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Gavel to Gavel: Updated guidance on HIPAA covered entities' use of tracking technology

By: **Philip D. Hixon**//Guest Columnist//April 12, 2024

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On March 18, 2024, the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Service updated its Bulletin on HIPAA Covered Entities' obligations when using online tracking technologies, revising guidance published in December 2022.

Tracking technologies include cookies, web beacons, tracking pixels, tracking codes, and other scripts or codes used to gather website and application user information.

Collection and use of this information from a website or application is subject to the HIPAA Privacy Rule and Security Rule if the information includes protected health information (PHI). The potential PHI includes obvious things like a medical record number but could also include information such as an IP address, a device ID, a home address, an email address, or other information falling within HIPAA's definition of individually identifiable health information.

As noted in the Bulletin, "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 any other violations of the HIPAA Rules." Such information may be used permissibly for a Covered Entity's "health care operations," as defined by HIPAA. To the extent a third-party vendor is involved in permissible uses, the Covered Entity is obligated to have a Business Associate Agreement with the vendor. However, use of tracked PHI for marketing purposes would be impermissible, unless the Covered Entity has a HIPAA-compliant authorization from the tracked person.

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Although these examples are fairly straightforward, tracking technologies may involve a continuum of compliance issues. The OCR Bulletin distinguishes between "user-authenticated websites" where the user must log in to gain access and "unauthenticated websites" that are available to the public. Tracking technologies used in connection with the former websites (and mobile apps), such as a patient portal, will generally track PHI and, thus, HIPAA applies.

Unauthenticated websites present a conundrum warranting assistance from experienced health care counsel. According to the OCR, unauthenticated websites may track PHI for some users but not for others, depending on the user-specific purpose for the visit. The Bulletin contains examples that illustrate the challenges. A user who accesses a hospital's website to check job postings is not protected by HIPAA. However, a user who accesses the same website to identify a provider to give a second opinion on a diagnosis is subject to HIPAA protections.

The Bulletin underscores the importance of adherence to HIPAA regulations regarding the use of online tracking technologies, emphasizing the need for vigilance and clarity in safeguarding protected health information across various digital platforms and scenarios.

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