

Health Law & Business News

Eased Opioid Treatment Record-Sharing Proposed by Health Agency

By Shira Stein

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- Patients could more easily give consent for record sharing
 - Department clarifying when law applies to providers, insurers, agencies
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The Trump administration proposed to allow doctors to more easily obtain consent from patients for sharing information about their substance use treatment.

A proposal released Aug. 22 would allow patients to consent to their information being shared with entities like insurers, the Social Security Administration, and halfway houses, among others. Currently, substance-use patients need to name specific people at these institutions—information they may not know.

The changes would also allow doctors to disclose a patient is undergoing substance-use treatment in a natural disaster emergency without patient consent.

The regulation, known as the “Part 2 rule,” covers privacy for patients who undergo substance-use treatment. The law is designed to protect these patients from stigmatization or retaliation by giving them control over who can see their medical records. It only governs substance-use records and prevents law enforcement from using patients’ records against them.

This is the first rule to be released as part of an initiative being led by Health and Human Services Deputy Secretary Eric Hargan to change regulations so providers can more easily coordinate care. The department next plans to release changes to the physician self-referral law, known by its congressional sponsor former Rep. Pete Stark (D-Calif.), and the anti-kickback statute.

Doctors would still be required to get patient consent for sharing information about substance-use treatment, but these changes would “make that consent actually effectuated, consistent with their desires,” HHS Secretary Alex Azar said in a phone call with reporters.

Confusion Around Applicability

The rules around substance-use records only apply to health providers who receive federal funding for the treatment, including Medicare and Medicaid.

Doctors often don't know whether records are covered under the substance-use treatment record rule, so they tend to err on the side of protecting the records, and that "exacerbates the problems" with how the records are shared, Kirk Nahra, co-chair of the cybersecurity & privacy practice at WilmerHale, said.

This law has become a "bigger challenge" because more doctors are involved in treatment for substance-use disorders, Hargan said on the call.

Some primary care providers have opted not to care for patients with a substance-use disorder because they're worried they will unknowingly violate the rule, HHS Assistant Secretary for Mental Health and Substance Use Elinore McCance-Katz said in the call.

The rule would state that a health provider that has information about a patient's substance-use treatment doesn't, by itself, mean the record is subject to the regulation.

The rule also would tell providers that aren't receiving federal funds for treating substance-use patients that they don't need to redact information in their files as long as the original record received from a covered provider is segregated or segmented.

The administration will argue that it has the authority to make the change without consulting Congress because the current process came about under other HHS rules, two sources briefed on the discussions previously told Bloomberg Law.

The rule would let opioid treatment programs get patient consent to disclose prescribing and dispensing data to state prescription drug monitoring programs. They can't now disclose to state monitors.

The department received recommendations on how to improve the substance-use disclosure rule through public comment on two separate rules in the works that will make changes to the health privacy law and facilitate the electronic exchange of records.

The primary goal of the substance-use law was to make sure these records weren't used against people with substance-use disorder in criminal proceedings, but "now it's impeding a million other things," Nahra said.

There is no real reason to treat substance-use information differently from mental health information or HIV information, Nahra said.

More Possible Action?

Congress attempted to pass a bill streamlining the substance-use consent requirements in 2018, but there was a disagreement between House members and Senate Democrats about whether the patient needs to give consent at all.

The bill (H.R. 6082) passed the House and went no further. It would have allowed doctors to disclose information about a patient's substance-use treatment without their consent as long as they complied with the general health privacy law. The bill was ultimately left out of a package of dozens of bills to combat the opioid crisis that was signed into law in late 2018.

Azar said there have been some patients and providers who have advocated for the administration to go further in its changes to the regulation, but that the HHS doesn't believe it can under the statute.

Those people would like to see the law made more similar to the general health privacy law, but that would require congressional action, Azar said. He added the agency would support Congress taking action to make those changes.

Leaders of the House committee with jurisdiction over the issue agreed.

"Passing this legislation into law is the best way to fully and permanently ensure health-care providers can effectively treat patients with substance use disorders," House Energy & Commerce Committee Ranking Member Greg Walden (R-Ore.) and Health Subcommittee Ranking Member Michael Burgess (R-Texas) said in a statement reacting to the proposal.

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