

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

### March 25, 2020

**1. Question:** Can a facility utilize a spreadsheet to track employee who have reported to a checkpoint for an assessment and they have been advised by a VA provider to return home? The spreadsheet would contain the following: Full name of employee, Date of assessment, department, and supervisors name. The information would be utilized to alert the supervisor to follow up with the employee.

**Answer:** Prior to leaving from work, the employee would be required to notify their Supervisor. If the facility wants to have Supervisors complete data elements on a spreadsheet for leadership to be able to track employee cases of concern within the facility, that is acceptable. What is not permitted is for a VA health care provider or Occupational Health Provider to fill out the spreadsheet based on PHI in medical records and provide to leadership for the purposes of tracking the workforce unless signed, written authorizations are obtained from the employees. See serious and imminent threat guidance for when a provider can share the information without the employee's signed, written authorization.

**2. Question:** Supervisors want to know if employees are on leave due to COVID19 (came into contact with patients, childcare, etc). Can they put this on the leave request when they submit it in VATAS? Would this violate any HIPAA regulations?

**Answer:** All supervisors are being requested to submit information to the timekeepers so that they can track who is on leave during this national emergency in relation to COVID-19. Employees submitting health information to their employer or supervisor voluntarily or as a condition of employment is not subject to the HIPAA Privacy Rule. In addition, any health information in an employment record, such as VATAS, is not covered under the HIPAA regulations.

**3. Question:** Some of our veterans stay at a local shelter or facility with up to 6 people per room, The manager of that facility would like us to let him know if one of the Veterans staying at his facility gets this coronavirus so he can inform the others in the room. Can we do this?

**Answer:** Until such time as the Veteran tests positive or is diagnosed with COVID-19, there is no legal authority under which VHA may disclose the Veteran's health information to staff at a local shelter without the signed, written authorization of the Veteran. Once the Veteran tests positive or is diagnosed with COVID-19 the VHA facility may disclose that information to local shelter staff under the serious and imminent threat authority as long as the Privacy Act and HIPAA Privacy Rule requirements for use of that specific authority are followed. See serious and imminent threat guidance for more information on how to apply this authority.

VHA may not use the serious and imminent threat authority to disclose health information when the Veteran is awaiting COVID-19 testing or test results, the COVID-19 test results are negative, or the Veteran needs to isolate due to potential exposure from others or because the Veteran refused a test.

**4. Question:** Are there mechanisms in play for previous contacts of COVID-positive individuals to be notified to quarantine or isolate? Absent a "serious and imminent harm" disclosure.

**Answer:** The only legal authority to make the disclosure without signed, written authorization in the situation posed is the serious and imminent threat authority. The VHA Privacy Office is unaware of the mechanisms that VHA facilities are employing to make such contact using this authority.

**5. Question:** The state epidemiologist is asking for the COVID-19 positive patient's face sheet, labs, x-ray results, and pertinent notes so they can trace the patient for public health reasons (given we are in a declared health care emergency). What is your guidance on this?

**Answer:** Additional information is required in order to provide a more comprehensive response, but based on the limited information in the question - VHA may disclose identifiable patient health information to State Public Health Authorities for public health reporting and response when a written request letter compliant with 38 U.S.C § 5701(f) is received from the State agency. VHA facilities often have standing written request letters from State Public Health Authorities on file that may be used for this purpose. The VHA facility Privacy Officer can assist in determining if a specific VHA facility has a standing written request on file for the applicable state. The written request letter for each State Public Health Authority will be specific to the state public health posture and needs depending on how the State is handling the COVID-19 pandemic.

**6. Question:** Our facility is advising veterans with symptoms to self-quarantine (with or without COVID-19 testing, with or without being seen). Can we provide a work note without a signed ROI from the veteran? Veterans are requesting for us to fax the note to their employer.

**Answer:** VHA may not disclose health information to an employer of a Veteran or patient without the signed, written authorization of the Veteran/patient on VA Form 10-5345 or other authorization form that complies with VHA Directive 1605.01 Para. 14. VHA may, however, provide such a note directly to the Veteran or patient via regular mail or fax.

**7. Question:** Employees are being asked to inform their supervisors if they test positive for COVID19 and the information is shared with our infection control staff. Do we need to have the employees written HIPAA authorization to share the information?

**Answer:** No, employees submitting health information to their employer or supervisor voluntarily or as a condition of employment is not subject to the HIPAA Privacy Rule. Therefore, facility leadership can report this information to Occupational health or your infection control staff without a signed, written authorization from the individual as this would be considered a requirement to reporting internally. Please let your employees know that staff are not sharing their information irresponsibly and that VHA takes their privacy seriously and are balancing that with our duty to address a public health crisis and appropriately care for our Veterans.

**8. Question:** Staff asked if they have legal or other authority to post the list of COVID-19 testing (positive/negative/pending) on a limited access Secure SharePoint. The list contains employee record of testing. I confirmed with the staff member that it is possible that supervisors that are on the COVID-19 operational committee or other authorized supervisors may have access to the files (COVID-19 testing information).

Answer: First, any PII/PHI placed on a VA Secure SharePoint site must be limited to only those VA staff with a need for access to the information to perform official duties. The SharePoint site may only be active for the period of time that it is needed and must be managed to ensure employee who no longer need access to the information have permissions to the site removed.

To determine appropriateness of placing the list of COVID-19 testing (positive/negative/pending) of employees on the SharePoint, how the data was collected needs to be understood.

- If employees are being tested in the VHA facility Employee Occupational Health (EOH) Unit, then the information may not be shared in any format that would allow it to be seen or used for employment or personnel purposes. EOH may share the PHI with individuals in the facility for treatment of the individual employees on the list or for specified health care operations, such as QA activities. Otherwise, a signed, written authorization is required or other legal authority must be applicable, such as the serious and imminent threat authority for positive COVID-19 individuals.
- If employees are reporting COVID-19 testing to their Supervisor voluntarily or under an employment mandate, the information would be part of personnel records and not covered by the HIPAA Privacy Rule. Therefore, sharing on the information on the SharePoint is not an issue as long as those access have a need for the information to perform official VA duties.
- If the employee is a Veteran and tested by a VA provider as part of Veteran care, the information may be shared within the facility for treatment of that employee Veteran or for health care operations, including management of health care resources. The information may not be shared with leadership or supervisors for personnel related matters or employment purposes.

**9. Question:** If a patient is sent to us for inpatient care, we test the patient for COVID and it comes back positive, do we have any disclosure authority to tell anyone outside of VA that had contact with the patient under the “serious and imminent harm” premise?

**Answer:** Yes. VHA may use the serious and imminent threat provision to disclose the PHI on a patient who has tested positive for COVID-19 to any person in a position to lessen or prevent the threat to the public. See serious and imminent threat guidance for more information on how to apply this authority.

**10. Question:** Our facility is asking that supervisors report/update to leadership any employees impacted by COVID. Leadership is asking that this information be sent to our OCC Health physician for tracking purposes. Leadership wants a report about any employee experiencing an exposure that requires quarantine (at home or wearing a mask) to include the following:

- Is the employee quarantined (at home or at work wearing a mask) or hospitalized/in isolation?
- Date of the quarantine or isolation start.
- Clinical or administrative employee.
- Work status (e.g. working with precautions (mask, screening, etc), teleworking, on leave, etc)

If clinical employee, indicate whether the employee is still able to engage in clinical care (providing care on-site, or providing care via telehealth or alternate means).

Can we report without an authorization from the individual.

**Answer:** Yes. Employees submitting health information to their employer or supervisor voluntarily or as a condition of employment through VATAS or other mechanisms is not subject to the HIPAA Privacy Rule. Therefore, facility leadership can report this information to Occupational health staff without a signed, written authorization from the individual as this would be considered a requirement to reporting internally. Please let your employees know that staff are not sharing their information irresponsibly and that VHA take their privacy seriously and are balancing that with our duty to address a public health crisis and appropriately care for our Veterans.

**11. Question:** A provider announced rather loudly in a hallway that a patient was COVID-19 positive. While it is possible that the serious and imminent threat provision was appropriately applied, it is also possible that the information was shared out of fear without following appropriate policies. It is my understanding that the release was appropriate; however auditory privacy was not followed and needs to be addressed.

**Answer:** While incidental disclosures are acceptable when reasonable safeguards are employed, discussing patient information in a public place, such as a hallway, loudly is not appropriate as reasonable safeguards around auditory privacy to prevent incidental disclosure are not being used. Anytime a VA provider is talking about a patient loudly in a hallway even with just mentioning the first name it is an auditory privacy violation. It does not matter if the VA provider had authority to discuss the PHI with other VA staff. Please enter a ticket into PSETS for any such instance and continue the investigation as you normally would, e.g., advising supervisor and HR.

**12. Question:** In the event of the death, can the VA facility share with the persons or company who are picking up the body of a person that had COVID-19 be notified the Veteran had the disease? Would this also fall under the serious and imminent threat authority?

**Answer:** In order to utilize the serious and imminent threat authority there must be an imminent threat to the person or public and the disclosure is made to an individual in a position to prevent or lessen the threat. What imminent threat is posed to the funeral home or coroner picking up the body of the deceased Veteran? If there is an imminent threat how may the funeral home or coroner lessen that threat to the public? The VHA Privacy Office recommends you check with your Infection Control staff to determine whether an threat from COVID-19 remains after death.

**13. Question:** Has anyone been asked about using Zoom? Due to the COVID-19 (similar to skype)

One of our providers has a Court hearing scheduled for one of our patients this Friday (3/27). Due to COVID-19 mitigation efforts, the Court is requesting to use Zoom since we do not have video conferencing capabilities on the inpatient unit. The Courts would be agreeable to a phone conference, but would prefer using Zoom. Is this allowable? If so, what process would I have to put in place?

**Answer:** Please reach out to your facility ISSO. The March 19, 2020 memo from the Assistance Security for OI&T, CIO titled, "Use of Video Communication Technology under COVID-19" does not address other purposes. Therefore, you need to obtain guidance from the ISSO. However, from a Privacy perspective there is no preference on video teleconference tools used to conduct VHA business as long as legal authority exists for the use or disclosure of PII/PHI for the purpose the video conferencing tool is being used. In the court case above, that legal authority is likely a Court Order or an authorization signed by the Veteran, but you do not to ensure it exists prior to discussing options with the facility ISSO.