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# Is Your Emergency Preparedness Plan HIPAA Compliant? By Luis J. Acevedo, Attorney

By Marissa Machado posted 8 days ago

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Home and Community Support Service Agencies (“HCSSA”) usually tailor and develop their emergency preparedness policies and contingency plans narrowly, with an emphasis in meeting the requirements of 40 Tex. Admin. Code §97.256. While designing their policies to meet such requirements is a regulatory imperative, a failure to include steps to ensure compliance with required federal administrative safeguards may expose HCSSAs to violations of 40 Tex. Admin. Code §97.256 and the Health Insurance Portability and Accountability Act of 1996, as amended (“HIPAA”).

Rule §97.256(a) related to Emergency Preparedness Planning and Implementation indicates that an agency must have a written emergency preparedness and response plan that comprehensively describes its approach to a disaster that could affect its ability to provide services. This written plan must be based on a risk assessment that identifies the disasters, including those from man-made causes, that are likely to occur in the agency’s service area. On the other hand, 45 C.F.R. §164.308(a)(7) requires covered entities and business associates to establish and implement policies and procedures for responding to an emergency or other occurrence (for example, fire, vandalism, system failure, and natural disaster) that damages systems that contain electronic protected health information. These policies and procedures must be focused on restoring any loss of data, maintaining retrievable exact copies of electronic protected

health information and the protected health information, and establishing procedures to enable continuation of critical business processes for protection of the security of electronic protected health information while operating in emergency mode.

Problems arise, amongst others, when HCSSAs fail to: (i) include in their plan guidelines and processes for safeguarding protected health information; (ii) consider cyberattacks as man-made disasters that could affect their ability to provide services; and (iii) to include their HIPAA Compliance Officer as a member of the in the process of developing and implementing their plan.

HCSSAs should review, and if necessary amend their policies, to guarantee their plans address recovery and protection of protected health information during a disaster, with full participation and input from the agency's HIPAA compliance officer. Providers should not assume that "Disaster", as defined by 40 Tex. Admin. Code §97.2(43), does not include man-made events like a cyberattack. The Department of Health and Human Services' Office for Civil Rights ("OCR") has recently described cyberattacks as events that trigger a provider's obligation under 45 C.F.R. §164.308(a)(7)[1]. It is not unreasonable to expect our state regulatory to follow suit in future enforcement actions.

[1] Available at: <https://www.hhs.gov/sites/default/files/march-2018-ocr-cyber-newsletter-contingency-planning.pdf>



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