

## Privacy Questions Regarding Use and Disclosure of PHI During COVID-19

April 1, 2020

1. Our Employee Health MSA, sent an instant message to an employee containing the results of their COVID-19 test (which was negative). Is this a HIPAA violation for the employee health MSA to deliver this news in an instant message?

**Answer:** Providing an individual with a test result via Skype IM is not a HIPAA privacy or security violation. Skype IM is considered secure per VA security policy and the PHI was provided directly to the employee, who was the patient. However, sharing test results over Skype IM is not the most patient friendly mechanism and would not our recommended choice. In addition, test results should be appropriately documented in the employee medical record.

2. What can I release to the Senator's team regarding our COVID cases?

**Answer:** The facility may provide aggregate data. VHA facilities cannot disclose veteran or employee PHI from medical records to a Congressional member without a signed, written authorization unless the member is a Chair of a Congressional Committee and he/she is requesting information in that capacity. See VHA Directive 1605.01 Para. 18 for policy on disclosures of PHI to Congress and Congressional members.

If employee PII is part of a personnel record and not the veteran health record or employee medical file, then the information can be provided to a Congressional member per a Routine Use in the applicable Privacy Act SORN.

3. Can we tell ambulance providers or EMTs that a patient is COVID-19 positive?

**Answer:** Yes. When an ambulance service is a business associate under a BAA, you may provide this information to the ambulance drivers providing transport under the treatment provisions. For EMTs, who are not business associates, you may still provide this information for the EMT to treat the individual during transport to the hospital or facility.

4. If Veterans do not have My HealthVet, and a psychotherapist wants to email them psychotherapy material can he send it to them from his VA email address during this emergency? This does not contain PHI/PII, however it will be emailed to the veteran's personal email from the providers VA email address.

**Answer:** VA employees may use their VA email accounts to email generic non-VA sensitive information to Veterans unencrypted. Caution must be taken so that the Veteran knows that they cannot email any PHI back to the VA employee, if a response is requested.

5. The ROI office received an email from LabCorp requesting the facility provide the mailing addresses and phone numbers of the patients the company has tested for COVID-19 to be released to CDC. The VAMC has a contract with LabCorp and has forwarded a list of patients for COVID-19 testing. Can we rely on PA Routine Use to release this info?

**Answer:** It is our understanding that LabCorp has the names of the VA patients who they have tested for COVID-19 but not the mailing addresses or phone numbers. While you can use your contract authority and Routine Use 29 under the Patient Medical Record – VA, 24VA10P2 to make the disclosure under the Privacy Act, you still need disclosure authority under the HIPAA Privacy Rule to provide the patient information. At this time, the HIPAA Privacy Rule authority is not apparent as LabCorp as a health care provider is asking VHA to provide information for them to perform public health reporting. The VHA Privacy Office will continue to evaluate the options to provide further guidance.

6. The Union is requesting a list of employees that were sent home during the COVID-19 emergency. Per HR, the list would not contain any diagnosis or information regarding symptomatic vs. asymptomatic symptoms. It's assumed that they are requesting this for representational duties to ensure management is authorizing AA consistently and equitably.

**Answer:** VA unions, in the course of fulfilling their representational responsibilities, may make a request to management to provide copies of facility records pursuant to its authority under 5 U.S.C. 7114(b)(4). Unions may request any records that are maintained by a VHA health care facility. This might include releasable portions of completed Administrative Boards of Investigation (AIB), patient health records, or an employee's personnel records. However, under certain circumstances, unions may not be legally entitled to receive protected health information on employees or patients as information is protected by other statutes, such as the HIPAA Privacy Rule. You need to work with the facility HR to determine if the information requested is coming from the Employee Medical File or other personnel records such as Time and Attendance.

7. If a DOM patient tests positive, are we allowed to disclose the patient's name who tested positive to employees if they contact us. The individuals that contact us may or may not have treated the patient but are in close quarters with them.

**Answer:** When a patient tests positive for COVID-19, the facility may share limited PHI to inform employees or patients who are at risk for exposure under the serious and imminent threat provisions. See the Serious and Imminent Threat Privacy Fact Sheet for more details and requirements for notifying the patient of the disclosure at their last known address.

If PHI does not need to be shared in order to inform employees or patients of a risk of exposure, and there is no ability of the employees or patients to ascertain the identity of the DOM patient that tested positive, then you can share information without use of the serious and imminent threat provision. For example, you may tell other DOM patients that a fellow patient tested positive for COVID-19 without sharing any other information. This would not implicate the serious and imminent threat provision. HOWEVER, if you stated that a DOM patient tested positive for COVID-19 on March 30, 2020 and will be sent to the

hospital during treatment, that would be PHI and implicate the serious and imminent threat provision requirements.

8. Is it appropriate to disclose the COVID-19 employee's name when interviewing employees (contact tracing) or should we simply state they have been exposed to a fellow employee who tested positive for COVID-19?

**Answer:** There is nothing prohibiting the sharing of the person's name when you are using the serious and imminent threat provision to make the disclosure. But if you do not have to share the employee's name to accomplish the necessary purpose of contact tracing, then refrain from sharing it. This will likely be a case-by-case decision based on the specific circumstances of the contact tracing. See answer to Question 7 above for similar examples.

9. Employee Health maintains a list of Veteran/employees who test positive but does not share the name of the infected Veteran/employee with the potentially impacted co-workers; only that they may have been exposed. Is this permissible? Everything I have seen states Veteran records may not be used for employment unless you have the written authorization via the VAF 10-5345.

**Answer:** Yes. Employee Health may share limited PHI to inform employees or co-workers who are at risk for exposure under the serious and imminent threat provisions. See the Serious and Imminent Threat Privacy Fact Sheet for more details. If PHI does not need to be shared in order to inform employees or co-workers of a risk of exposure, and there is no ability of the employees or patients to ascertain the identity of the individual, then you can share information without use of the serious and imminent threat provision. In addition, the VHA Office of Occupational Health may be providing programmatic guidance to the facility EOH.

10. Can positive COVID results, completed on a Veteran/employee, during his/her Veteran care, be shared with Employee Health to conduct tracers on potentially impacted co-workers? EH does not share the name of the infected Veteran/employee with the potentially impacted co-workers; only that they may have been exposed.

**Answer:** Yes, but the information is being shared on the Veteran/employee as a patient so the Serious and Imminent Threat requirements under both the HIPAA Privacy Rule and Privacy Act must be followed in order to provide the information to Employee Occupational Health (EOH) for tracer purposes. If the information was being provided to EOH from the patient health record for treatment of the Veteran/employee that would be a different matter. In addition, the VHA Office of Occupational Health may be providing programmatic guidance to the facility EOH on such activities.

11. If an employee is just out sick, do they have to give specifics to their Payroll Office?

**Answer:** The VA Office of the Chief Human Capital Officer (OCHCO) issued a bulletin the HR Emergency Preparedness FAQs - Version 4 that addresses the various Leave and Hours of Duty questions including use of Weather and Safety Leave or CT/OT due to COVID-19 and the requirements for marking it such. Weather and Safety Leave is discretionary, so there are constraints on it being granted, and any information provided by the employee for this purpose is not subject to the HIPAA Privacy Rule. **Contact your facility HR or Payroll Office for a copy of the bulletin.**

As it relates to sick leave in general, Supervisors may (and in many instances are being encouraged to) ask an employee if the sick leave is related to COVID-19, but the employee is not required to provide any information for the sick leave beyond what is currently required by policy. If the employee volunteers the information and indicates they are out due to COVID-19, this information is not subject to the HIPAA Privacy Rule.

12. With our providers treating via video, is the below process acceptable for mailing notes to patients that they would have received during in-person visit? Several of our MH providers have requested a solution for their at-risk patients who may need a copy of the MH note to cope with an issue, and not all have access to My HealtheVet.

**Answer:** Providers can provide a copy of their treatment note to their patient as part of their discharge planning or patient education by regular mail (no email). The patient does not need to fill out a written request or VAF 10-5345a for the patient to be provided a copy of the note for these purposes. However, you want the provider to work with the facility PO and Chief of HIMS on a process to ensure the information is mailed correctly and appropriately tracked. These mailings do not need to be placed DSS ROI Plus software as they are not ROI requests.

13. Is it right for the facility occupational health service to ask an employee for their COVID-19 test results?

**Answer:** Yes, asking is never an issue. The better question is – are employees required or mandated to provide their COVID-19 test results, and this is not something the VHA Privacy Office can answer. Consult with HR to determine if the facility has mandated employees to share their COVID-19 test results or if it is a voluntary ask at this point for the health and well-being of our patients and employees.

14. There have been reports from some VA locations that staff have been advised that disciplinary action may be taken if they use another platform besides VCC.

**Answer:** The VHA Privacy Office is not aware of any such reports. The DUSOM emailed titled, "Memorandum: Use of Video Communication Technology Under COVID-19" sent to VISN Directors on March 31, 2020 contained the CIO Memo on the use of video teleconferencing technologies for telehealth services during the COVID-19 crisis and guidance from the DUSHOM that VHA clinicians may use video chats, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video or Skype to provide telehealth. Though VCC is still preferred when available as an option.

15. Can we release negative test results from a patient thought to have COVID-19 to a home health agency (HHA)? The patient is now deceased and the HHA has quarantined their nursing staff out of precaution.

**Answer:** No. Though the patient is deceased, the patient's PHI in VHA health records continues to be protected under the HIPAA Privacy Rule. There is no authority to permit this disclosure to the home health agency (HHA), as it is not for treatment since the patient is deceased and there is no serious and imminent threat to the HHA staff as the patient has tested negative for COVID-19.

However, you may tell the next-of-kin of the deceased as the patient's personal representative the test results and let the next-of-kin choose to share the results with the HHA directly or to sign an authorization for VHA to share with the HHA.

16. Is there is any restriction to providing numbers of COVID-19 patients to the public, and whether we can classify veterans and employees separately?

**Answer:** You can provide aggregate data to the public and there is no privacy concern with providing numbers separately for patients vs. employees. The VHA Office of Patient Care Services/Public Health has been providing aggregate numbers by facility on their public website at [https://www.publichealth.va.gov/n-coronavirus/?utm\\_source=Homepage&utm\\_campaign=Coronavirus](https://www.publichealth.va.gov/n-coronavirus/?utm_source=Homepage&utm_campaign=Coronavirus).