

IL HIE Legal task Force  
General PHI Workgroup  
September 28, 2011

Attended by Phone

Melissa January, Drinker, Biddle & Reath, LLP  
Patricia King, Swedish Covenant Hospital  
Marcia Matthias, Southern Illinois Health Care  
Valerie Montague, Ungaretti & Harris, LLP  
Tracy Salinski, Arnstein & Lehr, LLP

Office of Health Information Technology

Mark Chudzinski, General Counsel  
Melissa Tyler, Legal Intern

Patricia King, co-chair of the workgroup, opened the meeting at 11:05 a.m., hosted by OHIT at the State of Illinois J.R. Thompson Center in Chicago, with a telephone conference call-in option. Notice of the meeting and the agenda were posted on the OHIT website and at the Chicago meeting location no later than 48 hours prior to the meeting. Roll was taken and phone attendees confirmed their ability to hear and participate.

On motion duly made and seconded, the minutes of the prior meeting were approved.

Each member of the group gave a report on the state statute they were assigned to review.

Kansas, 2011 Kansas Laws Ch. 114 (H.B. 2128 § 21-34):

- The Kansas HIE law does two relevant things. First, with respect to disclosure and access to protected health information (PHI), the statute harmonizes Kansas state law with HIPPA. Second, the act allows for the disclosure of PHI to Kansas health information exchanges (HIE).
  - o It was suggested that it might be beneficial for Illinois to harmonize its laws with HIPPA.
- The law provides that if a covered entity has entered into an agreement with an HIE, the entity does not need to receive consent to send the patient's information through the HIE. The entity must however provide the patient with notice that the entity provides information to the HIE and give the patient the option to opt-out of the program.
  - o The patient may opt-out of the HIE entirely or only with respect to certain designated categories of PHI, so long as the restriction is "reasonable." The statute does not define "reasonable" restrictions.
- The statutes allows the covered entity to give notice of its participation in an HIE in its "notice of privacy practices."
- If the covered entity does not have an agreement with an HIE it must receive authorization from an individual before disclosing any information to an HIE.

In the ensuing discussion, it was noted that the Kansas model might be a helpful model to consider for Illinois because it has provisions for special categories of PHI. Illinois is in a unique

situation because Illinois law gives special protection to sensitive information and the Kansas approach seems in line with this. It was also noted that allowing providers to include notice of HIE practices within the “notice of privacy practices” is a good model. The group agreed that this is good idea because it allows the covered entity to give all of the relevant notices at once. The “notice of privacy practices” was recognized by the group as a good vehicle for putting patients on notice that a covered entity has a contract with an HIE while not burdening the patient with another form to read.

Arizona, 2011 AZ H.B. 2620:

- The HIE bill gives the patient the right to opt-out, but does not mention whether the patient’s information is automatically included in the HIE.
- It was noted that this law includes many rules regarding clinical laboratories.
- The group discussed the recent federal Notice of Proposed Rule Making on Making (NPRM) on the Clinical Laboratory Improvement Amendments (CLIA), which gives patients the right to obtain copies of lab results directly from the lab, rather than requiring them to go to their physician.
  - o The group discussed that there may be some complications under federal law for labs because, currently, labs are only allowed to deliver test results to the ordering physician. This creates some difficulties for the HIE because it does not allow laboratories to deliver results to the HIE, unless the HIE is interpreted as an agent of the physician.
  - o It was noted that Illinois law is consistent with federal law with respect to clinical lab results.

Maine, 2011 ME S.P. 414:

- Maine gives the patient the option to opt-out of the HIE.
- The Maine Bill references a “state designated” HIE, but does not define the term.
- The bill does not define “record locator service.”
- The bill requires that the HIE provide patients access to an “access log.”

Minnesota, Minn. Stat. Ann. § 144.291:

- Minnesota requires that patients “opt-in” to participate in an HIE.
- Minnesota requires that the HIE to maintain an audit log and has good language about patient access rights.
- The statute defines “record locator service.”

Texas, 2011 Tex. Sess. Law serv. Ch. 1126 (H.B. 300):

- The Texas bill deals with health information generally. It broadens the duties of covered entities under HIPPA. It also prohibits the sale of PHI.
- The only HIE specific provision in the bill requires HIEs to adopt heightened standards for electronic disclosure. These standards have not have not yet been determined.
- Texas commissioned the University of Houston to produce studies on different legal aspects of the HIE including consent, standards, and trust agreements. (Texas expects that there will be trust agreements between the HIE and providers.) It was agreed that these studies would be circulated to the group for review.

In the ensuing discussion, it was noted that Illinois imposes on the state HIE standards in order to ensure there is connectivity between the local/regional/state HIEs. The problem is multiplicity of standards among all the different states. The federal standards are not very strong and this creates a situation where many electronic medical records cannot be transferred.

New Mexico, 2009 NM S.B. 278 (NS):

- New Mexico has taken a unique approach. It define RLS separate from HIE. Additionally, RLS is opt-out while HIE is opt-in.
- The RLS receives demographic information and this is separate from health care information which goes to the HIE.
- It was noted that this sort of separation makes sense because of the different types of information being shared.

In the ensuing discussion, the group considered freedom of access laws and whether, on the state level, the HIE would benefit from exemption from some of these laws (e.g., the Freedom of Information Act (FOIA)).

The group decided that it might be beneficial to create a spreadsheet outlining the various provisions of the statutes. This will allow the group to look at the provisions all together and determine which are best to suggest to the Authority. Additionally, the group decided that, with regard to the opt-in/opt-out discussion, the best approach is to flesh out the arguments on both sides and leave the policy decision to the Authority or the General Assembly.

Patricia asked for questions and comments and there were none.

The next meeting was set for Wednesday, October 19<sup>th</sup> at 11:00a.m. It was suggested that by this time group members identify what they would like to include in the spreadsheet.

The meeting adjourned at 11:42a.m.