

# HIPAA COMPLIANCE UPDATE: FACEBOOK, TWITTER AND LEGAL LIABILITIES

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Hogan Marren, Ltd.

# Agenda

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- Health care social media landscape
- HIPAA compliance
- Other related legal issues
- Developing a social media policy
- Questions

# Health Care Social Media Landscape

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## **Social media continues to grow at a rapid rate**

- Facebook
  - ▣ Founded in 2004.
  - ▣ Currently more than 500 million active users, half of whom log on in any given day.
- Twitter
  - ▣ First tweet in March of 2006.
  - ▣ Averaging 140 million tweets per day and one billion each week.
- You Tube
  - ▣ Founded in February 2005.
  - ▣ As of May 2010, more than 2 billion video views per day.

# Health Care Social Media Landscape

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## Related developments propel growth

- Mobile devices
  - ▣ CDC text messaging campaign for H1N1 flu information.
  - ▣ Mobile internet access is projected to double by 2014.
- Mobile apps
  - ▣ More than 250,000 apps are available for the iPhone.
  - ▣ Nine percent of mobile phone users had apps on their phone that help them track or manage their health.
- Mobile health devices.
- What's next?

# Health Care Social Media Landscape

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## **Uptake of social media is fast and widespread**

- 86 percent of adults ages 18-29 use social networking sites.
- Among adults ages 50 and older, social networking has nearly doubled over the past year – from 22 percent to 42 percent.
- 61 percent of adults ages 30-49 now use social networking sites.

Source: Pew Research Center's Internet & American Life Project Surveys, September 2005-May 2010.

# Health Care Social Media Landscape

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## **Social media has invaded the workplace**

- Individuals use social media for professional and personal communication.
- Employees are increasingly using social media while at work.

# Health Care Social Media Landscape

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## Health care industry participation expanding

- Pharma led the way with efforts to promote their brands.
- As of January 2011, 906 hospitals using social media to reach patients and educate the public.
  - ▣ 719 Facebook pages
  - ▣ 674 Twitter accounts
  - ▣ 448 You Tube channels

Source: Found in Cache <http://ebennett.org/hsnl/>

- Health insurers mainly focused on customer service issues.

# Health Care Social Media Landscape

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Dear Nexium, your purple pill is \$180 WITH insurance? What's inside it? iPhones?

3:24 PM May 19th via Twitter for iOS  
Retweeted by 6 people

**redban**

@redban Saw your tweet about access to NEXIUM® (esomeprazole magnesium) AstraZeneca may be able to help. Call us @ 800-236-9933

8:51 AM May 21st via web in reply to redban

**AZhelps**  
AstraZeneca Helps

**facebook**

Children's Hospital of Boston

Children's Hospital Boston

My wife works for Children's Hospital in Boston. I am so proud to say I am married to a woman that helps bring in donations to help so many of the children at the hospital that are sick and I hope they feel up close.

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**YouTube** Search Browse Upload socialmediadelivered Sign Out

**MAYO CLINIC** The needs of the patient come first. Mayo Clinic's Primary Value

Mayo Clinic Channel  
Subscribe All Uploads Favorites Playlists

myofibrosis-mayo clinic

00:19 / 10:28 240p

Info Favorite Share Playlists Flag

**Myofibrosis-Mayo Clinic**  
From: mayoclinic | July 14, 2009 | 4,939 views  
Mayo Clinic Dr. Reuben Mesa discusses the symptoms, treatment and research being conducted for Myofibrosis.

View comments, related videos, and more

Search: mesa  
Search results for "mesa"

- Chronic Myeloid Leukemia-Mayo Clinic  
mayoclinic - 659 views
- Myelodysplastic Syndrome (MDS) -Mayo  
mayoclinic - 773 views
- Myelofibrosis Update -  
Mayo Clinic  
mayoclinic - 1,434 views
- Myelofibrosis-Mayo  
Clinic  
mayoclinic - 4,939 views
- POLYCYTHEMIA VERA (PV) - Mayo Clinic  
mayoclinic - 2,651 views
- Sharing Mayo Clinic  
Video Highlights  
mayoclinic - 1,689 views
- The Value of YouTube  
Videos for Cancer  
mavoclinic - 190 views

Subscribers (1893)

- lucasjuni...
- BodyInMind1
- LakeandR...
- abianchi13
- sahlinas
- aciuvideos
- EvoivNetwork

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# Health Care Social Media Landscape

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## **The cautionary tales continue**

- California Department of Public Health is investigating an incident in which nurses and staff posted photographs of a dying 60-year old stabbing victim to Facebook.
- The Rhode Island Board of Medical Licensure reprimanded a physician and ordered her to pay a fee after she was found to have used Facebook “in a manner that inadvertently violated confidentiality,” after she communicated about her experience working in a hospital emergency department. The hospital also terminated her privileges.

# HIPAA Compliance

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## Privacy: Protected Health Information (PHI)

- PHI is:
  - ▣ information created or received by a covered entity (*health care provider, health plan or health care clearinghouse*), or its Business Associate ;
  - ▣ identifies, or could be used to identify, an individual ; and
  - ▣ relates to that individual's past, present or future physical or mental health condition, receipt of health care by the individual, or payment for the provision of health care services to that individual.

*Under HIPAA, PHI in the “public domain” is still PHI when used or disclosed by a covered entity.*

# HIPAA Compliance

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## **Privacy: Authorization**

- May use and disclose PHI for purposes of treatment, payment and health care operations without an authorization.
- Must obtain an authorization in order to use or disclose PHI for marketing activities.

*A covered entity must have a valid HIPAA authorization for disclosures of PHI through social media, e.g., Patient of the Month.*

# HIPAA Compliance

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## **Privacy: De-Identified PHI**

- When health information does not identify an individual and there no reasonable basis to believe that it can be used to identify an individual, it is “de-identified” and is not PHI.
- Standard for de-identification of PHI currently under review by HHS.

*If choose to de-identify, keep abreast of changes to the standards for de-identification.*

# HIPAA Compliance

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## Privacy: De-Identified PHI (continued)

- Two options for de-identifying PHI:
  - ▣ safe harbor: remove all of eighteen identifiers and have no actual knowledge that the remaining information could be used to identify an individual, either alone or in combination with other information.
  - ▣ statistical approach: requires a qualified statistical or scientific expert.

*Removing names and addresses is not sufficient.*

# HIPAA Compliance

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## **Privacy: Incidental Uses and Disclosures**

- A covered entity is permitted to use or disclose PHI incident to other permitted uses and disclosures, but only to the extent compliant with HIPAA privacy rule.
- Incidental uses or disclosures resulting from failure to apply reasonable safeguards is a HIPAA violation.

*Policies for use of social media and mobile devices must incorporate safeguards to protect privacy of PHI.*

# HIPAA Compliance

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## **Security: Electronic PHI (ePHI)**

- HIPAA Security Rule applies to ePHI
  - ▣ Transmitted or maintained in electronic media.
  - ▣ Electronic media includes storage media such as flash drives, as well as transmission media such as the internet.
  - ▣ Transmissions of paper via fax and voice via the telephone are not electronic media.

*PHI transmitted through social media is subject to the HIPAA Security Rule, as well as the HIPAA Privacy Rule.*

# HIPAA Compliance

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## **Security: Safeguards, Policies and Procedures**

- Develop and implement administrative and technical safeguards to protect electronic PHI.
- Review policies and procedures periodically and update, as needed, in response to environmental or operational changes.

*Access control, workstation use and security, risk analysis, risk management, training and discipline polices likely to require updating for impact of social media.*



# HIPAA Compliance

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## **Security: Risk Analysis**

- Conduct an accurate and thorough assessment of potential risks and vulnerabilities to confidentiality, integrity and availability of ePHI.

*Must consider risk arising from members of your workforce having access to social media, in conjunction with its ease of use.*

# HIPAA Compliance

## Breach Notification

- Must provide notice of any breach of unsecured PHI.
- Breaches are violations of the HIPAA Privacy Rule that pose a significant risk of harm to the individual.
- Notice must included specific content and must be provided without delay.

*PHI posted on any social networking site will trigger a duty to notify if it is a breach.*

# HIPAA Compliance

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## **Post HITECH Enforcement: Willful, Neglect Standard**

- New standard: wanton or reckless conduct and a departure from ordinary care.
- Highest level of penalty: \$50,000 per violation with an annual maximum of \$1.5 million.

*Consider what ordinary care requires in developing policies and procedure, e.g., since every mobile phone has a camera need to prohibit individuals from taking pictures.*

# HIPAA Compliance

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## **Post HITECH Enforcement: Penalties**

- Increased the civil monetary penalties for HIPAA violations.
- Individual criminal liability for wrongful disclosure of PHI.
- Expanded the enforcement mechanisms and resources.
- Now actual enforcement and penalties.
  - ▣ Mass. General : \$1 million
  - ▣ Cygnet Health: \$4.3 million

*Factor rigorous enforcement and steep penalties into evaluating business risk of social media.*

# Other Related Legal Issues

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## **State law causes of action for privacy violations**

- HIPAA does not pre-empt more stringent state Law, e.g., law is more protective of PHI.
- State statutes prohibit wrongful disclosure of health information.
- Potential tort liability for invasion of privacy and defamation.

# Other Related Legal Issues

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## **Practicing medicine through social networking**

- Could create a doctor-patient relationship, e.g., a physician “friending” an individual asking for advice, which may in turn provide a basis for malpractice liability.
- If not licensed in the state where the “patient” is located, may violate applicable state medical practice act.

# Other Related Legal Issues

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## **Monitoring employee use of the internet**

- Stored Communications Act (“SCA”) and Electronic Communication Privacy Act (“ECPA”): generally permit monitoring if employee has no “reasonable expectation of privacy” and employer has legitimate business purpose.
- Must balance against free speech and off-duty conduct statutes.

# Social Media Policy

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## Determine organizational approach

- Ask: Is this a risk to mitigate an opportunity to be exploited or some combination of both?
- Define organizational objectives, possibilities include:
  - ▣ Promote the brand
  - ▣ Foster community
  - ▣ Provide information
  - ▣ Train personnel
  - ▣ Connect with mainstream media
  - ▣ Communicate in a crisis
  - ▣ Collaborate with partners (*tread carefully if implicates Medicare or other government payors*)



# Social Media Policy

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## **Utilize a collaborative process**

- Legal/compliance
- HIPAA Privacy and Security Officers
- Human resources
- Marketing
- Information Technology
- Medical Staff

# Social Media Policy

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## **Integrate with other polices**

- HIPAA Privacy and Security
- Other Confidentiality and Non-Disclosure
- Intellectual Property
- Acceptable Use for Information and Technology
- Code of Conduct

# Social Media Policy

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## **Mitigate the risk by providing clear direction**

- Define social media.
- Prohibit sharing of PHI unless there is a valid HIPAA authorization.
- Prohibit sharing of confidential business information.
- Require disclaimers.
- Require approvals.
- Require training.

# Social Media Policy

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## **Mitigate the risk (continued)**

- Require compliance with other organizational policies, procedures and safeguards.
- Appropriately advise employees of monitoring.
- Reserve the right to remove postings at any time for any reason.
- Impose sanctions up to and including termination.
- Advise individuals of criminal liability for wrongfully obtaining or disclosing PHI.

# Social Media Policy

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## **Exploit the opportunity by defining best practices**

- Add value.
- Consider content, language and tone: Think CNN, your mother and your boss.
- Correct misinformation.
- Know when to take a conversation off-line.
- Admit mistakes.

# Social Media Policy

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Mistakes will be made.

The screenshot shows a Twitter thread. At the top is the profile header for the American Red Cross (@RedCross). The first tweet is from Ryan, stating: "Ryan found two more 4 bottle packs of Dogfish Head's Midas Touch beer.... when we drink we do it right #gettngslizzerd". It is timestamped "HootSuite · 2/15/11 11:24 PM". A reply from @riaglo (Gloria Huang) follows: "Rogue tweet frm @RedCross due to my inability to use hootsuite... I wasn't actually #gettngslizzard but just excited! #nowembarassing". This reply is timestamped "2 hours ago via HootSuite" and includes interaction icons for Favorite, Retweet, and Reply. A second tweet from @RedCross responds: "We've deleted the rogue tweet but rest assured the Red Cross is sober and we've confiscated the keys." This tweet is timestamped "57 minutes ago via Übertwitter" and includes interaction icons. Below this is a line "Retweeted by stefsealy and 51 others" and a row of small profile pictures of users who retweeted.

American Red Cross  
@RedCross

Ryan found two more 4 bottle packs of Dogfish Head's Midas Touch beer.... when we drink we do it right #gettngslizzerd

HootSuite · 2/15/11 11:24 PM

@riaglo  
Gloria Huang

Rogue tweet frm @RedCross due to my inability to use hootsuite... I wasn't actually #gettngslizzard but just excited! #nowembarassing

2 hours ago via HootSuite ☆ Favorite ↻ Retweet ↩ Reply

@RedCross  
American Red Cross

We've deleted the rogue tweet but rest assured the Red Cross is sober and we've confiscated the keys.

57 minutes ago via Übertwitter ☆ Favorite ↻ Retweet ↩ Reply

Retweeted by stefsealy and 51 others

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# Social Media Policy

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## Consult available resources

- Ed Bennet's Collection of Health Care Social Media Policies at <http://ebennett.org/hsnl/hsmp/>
- Social Media Governance's collection of Social Media Policies at <http://socialmediagovernance.com/policies.php?f=0>
- CDC's *The Health Communicator's Toolkit* at [http://www.cdc.gov/healthcommunication/ToolsTemplates/SocialMediaToolkit\\_BM.pdf](http://www.cdc.gov/healthcommunication/ToolsTemplates/SocialMediaToolkit_BM.pdf)
- AMA Policy: Professionalism in the Use of Social Media at <http://www.ama-assn.org/ama/pub/meeting/professionalism-social-media.shtml>

Questions?