases. Where the remark is "Both" in the sixth column, the comments describe which part of the state regulation is more stringent or detailed, or which part of HIPAA is more stringent. Finally, the last column provides any commentary relevant to this analysis of the state regulation. However, the assessment of whether a state regulation is preempted or not is only an educational guide and resource, and any final determination on whether such state regulation is preempted would have to be the result of court action or decision. Those using the assessment are encouraged to seek legal advice concerning how the various laws and regulations may impact their own particular facts and circumstances.

This preemption analysis chart is a working document that is subject to review and revision. All individuals and entities that review this document are encouraged to provide feedback and omitted regulations to Sallie H. Milam, Chief Privacy Officer for the West Virginia State Privacy Office at: sallie.h.milam@wv.gov.

In addition to the preemption chart below, other useful information and links related to HIPAA and health care privacy and security can be found at the following:

1. West Virginia State Privacy Office: <http://www.privacy.wv.gov>
2. U.S. Department of Health and Human Services (HHS), Office for Civil Rights, Health Information Privacy: <http://www.hhs.gov/ocr/privacy/index.html>
3. The Office of the National Coordinator for Health Information Technology: <http://www.healthit.gov/providers-professionals/ehr-privacy-security>

Last Updated by Pullin, Fowler, Flanagan, Brown & Poe, PLLC: October 10, 2017.

SUBJECT	WV CSR	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT AND/OR MORE DETAILED	COMMENTS
Behavioral Health Patient Rights Rule	§64-59-1 et seq.	Establishes the rights of clients of state operated behavioral health facilities; also sets forth standards for the confidentiality of client records and the disclosure of client records in the following circumstances: 11.2.1(a) in a proceeding under W. Va. Code § 27-5-4 to disclose the results of an involuntary examination made pursuant to W. Va. Code § 27-5-2 or W. Va. Code § 27-5-3; (b) in a proceeding under W. Va. Code § 27-6A-1, <i>et seq.</i> to disclose the results of an involuntary examination made pursuant thereto; (c) pursuant to an order of any court; (d) to protect against a clear and substantial danger of imminent injury by a client to himself or herself or another; and (e) for treatment or internal review purposes to staff of the behavioral health facility.	164.512(a) 164.512(c)	No	State Law	
Health Information Network-Uses and Disclosures	§ 65-28-1 et seq.	Permits access to network only to designated authorized users within participating organizations; identifies an inquiry by a participating organization for a permitted purpose or a point-to-point disclosure between two participating organizations as the only two types of protected health information transactions; requires that either type of transaction designate the	164.506 164.508 164.510 164.512(a)-(k) 160.203(b)	No	Both	W. Va. Code § 16-29G-8 requires compliance with both state confidentiality laws and HIPAA.

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		permissible purpose of the disclosure and use; forbids the Network from selling protected health information to third parties without authorization from the affected party; requires patients to be provided with the option to opt-out of the Network; even when opted out the Network will still disclose protected health information to state or federal agencies for public health reporting.				
State Board of Examiners for Licensed Practical Nurses	§ 10-2-14.2. e	When the Board reviews medical records during a complaint or investigation for licensing, all patient identifying information must be removed or redacted prior to introduction as evidence.	164.512(d)	No	Both	
Controlled Substances Monitoring Program	§15-8-1 et seq. §15-6-1 et seq.	Establishes regulations pursuant to W.Va. Code §60A-9-1 et seq. The program requires prescription and patient information for Schedule II, III, and IV controlled substances and opioid antagonists to be reported within 24 hours to the database. The repository has a duty to maintain the security of the database, which is to be confidential. Exceptions to confidentiality include, but not limited to, monitoring by the Board of Pharmacy for abnormal practices, law enforcement investigating a specific individual, the Chief Medical Examiner, physicians prescribing	160.203(c) 164.512 (a), (b), (d), (e), (f), (g), (j)	No	State Law	Gabapentin has been designated as a "Drug of Concern" pursuant to W.Va. Code §60A-9-9 and must be reported to the program.

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		such substances, Chief Medical Officers investigating death, investigations for licensing, those with valid court or administrative orders, and medical school deans and hospital executives to monitor their physician practices. Information released shall be related to a specific patient, individual, or entity under any investigation set forth except that physicians can request specific data for providing treatment.				
State Board of Examiners or Speech-Language Pathology and Audiology	§ 29-1.15.4.j § 29-5-2.4.b.9	Prohibits individuals from revealing professional or personal information about the person served professionally; exceptions include when authorized by individual, when required to do so by law, or unless doing so is necessary to protect the welfare of the person or the community; mandates telepractice providers comply with all laws, rules, and regulations governing maintenance of patient/client records and confidentiality requirements.	160.203 164.512(a), (b), (c)	No	Both	Rule requires compliance with both state confidentiality laws and HIPAA. 2017 update did not change disclosure requirements.
Medical Examiner – Pronouncement, Investigation, Certification of Deaths, and Autopsy Reports	§ 64-84-8.2 § 64-84-19.2	Permits the Office of the Chief Medical Examiner and the County Medical Examiner to obtain and review medical records of the deceased to identify the body or when review of medical records may help determine the cause of death or answer material questions during an	164.512(g)	No	Both	

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		investigation; original medical records may not be incorporated into the medical examiner's file; copies of medical records may only become part of the file at the discretion of the prosecutor and may not be released upon any request or subpoena; copies not maintained in the final medical examiner file shall be returned to the original institution or destroyed at the time the case is closed; autopsy reports shall not include medical records of the deceased.				
Health Promotion and Disease Prevention	§ 64-7-6 § 126-51-4.23	Requires health care providers to report administration of vaccines through the West Virginia Statewide Immunization Information System (WVSIIIS). All of the data in WVSIIIS is confidential and exempt from disclosure except for limited disclosure related to the purpose of delivering medical or immunization services, investigating or managing an outbreak of a reportable disease, or determining if children enrolled in school have all required immunizations.	160.203(c) 164.512(a), (b)	No	State law	
Fatality and Mortality Review Team	§ 64-29-7.4 § 64-29-14 § 64-29-15	Creates four Fatality and Mortality Review Teams (FMRT) and related Review Panels. Requires all Review Panel members to sign a sworn statement promising to maintain the confidentiality of information,	160.203(c) 164.512(a), (b), (c), (f), (g)	No	State law	

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		<p>records, discussions, and opinions disclosed during reviews. Grants Review Panels the authority to call for an immediate review of medical records requested from physicians and hospitals treating the person whose death is under review. Requires health care providers to supply records for evaluation and review purposes only regarding the death of the person whose death is under review. Patient, hospital, and medical practitioner names are removed following nationally recommended guidelines and process to ensure confidentiality. No identifying information will be released in the annual report. All information, records, and opinions expressed by members are confidential and are not to be released or disclosed, not subject to discovery, subpoena, or introduction into evidence in any civil or criminal proceedings. Members of the FMRT and each of the Advisory Panels may not be questioned in any civil or criminal proceeding regarding information presented in or opinions formed as a result of a meeting of the panel.</p>				
Emergency Medical Services – Data System,	§64-48-3.2 §64-48-4.13 §64-48-6.2.k	Requires EMS agencies to collect, maintain, and report accurate patient data for all incidents and complete	164.506 164.508 164.512(a), (b),	No	HIPAA	

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Records, Personnel, and Investigative/Disciplinary Action	§64-48-7	<p>patient care report for all incidents, which shall be made available to the receiving facility following an ambulance transport.</p> <p>Requires secure storage for all medical records.</p> <p>Prohibits certified personnel from disclosing medical information regarding any patient without that patient's consent, except that information required for continuation of treatment, for payment purposes or operations, including quality review investigations and training, or by mandate of a legally issued subpoena or lawful court order.</p> <p>Authorizes the Commissioner to initiate investigations to determine if disciplinary action is appropriate for (among other things) the improper disclosure of confidential patient information.</p>	(d), and (e)			
AIDS-Related Medical Testing and Confidentiality	§64-64-8 and 9 §64-64-12 and 13	Victims of sexual crimes are eligible for HIV counseling and testing and all testing information is subject to the confidentiality requirements of W. Va. Code §16-3C-1 <i>et. seq.</i> Provides that agents or employees of a health facility have a need to know HIV results when the information is medically necessary	160.203(c) 164.506 164.508 164.512(a), (b), (c), (e), (g), (h), (i), and (j)	No	State law	<p>Permitted disclosures without authorization are largely in accord with HIPAA permitted uses.</p> <p>State law includes detailed requirements for certain disclosures</p>

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		<p>to protect the individual from a significant risk of transmission or will impact the mode of treatment. Results may be disclosed to providers, emergency responders, or others who have been subject to significant exposure during the course of medical practice or in the performance of professional duties. Results may be disclosed to claims management personnel solely for the purpose of prompt and accurate evaluation and payment of medical or related claims. Results may be disclosed to facilitate health information exchanges, to legally authorized public health authorities, and to persons allowed to access the record by court order.</p> <p>Describes the information that should be provided to a sexual or needle-sharing partner of the HIV-infected person.</p> <p>Requires all health care providers and laboratories to report HIV infection associated laboratory tests that are positive or results that are either indicative of or a progression toward the HIV infection.</p>				and reporting.
Tuberculosis – Reporting	§64-76-4 §64-76-7 §64-76-8	Requires any institution with a patient diagnosed or suspected of having tuberculosis to report that	160.203(c) 164.506 164.512 (a), (b),	No	State Law	

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	§64-76-9	<p>admission, death, discharge, or transfer to the Division of Tuberculosis Elimination. The institution must also make available to the Bureau for Public Health the patient-related records, reports, and other data pertaining to confirmed and suspected tuberculosis patients. The Division will maintain a registry of all verified tuberculosis cases. Authorizes the Bureau to release tuberculosis related information regarding a patient to allow for diagnosis, treatment, and monitoring care by the original reporting source and other health providers in charge of the patient's or a contact's (a person who was exposed by sharing air with the infected patient) care; to identify a specific patient to the Division of STD, HIV, Hepatitis, in the Bureau to compare registries to assist in case finding, and patient care; and to allow for diagnosis, treatment, and monitoring of care by tuberculosis control programs in other states for the patient who has relocated to another state and for the patient's contacts who live in another state and are under a health care provider's care.</p> <p>Requires health care providers, public health officers, and chief</p>	and (j)			

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		<p>medical officers to immediately report by telephone to the local health department the name, age, sex, race, home, address, and type of disease of any person with a diagnosis of or suspected of having tuberculosis. The provider must also submit a written report to the local health department of the patient's county of residence within 24 hours of diagnosis, and must submit updates of the patient's progress and report any screening of contacts to the local health department.</p> <p>Requires health care providers who are aware of a non-adherent tuberculosis patient to contact the local health officer for necessary interventions.</p> <p>Establishes procedures for involuntary commitment of non-adherent tuberculosis patients.</p>				
Neonatal Abstinence Centers – Oversight Authority and Patient Rights	§69-9-4 §69-9-7	<p>Designates the Office of Health Facility Licensure and Certification as the oversight agency for licensing and inspection of neonatal abstinence centers.</p> <p>Requires centers to ensure that all alleged violations involving mistreatment, abuse, neglect, and misappropriation of property,</p>	160.203(c), (d) 164.512(a), (c), and (d) 160.203(b)	No	State Law	State law provides greater rights of access to PHI than HIPAA The legal representative under state law is the same individual as the personal

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		including injuries of known and unknown origin are reported in accordance with State law and to the OHFLAC. Acknowledges parents' and/or legal representatives' right to be informed of the patient's medical condition, care and treatment. Provides for the confidentiality of each patient's personal and medical records and requires the center to provide access to all of the patient's records to the patient and legal representative within 24 hours of such a request.				representative under HIPAA.
Chronic Pain Management Clinic Licensure – Inspections, Patient Rights, Records, Quality Assurance and Performance Improvement; Incident Reporting	§69-8-5 §69-8-9 §69-8-11 §69-8-13 §69-8-15	Requires the Secretary or its designee to conduct unannounced inspections of all pain management clinics, which shall include review of a comprehensive listing of total patients, identifiers of those receiving chronic pain treatment and other services, diagnosis for each patient, demographic information for each patient, and a list of medications administered, dispensed, or prescribed for each patient. Inspections may include interviews with staff and patients, review of clinical records, observation of service delivery, and review of facility documents, including patient records.	160.203 (c) and (d) 164.506 164.512 (a), (b), (d)	No	Both	Rule requires patient information to be maintained in accordance with state and federal law, including HIPAA.

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		Provides for patient rights regarding confidentiality; requires the clinic to maintain patient records in compliance with state and federal law, including HIPAA; requires the clinic to maintain quality assessment and performance improvement policies; and reporting of adverse events or incidents to the Office of Health Facility Licensure and Certification and other applicable state agencies within 24 hours.				
Medication Assisted Treatment – Opioid Treatment Programs	§69-11-1 et seq. §69-11-7	Establishes regulations for Opioid Treatment Centers pursuant to W.Va. Code §16-5Y-1. The regulations set guidelines for licensing, oversight, facility standards, inspections, administration and staffing, required services, patient care requirements, and patient rights. Facilities require an annual inspection of records and physician practices by the Office of Health Facility Licensure and Certification. The rules require facilities to follow both state and federal law in regard to patient confidentiality. This rule requires compliance with the Controlled Substances Monitoring Program Database.	160.203(c) 164.506 164.508 164.512(a), (b), (c), (d) (e), (g), (h), (i), and (j)	No	State Law	Rule requires patient information to be maintained in accordance with state and federal law, including HIPAA and 42 CFR Part 2.
Medication Assisted Treatment –	§69-12-1 et seq. §69-12-18.1.j	Establishes regulations for Office Based Medication Assisted Treatment for Opioids pursuant to	160.203(c) 164.506 164.508 164.512(a), (b),	No	State Law	Rule requires patient information to be maintained in

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Office Based Medication Treatment		W.Va. Code §16-5Y-1. The rule establishes the Bureau of Behavioral Health and Health Facilities as the state opioid treatment authority and the Office of Health Facility and Licensure and Certification as the agency with the power of oversight and investigation for the program. The rule establishes procedures for licensing, inspections, administrative and staffing requirements, patient rights, medication practices, required services, and treatment guidelines. This rule provides for oversight and inspection of records. The rule requires patient records to be confidentially maintained in compliance with state and federal law. The rule requires compliance with the Controlled Substances Monitoring Program.	(c), (d) (e), (g), (h), (i), and (j)			accordance with state and federal law, including HIPAA and 42 CFR Part 2.
Development of Methodologies to Examine Need for Substance Use Disorder Treatment Facilities within the State	§69-13-1 et seq.	Establishes rules for systematic analysis for the relative needs for substance abuse treatment in the state. Describes data collection abilities and duties for the Bureau for Behavioral Health and Health Facilities. Data is to be used to determine areas of state with greatest need for substance abuse resources.	164.512 (a), (b), and (d)	No	State Law	
Collection and Exchange of	§69-14-1 et seq.	Requires mandatory reporter who treats, or is requested to treat, an	164.512(a),(b)	No	State Law	

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Data Related to Overdoses		overdose to report the incident in accordance with confidentiality standards. Requires minimum amount of protected health information be disclosed for reporting standards.				
Licensure and Practice of Pharmacy	§15-1-1 et seq.	Generally, provides rules and regulations for the licensing and practice of pharmacy in WV. Provides for inspection and investigation powers, confidentiality of patient records, and limited telepharmacy practice.	160.203 164.506 164.512(a),(d), (e)	No	State Law	
Board of Medicine Rules for Dispensing of Prescription Drugs by Practitioners	§11-5-1 et seq.	The rules provide for certain practice guidelines and record keeping requirements for dispensing controlled substances. Practitioners are also required to comply with the Controlled Substance Monitoring Program. Allows for inspections of prescription records for complaints, suspected noncompliance, and by appropriate state or federal officials.	164.512(a),(b), (f)	No	State Law	This rule only applies to controlled substances, not general prescription medications.
Confidentiality of Physician Disciplinary Proceedings	§11-1A-11 et seq.	Documents, records, files, and other information gathered in the process of the WV Board of Medicine investigating a complaint are confidential. These records may be disclosed in accordance with a law enforcement investigation, and the entity that receives these records must keep them confidential, except as necessary to further the	164.512(a),(f)	No	State Law	If the Board finds probable cause to institute disciplinary charges against a licensee, he or she shall be entitled to receive disclosures of information contained within the complaint file as set forth in

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15

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		investigation.				W.Va. Code § 30-3-14(i).
Regulation of Mixed Martial Arts	§177-2-1 et seq.	Generally establishes rules for Mixed Martial Arts events. Regulates necessary licenses, permits, insurance, and rules for bouts. Regulations require a pre-fight medical inspection and certification by a duly licensed physician approved by the Commission. Licensed MMA Fighters must submit evidence that they are free of HIV, Hepatitis B, and Hepatitis C. Regulations also prohibit the use of controlled substances without a prescription, and the Commission may order a drug test for such substances.	164.512(a), (b)	No	State Law	

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