

HIPAA Privacy Rule Checklists Section 164.506 – Consents

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I. Test for When a HIPAA Privacy Consent Must be Obtained

A covered health care provider is required to obtain a consent which conforms to the requirements at Section II (*a conforming consent is hereinafter referred to as "HIPAA privacy consent"*) if each of the following are present:

- a. ____ Protected health information will be used or disclosed;
- b. ____ The use or disclosure is to carry out treatment, payment or health care operations; and
- c. ____ None of the following exceptions apply:
 - i. **Indirect Treatment Relationship**. The covered health care provider has an indirect treatment relationship with the individual. *Note:* An indirect treatment relationship exists when **both** of the following are met: (1) the health care provider delivers health care to the individual based on the orders of another health care provider; and (2) the health care provider typically provides services or products, or reports the diagnosis or results associated with the health care, directly to another health care provider, who provides the services or products or reports to the individual;
 - ii. **Inmates**. The covered health care provider created or received the protected health information in the course of providing health care to an individual who is an inmate;
 - iii. ***Emergency Treatment**. It is an emergency treatment situation *and* the covered health care provider attempts to obtain the HIPAA privacy consent as soon as reasonably practicable after the delivery of treatment;
 - iv. ***Required by Law**. The law requires the covered health care provider to treat the individual, and the covered health care provider attempts to obtain the HIPAA privacy consent but is unable to obtain such consent; *or*
 - v. ***Substantial Barriers to Communication, But Consent is Clearly Inferred**. The covered health care provider has attempted to obtain the HIPAA privacy consent from the individual but is unable to obtain such consent due to substantial barriers in communicating with the individual, and the covered health care provider determines, in the exercise of professional judgment, that the individual's consent to receive treatment is *clearly inferred* from the circumstances.

**Note:* If the covered health care provider fails to obtain a HIPAA privacy consent because of exceptions (iii), (iv) or (v), the covered health care provider *must document* its attempt to obtain consent and the reason why the consent was not obtained.

Note: If a covered entity is not required to obtain a consent, it may obtain an individual's consent for the covered entity's own use or disclosure of protected health information to carry out treatment, payment, or health care operations, provided the consent meets the requirements in Section II and III, *below*.

In general, except as provided for “joint consents” (see below), a HIPAA privacy consent obtained by a covered entity is not effective to permit another covered entity to use or disclose protected health information.

II. Required Contents of a HIPAA Privacy Consent

In order to conform to § 164.506(c), a HIPAA privacy consent must satisfy each of the following elements:

- a. ____ It is in plain language;
- b. ____ It informs the individual that protected health information may be used and disclosed to carry out treatment, payment, or health care operations;
- c. ____ It refers the individual to the Notice of Privacy Practices for Protected Health Information for a more complete description of such uses and disclosures;
- d. ____ It states that the individual has the right to review the notice prior to signing the consent;
- e. ____ It states whether the covered entity has reserved the right to change the terms of its Notice of Privacy Practices for Protected Health Information, and how the individual may obtain a revised Notice;
- f. ____ It states that the individual has the right to request that the covered entity restrict how protected health information is used or disclosed to carry out treatment, payment, or health care operations;
- g. ____ It states that the covered entity is not required to agree to requested restrictions;
- h. ____ It states that, if the covered entity agrees to a requested restriction, the restriction is binding on the covered entity;
- i. ____ It states that the individual has the right to revoke the consent in writing, except to the extent that the covered entity has taken action in reliance thereon; *and*
- j. ____ It is signed by the individual and dated.

III. Other Rules for HIPAA Privacy Consents

- a. **Defective Consents.** A HIPAA privacy consent is not valid (except to the extent that the covered entity has taken action in reliance thereon) *if* the document has any of the following defects:
 - ____ Any of the elements in Section II are missing from the consent; *or*
 - ____ The individual has revoked in writing the consent.
- b. **Combining HIPAA Privacy Consent with Other Consents.** If the HIPAA privacy consent is combined with other types of written legal permission from the individual (*e.g.*, an informed consent for treatment or a consent to assignment of benefits), the HIPAA privacy consent must satisfy each of the following requirements:
 - ____ The HIPAA privacy consent is visually and organizationally separate from the other written legal permission; *and*

_____ The HIPAA privacy consent is separately signed by the individual and dated.

Note: While a HIPAA privacy consent may be combined with other legal permission, it *may not* be combined in a single document with the Notice of Privacy Practices for Protected Health Information.

Note: A HIPAA privacy consent may be combined with a research authorization that complies with HIPAA. *See applicable "authorization" requirements.*

c. **Conditioning Consents.**

- i. A covered health care provider may condition treatment on the provision by the individual of a HIPAA privacy consent.
- ii. A health plan may condition enrollment in the health plan on the provision by the individual of a consent under this section sought in conjunction with such enrollment.

d. **Revocation of Consent.** An individual may revoke a HIPAA privacy consent at any time, provided that such revocation be in writing. *Note:* The revocation does not revoke action taken by the covered entity in reliance on the HIPAA privacy consent up to the time of revocation.

e. **Consent Retention Policy.** HIPAA requires that a covered entity document and retain any signed HIPAA privacy consent. It must be retained for six (6) years after the date of its creation, or the date when consent was last in effect, whichever is later. Either the original or an electronic copy of the original must be retained.

f. **Resolving Conflicting Consents.** HIPAA provides the following *alternatives* for resolving conflicts between HIPAA consents and other consents, authorizations, or written legal permission from an individual for a disclosure of protected health information to carry out treatment, payment, or health care operations:

- i. **Rule: Use the more restrictive consent, authorization, or other legal permission from the individual.** If a covered entity has obtained a HIPAA privacy consent and receives any authorization or written legal permission from the individual for a disclosure of protected health information to carry out treatment, payment, or health care operations, the covered entity *may disclose* such protected health information only in accordance with the *more restrictive* consent, authorization, or other written legal permission from the individual.

- ii. **Rule: How to resolve conflicts.** A covered entity *may* attempt to resolve a conflict between a consent and an authorization or other written legal permission from an individual as follows:

- (a) Obtain a new HIPAA privacy consent from the individual for the disclosure to carry out treatment, payment, or health care operations; *or*

- (b) Communicate orally or in writing with the individual in order to determine the individual's preference in resolving the conflict. The covered entity must document the individual's preference and may only disclose protected health information in accordance with the individual's preference.

- g. **Joint Consents.** Entities that participate in certain organized health care arrangements (as *defined in HIPAA*) may use a joint consent as follows:
- i. The joint consent must include the name or other specific identification of the covered entities, or classes of covered entities, to which the joint consent applies; *and*
 - ii. The joint consent must meet the requirements for HIPAA privacy consents, except that the statements required by this section may be altered to reflect the fact that the consent covers more than one covered entity.

Note: If an individual revokes a joint consent, the covered entity that receives the revocation must inform the other entities covered by the joint consent of the revocation as soon as practicable.