

Use of Online Tracking Technologies May Result in HIPAA Breaches



December 27, 2022

In last month's [Health Law Update](#), we reported on a [Notice of Data Breach](#) posted on the website of Advocate Aurora Health, Inc. (Advocate) on October 20, 2022, and the subsequent [class action lawsuit](#) filed against Advocate and Meta Platforms, Inc. That lawsuit related to Advocate's use of Internet tracking technologies and disclosures of certain protected health information (PHI) to specific vendors because of pixels on the health system's websites or applications.

On December 1, 2022, the Department of Health & Human Services, Office for Civil Rights (OCR) posted a [Bulletin](#) on its website titled, "Use of Online Tracking Technologies by HIPAA Covered Entities and Business Associates." In the Bulletin, the OCR addresses the obligations of covered entities and business associates when using online tracking technologies. "Regulated entities are not permitted to use tracking technologies in a manner that would result in impermissible disclosures of PHI to tracking technology vendors or any other violations of the HIPAA Rules. For example, disclosures of PHI to tracking technology vendors for marketing purposes, without individuals' HIPAA-compliant authorizations, would constitute impermissible disclosures."

The Bulletin addresses:

- What is a tracking technology?
- How do the HIPAA Rules apply to regulated entities' use of tracking technologies?

o Tracking on user-authenticated webpages

o Tracking on unauthenticated webpages

o Tracking within mobile apps

o HIPAA compliance obligations for regulated entities when using tracking technologies

Important takeaways include:

- The OCR has concluded that when a health care provider collects a patient's individually identifiable information through its website or mobile app, the information connects the individual to the provider, thus making such information PHI.
- Simply providing notice about use of tracking technologies to website or app users by virtue of a website privacy policy, notice, or terms and conditions of use is not enough to permit a covered entity to disclose PHI to a tracking vendor; a business associate agreement and full compliance with HIPAA is required.
- Website banners that ask users to accept or reject a website's use of tracking technologies, such as cookies, do not constitute a valid HIPAA authorization from such users.
- Use of such tracking technologies and disclosures of PHI to tracking technology vendors creates unreasonable risk of HIPAA breaches, absent full HIPAA compliance.

For additional information or if you would like assistance with your HIPAA compliance program, please contact:

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