

# Legal Advisory



*AHA's advisories, a service to members, are produced whenever there is a significant development that affects the job you do in your community.*  
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## State Law Preemption Under HIPAA

### A Message to AHA Members:

Under current law, hospitals and health systems must be in compliance with the final Health Insurance Portability and Accountability Act (HIPAA) privacy regulation by April 14, 2003. An essential step in that process will be determining whether the federal HIPAA requirements preempt state privacy laws. That determination will guide the medical privacy policies and procedures that hospitals adopt and follow as part of their HIPAA compliance efforts.

The limited statutory preemption of state laws contained in the HIPAA regulation and the current lack of regulatory guidance on preemption will, in some states, make it extremely difficult for providers to know with certainty which rules to follow. In addition, providers that are located or work in more than one state may have a difficulty establishing policies that comply with the federal HIPAA regulation and multiple state laws.

The AHA continues to support full federal preemption that would establish a uniform set of medical privacy standards and help to address the complexity of the HIPAA privacy regulation, thereby ensuring that its requirements are more workable for hospitals. The AHA also will continue working with the White House, the Department of Health and Human Services and Congress to ensure that the high costs of implementing the medical privacy requirements do not put hospitals in financial jeopardy.

To assist hospitals with the complicated task of state preemption analysis, the AHA prepared this legal advisory to provide an overview of the preemption provisions in the final HIPAA privacy rule. It includes a flow chart with a model framework that hospitals can use to conduct or evaluate a state preemption analysis. We've also provided excerpts from a sample analysis of one current state law, the Illinois AIDS Confidentiality Act, using this framework. The full 9-page analysis, a summary of the resulting impact on privacy policies and procedures, and the flow chart are available at [www.aha.org/hipaa](http://www.aha.org/hipaa) under "Other Strategic Resources" in the Strategic Resources and Tools for Change™ section. If you have trouble downloading the information or do not have Internet access, contact the AHA at (800) 424-4301.

The AHA has been meeting with representatives of the American Medical Association and the Blue Cross and Blue Shield Association to determine whether our national associations should bring together interested hospitals, providers and health plans at the state level to conduct preemption analyses. As part of that effort, our associations have compiled information about some current local efforts already underway to evaluate the preemptive effect of the HIPAA

privacy regulation. That information is also available on the AHA Web site at the address cited above.

To prepare for a preemption analysis of your state's privacy laws, check off the following items from your to-do list:

- ✓ Share this advisory with your legal counsel, chief privacy officer, the heads of the compliance and risk management departments, and other members of your HIPAA privacy implementation team.
- ✓ Contact your state, regional, and/or metropolitan hospital associations to find out about existing association plans or efforts related to HIPAA state law preemption analysis and/or work through your respective hospital associations to become part of and take advantage of any local joint efforts already underway to evaluate the preemptive effect of the HIPAA privacy regulation.
- ✓ If conducting a preemption analysis on your own, adapt the proposed analytical framework and attached worksheets as appropriate to facilitate your organization's efforts.
- ✓ Be sure to incorporate the results of the state law preemption analysis when modifying your organization's privacy policies and procedures.

For more information about our HIPAA initiative, contact the AHA at (800) 424-4301, or visit [www.aha.org](http://www.aha.org) and click on the "HIPAA" icon.



Rick Pollack  
Executive Vice President

September 7, 2001

# *Legal Advisory*

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## State Law Preemption Under HIPAA

### **Background**

Under current law, hospitals and health systems must be in compliance with the final Health Insurance Portability and Accountability Act (HIPAA) privacy regulation by April 14, 2003. Compliance with the regulation will require that hospitals determine whether the federal HIPAA requirements preempt state privacy laws. Under HIPAA, contrary state privacy laws will be preempted, except where they:

- Are “more stringent” than the HIPAA privacy requirements;
- Provide for the reporting of disease or injury, child abuse, birth or death, or for public health surveillance, investigation, or intervention; or
- Require health plans to report or provide access to information on management or financial audits, program monitoring, or licensure or certification of facilities or individuals.

In addition, the Department of Health and Human Services (HHS) may grant an exception in certain defined situations that allows a state privacy law to continue in force. Exceptions may be granted:

- When the HHS Secretary determines that the state law is necessary to prevent fraud or abuse, to regulate insurance and health plans, or for reporting about health care delivery or costs; and
- For laws serving a compelling public health, safety or welfare need when the Secretary determines that the intrusion into privacy is warranted when balanced against the societal need that the law addresses.

For such exceptions to be granted, a written request must be submitted to the Secretary. The request must identify the law, state the reasons why the law should not be preempted, how providers and health plans will be affected by the exception, and any other information the Secretary may request. Exceptions granted will remain in force until the state law excepted no longer exists or the Secretary revokes the exception after determining that there is no longer any support for the exception.

## Implications for Hospitals

The limited statutory preemption of state laws contained in the final medical privacy regulation and the current lack of regulatory guidance on preemption will, in some states, make it difficult for providers to know with certainty which rules to follow. In addition, providers that are located or work in more than one state may have difficulty establishing policies that comply with the federal HIPAA regulation and multiple state laws.

Analysis of the preemptive effect of the HIPAA privacy regulation will be, in many states, a complicated and difficult undertaking. As part of the AHA's efforts to address the complexity of the HIPAA privacy regulation and ensure that its requirements are more workable for hospitals, the AHA continues to support full federal preemption of state laws to establish a uniform set of medical privacy standards. The AHA will continue to work with the White House, HHS and Congress to fix the privacy rule and to provide adequate funding to ensure that the high costs of implementation do not put hospitals in financial jeopardy.

The state preemption provisions of HIPAA will require complex evaluations simply to determine which medical privacy law applies—federal or state. The materials attached to this legal advisory provide examples of an analytic framework that can be used to conduct or evaluate a state law preemption analysis. They include a flow chart that depicts steps involved in evaluating whether a particular state law is preempted by HIPAA, and excerpts from a worksheet that analyzes the Illinois AIDS Confidentiality Act, using the steps depicted in the chart. The Chicago law firm of Katten, Muchin & Zavis (KMZ), prepared these materials. The flow chart, the complete 9-page analysis and a summary of the expected impact on a providers' medical privacy policies and procedures is available on our HIPAA Web site at [www.aha.org/hipaa](http://www.aha.org/hipaa) under "Other Strategic Resources" in the Strategic Resources and Tools for Change™ section. If you have trouble downloading the materials or do not have Internet access, contact the AHA at (800) 424-4301.

Some current local efforts already are underway to evaluate the preemptive effect of the HIPAA privacy regulation. A chart identifying some of these local efforts is available at [www.aha.org/hipaa](http://www.aha.org/hipaa) under "Other Strategic Resources" in the Strategic Resources and Tools for Change™ section or, for member hospitals without Internet access, by calling the AHA at (800) 424-4301. The chart reflects information gathered to date by KMZ, the AHA, American Medical Association (AMA), and Blue Cross and Blue Shield Association (BCBSA) through informal contacts with the state health departments; state, regional and metropolitan hospital associations; state medical societies; and local Blue Cross health plans. Hospitals should contact their state, regional, and/or metropolitan hospital associations to find out about association plans or initiatives related to preemption analysis or to become involved in any existing local joint efforts to conduct a preemption analysis.

The first step in the HIPAA preemption analysis is to determine which state laws might be subject to preemption. Any state laws that are "contrary" to a provision of HIPAA may be subject to preemption. Under the regulation, a state law is "contrary" if:

- An organization would find it impossible to comply with both the state law provision and a federal requirement specified in the HIPAA privacy regulation; or

- The state law provision creates an obstacle to achieving the full purpose and objectives of HIPAA.

To identify such laws, examine state constitutional provisions, statutory and case law, agency regulations and rules, and actions of state officials that have the force of law in the state. The preamble to the medical privacy rule suggests that examination must extend to evidentiary privileges recognized in state law and to any *local laws* recognized and treated by the state as state law substitutes because of the need to address the particular concerns of the local areas involved (e.g., New York City).

Once all laws potentially subject to preemption have been identified, the next step is to determine to what extent these laws are in fact preempted by the HIPAA medical privacy regulation. The regulation necessitates that the preemption analysis proceed on a provision-by-provision basis. In some cases, for example, only certain specific provisions of a complex state law may be preempted and hospitals will be required to comply with other remaining provisions of this same law.

The most straightforward way to proceed with analyzing state law provisions is to consider first whether the provision falls within any of a number of specified carve outs that would save the provision from preemption. The preemption provisions in the privacy regulation would save those laws that:

- Provide for disease, injury, child abuse, birth or death reporting or for public health surveillance, investigation, or intervention;
- Require health plans to report or allow access to information essential for management and financial audits, program monitoring and evaluation, or facility and professional licensure and certification; or
- Authorize or prohibit disclosure of a minor's protected health information to parents or guardians.

Next, consider whether the provision is saved from preemption because it is "more stringent" than a provision in the HIPAA medical privacy regulation. The regulation saves from preemption those state laws "relating to the privacy of health information" that are "more stringent" than the HIPAA privacy requirements. As defined in the regulation, a state law "relates to the privacy of health information" when its specific purpose is the protection of health information privacy or when it affects health information privacy in a "direct, clear, and substantial way."

A law is defined by the regulation to be "more stringent" and therefore of continuing applicability if the law:

- Further limits or prohibits the circumstances under which a use or disclosure of information is otherwise permitted by the HIPAA privacy rule (Laws limiting disclosures to the Secretary of HHS of information about compliance with the HIPAA

privacy requirements or to the individual who is the subject of the information are specifically preempted.);

- Permits greater rights of access or amendment to the individual who is the subject of the information than those in the HIPAA privacy regulation;
- Allows individuals to receive more information about a proposed use, disclosure, rights, and remedies than the HIPAA privacy regulation provides;
- Narrows the scope or duration of consent or authorization for use or disclosure of protected health information, increases the privacy protections afforded by consent or authorization (for example, expanding the criteria for consent or authorization), or reduces the coercion involved in or surrounding consent or authorization;
- Requires more detailed collection, reporting and/or accounting for disclosures of information or establishes a longer period for retention of such information than required in the HIPAA privacy regulation; or
- Otherwise provides greater privacy protections for the individual whom the information concerns.

Finally, the final HIPAA medical privacy regulation permits the Secretary upon request to save certain types of state laws from preemption. Consider whether a credible argument could be made to the Secretary that the provision is:

- Necessary to prevent fraud or abuse, to regulate insurance and health plans, or for reporting about health care delivery or costs; or
- Serving a compelling public health, safety or welfare interest that would warrant an intrusion into privacy.

It will be important for hospitals to be aware whether the Secretary has already made a determination that a state law is saved from preemption and/or whether the state is considering the submission of an exception request to the Secretary. Hospitals will want to work through their respective state hospital associations to gather information about and consider appropriate actions related to exception requests.

Once the analysis of the various provisions of state law is complete, hospitals will need to determine the impact on their existing medical privacy policies and procedures. Provisions of state law that are saved from preemption may require modifications to the notice of privacy policies that hospitals are required to provide under the HIPAA privacy regulation, development of additional specific authorization forms for use and disclosure of protected health information, or other changes in procedures. Hospitals adapting the model patient notice and authorization forms that AHA has made available to its members for their respective organizational needs will want to ensure that they incorporate the completed state law preemption analysis. These model forms are available at [www.aha.org/hipaa](http://www.aha.org/hipaa).

## **Suggested Actions for Hospitals**

Hospitals should contact their state, regional, and/or metropolitan associations to find out about any planned or existing association initiatives related to preemption analysis. If conducting a preemption analysis on your own, hospitals may wish to adapt the proposed analytical methodology and worksheets for use in your own preemption analysis efforts, or to assess analysis conducted by others on your behalf.

The AHA has been meeting with representatives of the AMA and BCBSA to determine whether there is a role for our national associations in facilitating efforts to bring together at the state level Blue Cross Plan(s), medical societies, and AHA members working through their state, regional and/or metropolitan hospital associations to conduct preemption analyses. Such joint efforts could have significant advantages for hospitals, including:

- Reducing the costs to individual providers of conducting the analyses;
- Minimizing or avoiding altogether disputes between plans and providers as to the scope of the preemptive effect of the regulation where the local Blue Cross Plan(s), the local medical society, and AHA member hospitals can agree on the results of a joint analysis; and
- Generating agreement by regulators that the analysis is valid and applicable where a joint analysis can be developed locally by entities covering a broad spectrum of the health care provider/payer communities.

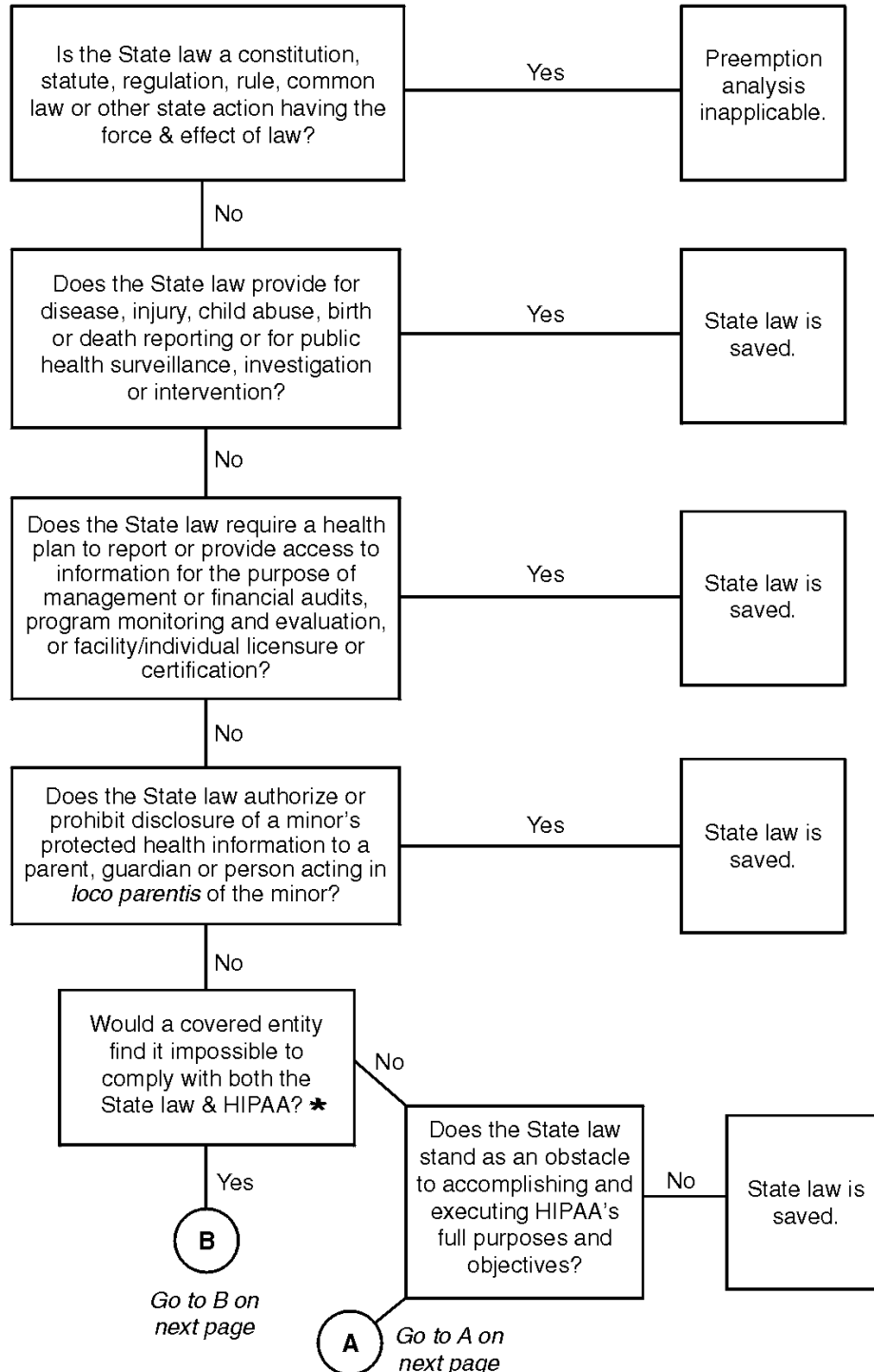
BCBSA is sending a memorandum similar to this one to local affiliated health plans to explore interest in cooperative preemption analysis efforts. The AMA has been in communication with counsel for the state medical societies and others in a similar effort. Hospitals may also want to work through their state, regional, and/or metropolitan hospital associations to contact general counsel at the state medical society and/or representatives of the local Blue Cross Plan(s) about joint efforts. It is also entirely appropriate to consider including others interested and willing to participate in such joint local preemption analysis efforts.

Also, AHA members can contact Melinda Hatton, vice president and chief Washington counsel, at (202) 626-2336 or Lawrence Hughes, director, member relations, at (312) 422-3328 for more information about the HIPAA state law preemption requirements and preemption analysis efforts.

## ATTACHMENT TO AHA LEGAL ADVISORY

*This document contains a chart with a model framework that hospitals can use to conduct or evaluate a state preemption analysis that is required under the final privacy rules issued by HHS pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The law firm of Katten Muchin Zavis prepared it for the AHA.*

### STATE LAW PREEMPTION ANALYSIS UNDER HIPAA

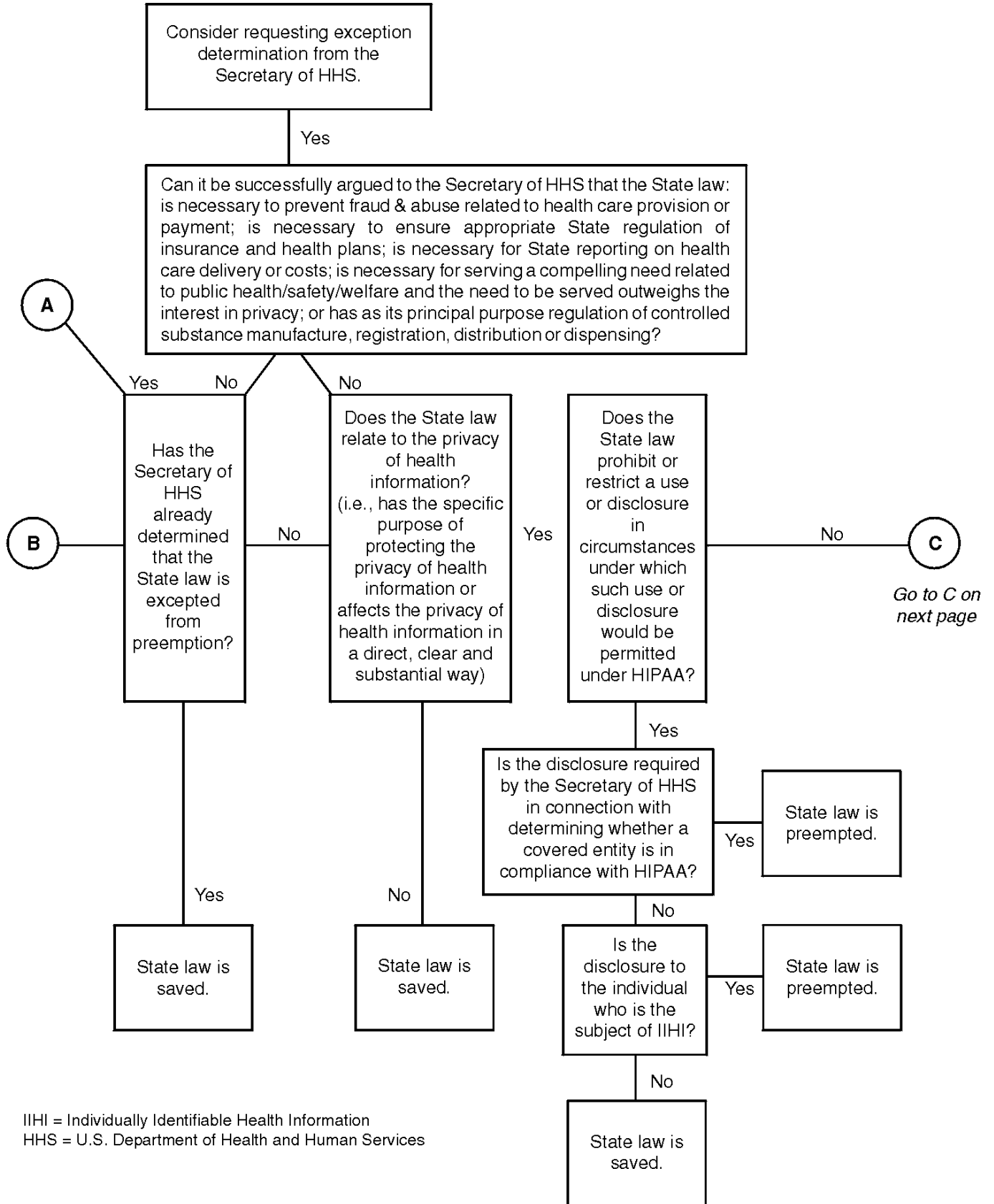


IIHI = Individually Identifiable Health Information  
 HHS = U.S. Department of Health and Human Services

**\* Note:** This question includes an analysis under 45 CFR 164.512(a) - (l).

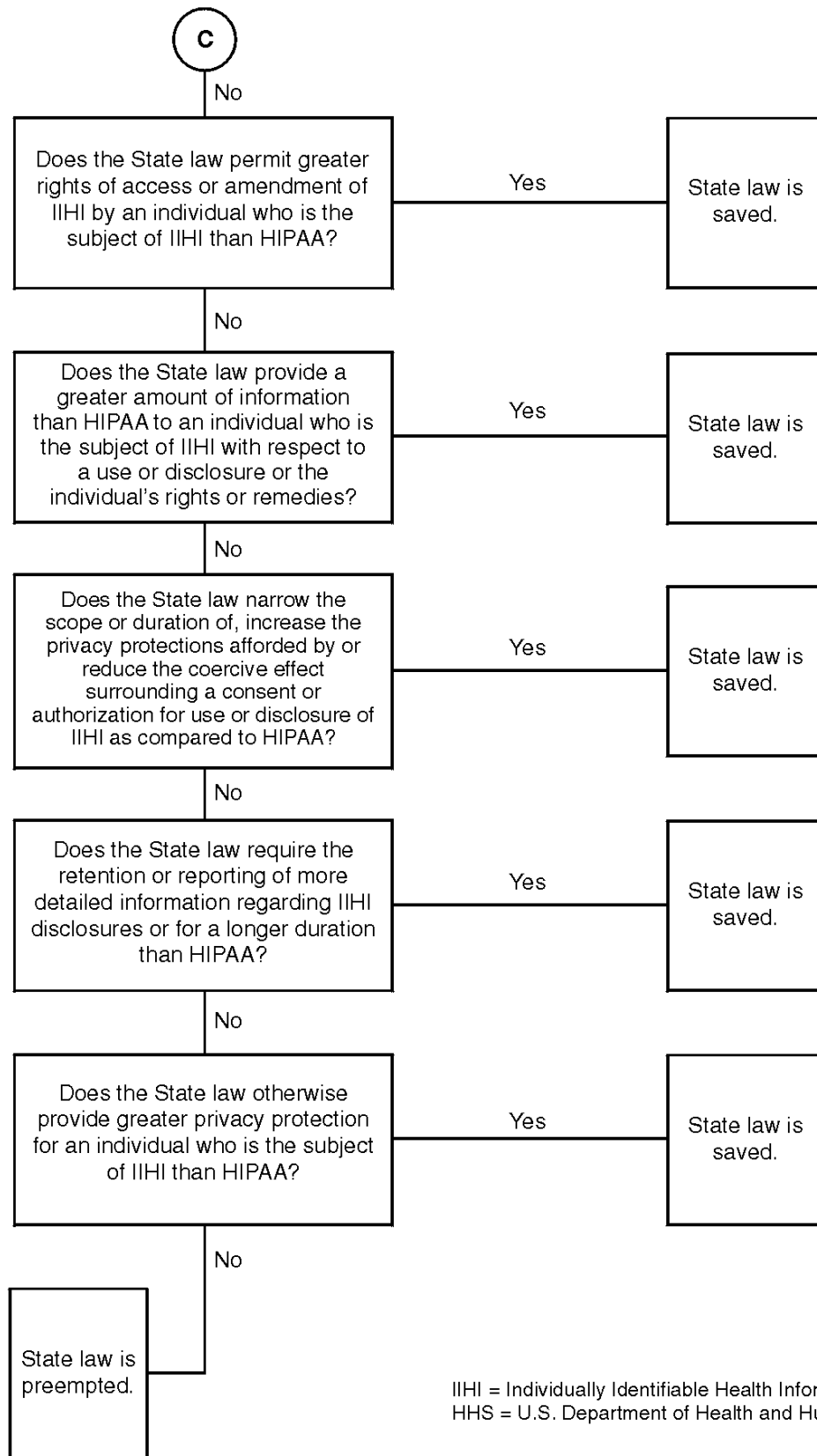
**THIS CHART IS FOR EDUCATIONAL PURPOSES ONLY AND DOES NOT CONSTITUTE LEGAL ADVICE.**

# STATE LAW PREEMPTION ANALYSIS UNDER HIPAA



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# STATE LAW PREEMPTION ANALYSIS UNDER HIPAA



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## EXCERPTS FROM HIPAA PREEMPTION ANALYSIS WORKSHEET

This page illustrates the first 5 steps in a full preemption analysis, using a selected provision of one Illinois statute and its related regulations. The complete 10-step worksheet (9 pages) analyzing all provisions of this Illinois statute is available on the AHA Web site at [www.aha.org/hipaa](http://www.aha.org/hipaa) under “Other Strategic Resources” in the Strategic Resources and Tools for Change™ section, or for those without Internet access, by contacting the AHA at (800) 424-4301.

### **STATUTE/REGULATION/CASE:**

410 ILCS 305/1 et al. (AIDS Confidentiality Act or “Act”), 77 IL ADC 697.110 et al. (regulations promulgated under the Act).

### **DESCRIBE STATUTORY/REGULATORY STRUCTURE:**

Under Section 305/9, the Act prohibits disclosures of the identity of any person upon whom a test is performed or the results of such a test in a manner that permits identification of the test subject. The Act, however, proceeds to provide a number of exceptions where disclosure is permitted. These are set forth in subsections (a) through (k) of Section 305/9. The regulations mirror this structure and provide further detail. A sample release form is provided in the regulations.

### **STATUTORY/REGULATORY SUBSECTION, IF APPLICABLE:**

All sections of the Act and regulations have been reviewed. There appear to be no cases that change the analysis. The key section of the Act is 305/9. The key section of the regulations is 697.140.

### **ENTITIES COVERED UNDER STATUTE/REGULATION/CASE (Indicate entities to whom state law applies and compare to HIPAA covered entities):**

The Act applies to a “person,” which is defined as “any natural person, partnership, association, joint venture, trust, governmental entity, public or private corporation, health facility or other legal entity.” 305/3(h). “Health facility” defined broadly as “hospital, nursing home, blood bank, blood center, sperm bank or other health care institution, including any health facility as that term is defined in the Illinois Health Facilities Authority Act.” 305/3(e). The Act does not apply to HMOs nor to any insurance company, fraternal benefit society, or other insurer regulated under the Illinois Insurance Code. 305/15.1. Conclusion: Applies to health care providers, health plans (not otherwise excepted out), and healthcare clearing houses.

NOTE: The Act applies to disclosures of “test results” an undefined term. An IDPH representative indicated that IDPH interprets this term to mean not only actual test results, but also information that would indirectly indicate test results (e.g., an AZT prescription).

**Does the state law fall within a statutory “carve-out” category? If so, the law will be saved.**

***Does the state law fit the carve-out for public health and related reporting of disease, injury, abuse, death, birth, public health surveillance, investigation, etc., under HIPAA 160.203? Indicate all sections of state law qualifying for this carve-out treatment. Explain, and complete an operational impact analysis on a provision-by-provision basis.***

Subsection 305/9(a) – disclosure to spouse of test subject provided certain conditions are met - could, arguably, qualify as public health intervention.

Operational Impact: The above disclosure is, arguably, allowed without consent or authorization under both state law and HIPAA.

(b) Does the state law fit the carve-out for health plan reporting and access to records for management audits, financial audits, program monitoring and evaluation, or the licensure of facilities or individuals under HIPAA 160.203? Indicate all sections of state law qualifying for this carve-out treatment. Explain, and complete an operational impact analysis on a provision-by-provision basis.

No provision qualifies for this carve-out.