

FAQ: SERVICES TO IMMIGRANT PATIENTS

Revised: May 4, 2017



IMMIGRATION ENFORCEMENT AT HEALTH CENTERS

1. When immigration officials are in the area health centers report patients not coming to appointments and many reporting not even leaving their homes. Are there any actions a health center can take to help ensure their patients' safety and privacy when they see ICE/law enforcement outside the health center?

Health centers may provide information to their patients regarding their rights with respect to Immigration and Customs Enforcement (ICE) and other law enforcement by posting signage with patient rights or providing “know your rights” information found on California Health+ Advocates Immigration Resource Page, (http://capca.nationbuilder.com/immigrant_resources) or provided by our immigrant partners, such as, the National Immigration Law Center (NILC), the Immigrant Legal Resource Center (ILRC), the American Civil Liberties Union (ACLU), or other Immigration Law experts. Health centers cannot prevent ICE officials from coming into public spaces outside of or within the health center facility.

Health centers should know that the Department of Homeland Security (DHS), which oversees the actions of ICE and Customs and Border Patrol (CBP), maintains a policy that immigration enforcement actions such as arrests, interviews, searches, and surveillance will generally not occur at sensitive locations, which includes health care facilities like health centers. This policy is generally referred to as the DHS sensitive location policy.

There are exceptions to this policy. For instance, ICE officials may carry out enforcement actions in sensitive locations without prior approval in exigent circumstances related to national security, terrorism, or public safety, or where there is an imminent risk of destruction of evidence material to an ongoing criminal case. Absent such circumstances, ICE officials are generally required to consult with their supervisor prior to taking enforcement actions.

If a health center believes that enforcement activities are occurring in a manner inconsistent with the DHS sensitive location policy, a health center may lodge a complaint about a particular DHS enforcement action that may have taken place in violation of the sensitive location policy. To make a complaint, use the following contact information:

- ICE Enforcement and Removal Operations (ERO) through the Detention Reporting and Information Line at (888)351-4024 or through the ERO information email address at ERO.INFO@ice.dhs.gov, also available at <https://www.ice.gov/webform/ero-contact-form>
- The Civil Liberties Division of the ICE Office of Diversity and Civil Rights at (202) 732-0092 or ICE.Civil.Liberties@ice.dhs.gov
- CBP Information Center to file a complaint or compliment via phone at 1 (877) 227-5511, or submit an email through the website at <https://help.cbp.gov>.

It is important to note that the DHS policy on sensitive locations is ultimately determined by the Administration and can be changed without Congressional approval or formal rulemaking by the executive branch. A copy of the memorandum and frequently asked questions can be found on the U.S. Immigration and Customs Enforcement (ICE) website [here](#).

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2. *What are the distinctions between public and private spaces and the legal implications of each space?*

Some health centers have sought to adopt internal policies and procedures that limit law enforcement on their premises by designating certain spaces as “private” protected spaces in which law enforcement may not enter without a warrant.

Because of the need to make a case-by-case determination, health centers should consult competent legal counsel when adopting and implementing internal policies and procedures related to the public/private space distinction. If a health center adopts policies that are intended to limit immigration enforcement on their premises by posting notices on facility entrances or designating spaces as private versus public spaces, the health center should be aware that such designations do not guarantee that immigration officials will or must comply with those policies.

The key test for assessing whether law enforcement is allowed near or in a health center is whether patients have a reasonable expectation of privacy. Because health centers must be open to the public and are required to serve all residents regardless of their ability to pay, it is very difficult for a health center to maintain a reasonable expectation of privacy for patients in the main public areas of the health center (*e.g.* the waiting room or lobby). However, health centers may work with counsel to establish some limitations on the space within the health center by restricting areas to only patients and individuals accompanying the patient.

Under the Fourth Amendment of the U.S. Constitution, the test for determining whether an individual has a reasonable expectation of privacy looks at not only whether that person subjectively has a reason to expect privacy, but also whether there is an objective expectation of privacy. For example, it is more probable that a patient at a health center has a reasonable expectation of privacy in a doctor’s office or examination room than in a waiting area or lobby area at a health center that opens its doors to all patients and where there are many other individuals present in the area. Given that a doctor’s office or examination room is not public space, law enforcement would need to obtain a warrant signed by a judge before searching such areas.

Ultimately, there is no single test for determining what makes an expectation of privacy reasonable, and whether there is a reasonable expectation of privacy is a fact intensive inquiry. According to Fourth Amendment case law, some factors that are relevant to whether there is a reasonable expectation of privacy may include:

- the number of people in the space;
- who has access to certain areas of the health center;
- how many people have access to the space at any given time;
- whether there are signs designating spaces or rooms as private space;
- whether there is a security guard present at the entrance

Lastly, while health centers must serve all individuals of their community regardless of their immigration status, health centers should not take steps to conceal or shield undocumented immigrants from enforcement, such as hiding undocumented immigrants in certain areas of the health center away from law enforcement officials. Such concealment could constitute a criminal offense punishable by fine and/or imprisonment.

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PRIVACY RIGHTS & INFORMATION SHARING

3. What are the protections to patient information?

As health care providers, health centers are required to protect the confidentiality of certain patient information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191.

The HIPAA Privacy Rule addresses the use and disclosure of individuals' health information, called "protected health information" (PHI) by organizations subject to the Privacy Rule, which are called "covered entities," as well as standards for individuals' privacy rights to understand and control how their health information is used and disclosed.

A covered entity may not use or disclose PHI except: (1) as permitted or required by the Privacy Rule; or (2) as the individual who is the subject of the information (or the individual's personal representative) authorizes in writing. The HIPAA Privacy Rule only allows covered entities to disclose PHI to law enforcement officials, without the individual's written authorization, for certain limited purposes. The circumstances in which a health center may be required to disclose PHI to law enforcement are covered in the next section.

PHI includes demographic data and information that identifies the individual that relates to: the individual's past, present or future physical or mental health or condition; the provision of health care to the individual; or the past, present, or future payment for the provision of health care to the individual. PHI includes many common identifiers (*e.g.*, name, address, birth date, Social Security Number).

Health care providers that provide certain behavioral health services must also protect patient information pursuant to the Confidentiality of Alcohol and Drug Abuse Patient Records regulations (42 CFR Part 2), which restrict the disclosure and use of patient records that include information on substance use diagnoses or services.

The Part 2 regulations apply if:

1. A provider is *not* a general medical care facility, then the provider meets Part 2's definition of a "program" if it is an individual or entity that holds itself out as providing, *and* provides alcohol or drug abuse diagnosis, treatment or referral for treatment.
2. The provider is an identified unit within a general medical care facility, it is a "program" if it holds itself out as providing, *and* provides, alcohol or drug abuse diagnosis, treatment or referral for treatment.
3. The provider consists of medical personnel or other staff in a general medical care facility, it is a program if its primary function is the provision of alcohol or drug abuse diagnosis, treatment or referral for treatment *and* is identified as such specialized medical personnel or other staff within the general medical care facility.

Health centers that receive federal grant funds under Section 330 of the Public Health Service Act are also subject to confidentiality requirements under the implementing regulations. 42 CFR §51c.110 states:

All information as to personal facts and circumstances obtained by the project staff about recipients of services shall be held confidential, and shall not be divulged without the individual's consent except as may be required by law or as may be necessary to provide service to the individual or to provide for

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medical audits by the Secretary or his designee with appropriate safeguards for confidentiality of patient records. Otherwise, information may be disclosed only in summary, statistical, or other form which does not identify particular individuals.

Finally, all federal grant recipients must also protect personally identifiable information (“PII”) subject to the terms and conditions of the grant. See 45 CFR §75.365. Protected PII is defined as “an individual's first name or first initial and last name in combination with any one or more of types of information, including, but not limited to, social security number, passport number, credit card numbers, clearances, bank numbers, biometrics, date and place of birth, mother's maiden name, criminal, medical and financial records, educational transcripts. This does not include PII that is required by law to be disclosed.” 45 CFR §75.2.

4. Under what circumstances is a health center required to disclose protected health information without a patient’s consent?

a. HIPAA

When health centers receive a request for patient PHI, the response to the request will fall into one of three categories:

- Required disclosure even if the patient has not expressly authorized disclosure
- Permissible disclosure, but not a required disclosure
- Prohibited disclosure without patient authorization (see question 3 for discussion on prohibited disclosures)

As a covered entity under HIPAA, health centers may be required to report PHI to a law enforcement official when a law requires such reports, including laws that require the reporting of certain types of wounds or other physical injuries. State laws commonly require health care providers to report incidents of gunshot or stab wounds, or other violent injuries. State laws may also require health care providers to report child abuse or neglect and/or adult abuse, neglect, or domestic violence. A covered entity may also be required to provide PHI to a law enforcement official in compliance with a properly issued court order, warrant, subpoena, or summons. The type of entity issuing the request determines a covered entity’s response:

Court-ordered requests: Generally, a covered entity must disclose PHI if the information is requested pursuant to a court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer, or a grand jury subpoena. A covered entity should only release the information expressly authorized by the court-ordered request, whether a warrant, subpoena, grand jury subpoena, or administrative order.

A warrant can also name an individual that law enforcement is seeking to arrest. If law enforcement attempts to execute a warrant, the designated personnel at the health center should calmly direct the law enforcement officer to an area away from other patients (such as a conference room, but avoiding private areas where patients are receiving treatment) to inspect the warrant and verify that it is signed by a judge. If the individual named in the warrant is present at the health center, a health center staff person should walk the person out of any private area (e.g. doctor’s office or examination room) to protect the reasonable expectation of privacy of other patients in those areas.

Administrative requests: An administrative request, subpoena, or summons is one that is issued by a federal or state agency or law enforcement official, rather than a court of law. Such requests include administrative

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subpoenas or summons, a civil or an authorized investigative demand, or similar type of request (typically used for law enforcement purposes) signed by someone other than a judge or magistrate. When responding to administrative requests, covered entities are *required to disclose only if* the “administrative body is authorized to require the production of such information.” 45 C.F.R. 164.103. Otherwise, the covered entity is permitted to disclose information but not required to do so. For all responses to administrative requests, a covered entity *may* disclose PHI only if:

- The information sought is relevant and material to a legitimate law enforcement inquiry;
- The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and
- De-identified information could not reasonably be used.

Requests not accompanied by a court order or issued by a court: When a subpoena, summons, discovery request or other lawful process is not accompanied by an order of a court or administrative tribunal or has not been otherwise issued directly from a court, a covered entity is permitted to disclose the information, but not required to do so. Before disclosing, the covered entity must receive satisfactory assurance from the party seeking the information that: (1) reasonable efforts have been made to ensure that the individual who is the subject of the requested PHI has been given notice of the request, or (2) that the party requesting the information has made reasonable efforts to secure a qualified protective order.¹ A covered entity should only release the PHI requested because HIPAA’s minimum necessary requirement applies when responding to requests not accompanied by court order or issued by a court.

b. Grants Management Requirements

The federal grant awarding agency, U.S. Inspector General, U.S. Comptroller General, and pass-through entity (prime grantee) each have a right to access the health center’s “documents, papers, or other records” pertinent to the federal grant. *See* 45 CFR §75.364(a). This access right includes the right to interview health center staff to discuss such documents. *Id.* The federal agency could construe patient information (even PHI and PII) to be pertinent to the grant and therefore demand access to that information.

Health centers are not required to verify immigration status and therefore should not maintain those records, but if they do, they may be required to submit such information to the federal granting agency or its designee.

¹ “A qualified protective order is an order of a court or administrative tribunal or a stipulation by the parties that prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and requires the return to the covered entity or destruction of the protected health information (including any copies) at the end of the litigation or proceeding. The party requesting the information must provide a written statement and accompanying documentation that demonstrates:

The parties to the dispute have agreed to a qualified protective order and have presented it to the court or administrative tribunal; or

The party seeking the protected health information has requested a qualified protective order from the court or administrative tribunal.” *See* <https://www.hhs.gov/hipaa/for-professionals/faq/711/may-a-covered-entity-not-party-to-legal-proceedings-disclose-information-by-court-order/index.html>

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5. Should health centers establish policies and procedures for disclosure of PHI?

Yes, covered entities should have policies and procedures in place to respond to disclosures of PHI in response to court orders, warrants, subpoenas, summons and administrative requests. The procedure should provide details to help employees determine how to respond. For example, the procedure should provide guidance on determining whether a document labeled “subpoena,” “warrant,” or “summons” has been issued by a court or judicial officer. Often such requests are handled by the covered entity’s Privacy Officer and/or medical records department to assure that information is disclosed appropriately. If there are questions as to whether the document has been properly issued, the covered entity should contact competent legal counsel.

Some health centers may choose to implement a policy that is more protective of patient information, under which staff members only disclose patient information when required to do so by law. When a health center chooses to implement such a policy it is important that the health center consult competent legal counsel to help the center determine when and to what extent the health center is required to comply with administrative requests.

When responding to requests issued by law enforcement, if the law enforcement official is not known to the covered entity, the covered entity must verify the identity and authority of the individual prior to disclosing the information. Covered entities should develop a verification procedure to determine and document:

- The specific agency the requester is from
- Whether or not the requester has law enforcement power
- The reason the requester wants the information
- The specific types of PHI the requester seeks

A covered entity may require that a law enforcement official provide their badge or identification card to be photocopied by the covered entity. A covered entity should also develop procedures for information requests by phone, such as requiring a call-back process through publicly listed agency phone numbers.

Disclosures to law enforcement are subject to the accounting of disclosures requirement under the HIPAA Privacy Rule. As such, if the covered entity makes a disclosure to law enforcement without a patient’s authorization, the covered entity should document the disclosure in compliance with its policies and procedures. Along with the information required for the accounting of disclosures, covered entities may include in the documentation information supporting the decision to disclose the information to law enforcement.

6. If a patient asks the health center, “Is my information safe,” how can the health center respond?

Health centers and their providers are required to protect patient information and in most circumstances the health center must obtain consent from the patient before any patient information is disclosed. There are some rare circumstances in which the health center is required to disclose patient information without the patient’s consent. Those circumstances include the following:

- Reporting child abuse or neglect, domestic violence, or incidents of violent injuries, such as gunshot wounds or stab wounds.
- Responding to requests from law enforcement such as a warrant, subpoena or summons issued by a court or administrative enforcement authority. In such circumstances, a health center must verify the

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authenticity of the request will only disclose the information expressly described in the order or request as necessary to comply with the law or request.

- Reports to funding agencies. In these circumstances health centers will only provide summary information of all patients and redact

The health center is not required to verify an individual's immigration status to provide services to residents in the community. Consequently, if the health center's policy is to not collect or maintain information regarding immigration status, then it will not be able to disclose such information.

SANCTUARY JURISDICTION & DEFUNDING

7. Does the Executive Order 13768, "Enhancing Public Safety in the Interior of the United States" apply to health centers and could a health center that serves undocumented patients be fined or otherwise penalized for "facilitat[ing] their presence"?

Executive Order 13768, regarding so-called sanctuary jurisdictions, pertains to government entities and their law enforcement resources. It is important to note that currently there is no federal definition for "sanctuary jurisdiction," and in any event, the Executive Order does not apply to health centers or other private entities.

In addition, it is unlikely that a health center would be deemed to be facilitating the presence of an undocumented immigrant merely by providing health services. Health centers are required to provide services to all residents in their service area and are not required to verify the immigration status of patients or maintain records related to that status.

If a health center chooses to conceal or shield an undocumented immigrant from lawful enforcement actions, the health center should understand that such concealment could constitute a criminal offense. The health center and its staff could be subject to fines, imprisonment, and loss of rights to receive federal funding.

8. What does it mean to declare your health center as a "sanctuary location" or "safe space"?

Some health centers have expressed a desire to become a "sanctuary" or a "safe space," but just as with the term "sanctuary jurisdiction," there is no clear definition of established criteria for what it means to be a sanctuary or safe space.

Before attaching titles or names that invoke thoughts of defiance with federal policy or imply safety to those targeted by the federal government, health centers should think through what protections they hope to provide and then check in with their legal counsel to determine what consequences, if any, could result. Because the word "sanctuary" means different things to different people, it has been used as a "catch-all" phrase and it is not clear to the public or patients what definition health centers have in mind when they refer to themselves as "sanctuary" or "safe place." Thus, health centers may find that it is better to use alternate terminology to decrease confusion among patients and put policies and procedures in place that clearly layout the protections that the health center has for its patients.

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9. A recent clarification memo put forward by DHS adds to the list of immigrants that are eligible for deportation those that “abuse” public benefits. Are immigrants who utilize public benefits in jeopardy of being deported according to this recent clarification? Such public benefits may include care from a community clinic or health center, Medicaid, or Family PACT:

[DHS guidance](#) issued February 21, 2017 states as follows:

Q18: What threshold of abuse of a public benefit program will render someone removable?

A18: Those who have knowingly defrauded the government or a public benefit system will be priority enforcement targets.

This means that under DHS guidance, an individual will be considered a priority for deportation or removal on the basis of using a public benefit if s/he provided false information to obtain services under a public benefit (*e.g.* providing a false name or social security on an application for benefits). Health centers are required to provide services to all residents in their service area regardless of ability to pay and are not required to verify immigration status to provide services.

EMPLOYMENT AUTHORIZATION DOCUMENTATION

10. What obligation does an employer have if they knowingly employ an individual who has had their employment authorization document (EAD) expire? It may not be unusual for an employer to verify the I-9 only once—at hire – what is your advice about balancing rights and obligations in this situation?

All employers, in the United States, including health centers, are required to make sure all employees, regardless of citizenship or national origin, are allowed to work in the United States and re-verify all employees with expired employment authorization documents. However, a health center is not required to re-verify eligibility to work if an employee presented an Alien Registration Receipt/Permanent Resident Card (“Green Card”) or passport (even if it has an expiration date and later expires) when the employee first completed the I-9 Form.² In addition, an employer is not required to re-verify [List B documents](#), which establish identity, that have expired.³

If the Immigration and Customs Enforcement (ICE) officials conduct an audit of a health center for purposes of work authorization/Form I-9 compliance and technical or procedural violations are found, an employer is typically given ten business days to make corrections. A health center may receive a monetary fine for all substantive and uncorrected technical violations.

² See U.S. Citizenship and Immigration Services, *What Do I Do When Employees Employment Authorization Expires?* <https://www.uscis.gov/i-9-central/i-9-central-questions-answers/faq/what-do-i-do-when-employees-employment-authorization-expires>.

³ Currently, List B documents include Driver’s license issued by a state or territory of the United States, ID Card issued by federal, state, or local government agencies or entities, school ID card with a photograph, voter registration card, U.S. military card or draft record, military dependent’s ID card, U.S. Coast Guard Merchant Mariner Document (MMD) card, Native American tribal document, and driver’s license issued by a Canadian government authority.

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In determining penalty amounts, ICE considers five factors: the size of the business, good faith effort to comply, seriousness of violation, whether the violation involved unauthorized workers, and history of previous violations. If ICE determines that a health center knowingly hired or continued to employ unauthorized workers in violation of the Immigration and Nationality Act (INA), the health center will be required to cease the unlawful activity, may be fined,⁴ and in certain situations both employers and employees may be criminally prosecuted. Further, a health center may also be subject to debarment from future participation in federal grant programs, federal contracts, or receiving other government benefits.

It is recommended that employees apply to renew employment authorization documentation within 150-120 days before their current work authorization expires to minimize the possibility that their current work authorization expires before they receive a decision on their renewal request.

It is important to note that health centers must re-verify all employees regardless of immigration status or citizenship. Additionally, the employee is allowed to choose which documents to present when completing the I-9 form, as long as the documents are on the list of acceptable documents and reasonably appear to be genuine. If a health center only re-verifies a certain group of employees or refuses to accept a document that is on the list of acceptable documents, the health center may be considered in violation of federal law for discrimination.

⁴ Monetary penalties for knowingly hire and continuing to employ violations range from \$375 to \$16,000 per violation, with repeat offenders receiving penalties, at the higher end. Penalties for substantive violations, which includes failing to produce a Form I-9, range from \$110 to \$1,100 per violation. See *Form I-9 Inspection Overview*, U.S. Immigration and Customs Enforcement (June 26, 2013), <https://www.ice.gov/factsheets/i9-inspection#fineSchedule> (last accessed on April 3, 2017).