HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1147 Patient Access to Records
SPONSOR(S): Payne
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	12 Y, 1 N	McElroy	McElroy
2) Health Care Appropriations Subcommittee			
3) Health & Human Services Committee			

SUMMARY ANALYSIS

Patient engagement in their healthcare leads to better health outcomes, reduces administrative costs and increases patient satisfaction through better communication with providers. Patient access to treatment records is necessary for active engagement to occur. The use of electronic health records, patient portals and electronic personal health records by providers and patients facilitates access and, by default engagement.

Florida has enacted laws governing patient access to records; however these laws lack standardization. The right to inspect records, whether the records have to be produced in paper form or electronically, and the timeframe to produce copies are different depending on which kind of health care facility or health care practitioner is involved.

HB 1147 allows patients, residents and legal representatives to control how they receive requested records. Health care providers and facilities may produce the requested records in paper or electronic format, upon request. However, health care providers and facilities must produce the requested records in an electronic format, including access through a web-based patient portal or submission into a patient's electronic personal health record, if the health care provider or facility maintains an electronic health recordkeeping system.

The bill also standardizes access to treatment records for patients, residents and legal representatives, excluding nursing homes residents, predominantly utilizing elements of existing law or rule. It standardizes the timeframe that health care providers and facilities must produce records or allow inspection of records. All health care practitioners and facilities must provide records within 14 days of a request. The bill also requires health care facilities and providers to allow inspection of records within 10 days.

Federal law currently requires nursing homes to provide residents with access to their records within 24 hours (excluding holidays and weekends) and a copy of any requested records within two working days of request. The bill incorporates these timelines into Florida law.

The bill has no fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Access to Medical and Clinical Records – Federal Law

Health Insurance Portability and Accountability Act

The federal Health Insurance Portability and Accountability Act (HIPAA), enacted in 1996, protects personal health information (PHI).[1] In 2000, the U.S. Department of Health and Human Services promulgated privacy rules which established national standards to protect medical records and other PHI.[2] These rules address, among other things, the use and disclosure of an individual's PHI.

Only certain entities are subject to HIPAA's provisions. These "covered entities" include:

- Health plans;
- Health care providers;
- Health care clearinghouses; and
- Business associates of any of the above.[3]

HIPAA requires the disclosure of an individual's PHI to the individual who is the subject of the PHI information or his or her personal representative,[4] upon his or her request.[5] A covered entity must produce the PHI in the electronic form and format requested by the individual, if it is readily producible in such form and format.[6]

In general, HIPAA privacy rules preempt any state law that is contrary to its provisions.[7] However, if the state law is more stringent, the state law will apply.

Requirements for Long-Term Care Facilities

Access to medical and clinical records by residents of a nursing home receiving federal funding is controlled by 42 CFR s. 483.10 not HIPAA. Such nursing homes are required to provide residents with access to their records within 24 hours (excluding holidays and weekends) and a copy of any requested records within two working days of request.[8]

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[1] Pub. L. No. 104-191 (1996). Protected health information includes all individually identifiable health information held or transmitted by a covered entity or its business associate.
[2] U.S. Department of Health and Human Services, *Health Information Privacy*, available at https://www.hhs.gov/hipaa/for-professionals/privacy/index.html (last visited January 8, 2020). The rules were modified in 2002.
[3] U.S. Department of Health and Human Services, Office for Civil Rights, *Summary of the HIPAA Privacy Rule*, (last rev. May 2003), available at https://www.hhs.gov/sites/default/files/privacysummary.pdf. (last visited January 8, 2020).
[4] Supra, FN 2. A personal representative is generally a person with authority under state law to make health care decisions on behalf of an individual.
[5] Supra, FN 3. HIPAA limits the access to psychotherapy notes, certain lab results, and information compiled for legal proceedings. A covered entity may also deny access to personal health information in certain situations, such as when a health care practitioner believes access could cause harm to the individual or others.
[6] 45 CFR § 164.524(c)(2)(i).
[7] 45 C.F.R. s. 160.203.
[8] 42 CFR s. 483.10(2)(g)

Currently, all but two of the licensed nursing homes in this state receive federal funding and would be subject to these requirements.[9] The Agency for Health Care Administration cited six nursing homes for failing to meet these requirements in 2018 and five in 2019.[10]

Access to Medical and Clinical Records – Florida Law

Facilities

Chapter 408, F.S., is the core licensure act for health care facilities. Any requirement contained within this chapter applies to all health care facilities, which includes:[11]

- Laboratories authorized to perform testing under the Drug-Free Workplace Act;
- Birth centers;
- Abortion clinics;
- Crisis stabilization units;
- Short-term residential treatment facilities;
- Residential treatment facilities;
- Residential treatment centers for children and adolescents;
- Hospitals;
- Ambulatory surgical centers;
- Nursing homes;
- Assisted living facilities;
- Home health agencies;
- Nurse registries;
- Companion services or homemaker services providers;
- Adult day care centers;
- Hospices;
- Adult family-care homes;
- Homes for special services;
- Transitional living facilities;
- Prescribed pediatric extended care centers;
- Home medical equipment providers;
- Intermediate care facilities for persons with developmental disabilities;
- Health care services pools;
- Health care clinics; and,
- Multiphasic health testing centers.

Currently, Chapter 408 does not include a statute establishing standard requirements for health care facilities to produce, or allow inspection of, a patient's or resident's medical, clinical and interdisciplinary records. Rather, the requirements are in each facility licensure act and vary, sometimes greatly. Some health care facilities do not have statutory requirements related to a patient's access to records.

Hospitals, Ambulatory Surgical Centers, and Mobile Surgical Centers

After a patient has been discharged, a licensed hospital, ambulatory surgical center, and mobile surgical center (licensed facility) must, upon written request, timely provide patient records in its possession to the patient.[12] The records may also be released to the patient's guardian, curator, or personal representative, or in the absence of one of those persons, to the next of kin of a decedent or the parent of the minor, or to any other person designated in writing by such patient. A licensed facility

[9] Correspondence from the Agency for Health Care Administration to committee staff dated March 31, 2019, on file with the Health and Human Services Committee.
[10] Correspondence from the Agency for Health Care Administration to committee staff dated January 10, 2020, on file with the Health and Human Services Committee.
[11] Ss. 408.803(11) F.S., and 408.802, F.S.
[12] S. 395.3025, F.S. This does not apply to facilities that primarily provide psychiatric care or certain clinical records created at any licensed facility concerning certain mental health or substance abuse services.

must also allow a patient or their representative access to examine the records in its possession, but may establish reasonable terms to assure that the records will not be damaged, destroyed, or altered.[13] There is no statutorily established timeframe for when a licensed facility must provide this access.

Nursing Homes

Upon request, a nursing home must provide a competent resident with a copy of any paper and electronic records of the resident which it has in its possession.[14] Such records must include any medical records and records concerning the care and treatment of the resident performed by the nursing home, except for notes and report sections of a psychiatric nature.[15] A nursing home must provide these records within 14 days for a current resident and 30 days for a former resident.[16] A nursing home may refuse to furnish these records directly to a resident if it determines that disclosure would be detrimental to the resident's physical or mental health.[17] However, upon such a refusal, a resident may have his or her records furnished to a medical provider designated by the resident.[18]

A nursing home must also allow a resident's representative access to examine the records in its possession, but may establish reasonable terms to assure that the records will not be damaged, destroyed, or altered.[19] There is no statutorily established timeframe for when a nursing home must provide this access.

Mental Health Facilities

A clinical record is required for each patient receiving treatment for mental illness at a receiving facility[20] or treatment facility.[21] The treatment or receiving facility must release a patient's clinical records if requested by the patient, the patient's guardian or counsel or the Department of Corrections.[22] There is no statutorily timeframe for when a receiving or treatment facility must provide the requested clinical records.

Hospices

A hospice is required to release a patient's interdisciplinary record if requested by an individual authorized by the patient or by the court.[23] There is no statutorily established timeframe for when a hospice must release a patient's interdisciplinary record.

Practitioners

Unlike the law for health care facilities, health care practitioner law has standardized records access requirements that apply to all practitioners.[24] A practitioner must provide a copy of patient medical

[13] S. 395.3025(1), F.S.
[14] S. 400.145(1), F.S.
[15] Id.
[16] Id.
[17] S. 400.145(5), F.S.
[18] Id.
[19] Id.
[20] A "receiving facility" is a public or private facility or hospital designated by the Department of Children and Families to receive and hold or refer, as appropriate, involuntary patients under emergency conditions for mental health or substance abuse evaluation and to provide treatment or transportation to the appropriate service provider. S. 394.455(39), F.S.
[21] S. 394.4615(1), F.S.; A "treatment facility" is a state-owned, state-operated, or state-supported hospital, center, or clinic designated by the Department of Children and Families for extended treatment and hospitalization, beyond that provided for by a receiving facility, of persons who have a mental illness, including facilities of the United States Government, and any private facility designated by the Department of Children and Families when rendering such services. S. 394.455(47), F.S.
[22] S. 394.4615(2), F.S.
[23] S. 400.611(3), F.S.
[24] A health care practitioner is any person licensed under ch. 457, F.S., (acupuncture); ch. 458, F.S., (medical practice); ch. 459, F.S., (osteopathic medicine); ch. 460, F.S., (chiropractic medicine); ch. 461, F.S., (podiatric medicine); ch. 462, F.S., (naturopathy); ch. 463, F.S., (optometry); ch. 464, F.S., (nursing); ch. 465, F.S., (pharmacy); ch. 466, F.S., (dentistry, dental hygiene, and dental laboratories); ch. 467, F.S., (midwifery); part I, part II, part III, part V, part X, part XIII, or part XIV of ch. 468, F.S., (speech language pathology and audiology, nursing home administration, occupational therapy, respiratory therapy, dietetics and nutrition practice, athletic trainers, or orthotics, prosthetics, and pedorthics); ch. 478, F.S., (electrolysis); ch. 480, F.S., (massage practice); part III or part IV of ch. 483, F.S.,

records to the patient if requested by the patient or his or her legal representative.[25] The patient's medical records must be released without delay for legal review.

Medical Records Held by Substance Abuse Providers

A substance abuse service provider may only release records with the written consent of the individual whom they pertain.[26] However, under limited circumstances, such as a medical emergency, the service provider may release records without the consent of the individual whom they pertain.[27] There is no statutorily established timeframe for a service provider to release requested records.

Electronic Medical Records Patient Portals

Patient portals are health care provider-owned and -operated electronic applications which give patients secure access to protected health information and allow secure methods for communicating and sharing information with health care providers.[28] These portals are typically connected to the electronic health records of a particular health care provider, practice group or institution.[29]

Portals vary in sophistication ranging from those which only allow patients to view medical records to those which allow patients to access specific-patient educational materials, schedule appointments and request prescription refills.[30] Improved access to records and health care providers can promote better informed health care decision-making and patient engagement.[31]

One of the drawbacks to patient portals is the inability of patients to have a centralized repository of their health care records. Patient portals are owned by health care providers, rather than by patients, and may not be interoperable with the electronic health records of another provider. A patient who receives treatment or services from multiple health care providers or facilities could feasibly have his or her records dispersed between multiple patient portals.

Electronic Personal Health Record

An electronic personal health record (PHR) is a patient owned electronic application through which individuals can access, manage and share health information in a private, secure and confidential environment.[32] PHRs that are offered by health plans or health care providers are subject to the HIPAA privacy rule. [33] PHRs that are offered by vendors, employers and other non-covered entities are not subject to the HIPAA privacy rule. These entities have contractual privacy policies, which may vary, but are required under federal law to notify customers in the event of a security breach.[34]

(clinical laboratory personnel or medical physicists); ch. 484, F.S., (dispensers of optical devices and hearing aids); ch. 486, F.S., (physical therapy practice); ch. 490, F.S., (psychological services); or ch. 491, F.S., (clinical, counseling, and psychotherapy services).

[25] S. 456.057, F.S. In lieu of copies of certain medical records related to psychiatric or psychological treatment, a practitioner may release a report of examination and treatment.

[26] S. 397.501(7)(a), F.S.

[27] Id.

[28] Kooij, Groen, van Harten, *Barriers and Facilitators Affecting Patient Portal Implementation from an Organizational Perspective: Qualitative Study*, J Med Internet Res. 2018 May; 20(5): e183, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5970285/ (last viewed January 8, 2020).

[29] Id.

[30] Griffin, Skinner, Thornhill, Weinberger, *Patient Portals: Who uses them? What features do they use? And do they reduce hospital readmissions?*, Appl Clin Inform. 2016; 7(2): 489–501, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4941855/ (last visited on January 8, 2020).

[31] Id.

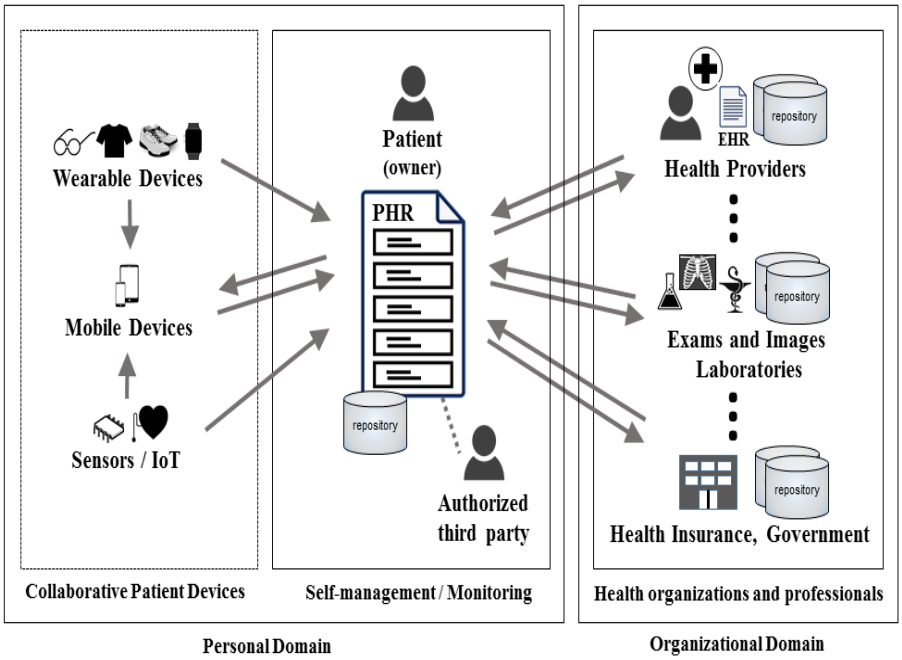
[32] Tang, Ash, Bates, Overhage, and Sands, *Personal Health Records: Definitions, Benefits, and Strategies for Overcoming Barriers to Adoption*, J Am Med Inform Assoc., 2006 Mar-Apr; 13(2): 121-126, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447551/pdf/121.pdf (last visited January 8, 2020).

[33] *Personal Health Records and the HIPAA Privacy Rule*, U.S. Department of Health and Human Services, Office for Civil Rights, available at https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/special/healthit/phrs.pdf (last visited January 8, 2020).

[34] 16 CFR § 318.3.

A PHR can be stand-alone or integrated. In a stand-alone PHR, the individual enters all information into the record.[35] This can be done manually by entering the medical data or by uploading medical records into the PHR. In an integrated PHR, information is submitted directly through electronic health care devices and through health care provider's electronic health records system.[36]

Integrated Personal Health Record[37]



Potential benefits of the use of a PHR, for patients, health care providers, and health care systems include:[38]

- **Empowerment of patients**. PHRs let patients verify the information in their medical record and monitor health data about themselves (very useful in chronic disease management). PHRs also provide scheduling reminders for health maintenance services.
- **Improved patient-provider relationships**. PHRs improve communication between patients and clinicians, allow documentation of interactions with patients and convey timely explanations of test results.
- **Increased patient safety**. PHRs provide drug alerts, help identify missed procedures and services, and get important test results to patients rapidly. PHRs also give patients timely access to updated care plans.
- **Improved quality of care**. PHRs enable continuous, comprehensive care with better coordination between patients, physicians and other providers.
- **More efficient delivery of care**. PHRs help avoid duplicative testing and unnecessary services. They provide more efficient communication between patients and physicians (e.g., avoiding congested office phones).
- **Better safeguards on health information privacy**. By giving patients control of access to their records, PHRs offer more selectivity in sharing of personal health information.
- **Bigger cost savings**. Improved documentation brought about by PHRs can decrease malpractice costs. PHRs' ability to reduce duplicative tests and services is a factor here, too.

[35] Id.
[36] Id.
[37] Roehrs A, da Costa CA, da Rosa Righi R, de Oliveira KSF, *Personal Health Records: A Systematic Literature Review*, J Med Internet Res 2017;19(1):e13, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5251169/ (last visited on January 8, 2020)
[38] Endsley, Kibbe, Linares, MD, Colorafi, *An Introduction to Personal Health Records*, Fam Pract Manag. 2006 May;13(5):57-62, https://www.aafp.org/fpm/2006/0500/p57.html (last visited on January 8, 2020).

PHRs can also potentially be beneficial in ensuring continuity of care in mass evacuations situations, such as hurricanes and brushfires.[39]

There are numerous potential barriers to the adoption and use of PHRs. These include privacy and security concerns, costs, integrity, accountability, health literacy and legal and liability risk.[40]

Effect of Proposed Changes

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Federal law currently requires nursing homes to provide residents with access to their records within 24 hours (excluding holidays and weekends) and a copy of any requested records within two working days of request. The bill incorporates these timelines into Florida law.

The bill defines "legal representative" as a client's attorney who has been designated by the patient or resident to receive copies of the patient's or resident's medical, care and treatment, or interdisciplinary records; any legally recognized guardian of the patient or resident; any court appointed representative of the patient or resident; or any person designated by the patient or resident or by a court of competent jurisdiction to receive copies of the patient's or resident's medical, care and treatment, or interdisciplinary records. This is current definition of legal representative found in the Board of Medicine's rules.

The bill provides an effective date of July 1, 2020.

B. SECTION DIRECTORY:

Section 1: Amends s. 394.4615, F.S., relating to clinical records confidentiality.
Section 2: Amends s. 395.3025, F.S., relating to patient and personnel records.
Section 3: Amends s. 397.501, F.S., relating to rights of individuals.
Section 4: Amends s. 400.145, F.S., relating to copies of records of care and treatment of a resident.
Section 5: Creates s. 408.833, F.S., relating to client access to medical records.
Section 6: Amends s. 456.057, F.S., relating to ownership and control of patient records.
Section 7: Amends s. 316.1932, F.S., relating to tests for alcohol, chemical substances, or controlled substances.
Section 8: Amends s. 316.1933, F.S., relating to blood test for impairment or intoxication in cases of death or serious bodily injury; right to use reasonable force.
Section 9: Amends s. 395.4025, F.S., relating to trauma centers.
Section 10: Amends s. 440.185, F.S., relating to notice of injury or death.
Section 11: Provides an effective date of July 1, 2020.

[39] Tang, Ash, Bates, Overhage, and Sands, *Personal Health Records: Definitions, Benefits, and Strategies for Overcoming Barriers to Adoption*, J Am Med Inform Assoc., 2006 Mar-Apr; 13(2): 121-126, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447551/pdf/121.pdf (last visited January 8, 2020).
[40] Vance, Tomblin, Studney, Coustasse, *Benefits and Barriers for Adoption of Personal Health Records*, 2015, https://mds.marshall.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1135&context=mgmt_faculty (last visited January 8, 2020).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES