

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 903
Finance

(Senator Hayes)

Health Information - Commercial Sale

This bill requires a “covered entity,” “business associate,” or “subcontractor” to obtain authorization from an individual before engaging in a “commercial sale” of the individual’s health information or protected health information, including de-identified data. The bill prohibits a covered entity, business associate, or subcontractor from discriminating against or penalizing an individual who (1) does not sign an authorization or (2) elects to receive compensation, as specified. The Maryland Department of Health (MDH) may adopt regulations to carry out the bill. MDH may not take any action to enforce the bill on or before December 31, 2020.

Fiscal Summary

State Effect: The bill is not anticipated to materially affect State operations or finances.

Local Effect: The bill is not anticipated to affect local government operations or finances.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: “Business associate,” “covered entity,” “health information,” “protected health information,” and “subcontractor” each have the meaning stated in 45 C.F.R. § 160.103. “Commercial sale” means the disclosure of health information that is or was protected health information, including de-identified health data, by a covered entity, business associate, or subcontractor for which the recipient pays for the information. The bill specifies numerous examples of uses of health information and health data that do not constitute a commercial sale.

Prior Authorization Required

Before an individual authorizes the sale of the individual's health information or protected health information, a covered entity, business associate, or subcontractor must inform the individual that the individual may elect to receive a share of any payment received by the covered entity, business associate, or subcontractor in exchange for the commercial sale of the individual's health information or protected health information. The authorization required must meet the requirements of 45 C.F.R. § 164.508, which details the standards of authorizations for uses and disclosures.

Limitations

The bill may not be construed to apply to (1) any State agency or political subdivision of the State; (2) any federal agency; or (3) any covered entity, business associate, or subcontractor that possesses protected health information that was created, received, transmitted, or maintained on behalf of a State agency or political subdivision of the State, or a federal agency.

Current Law/Background: Under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), covered entities may not use or disclose protected health information except either as the privacy rule permits or as an individual authorizes in writing. Covered entities may disclose protected health information without an individual's authorization for such purposes as treatment, payment, health care operations, and public interest activities. The HIPAA privacy rule defines "covered entities" as health plans, health care clearinghouses, and health care providers. "Protected health information" is individually identifiable health information that is transmitted or maintained by electronic media or any other form or medium, excluding individually identifiable health information in education records covered by the Family Educational Rights and Privacy Act, student health records for individuals attending an institution of postsecondary education who are at least age 18, and employment records held by a covered entity in its role as employer.

Maryland's Confidentiality of Medical Records Act requires health care providers and facilities to keep the medical record of a patient confidential and obtain written consent for disclosure, even for purposes of treatment and payment. Generally, a person to whom a medical record is disclosed may not redisclose the medical record unless authorized by the person in interest. Exceptions are made for such purposes as provision of health care services, billing, utilization review, and legal claims. Chapters 165 and 166 of 2017 expanded the exception to redisclosure to include instances where the medical record was disclosed to a guardian *ad litem* and certain criteria are met.

A health care provider may, under specified circumstances, disclose a medical record without the authorization of the person in interest if (1) the health care provider receives a written assurance from the party or the attorney representing the party that, in all other proceedings, a person in interest has not objected to the disclosure of the designated medical records within 30 days after the notice was sent or (2) a specified notice and other documentation is mailed by certified mail to the person in interest by the person requesting the disclosure at least 30 days before the records are to be disclosed.

Chapters 700 and 701 of 2017 expressed the intent of the General Assembly that Maryland's Confidentiality of Medical Records Act (1) not be interpreted to be more restrictive than the federal privacy regulations adopted under HIPAA; (2) is not intended to be in conflict with HIPAA; and (3) is to be interpreted in a way that is consistent with any federal regulations adopted under HIPAA, federal policy guidance on HIPAA, and any judicial decisions relating to HIPAA.

MDH advises that it currently releases health data for public health purposes or research purposes in compliance with all applicable federal regulations and its own Data Use Agreement protocol. MDH does not engage in the commercial sale of health information outside of its protocol.

Small Business Effect: A covered entity, business associate, or subcontractor that qualifies as a small business may be required to obtain authorization or to provide compensation to an individual in exchange for the commercial sale of the individual's health information or protected health information, including de-identified data.

Additional Information

Prior Introductions: None.

Cross File: HB 892 (Delegate Saab, *et al.*) - Health and Government Operations.

Information Source(s): Office of the Attorney General (Consumer Protection Division); Maryland Department of Health; Department of Legislative Services

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Analysis by: Nathan W. McCurdy

Direct Inquiries to:
(410) 946-5510
(301) 970-5510