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Legal Implications Of Video Recording Devices In Hospitals

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Cell phones, tablets and other mobile devices are now everywhere and they allow individuals to easily make visual and audio recordings in any setting, including all areas of a hospital. Additionally, surveillance cameras are now frequently used by businesses, including hospitals, to monitor their own employees as well as the activities of others on and around their premises. This article addresses the legal rules related to the use of video recordings in a hospital, particular in light of the privacy rules which apply to medical information.

Use of recording devices by hospital visitors and patients

Patient's friends and family members, as well as patients themselves, frequently want to make video recordings in the hospital. While this is understandable and generally harmless, it can lead to problems when it encroaches on other patient's privacy rights. Patients and visitors do not have a legal right to make video recordings in a hospital. This means that a hospital is free to enact policies restricting the ability of patients and visitors to make recordings and it is advisable to do so.

Under the HIPAA Privacy Rule, a hospital is not generally responsible for the actions of individuals who are not members of the hospital's "workforce", which is defined by HIPAA as employees, volunteers, trainees, and other persons whose conduct at work is under the direct control of the hospital. Thus, video recordings by patients and their friends and family that captures PHI regarding another patient will not necessarily constitute a HIPAA violation on the part of the hospital. However, HIPAA does require hospitals and other covered entities to put in place appropriate safeguards to protect the privacy of PHI. So, if a patient's PHI is recorded on video due to a hospital's failure to have appropriate safeguards in place, that would constitute a HIPAA violation on the part of the hospital. Thus, as a safeguard to protect the privacy of PHI, it is recommended that hospitals have a policy in place restricting the ability of patients and visitors to make recordings in the hospital. This policy could impose an outright ban on the use of any recording

devices in the hospital, or some lesser restrictions, such as only allowing recordings of patients by individuals who are friends or family members of the patient. The exact nature of the policy is up to the discretion of the hospital, so long as it is sufficient to reasonably safeguard the privacy of PHI.

Use of recording devices by hospital employees

Another privacy consideration for hospitals is recordings made on personal cameras, phones or other devices by employees. There is generally no legitimate clinical or operational need for such recordings by employees and allowing employees to do so poses a significant risk of privacy violations for a hospital. Because of these privacy concerns, hospitals should significantly restrict or prohibit employees from making their own video recordings in the workplace and strictly enforce these restrictions through training and personnel actions.

Video surveillance of hospital facilities

Most hospitals use surveillance cameras in their facilities. Video surveillance is generally legal unless the subject of the surveillance has a “reasonable expectation of privacy” under the circumstances. The law says that when individuals are in an area that is open to the public, they generally have no reasonable expectation of privacy from being photographed or videotaped. This means that hospitals are legally allowed to post video surveillance cameras in common areas such as parking lots, parking garages, reception areas and cafeterias. This same rationale also applies to other areas that are open to the public, such as emergency department waiting rooms and public hallways, and hospitals can legally post surveillance cameras in such areas. If surveillance cameras are used in these areas, the hospital should post signs stating that video surveillance is being used to put individuals on notice that they should not have an expectation of privacy in that area.

Video surveillance in areas where patient care is being delivered raises additional legal issues. Patient care areas are not generally open to the public and individuals in some patient areas will have a heightened expectation of privacy and could file a lawsuit against a hospital for invasion of privacy if they are subject to video surveillance. For example, courts have held that patients can have a

reasonable expectation of privacy in their private hospital rooms. Because of these privacy concerns, video surveillance generally should not be used in areas where patients have a heightened expectation of privacy, such as restrooms, showers, and changing areas, private rooms, or other similar areas. Video surveillance in other patient areas where there is a lowered expectation of privacy, such as emergency departments or operating rooms, does not create the same legal risk of invasion of privacy when a hospital can demonstrate a particular need for surveillance in the area, such as problems with violence in the emergency department, or specific concerns about inappropriate conduct by practitioners or staff in an operating room. When surveillance is used in such areas, it is recommended that hospitals have patients who may be subject to surveillance sign a consent form acknowledging that surveillance is being used. This consent language can be on a separate form or it can be incorporated into existing forms. This will serve to notify patients that they do not have an expectation of privacy, as well as ensure compliance with guidance from CMS which expressly states that video recording of patients receiving medical treatment in

a Medicare participating hospital requires the consent of the patient or his/her representative. There can be some rare instances where surveillance of patients can be legally justified without their consent. Some court opinions have upheld hidden surveillance in private patient rooms when there was sufficient suspicion of criminal activity and the surveillance was used to further patient safety. Because of the privacy issues involved, hospitals that are considering placing video surveillance cameras in patient care area should first confer with legal counsel regarding the specific facts and circumstances involved.

A related legal issue is whether hospitals can conduct video surveillance of their employees in the workplace. Employees do not have a general right to privacy in the workplace that prohibits video surveillance, except in certain specific situations where there is a higher expectation of privacy. Thus, employers can generally use video surveillance of employees in most areas in the workplace, such as hallways, break rooms, etc. Courts have held, however, that employees have a right to privacy in certain areas and while engaged in certain activities in the workplace. For example, courts have held that employees have a reasonable expectation of privacy in employer restrooms, and in locker rooms where employees change clothes, and video surveillance generally should not be used in such areas. As discussed above with regard to video in patient care areas, video surveillance might be justified even in areas where employees have a reasonable expectation of privacy when there is a sufficient suspicion of illegal or improper activity. Again, prior to placing video surveillance cameras in such areas, hospitals should consult with legal counsel. Also, except in unusual circumstances, a hospital should notify its employees when video surveillance is being used in the workplace to put employees on notice that they do not have a reasonable expectation of privacy in the area being recorded.

HIPAA and video surveillance

Although video surveillance in a hospital can violate patients privacy rights by intruding on their privacy, such surveillance will generally not constitute a HIPAA violation and HIPAA does not prohibit such surveillance. The mere fact that protected health information is recorded by a hospital surveillance camera, is not in itself a violation of HIPAA. PHI captured on surveillance camera will generally be an “incidental” access or use of PHI which would not violate HIPAA as long as the access to, use and disclosure of the captured PHI otherwise complies with the Privacy Rule. To ensure HIPAA compliance, hospitals that use video surveillance cameras in a way that might record PHI should limit access to the recordings to individuals who need the information for legitimate hospital operations and any recorded PHI should be kept secure and only disclosed as allowed by the Privacy Rule.

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