

Privacy - MODEL Facility Policy

POLICY NAME: Marketing Under the HIPAA Privacy Standards/HITECH

DATE: (facility to insert date here)

NUMBER: (facility to insert number here)

Purpose: To facilitate compliance with requirements of the Health Insurance Portability and Accountability Act (HIPAA) Standards for Privacy of Individually Identifiable Health Information (Privacy Standards), 45 CFR Part 164 and the sections that relate to uses and disclosures of protected health information (PHI) for marketing purposes, and the Health Information Technology for Economic and Clinical Health Act (HITECH) component of the American Recovery and Reinvestment Act (ARRA).

Policy:

An authorization signed by the patient or the patient's personal representative (as defined by state law) is required and must be obtained for any uses or disclosures of PHI for purposes of marketing under the HIPAA Privacy Standards.

Refer to the HIPAA Privacy Standards, 45 CFR Parts 160.101 and 164.501, and IP.PRI.001, the Patient Privacy Program Requirements Policy, for definitions.

Marketing

To make a communication about a product or service that encourages recipients of the communication to purchase or use the product or service other than those defined in the Non-Marketing section below.

Non-Marketing

Communication about a product or service that encourages recipients of the communication to purchase or use the product or service and the communication:

1. Is to provide refill reminders or otherwise communicate about a drug or biologic that is currently being prescribed for the individual, only if any financial remuneration received by the covered entity in exchange for making the communication is reasonably related to the covered entity's cost of making the communication.
2. For the following treatment and health care operations purposes, except where the covered entity receives financial remuneration in exchange for making the communication:
 - a. For treatment of an individual by a health care provider, including case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual;
 - b. To describe a health-related product or service (or payment for such product or service) that is provided by, or included in a plan of benefits of, the covered entity making the communication, including communications about: the entities participating in a health care provider network or health plan network; replacement of, or enhancements to, a health plan; and health-related products or services available only to a health plan enrollee that add value to, but are not part of, a plan of benefits; or

- c. For case management or care coordination, contacting of individuals with information about treatment alternatives, and related functions to the extent these activities do not fall within the definition of treatment.

Procedure:

1. Authorization must be obtained from a patient or the patient's legal representative for any use or disclosure of PHI for marketing, except for communication in the form of:
 - a. A face-to-face communication made by a member of the facility workforce to an individual; or
 - b. A promotional gift (*e.g.*, infant formula) of nominal value provided by the facility.
2. If the marketing involves direct or indirect remuneration to the facility from a third party (sale of PHI), the authorization must state that such remuneration is involved. Refer to IP.PRI.010, the Authorization for Uses and Disclosures policy, for the authorization form. The sale of PHI does not require authorization if:
 - a. The price charged for the information reflects the cost of preparation and transmittal of the data;
 - b. Disclosures of PHI are to or by a business associate for activities that the business associate undertakes on behalf of a covered entity; or
 - c. Payments are received in the form of grants, or contracts or other arrangements to perform programs or activities.
3. Facilities may communicate to patients via newsletters, mailings or other means regarding treatment options, health related information, disease-management programs, wellness programs, or other community-based initiatives or activities in which the facility is participating.
4. All documentation for marketing must be kept for a minimum of six (6) years.
5. Facilities that engage patients for marketing and/or promotional purposes (*e.g.*, to use a patient's testimonial in marketing materials) must have two forms executed:
 - a. Authorization for Use and Disclosure of PHI for Marketing and/or Promotional Purposes
 - b. Consent for Use and Disclosure of Image, Voice and/or Written Testimonials

References:

Patient Privacy Program Requirements Policy, IP.PRI.001
Authorization for Uses and Disclosures Policy, IP.PRI.010
Records Management Policy, EC.014
American Reinvestment and Recovery Act of 2009, Title XIII, Subtitle D