

April 2020

Client Advisory

COVID-19 Legal Digest: COVID-19 and Notarizing Documents; COVID-19 and HIPAA

Covid-19 and Notarizing Documents

One of the most challenging aspects of practicing law during the COVID-19 pandemic has been a relatively simple, but legally essential action - that of notarizing important documents. Under New Jersey law, a notary must be physically present and observe the principal execute a document before it can be notarized. With the social distancing restrictions imposed as a result of the COVID-19 pandemic, and the natural reluctance of people to put themselves in harm's way, meetings to notarize documents have become nearly impossible to arrange.

On April 14, 2020, Governor Murphy signed legislation authorizing notaries and other officials who are authorized to notarize documents (including attorneys) to do so remotely by the use of "communication technology" - i.e., an electronic device or process that allows remotely located individuals to communicate with each other simultaneously by sight and sound.

However, in order for such notarization to be valid, several requirements are established by the statute:

1. The notary must either know or obtain satisfactory evidence of the identity of the remotely located signer.
2. The notary must confirm that the document in his possession is the same as that being signed by the remotely located signer.
3. The notary must create an audiovisual recording of the execution and notarization, which recording must be preserved for ten (10) years.

There are some limited exceptions to documents that may be remotely notarized - in particular, there are certain sections of the Uniform Commercial Code and certain documents utilized in adoption, divorce or family law matters. There are additional conditions if the remotely located individual is located outside of the United States. In addition, the law anticipates regulations for the implementation of the act, which may add to these requirements.

It is also important to know that this law applies only during the period of time that the Executive Order 103

adopted by Governor Murphy remains in effect. When that Executive Order is rescinded by the Governor, the statute is deemed expired.

The takeaway is that the remote notarization statute is a useful tool during the times of pandemic in order to notarize documents that cannot otherwise be notarized in person. However, given the cumbersome requirements of recording and the storage of that recording for ten (10) years, it would seem wise to re-execute documents that have been notarized remotely once Executive Order 103 is rescinded and business returns to relative normality.

Please reach out to your Archer contact or any member of [Archer's COVID-19 Task Force](#) with any questions you may have.

Covid-19 and HIPAA

During the current public health emergency, well-established rules have been relaxed and the federal and state governments have issued a dizzying array of alerts and reminders to healthcare providers seeking to maintain regulatory compliance under unprecedented workloads. Below is a summary of some of the guidance issued between February 3rd and April 9th surrounding providers' obligation to preserve patient privacy.

February 3, 2020: The Office of Civil Rights ("OCR") at the U.S Department of Health and Human Services issued guidance on ways covered entities and business associates may share protected information under the HIPAA Privacy Rule during a public health emergency. View it [here](#).

March 17, 2020: OCR announced that it will exercise its enforcement discretion to not impose penalties for HIPAA violations against health care providers that in good faith provide telehealth using non-public facing audio or video communication products during the Covid-19 nationwide public health emergency. This exercise of enforcement discretion applies regardless of whether the telehealth service is related to the diagnosis and treatment of health conditions related to COVID-19. View it [here](#).

March 20, 2020: OCR issued guidance in the form of FAQs on telehealth remote communications following its notification of enforcement discretion. View it [here](#).

March 24, 2020: OCR issued guidance to help ensure first responders and others receive protected health information about individuals exposed to COVID-19. View it [here](#).

The HIPAA Privacy Rule permits a covered entity to disclose protected health information (“PHI”) of an individual who has been infected with, or exposed to, COVID-19, in certain circumstances:

- HIPAA permits a covered skilled nursing facility to disclose PHI about an individual who has COVID-19 to emergency medical transport personnel who will provide treatment while transporting the individual to a hospital’s emergency department.
- HIPAA permits a covered entity, such as a hospital, to disclose PHI about an individual who tests positive for COVID-19 in accordance with a state law requiring the reporting of confirmed or suspected cases of infectious disease to public health officials.
- A covered entity may disclose PHI to a first responder who may have been exposed to COVID-19, or may otherwise be at risk of contracting or spreading COVID-19.
- A covered entity may disclose PHI to prevent or lessen a serious and imminent threat to a person or the public when such disclosure is made to someone they believe can prevent or lessen the threat.
- Except when required by law, or for treatment disclosures, a covered entity must make reasonable efforts to limit the information used or disclosed under any provision listed above to that which is the “minimum necessary” to accomplish the purpose for the disclosure.

March 28, 2020: OCR issued a bulletin on civil rights laws and HIPAA flexibilities that apply during the COVID-19 emergency. The bulletin is particularly focused on ensuring that covered entities do not unlawfully discriminate against people with disabilities when making decisions about their treatment during the COVID-19 health care emergency. View it [here](#).

April 2, 2020: OCR announced notification of enforcement discretion to allow uses and disclosures of PHI by business associates for public health and health oversight activities during the COVID-19 nationwide

public health emergency. The HIPAA Privacy Rule already permits covered entities to provide this data, and this announcement allowed business associates to also share this data without risk of a HIPAA penalty. View it [here](#).

April 9, 2020: OCR announced notification of enforcement discretion for community-based testing sites during COVID-19. The notification was issued to support certain covered health care providers, including some large pharmacy chains, and their business associates that may choose to participate in the operation of a Community Based-Testing Site, which includes mobile, drive-through, or walk-up sites that only provide COVID-19 specimen collection or testing services to the public. View it [here](#).

Stark Law Waivers in Response to COVID-19: On March 30, in response to COVID-19, the Centers for Medicare and Medicaid Services issued blanket waivers that will have retroactive effect to March 1, 2020 and will permit referrals and financial relationships that would otherwise be sanctioned by the Physician Self-Referral Law, also known as “Stark Law.” The blanket waivers apply only to financial relationships and referrals that are related to the COVID-19 outbreak in the United States. The waivers allow for reimbursement for certain services and exemption from sanctions for noncompliance, absent the government’s determination of fraud or abuse. CMS has issued guidance on these waivers, which can be found [here](#).

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