

# HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)

A new rule released by the Biden Administration in April 2024 seeks to tighten privacy protections between patients and providers to ensure that medical information is not used against people providing lawful reproductive health care.

The new rule went into effect on June 25th, 2024. Must be complied with by December 23, 2024.

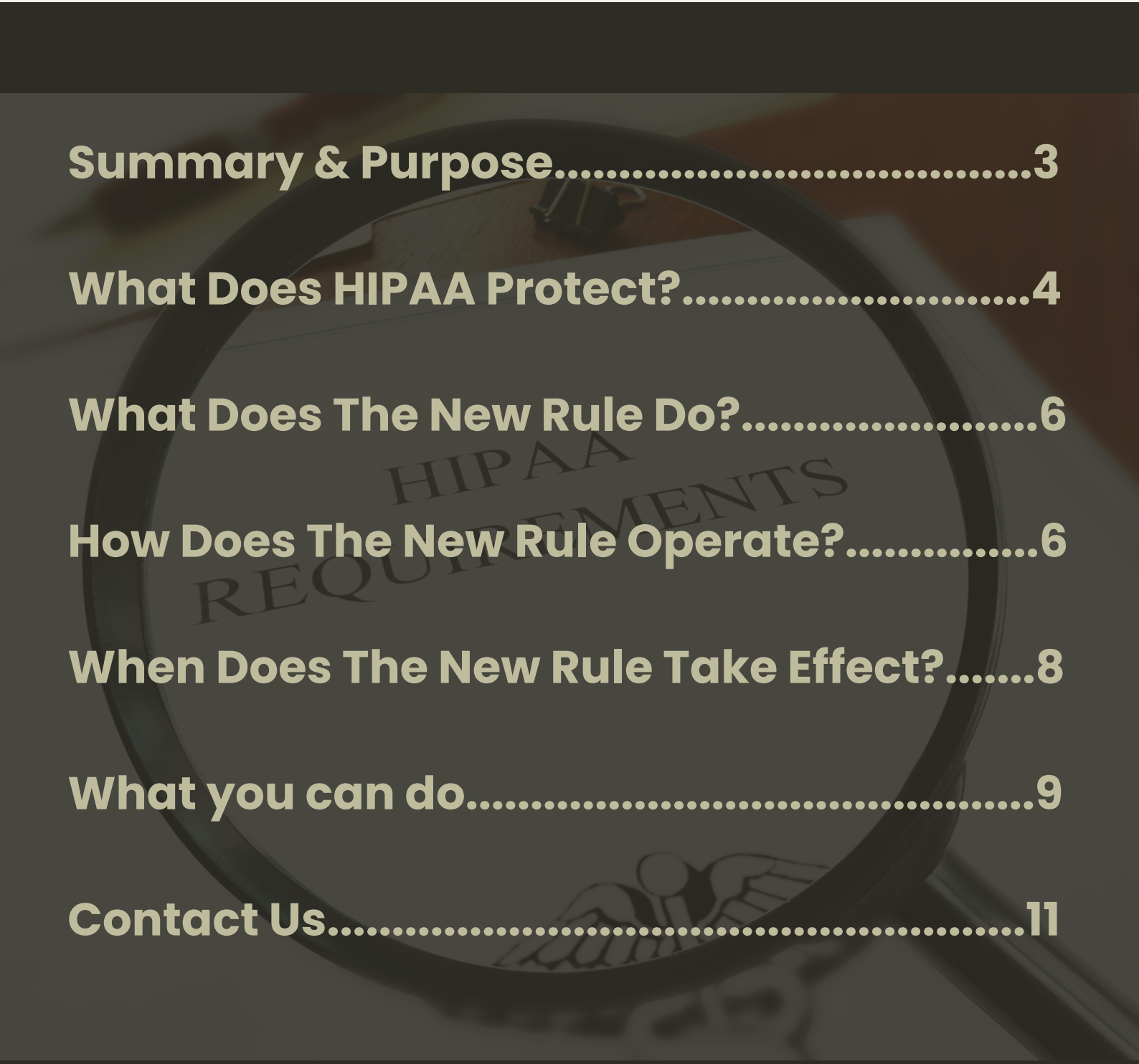
The following document contains more information on the new rule.

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# HIPAA PRIVACY RULE TO SUPPORT REPRODUCTIVE HEALTH CARE



# TABLE OF CONTENTS



**Summary & Purpose.....3**

**What Does HIPAA Protect?.....4**

**What Does The New Rule Do?.....6**

**How Does The New Rule Operate?.....6**

**When Does The New Rule Take Effect?.....8**

**What you can do.....9**

**Contact Us.....11**

Information in this resource does not constitute legal advice and is not a substitute for retaining legal counsel.

# SUMMARY & PURPOSE



On April 26, 2024, President Biden's Department of Health and Human Services (HHS) finalized the 'HIPAA Privacy Rule to Support Reproductive Health Care,' a new Rule strengthening protections for reproductive health care information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Post-Dobbs, states all over the country enacted harsh abortion bans with civil, criminal and professional consequences attached; some states even seek to criminalize interstate travel for abortion. As a result, concerns about pregnancy and abortion criminalization and the sharing and disclosure of private patient information is at an all-time high. The fear of criminalization is particularly urgent for patients who must leave their home state to obtain care and are concerned that the sharing of their healthcare information between states could lead to or aid in investigations into their reproductive health activity.

In recognition of the heightened risk and far reaching implications of the Dobbs decision and the need to protect patient privacy, HHS published new guidance limiting the disclosure of reproductive health care information for certain non-health related purposes. Specifically, the Rule prohibits the disclosure of certain patient data for use in investigations related to the provision or receipt of reproductive health care, including abortion. The goal is to ensure that individuals are not deterred from seeking, obtaining, providing or facilitating lawful reproductive health care and that open communication in the patient-provider relationship is protected.



# WHAT DOES HIPPA PROTECT?

- HIPAA is a federal law that generally prohibits disclosure of 'protected health information' (PHI) in order to safeguard patient information from being shared without their consent or knowledge. The overarching goal of HIPAA's Privacy Rule is to support a trusting relationship between patients and the health care system and provide greater privacy protections, particularly as health care technology advances.
- PHI covered by HIPAA is information that identifies or could be used to identify a person (such as their name, date of birth, address or social security number) and relates to data about that person's past, present or future health, the provision of health care to the individual, or information about the past, present, or future payment for the provision of health care.
- Although PHI is generally protected from unauthorized disclosure, HIPAA's Privacy rule allows disclosure in certain circumstances, such as for public health activities, judicial and administrative proceedings, research or certain law enforcement purposes. You can read more about permissible disclosures [here](#).

**Important Note:** HIPAA's protections generally extend to reproductive health care and pregnancy related health care activities.

# WHAT DOES THE NEW RULE DO?

In sum, the Rule does three key things:

1. **Prohibition on Disclosure:** The main feature of the Rule is its clarification that HIPAA's Privacy Rule prohibits use or disclosure of PHI for the purpose of investigating or imposing liability on any person for seeking, obtaining, providing, or facilitating lawful reproductive health care or to identify a person for such an investigation. This prohibition on disclosure applies to criminal, civil or administrative investigations or proceedings;

According to HHS, "seeking, obtaining, providing, or facilitating" would include, but not be limited to activities such as: expressing interest in, inducing, using, performing, furnishing, paying for, disseminating information about, arranging, insuring, assisting, or otherwise taking action to engage in reproductive health care; or attempting any of the same.

**Note:** The new Rule does not create a blanket prohibition against disclosure of certain types of PHI—instead, it protects reproductive health care information from disclosure for certain purposes. In declining to create protections for specific categories of PHI, the administration expressed concerns about the ability of regulated entities to segment PHI and effects on care-coordination.

2. **Attestation:** Regulated providers, health plans, or clearinghouses must obtain a signed attestation that any requests for reproductive health-related PHI are not being sought or used for the prohibited purposes described above;

This requirement would apply where the requester is making the request for any of the following reasons: 1) disclosures for health oversight activities; 2) disclosures for judicial and administrative proceedings; 3) disclosures for law enforcement purposes; or 4) disclosures about decedents to coroners and medical examiners.

3. **Notice of Privacy Practices:** Covered entities must modify their Notice of Privacy Practices to support reproductive health care privacy.



# HOW DOES THE RULE OPERATE?

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The Rule Only Applies to legally provided healthcare—that is, services that are legal in the state where the patient obtained them or that are federally protected. It does not protect information related to unlawful care, nor does it override state abortion bans.

- The Rule also creates a presumption of lawfulness, meaning that when a covered entity is presented with a request for PHI, the reproductive health care at issue is presumed to be lawful unless:
  - The covered entity has actual knowledge that the care was not lawful; or
  - The covered entity is presented with factual information that demonstrates a substantial factual basis that the health care was not lawful under the circumstances.
- The Rule clarifies that it does not expect covered entities to conduct research into another state's laws or analyze an individual's PHI in order to determine if care provided by another facility was lawful, nor are they required to consult with an attorney. Instead, when care was provided elsewhere, the covered entity may limit their determination of lawfulness to the information provided by the person requesting disclosure and must presume lawfulness unless presented with facts or actual knowledge that demonstrate otherwise.

- Examples of what is and is not prohibited from disclosure:
  - Disclosure would likely be prohibited in the following examples:
    - A person travels from their home state where abortion is banned to obtain care in a state where it is legal. The patient's home state then requests information about that care. If the covered entity provided the care and knows it to be lawful, they cannot disclose the patient's information
      - If the information is requested from a covered entity that did not provide the care in question, then the covered entity must presume that the care was lawful unless the requester specifically provides them with facts showing otherwise.
    - If a person accesses reproductive health care that is authorized under federal law, regardless of the state that where the health care was provided. An example of this would be accessing contraception.
    - If a person obtains reproductive health care in a state where that care is lawful, then PHI cannot be disclosed for purposes of further investigating the circumstances of that care.

**Preemption:** The Rule preempts state or other laws requiring a regulated entity to use or disclose PHI for a purpose prohibited under the Rule or other HIPAA provisions. It does not preempt requests for information for other purposes, such as the examples given below.



# HOW DOES THE RULE OPERATE?

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- Disclosure is not prohibited if the care was not lawful, or if the request for PHI is not for the purpose of investigating a person for seeking, obtaining, providing or facilitating lawful reproductive health care. So for example, the prohibition would likely not apply in the following examples:
  - Law enforcement investigations into unlawful activity such as sexual assault or human trafficking;
  - A request for disclosure to a health oversight agency conducting health oversight activities such as whether reproductive health care was provided and appropriately billed;
  - Investigations into substandard medical care or allegations of patient abuse or neglect;
  - Investigations into whether a person submitted a false claim for reproductive health care for payment by the government;
  - Requests for PHI to investigate alleged violations of Federal nondiscrimination laws or other abusive conduct.





# WHEN DOES THE RULE TAKE EFFECT?

The Rule went into effect on June 25, 2024.

Compliance: Covered individuals and entities must comply with the new Rule by December 23, 2024.

## OTHER UPDATES:

- On March 18, 2024, the Office of Civil Rights at the Department of Health and Human Services issued updated guidance about the use of tracking technology and HIPAA. HHS notes that impermissible disclosure of PHI through tracking technology and applications may violate the Privacy Rule and result in harms including identity theft, financial loss, discrimination, stigma, mental anguish and other harms. Tracking technology can lead to the disclosure of incredibly sensitive medical information about an individual and entities covered by HIPAA have an obligation to protect that data.
- Under the March update, HHS clarifies what is considered a tracking technology, and how the information contained therein must be safeguarded.
  - A tracking technology is one used to collect and analyze information about how users interact with regulated entities' website or apps; if the information collected through these technologies include PHI, then HIPAA applies.
  - Regulated entities are not permitted to use tracking technologies in a manner that would result in impermissible disclosures of PHI to tracking technology vendors or others. For example, an entity may not disclose such information to the technology vendor for the vendors' marketing purposes, without HIPAA-compliant authorizations.

If a person believes that a healthcare provider has violated HIPAA, they can file a complaint with HHS's Office of Civil Rights.

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# NOW WHAT?

## Be An Advocate

- **Own your expertise:** As providers, you are experts on how to care for your patients, and you are experts on how restrictive laws interfere with that care. We are in a situation where lawmakers, judges and justices are substituting expert medical judgment with their own often ideologically motivated determinations. As providers, you are in a powerful position to push back.
- **Partner with advocacy groups:** Groups working for equitable healthcare need medical voices in their midst. Reach out in whatever capacity fits with your skills, your time and your passions.
- **Educate yourself and others:** Educate yourself and others about what the law does and does not require, so that you can be an effective advocate for your patients and yourself. Where you are unsure, reach out to groups like Lawyers for Good Government—we are literally here to help.
- **View voting as a health equity issue:** Voting and healthcare are deeply linked, and it's critical that we talk about them as two sides of the same coin. The next administration will impact health care on the federal, state and local levels, and it is important that we encourage voters to make decisions with this in mind.

# BUT WAIT, THERE'S MORE.....

## Stay Up to Date on Reproductive Health Law: **L4GG Policy Resource Hub for Reproductive Health**

L4GG's Reproductive Rights and Health Equity program seeks to meet providers' needs in a constantly changing reproductive health law landscape. In pursuit of that goal, we have created the Policy Resource Hub for Reproductive Health ("the Hub"), which is designed to give providers and other reproductive health stakeholders accurate, reliable, and up-to-date legal research on abortion laws in all 56 U.S. states and territories.

The 'Abortion Laws by State' portion of the Hub (requires registration) provides free, live-linked and publicly-available legal guidance around some of the most common questions for reproductive health providers in every state, such as 1) until what point in pregnancy is abortion legal; 2) what are the exceptions, exemptions, affirmative defenses and reporting requirements related to abortion law;" and 3) what are the laws relating to minors accessing abortion.

In addition to the Abortion Laws by State, the Hub also includes every edition of our Reproductive Health Digest, as well as our Repro in the News story collection project. The Digest is published bi-weekly and is designed to act as a resource for clinicians, lawyers, advocates, journalists, and others. It provides detailed information, analysis, and context about ongoing reproductive health news and legal developments, ensuring everyone has the news they need in one easy-to-read place. The Repro in the News project is a constantly updated story bank containing thousands of news hits about reproductive health, searchable by state.

We invite you to subscribe to these resources and share them with anyone in your network who may benefit from having access. Questions? Feel free to reach out to Alyssa Morrison at [amorrison@lawyersforgoodgovernment.org](mailto:amorrison@lawyersforgoodgovernment.org)

# THE TEAM



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