



**PERMITTED DISCLOSURES OF PROTECTED
HEALTH INFORMATION FOR THE PURPOSE OF
MONTANA WORKERS' COMPENSATION**

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HIPAA GENERALLY

- The Health Insurance Portability and Accountability Act (HIPAA) of 1996 (P.L.104-191) was enacted by the U.S Congress in 1996.
- The HIPAA Privacy Rule took effect on April 14, 2003.

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HIPAA PRIVACY RULE

- A major goal of the Privacy Rule is to assure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public's health and well being.
- A major purpose of the Privacy Rule is to define and limit the circumstances in which an individual's protected health information may be used or disclosed by covered entities. A covered entity may not use or disclose protected health information, except either:
 - (1) as the Privacy Rule permits or requires; or
 - (2) as the individual who is the subject of the information (or the individual's personal representative) authorizes in writing

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PROTECTED HEALTH INFORMATION

- HIPAA's privacy rule establishes regulations for the use and disclosure of Protected Health Information (PHI).
 - **PHI** is any information held by a covered entity which concerns health status, provision of health care, or payment for health care that can be linked to an individual. This is interpreted rather broadly and includes any part of an individual's identifying information (name, social security #), medical record or payment history.

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PERMITTED USES AND DISCLOSURES UNDER HIPAA

- Generally, a covered entity is permitted, but not required, to use and disclose PHI, without an individual's authorization, for the following purposes:
 1. To the Individual;
 2. For Treatment, Payment, and Health Care Operations;
 3. Incident to an otherwise permitted use and disclosure;
 4. As required by law; and
 5. Limited Data Set for the purposes of research, public health or health care operations.

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COVERED ENTITIES SUBJECT TO HIPAA

- Health care clearinghouses
- Employer sponsored health plans
- Health insurers
- Healthcare providers

***IMPORTANT: EMPLOYERS ARE NOT COVERED ENTITIES SUBJECT TO HIPAA**

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HIPAA PRIVACY RULE PREEMPTS STATE LAW

- In general, State laws that are contrary to the Privacy Rule are preempted by the federal requirements, which means that the federal requirements will apply.
- The Privacy Rule provides exceptions to the general rule of federal preemption for contrary State laws that:
 - (1) relate to the privacy of individually identifiable health information and provide greater privacy protections or privacy rights with respect to such information,
 - (2) provide for the reporting of disease or injury, child abuse, birth, or death, or for public health surveillance, investigation, or intervention, or
 - (3) require certain health plan reporting, such as for management or financial audits.

COVERED ENTITIES, HIPAA AND WORKERS' COMPENSATION

- The HIPAA Privacy Rule does not apply to entities that are either workers' compensation insurers, workers' compensation administrative agencies, or employers, except to the extent they may otherwise be covered entities.
- "A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault." 45 CFR 164.512(l).

BACKGROUND OF WC EXCEPTION

- The HIPAA Regulations recognize that workers' compensation insurers, administrative agencies and employers need access to the health information of individuals who are injured on the job or who have a work-related illness, and that these entities need to access PHI to process or adjudicate claims and to coordinate care under workers' compensation systems.

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BACKGROUND OF WC EXCEPTION

- Generally, the health information related to workers' compensation claims is obtained from health care providers who treat the injured workers and who may be covered by the Privacy Rule.
- The Privacy Rule recognizes the legitimate need of insurers and other entities involved in the workers' compensation systems to have access to individuals' health information as authorized by State or other law.
- To the extent the disclosure is required by State or other law. The disclosure must comply with and be limited to what the law requires. See 45 CFR 164.512(a).

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HOW THE RULE WORKS

Disclosures W/O Individual Authorization

- The Privacy Rule permits covered entities to disclose protected health information to workers' compensation insurers, state administrators, employers, and other persons or entities involved in workers' compensation systems, without the individual's authorization:
 - To the extent the disclosure is required by State or other law. The disclosure must comply with and be limited to what the law requires.
 - For purposes of obtaining payment for any health care provided to the injured or ill worker.

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Disclosures With Individual Authorization

- In addition, covered entities may disclose protected health information to workers' compensation insurers and others involved in workers' compensation systems where the individual has provided his or her authorization for the release of the information to the entity.
- The authorization must contain the elements and otherwise meet the requirements specified at 45 CFR 164.508.

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DISCLOSURES LIMITED TO THE “MINIMUM NECESSARY”

- Covered entities are required reasonably to limit the amount of protected health information disclosed under 45 CFR 164.512(l) to the minimum necessary to accomplish the workers’ compensation purpose.
 - Under this requirement, protected health information may be shared for such purposes to the full extent authorized by State or other law.
 - Covered entities are required reasonably to limit the amount of protected health information disclosed for payment purposes to the minimum necessary.

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MINIMUM NECESSARY AND STATE ADMINISTRATION

- Where protected health information is requested by a state workers’ compensation or other public official, covered entities are permitted to reasonably rely on the official’s representations that the information requested is the minimum necessary for the intended purpose. See 45 CFR 164.514(d)(3)(iii)(A).
- Covered entities are not required to make a minimum necessary determination when disclosing protected health information as required by State or other law, or pursuant to the individual’s authorization. See 45 CFR 164.502(b).

*The Department of Health and Human Services has promised that it will actively monitor the effects of the Privacy Rule, and in particular, the minimum necessary standard, on the workers’ compensation systems and consider proposing modifications, where appropriate, to ensure that the Rule does not have any unintended negative effects that disturb these systems.

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THE NEXT QUESTION: WHAT DOES MONTANA LAW SAY?

- ❑ The HIPAA privacy rule allows disclosures by covered entities as permitted or required by Montana law.
- ❑ So, in order to determine what information covered entities can disclose under the Montana Workers' Compensation system, we must look at the applicable Montana statutes.

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DISCLOSURES OF HEALTH INFORMATION: MT STATUTES

50-16-525. Disclosure by health care provider.* (1) Except as authorized in 60-16-529, 50-16-530, and 50-19-402 or as otherwise specifically provided by law or the Montana Rules of Civil Procedure, **a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent or employee of a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization.** A disclosure made under a patient's written authorization must conform to the authorization.

Note:

50-16-505. Limit on applicability. The provisions of this part apply only to a health care provider that is not subject to the privacy provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. 1320d, et seq., and administrative rules adopted in connection with HIPAA.

*Thus, this section is only applicable to providers not subject to HIPAA.

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MONTANA STATUTES (cont.)

50-16-527. Patient authorization -- retention -- effective period -- exception -- communication without prior notice for workers' compensation purposes. (TITLE 50. HEALTH AND SAFETY ; CHAPTER 16. HEALTH CARE INFORMATION; Part 5. Uniform Health Care Information)*

- (1) A health care provider shall retain each authorization or revocation in conjunction with any health care information from which disclosures are made.
- (2) Except for authorizations to provide information to third-party health care payors, an authorization may not permit the release of health care information relating to health care that the patient receives more than 6 months after the authorization was signed.
- (3) Health care information disclosed under an authorization is otherwise subject to this part. An authorization becomes invalid after the expiration date contained in the authorization, which may not exceed 30 months. If the authorization does not contain an expiration date, it expires 6 months after it is signed.
- (4) **Notwithstanding subsections (2) and (3), a signed claim for workers' compensation or occupational disease benefits authorizes disclosure to the workers' compensation insurer, as defined in 39-71-116, or to the agent of a workers' compensation insurer by the health care provider. The disclosure authorized by this subsection authorizes the physician or other health care provider to disclose or release only information relevant to the claimant's condition. Health care information relevant to the claimant's condition may include past history of the complaints of or the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery.** A release of information related to workers' compensation must be consistent with the provisions of this subsection. Authorization under this section is effective only as long as the claimant is claiming benefits. This subsection may not be construed to restrict the scope of discovery or disclosure of health care information as allowed under the Montana Rules of Civil Procedure, by the workers' compensation court, or as otherwise provided by law.
- (5) A signed claim for workers' compensation or occupational disease benefits or a signed release authorizes a workers' compensation insurer, as defined in 39-71-116, or the agent of the workers' compensation insurer to communicate with a physician or other health care provider about relevant health care information, as authorized in subsection (4), by telephone, letter, electronic communication, in person, or by other means, about a claim and to receive from the physician or health care provider the information authorized in subsection (4) without prior notice to the injured employee...

*Thus, this section is only applicable to providers not subject to HIPAA.

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MONTANA STATUTES (cont.)

50-16-805, MCA. Disclosure of information for workers' compensation and occupational disease claims and law enforcement purposes*

- (1) To the extent provided in 39-71-604 and 50-16-527, a signed claim for workers' compensation or occupational disease benefits authorizes disclosure to the workers' compensation insurer, as defined in 39-71-116, by the health care provider.

39-71-116. Definitions...(14)"Insurer" means an employer bound by compensation plan No. 1, an insurance company transacting business under compensation plan No. 2, or the state fund under compensation plan No. 3.

Note:

(TITLE 50. HEALTH AND SAFETY; CHAPTER 16. HEALTH CARE INFORMATION; Part 8. Health Care Information Privacy Requirements for Providers Subject to HIPAA)

50-16-802. Applicability. This part applies only to health care providers subject to the health care information privacy protections of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. 1320d, et seq., and administrative rules adopted in connection with HIPAA.

*Thus, this section applies to those providers subject to HIPAA.

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MONTANA STATUTES (cont.)

39-71-604. Application for compensation -- disclosure and communication without prior notice of health care information.
(TITLE 39. LABOR; CHAPTER 71. WORKERS' COMPENSATION; Part 6. Claims for Benefits)

- (1) If a worker is entitled to benefits under this chapter, the worker shall file with the insurer all reasonable information needed by the insurer to determine compensability. It is the duty of the worker's attending physician to lend all necessary assistance in making application for compensation and proof of other matters that may be required by the rules of the department without charge to the worker. The filing of forms or other documentation by the attending physician does not constitute a claim for compensation.
- (2) **A signed claim for workers' compensation or occupational disease benefits authorizes disclosure to the workers' compensation insurer, as defined in 39-71-116, or to the agent of a workers' compensation insurer by the health care provider. The disclosure authorized by this subsection authorizes the physician or other health care provider to disclose or release only information relevant to the claimant's condition. Health care information relevant to the claimant's condition may include past history of the complaints of or the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery. A release of information related to workers' compensation must be consistent with the provisions of this subsection. Authorization under this section is effective only as long as the claimant is claiming benefits. This subsection may not be construed to restrict the scope of discovery or disclosure of health care information, as allowed under the Montana Rules of Civil Procedure, by the workers' compensation court or as otherwise provided by law.**
- (3) A signed claim for workers' compensation or occupational disease benefits or a signed release authorizes a workers' compensation insurer, as defined in 39-71-116, or the agent of the workers' compensation insurer to communicate with a physician or other health care provider about relevant health care information, as authorized in subsection (2), by telephone, letter, electronic communication, in person, or by other means, about a claim and to receive from the physician or health care provider the information authorized in subsection (2) without prior notice to the injured employee...

MONTANA STATUTES SYNOPSIS

- ❑ All statutes allowing for the disclosure of PHI by a provider discuss only disclosure of information from the provider to the insurer or the insurer's agent.
- ❑ No Montana law permits a provider to release PHI to an employer or other person or entity without the employee's prior authorization.

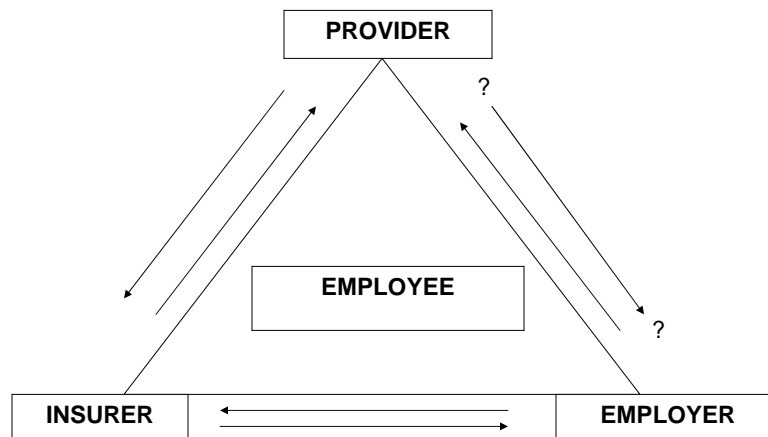
Administrative Rules of Montana

24.29.1404 DISPUTED MEDICAL CLAIMS

- (1) After mediation, disputes between an insurer and a medical service provider arising over the amount of a fee for medical services are resolved by a hearing before the department upon written application of a party to the dispute or the injured worker. The following issues are considered to be disputes arising over the amount of a fee for medical services:
 - (a) amounts payable to medical providers, when benefits available directly to claimants are not an issue;
 - (b) access to medical records;
 - (c) timeliness of payments to medical providers; or
 - (d) requirements for documentation submitted by a provider to an insurer pursuant to ARM 24.29.1513 as a condition of the payment of medical fees.
- (2) All other disputes arising over medical claims, including travel expense reimbursement to injured workers, shall be brought before a department mediator as provided in part 24 of the Workers' Compensation Act.
- (3) Facility records must be furnished to the insurer upon request. Facilities must obtain the necessary release by their administrative procedures.
- (4) The rule of privileged communication is waived by the injured worker seeking benefits under the Workers' Compensation or Occupational Disease acts.

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Expressly permitted communication under HIPAA, Montana Statutes and Case Law



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SUMMARY

- ❑ HIPAA permits states to implement laws that allow for the free flow of PHI within state workers' compensation systems and amongst workers' compensation players.
- ❑ Thus, states may pass laws that permit covered entities, such as medical providers, to disclose PHI without the prior authorization of the injured worker to those players.
- ❑ However, outside of the circumstance where a disputed medical claim exists, Montana law does not explicitly permit a covered entity to provide PHI related to a worker's claim to anyone, or any entity, other than the worker's compensation insurer or the insurer's agent.
- ❑ In short, Montana law does not explicitly allow healthcare providers to disclose PHI to employers, independent vocational rehabilitation contractors or other (non-insurer) players in the workers' compensation system. This may inhibit providers from disclosing workers' compensation claim related health information to those₂₃ players.

APPLICABLE MONTANA CASE LAW

- ❑ *Bowen v. Super Value Stores, Inc.* (1987), 229 Mont. 84, 745 P.2d 330.
- ❑ Concerned a disputes between the employer's insurer and the inured employee regarding the proper procedure by insurer in obtaining pretrial discovery of medical information regarding the compensability of the inured employee's claim.
- ❑ The Montana Supreme Court held that, under Montana law, the insurer was "entitled to confidential health information from the medical providers related to the compensability of the worker's claim."
- ❑ The Court also stated "in order to clarify the statutes and rules, we hold that a claimant for Workers' Compensation benefits waives any privilege of confidentiality in health care information which is relevant to the subject matter involved in his claim."24

What about the Privacy Rights contained in the Montana Constitution?

- Article II, Section 10: Right of privacy.
- In *Thompson v. State* (2007), 338 Mont. 511, 167 P.3d 867, Workers sought a declaration that sections 39-71-604(3) and 50-16-527(5) be declared unconstitutional “because they violated the Workers’ state constitutional right to privacy...”
- The Workers’ Compensation Court agreed that the statutes violated the Workers’ constitutional right to privacy.
- The Montana Supreme Court reversed the decision and held that the Workers’ Compensation Court did not have the jurisdiction to issue a declaratory judgment on the constitutionality of those statutes.

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MONTANA’S PRIVACY RIGHT

- “Montana adheres to one of the most stringent protection of its citizens' right to privacy in the country. Mont. Const. Art. II, § 10.” *State v. Burns* (1992), 253 Mont. 37, 830 P.2d 1318
- “Montana's treatment of privacy rights is more strict than that offered by the Federal Constitution.” *Montana Human Rights Division v. City of Billings* (1982), 199 Mont. 434, 439, 649 P.2d 1283, 1286.

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MONTANA'S PRIVACY RIGHT (cont.)

- The Montana Supreme Court has said that “[i]n Montana, we have adopted a two-prong test to determine whether issues of privacy are protected under our Constitution as follows:
 - 1) Whether the person involved had a subjective or actual expectation of privacy; and,
 - 2) Whether society is willing to recognize that expectation as reasonable.”

State v. Burns (1992), 253 Mont. 37, 830 P.2d 1318 (citing *State ex rel. Great Falls Tribune Co. v. Eighth Judicial Dist. Court* (1989), 238 Mont. 310, 318, 777 P.2d 345, 350.; *Montana Human Rights Division v. City of Billings* (1982), 199 Mont. 434, 441, 649 P.2d 1283, 1287).

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SUMMARY OF CONSTITUTIONAL ISSUE OF PRIVACY RIGHT

- The Montana Supreme Court has not substantively addressed the Workers' Compensation statutes regarding disclosure of healthcare information without the prior authorization of the employee under the Right of Privacy granted in the Montana Constitution.
- If a Constitutional review were to be made, the Court would have to determine:
 - (1) whether the worker had a subjective or actual expectation of privacy in his/her medical records light of the circumstances (here in the context of his/her workers' compensation claim), and
 - (2) whether society is willing to recognize that expectation as reasonable.

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