

This form is intended to serve as a sample for Michigan attorneys assisting clients with forms for HIPAA compliance. Under HIPAA preemption standards a HIPAA form is not intended to replace a current form being used in compliance with applicable Michigan law. Use of the sample HIPAA forms will require integration of the HIPAA sample form with existing forms currently in use. The attorney also may wish to consult the HIPAA Matrix to determine if any preemption issue under Michigan law needs to be addressed in the form. This form is for educational purposes only and does not constitute, and may not be relied upon, as legal advice.

MUST FOLLOW HIPAA

16 Disclosures When We MUST Follow HIPAA and CANNOT Rely on Michigan State Law

<p>MCL 330.1748 (Confidentiality of Mental Health Records)</p>	<p><u>Disclosure for Legal Proceedings</u> HIPAA applies to subpoenas because Michigan law arguable permits disclosure of nonprivileged information pursuant to a subpoena without a court order, while HIPAA permits such disclosure pursuant to a subpoena without a court order only if certain additional requirements short of a court order are met. (adequate assurance) See 164.512(e)(i)(iii)-(iv).</p> <p><u>Disclosure for Patient’s Benefit Purposes</u> Disclosure of PHI for non-TPO purposes not for payment to the disclosing Covered Entity, HIPAA requires an authorization. Michigan law does not require an authorization for disclosure for life insurance, disability benefits, etc.</p> <p><u>Disclosure for Research Purposes</u> HIPAA requires authorization or an authorization waiver approved by the Institutional Review Board (“IRB”) or privacy board. HIPAA limits disclosure without an authorization to a limited data set where there is a data use agreement in place. Michigan law allows disclosure, even for research purposes, at the record holder’s discretion and is preempted by HIPAA.</p>
<p>MCL 330.1750 (Privileged Communications as Evidence)</p>	<p><u>Disclosure in Legal Proceedings</u> Assuming that the privileged communications contain confidential health information, HIPAA requires a court order for disclosure without authorization or satisfaction of other criteria. Michigan law allows disclosure in civil or administrative proceedings simply upon notice to the individual.</p>
<p>MCL 333.2632 (Confidentiality of Information Obtained During Research)</p>	<p><u>Disclosure of Research Information</u> HIPAA applies because it requires either an authorization or an IRB or privacy board approval of an authorization waiver prior to using or disclosing PHI for research purposes (subject to grandfathered provisions). Michigan law appears to allow the use or disclosure of confidential health information without such authorization or authorization waiver provided it is in strict conformity with the research project.</p>
<p>MCL 333.5127 (Consent by</p>	<p><u>Disclosure to Minor’s Spouse</u></p>

Minor for VD or HIV Testing)	HIPAA applies because it provides greater protection of PHI by permitting the minor to object to the disclosure to his or her spouse. Michigan law does not grant a similar right.
MCL 333.6113 (Additional Disclosures of Substance Abuse Records)	<p><u>Research Purposes</u> HIPAA applies if the information is PHI because HIPAA requires an authorization or an IRB or privacy board approved authorization waiver to disclose PHI for research purposes.</p> <p>If the information is de-identified, Michigan law applies because HIPAA does not apply to de-identified information.</p>
MCL 333.6121 (Validity of Minor Consent to Substance Abuse Treatment)	<p><u>Disclosure to Minor's Spouse</u> HIPAA applies because it provides greater protections of PHI by permitting the minor to object to the disclosure to his or her spouse, whereas Michigan law does not grant a similar right.</p>
MCL 333.17752 (Prescription Drug Records)	<p><u>Disclosure for Research Purposes</u> HIPAA applies because it requires either an authorization or an IRB or privacy board approval of an authorization waiver for the disclosure of PHI used in research, whereas Michigan law permits such disclosure without authorization.</p>
MCL 333.21743 (Confidentiality of Clinical Records by MDSS and Nursing Homes)	<p><u>Disclosure Upon Death</u> HIPAA applies because it only permits the disclosure of limited information for notification of death, dependent upon the professional judgment of the covered entity whereas Michigan law grants broader disclosure to the decedent's relative or guardian.</p>
MCL 400.712 (Adult Foster Care)	<p><u>Contested Case</u> HIPAA applies because Michigan law permits disclosure to a party to a contested case whereas HIPAA only permits disclosure in such context to a party in response to a subpoena or where the covered entity obtains satisfactory assurances of confidentiality.</p>
MCL 550.934 (Confidentiality Obligations of TPAs)	<p><u>Disclosure for Purchase of Insurance</u> HIPAA applies because it would require individual authorization if the stop loss policy holder is the employer (not a covered entity), but not if the policy holder is the group health plan (a covered entity).</p> <p><u>Disclosure to Plan Fiduciary</u> HIPAA applies because it would prohibit disclosure to a plan fiduciary who is an employer sponsoring a group health plan administered by the TPA while Michigan law would permit such disclosure. Note: Both Michigan law and HIPAA would apply if the plan fiduciary was not the employer.</p>
MCL 600.2157 (Waiver of Physician-Patient Privilege)	<p><u>Waiver of Privilege</u> HIPAA applies because it only permits disclosure of the confidential information in connection with a court proceeding</p>

	<p>in response to a court order or subpoena or, if the court order or subpoena has been issued, and the covered entity has given the person whose confidential health information is at issue an opportunity to object and assert the privilege. Practically speaking, given Michigan law, it is likely that if the person objecting to disclosure had filed suit to recover for personal injuries or malpractice, the court would, given the Michigan law here, consider that privilege to have been waived.</p>
<p>Opinion No. 2994 (January 16, 1945) (Disclosure of Patient's Admission)</p>	<p><u>Disclosure of Data</u> HIPAA applies because Michigan law is contrary to and provides less protection than HIPAA by prohibiting a covered entity from disclosing a patient's confidential health information in this context without express authorization. Note: It appears from this Opinion that the attorney's informal request did not arise in the context of judicial proceedings.</p>
<p>Rule 325.14910 (Content and Maintenance of Patient Records)</p>	<p><u>Access to Patient Records by Staff</u> HIPAA applies because although Michigan law and HIPAA both permit access by program personnel in treatment, HIPAA imposes limitations even on those personnel with access rights, based on the "minimum necessary" standard. Michigan law, on the other hand, would permit all personnel involved in treatment access; therefore, HIPAA is contrary to and more protective than Michigan law.</p>

MUST FOLLOW MICHIGAN LAW

18 Disclosures When We Must Follow Michigan State Law

<p>MCL 330.1748(12) AG Opinion No. 5125 (Ownership and Access to Medical Records)</p>	<p><u>Limiting Access to Mental Health Records</u> Michigan law provides the patient with greater access to psychotherapy notes that could not be accessed under HIPAA.</p> <p>HIPAA contains broader grounds for denying access than provided under Michigan law (e.g., under HIPAA, access to medical records held by correctional institution may be denied). Access may be denied only for reasons provided under Michigan law.</p>
<p>MCL 333.22210 (Privacy Policy for Short Term Facilities)</p>	<p><u>Record Access Request & Timely Response</u> Michigan law requires that a short-term facility make the records available for inspection and copying within a reasonable amount of time, not exceeding 7 days after the receipt of the written request (HIPAA = 30 days).</p>
<p>MCL 333.1143(a), 333.20175, 333.533, 333.21515 (Confidentiality of Peer Review Information for Psychiatric Facilities)</p>	<p><u>Not Subject to Court Subpoena</u> Michigan law prohibits public disclosure and disclosure even by court order or subpoena of peer review information.</p>
<p>MCL 333.6521 (Confidentiality of Substance Abuse Records)</p>	<p><u>Disclosure to Parole or Probation Officer</u> Michigan law permits disclosure of confidential health information to a parolee or probation officer only with the parolee or probationer's authorization. HIPAA permits disclosure without authorization for specified law enforcement purposes, such as in response to inquiries by parole or probation officers.</p>
<p>MCL 333.2632(2) & (3) (Confidentiality of Information Obtained During Research)</p>	<p><u>Disclosure of Research Information</u> Under Michigan law, the reporting or sharing of research information with the Michigan Department of Community Health is not admissible as evidence in a court action or before any other tribunal, board, agency or person. Research information may not be disclosed except as necessary to further the medical research project.</p>
<p>MCL 333.5114(3) (Reporting of HIV Test Results)</p>	<p><u>Manner of Compilation</u> A local health department cannot maintain a roster of names obtained, but may maintain individual files encoded to protect test subject identities. Local health departments are not functioning as covered entities in maintaining files of HIV test results.</p>
<p>MCL 333.20201 (2) (C) (Policies</p>	<p><u>Right to Restrict Disclosure</u></p>

<p>Regarding Patient Rights and Responsibilities in Facilities and Agencies)</p>	<p>A patient or resident may refuse the release of his or her personal and medical records to a person outside the facility except: (i) as required because of a transfer to another health care facility; (ii) as required by law; or (iii) as required by a third party payment contract.</p> <p>While HIPAA does not require covered entities to agree to the request, Michigan law mandates compliance with such requests.</p>
<p>MCL 333.20112 (Nursing Homes’ Policies for Access to Records)</p> <p>MCL 333.6112 & 6113 (Permitted Disclosure of Substance Abuse Records)</p> <p>MCL 333.17015 (Informed Consent for Abortion)</p> <p>MCL 333.16645 (Patient Identification on Orthodontic Devices and Dentures)</p> <p>MCL 333.5131 & 333.16281 (Disclosure of Child Abuse Investigation Records)</p>	<p><u>Nursing Home’s Patient Right Policies Must be Posted in the Facility</u></p> <p>A nursing home must develop and publicly post its policies relating to patient rights, including a policy providing reasonable access to patient records for inspection and copying upon receipt of a written request.</p> <p>Unlike HIPAA, Michigan law requires that the policy be posted in the facility.</p> <p><u>Disclosure with Consent or Authorization</u></p> <p>Prior written consent/authorization of the patient is required before disclosure of substance abuse records, even for treatment, payment or operations (unless medical emergency, research purposes without research subject identity, or with court order).</p> <p><u>Abortion Information – Disclosure with Patient Consent or by Judicial Process</u></p> <p>Permitted disclosure for identity and address only with the consent of the patient or by judicial process.</p> <p>HIPAA permits disclosure under other circumstances not permitted by Michigan law (i.e., public health purposes).</p> <p><u>Disclosure of PHI</u></p> <p>A dentist or dental laboratory which sells or furnishes denture or orthodontic devices shall permanently mark the patient’s name or social security number on the denture or orthodontic device, unless the patient specifically declines.</p> <p>Michigan law requires authorization prior to disclosure of confidential health information for TPO.</p> <p><u>Confidentiality of HIV or AIDS Test Results</u></p> <p>Disclosure of confidential health information is not permitted regarding HIV or AIDS. Such information may be disclosed pursuant to a court order to police for criminal investigation or child abuse.</p> <p>Under HIPAA, disclosure is permitted for child abuse or neglect investigation.</p>
<p>MCL 333.17020 & 333.17520</p>	<p><u>Access to Samples and Information</u></p>

<p>(Consent to Genetic Testing)</p>	<p>Michigan law requires consent/authorization as to who will have access to samples and information regarding genetic testing.</p> <p>HIPAA, however, permits disclosure without the individual's authorization if the disclosure is for TPO, or otherwise permitted by HIPAA.</p>
<p>MCL 333.18117, 333.16222, & 333.16281 (Confidentiality of Counselor Communications)</p> <p>MCL 333.18237, 333.16222, & 333.16281 (Privileged Disclosures to Psychologists)</p> <p>MCL 333.18513 & 333.1946 (Confidentiality of Communications to Social Workers)</p> <p>MCL 331.533 (Confidentiality of Information Utilized by Peer Review Entity)</p> <p>MCL 333.20191 (Infectious Agent and Emergency Treatment)</p>	<p><u>Disclosure with Consent</u></p> <p>Michigan law requires consent for disclosures by a licensed counselor or a limited licensed counselor, except for licensee's duty to report other licensee's violations and child abuse investigations.</p> <p>HIPAA permits disclosure for TPO without an authorization.</p> <p><u>Disclosure with Consent</u></p> <p>Michigan law requires consent for disclosures by a psychologist, except for licensee's duty to report other licensee's violations and child abuse investigations.</p> <p>HIPAA permits disclosure for TPO without an authorization.</p> <p><u>Disclosure with Authorization</u></p> <p>Requires authorization for disclosures by certified social workers unless part of a required supervisory process or pursuant to a duty of a mental health professional to warn.</p> <p>HIPAA permits disclosure for TPO without an authorization.</p> <p><u>Discoverability</u></p> <p>Peer review and related records are not discoverable pursuant to a discovery request. The records, however, may be produced pursuant to a subpoena or court order/warrant.</p> <p>HIPAA permits disclosure in response to a discovery request.</p> <p><u>Non-Disclosure of Infectious Agent and Patient Identity</u></p> <p>If test results indicate that the emergency patient is HIV infected, the health facility shall not reveal that the infectious patient is HIV infected unless that police, firefighter or other emergency personnel demonstrates in writing that the individual was exposed to blood, bodily fluids or airborne agents while providing assistance. Any disclosure made by the health facility shall not include the emergency patient's name.</p>