

Health Information Portability and Accountability Act

Breaking Down Statutory Text

This chart details which preemption sections of various omnibus and sectoral statutes deal with federal preemption.

Codified Section	Type of Preemption	Are the circuit courts in general agreement on what this means?
42 U.S.C. §1320d-7(a)(1)	Express Preemption	Yes
42 U.S.C. §1320d-7(a)(2)	Anti-Preemption Provision	Yes
42 U.S.C. §1320d-7(b)	Anti-Preemption Provision	Yes
42 U.S.C. §1320d-7(c)	Anti-Preemption Provision	Yes
45 CFR §160.202	Definitions	This section provides definitions to aid in the understanding of “contrary” and “more stringent.”
45 CFR §160.203	Express Preemption	Yes – most litigation is centered on determining if the State law is contrary to HIPAA.
45 CFR §160.203	Anti-Preemption Provision	Yes – most litigation is centered on determining if the State law is more stringent than HIPAA.
45 CFR §160.203(b)	Floor Preemption	Yes – most litigation is centered on determining if the State law is more stringent than HIPAA.

Methodology

The statutory text overwhelmingly contains express preemption and various savings clauses. Express preemption is directly related to statutory text, and it is the only form of preemption with this quality. The remaining types of preemption – field, impossibility, and obstacle – are forms of *implied* preemption. As the name suggests, these preemption categories are implicit in every statute and consequently do not rely on statutory text. (However, sometimes a statute will explicitly address an implied preemption principle, such as 42 U.S.C. § 2000h-4.) Instead, implied preemption principles appear exclusively in case law. Case law that relies on a theory of implied preemption are appropriately notated.

Since courts have not addressed every issue, there may be areas that are marked as “Not litigated.”

Legend:

Express Preemption
Field Preemption

Anti-Preemption Provision
Compliance Savings Clause

Impossibility Preemption
Obstacle Preemption
Floor Preemption

Remedies Savings Clause
Sunset Provision
Ceiling Preemption

Statutory Text

42 U.S.C. § 1320d–7
Effect on State Law

(a) General effect

(1) General rule

Except as provided in paragraph (2), a provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d–1 through 1320d–3 of this title, shall supersede any contrary provision of State law, including a provision of State law that requires medical or health plan records (including billing information) to be maintained or transmitted in written rather than electronic form.

(2) Exceptions

A provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d–1 through 1320d–3 of this title, shall not supersede a contrary provision of State law, if the provision of State law—

(A) is a provision the Secretary determines—

(i) is necessary—

(I) to prevent fraud and abuse;

(II) to ensure appropriate State regulation of insurance and health plans;

(III) for State reporting on health care delivery or costs; or

(IV) for other purposes; or

(ii) addresses controlled substances; or

(B) subject to section 264(c)(2) of the Health Insurance Portability and Accountability Act of 1996, relates to the privacy of individually identifiable health information.

(b) Public health

Nothing in this part shall be construed to invalidate or limit the authority, power, or procedures established under any law providing for the reporting of disease or injury, child abuse, birth, or death, public health surveillance, or public health investigation or intervention.

(c) State regulatory reporting

Nothing in this part shall limit the ability of a State to require a health plan to report, or to provide access to, information for management audits, financial audits, program monitoring and evaluation, facility licensure or certification, or individual licensure or certification.

45 CFR Part 160

Electronic Code of Federal Regulations (e-CFR)
Title 45. Public Welfare
Chapter A. Department of Health and Human Services
Subchapter C. ADMINISTRATIVE DATA STANDARDS AND RELATED REQUIREMENTS
Part 160. GENERAL ADMINISTRATIVE REQUIREMENTS
Subpart B. Preemption of State Law

§ 160.201 Statutory basis.

§ 160.202 - Definitions.

For purposes of this subpart, the following terms have the following meanings:

Contrary, when used to compare a provision of State law to a standard, requirement, or implementation specification adopted under this subchapter, means:

- (1) A covered entity or business associate would find it impossible to comply with both the State and Federal requirements; or
- (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act, section 264 of Public Law 104-191, or sections 13400-13424 of Public Law 111-5, as applicable.

More stringent means, in the context of a comparison of a provision of State law and a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter, a State law that meets one or more of the following criteria:

- (1) With respect to a use or disclosure, the law prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted under this subchapter, except if the disclosure is:
 - (i) Required by the Secretary in connection with determining whether a covered entity or business associate is in compliance with this subchapter; or
 - (ii) To the individual who is the subject of the individually identifiable health information.
- (2) With respect to the rights of an individual, who is the subject of the individually identifiable health information, regarding access to or amendment of individually identifiable health information, permits greater rights of access or amendment, as applicable.
- (3) With respect to information to be provided to an individual who is the subject of the individually identifiable health information about a use, a disclosure, rights, and remedies, provides the greater amount of information.
- (4) With respect to the form, substance, or the need for express legal permission from an individual, who is the subject of the individually identifiable health information, for use

or disclosure of individually identifiable health information, provides requirements that narrow the scope or duration, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the express legal permission, as applicable.

(5) With respect to recordkeeping or requirements relating to accounting of disclosures, provides for the retention or reporting of more detailed information or for a longer duration.

(6) With respect to any other matter, provides greater privacy protection for the individual who is the subject of the individually identifiable health information.

Relates to the privacy of individually identifiable health information means, with respect to a State law, that the State law has the specific purpose of protecting the privacy of health information or affects the privacy of health information in a direct, clear, and substantial way.

State law means a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law.

§ 160.203 General rule and exceptions.

A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law. *This general rule applies, except if one or more of the following conditions is met:*

(a) *A determination is made by the Secretary under § 160.204 that the provision of State law:*

(1) *Is necessary:*

(i) *To prevent fraud and abuse related to the provision of or payment for health care;*

(ii) *To ensure appropriate State regulation of insurance and health plans to the extent expressly authorized by statute or regulation;*

(iii) *For State reporting on health care delivery or costs; or*

(iv) *For purposes of serving a compelling need related to public health, safety, or welfare, and, if a standard, requirement, or implementation specification under part 164 of this subchapter is at issue, if the Secretary determines that the intrusion into privacy is warranted when balanced against the need to be served; or*

(2) *Has as its principal purpose the regulation of the manufacture, registration, distribution, dispensing, or other control of any controlled substances (as defined in 21 U.S.C. 802), or that is deemed a controlled substance by State law.*

(b) *The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.*

(c) *The provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention.*

(d) *The provision of State law requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals.*

§ 160.204 Process for requesting exception determinations.

§ 160.205 Duration of effectiveness of exception determinations.

Summary

The text of HIPAA contains express preemption, anti-preemption provisions, and floor preemption. Given the multiple clauses, the understanding of HIPAA's preemption is relatively clear. When addressed by a Court of Appeals, the inquiry is typically about ascertaining if the state law is more stringent than HIPAA, if there is a conflict, or if it is impossible to comply with both.

Case Law

S.C. Med. Ass'n v. Thompson, 327 F.3d 346 (4th Cir. 2003)

Facts: Appellants filed suit for declaratory relief from several provisions of HIPAA. The complaint argued HIPAA's non-preemption of "more stringent" state privacy laws is unconstitutionally vague and should be declared unconstitutional under the Due Process Clause of the 5th Amendment. However, the regulation explains four criteria that show when a law is "more stringent" than HIPAA.

Holding: HIPAA's non-preemption of "more stringent" state privacy laws is not unconstitutionally vague.

OPIS Mgmt. Res. LLC v. Sec'y Fla. Agency for Health Care Admin., 713 F.3d 1291 (11th Cir. 2013)

Facts: Plaintiffs operate and managed skilled nursing facilities in Florida. They received requests from spouses and attorneys-in-fact for medical records of deceased residents, which Plaintiffs refused to release because the parties were not "personal representatives" under HIPAA. The state agency cited Plaintiffs for violating Fla. Stat. §400.145, requiring nursing homes to release a former patient's records to the spouse, guardian, surrogate, or attorney-in-fact.

Holding: The Florida statute frustrates the purpose of HIPAA, so it is preempted.

Murphy v. Dulay, 768 F.3d 1360 (11th Cir. 2014)

Facts: Murphy received medical treatment from Dulay, and thereafter sued for medical negligence. Fla. Stat. §766.1065 requires the plaintiff to complete a written authorization form to release protected health information.

Holding: There is no conflict, so the Florida statute is not preempted.

Law v. Zuckerman, 307 F. Supp. 2d 705 (D.Md. 2004)

Facts: Plaintiff sued Defendant, her surgeon, for medical malpractice. Defendant's counsel engaged in *ex parte* pre-trial communications with Plaintiff's treating physician

without Plaintiff's knowledge or consent. Plaintiff alleges this is a violation of HIPAA. Parties are debating if HIPAA or the Maryland Confidentiality of Medical Records Act (MCMRA) controls. HIPAA provides that a provider *may* disclose patient records after using certain procedures, whereas MCMRA states a provider *shall* do so.

Holding: [MCMRA is not more restrictive than HIPAA, so HIPAA preempts the statute. Therefore, HIPAA controls.](#)

Nat'l Abortion Fed'n v. Ashcroft, 2004 U.S. Dist. LEXIS 1701 (N.D. Ill. 2004)

Facts: Appellants filed a civil suit against the US Attorney General, challenging the constitutionality of the Partial Birth Abortion Ban Act of 2003 (PBABA). During the lawsuit, the Government served Northwestern Hospital with a subpoena, seeking "all medical records associated with those medical record numbers to be identified by [Dr. Hammond]" as those who received medically necessary abortion procedures.

Northwestern moved to quash the subpoena as privileged from disclosure under HIPAA, the Illinois Medical Privacy Law (IMPL), and federal statutory and common law. The IMPL has strict disclosure protections under physician-patient privilege; in the situation at hand, the IMPL would not allow the disclosure.

Holding: [The IMPL more restrictive than HIPAA, so IMPL is not preempted.](#)

Nat'l Abortion Fed'n v. Ashcroft, 2004 U.S. Dist. LEXIS 1701 (7th Cir. 2004)

**Note – this is the same case as above, but the Seventh Circuit gives a different discussion. The Seventh Circuit weighs the concerns of the hospital and women in Illinois, mainly that the hospital will lose the confidence of its patients to protect their privacy, and "skillful Googlers" could identify the anonymous women based on their medical history.

Thomas v. 1156729 Ontario, Inc., 979 F. Supp. 780 (E.D. Mich. 2013)

Facts: Plaintiff suffered a traumatic brain injury after a car accident with a person driving for his employer, Defendant. Mich. Comp. Laws §600.2157 deals with patient-physician privilege and its waiver.

Holding: [HIPAA preempts Michigan law because the state law is less stringent, thereby undermining HIPAA's objectives.](#)

Hawes v. Golden, 2004-Ohio-4957 (Ohio 9th Ct. App. 2004)

Facts: Hawes' husband was killed when he drove into the rear end of Golden's tractor-trailer. R.C. § 2317.02(B)(1)(a)(iii) waives the physician-patient privilege when filing a wrongful death action.

Holding: [It is not impossible to comply with both state and federal law, so it is not preempted by HIPAA.](#)

Further Readings

Kirk J. Nahra, *The New HIPAA NPRM - The Latest and Greatest in the Evolution of the HIPAA Privacy Rule*. American Health L. Ass'n, Health L. Wkly, December 18, 2020.

Kirk Nahra, *Moving Toward a New Health Care Privacy Paradigm*. Wiley Rein, 2014

Jennifer Guthrie, *Time is Running Out—The Burdens and Challenges of HIPAA Compliance: A Look at Preemption Analysis, the “Minimum Necessary” Standard, and the Notice of Privacy Practices*. 12 Ann Health L 143, 2003.