What, No More Baby Pictures?

August 2014 • Lockton® Companies

When visiting a pediatric or obstetric clinic we have all seen the collages displayed in the waiting area, filled with pictures of infants and children.

We may even recognize some of the kids. For decades, physicians have proudly displayed these pictures and, many times, the stories of the care provided to the children as well. If you fail to see such a display during your next visit, the reason may be outlined in a recent New York Times article.

What has changed that has forced the removal of these photo walls? The basic core components of HIPAA have not changed significantly. What has changed is an increased level of HIPAA enforcement at the state and federal levels. While it appears that no clinic or healthcare organization has been fined over the unauthorized posting of patient photos, the increased enforcement concern has led many healthcare providers to be far more cautious. The Office of Civil Rights (OCR) reinforces this level of caution: “A patient's photograph that identifies him/her cannot be posted in public areas” unless there is “specific authorization from the patient or personal representative,” wrote Rachel Seeger (OCR spokeswomen) in an e-mail to the New York Times.
Is a Picture “Individually Identifiable Health Information?”

“Individually identifiable health information” includes information:

- That is created or received by a healthcare provider,
- That relates to the provision of healthcare to the individual, and
- That identifies the individual or there is a reasonable basis to believe the information can be used to identify the individual (45 C.F.R. § 160.103).

Since the posting of a picture identifies or potentially identifies an individual, and the posting in a medical office implies the provision of healthcare to the individual, a picture posted in a physician’s office is individually identifiable health information that may not be disclosed under the Privacy Rule without specific patient consent.

But The Parents Sent It To Us!

Isn’t a patient sending a photo into a clinic considered consent, or at least implied consent? Not according to Clinton Mikel, chairman of the American Bar Association’s eHealth, Privacy & Security Interest Group who stated in the New York Times article, “Unfortunately, there’s no concept of implied authorization for this type of use.” And note: health information includes information received by the provider, not just information created by the provider.

What Should We Do?

A healthcare entity may decide to remove all patient pictures from public display, as many cited in the Times article have done. This would be the most conservative risk avoidance approach. But, if the healthcare entity wishes to continue the displays, a process to make the display HIPAA-compliant should be instituted. This includes:

- **Obtain consent.** A HIPAA compliant consent form should be completed by the parent or legal decision-maker. The form should specifically authorize consent to the picture being placed on the display board.
- **Create a log.** The consent will have an expiration date, so create a log to track when the picture was placed on the board, when items are due for removal, and when they are removed.
- **Create a proper destruction process.** Treat the pictures like protected health information. The same precautions should be taken with the picture destruction as with the destruction of any other PHI.

Pictures tell a story, inspire, create warm feelings, and personalize the often impersonal world of healthcare. Parents send pictures because they are proud of their children and grateful to their providers. Providers post pictures because they are proud of their patients and their work. It’s a good thing, with the proper privacy precautions. Follow the steps above, and you may continue to display patient photos.

The opinions expressed in this article are not intended as legal advice and should not be relied upon as such. You should consult an attorney before making any decisions on HIPAA compliance or any other compliance issues.

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