

Fall 2019

The Federalism Challenges of Protecting Medical Privacy in Workers' Compensation

Ani B. Satz

Emory University, asatz@emory.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Health Law and Policy Commons](#), [Privacy Law Commons](#), and the [Workers' Compensation Law Commons](#)

Recommended Citation

Satz, Ani B. (2019) "The Federalism Challenges of Protecting Medical Privacy in Workers' Compensation," *Indiana Law Journal*: Vol. 94 : Iss. 4 , Article 7.

Available at: <https://www.repository.law.indiana.edu/ilj/vol94/iss4/7>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

THE FEDERALISM CHALLENGES OF PROTECTING MEDICAL PRIVACY IN WORKERS' COMPENSATION

ANI B. SATZ*

Under current law, injured workers face a Hobson's choice: They may file for workers' compensation or maintain their medical privacy. The reason for this is that § 164.512(1) of the Health Insurance Portability and Accountability Act's Privacy Rule (HPR) is widely misinterpreted by courts and legislatures as a wholesale waiver of privacy protections for injured workers. Section 164.512(1) excludes workers' compensation from federal privacy protections that may frustrate the efficient administration of workers' compensation claims. As the history and intent behind the HPR indicate, § 164.512(1) is premised on the assumption that states will protect workers' privacy by creating and implementing their own privacy regimes. An original empirical survey detailed in this Article indicates states have not adequately provided such protections.

This Article argues that workers' compensation programs must be aligned with the federal privacy protections of the HPR and proposes actions for the U.S. Department of Health and Human Services and the states to remedy privacy failures. The Article begins by explaining the misunderstood relationship between the HPR and workers' compensation generally. It then discusses why § 164.512(1) is misconstrued. The Article suggests that the answer may be rooted in the unclear boundary between constitutionally grounded federal privacy protections and the historic role of states in administering their own workers' compensation programs and protecting privacy. The Article argues that the protection of privacy in workers' compensation highlights a unique federalism relationship—what this Article terms “symbiotic” federalism—whereby the federal and state governments are mutually dependent on one another to ensure privacy is protected. Under this reading, workers' compensation statutes must be interpreted “through,” or in the spirit of the HPR, and contrary law preempted.

INTRODUCTION.....	1556
I. HIPAA PRIVACY RULE AND WORKERS' COMPENSATION	1562
A. OVERVIEW OF THE HIPAA PRIVACY RULE	1562
B. HIPAA PRIVACY RULE AND WORKERS' COMPENSATION	

* © Ani B. Satz 2019. Professor of Law, Emory University School of Law. J.D., 2001, University of Michigan; Ph.D., 2001, Monash University, Melbourne, Australia (completed at Princeton University). The author is grateful for comments provided by Tom Arthur, Deborah Dinner, Abbe Gluck, Nicole Huberfeld, Kay Levine, Todd Maziar, Jonathan Nash, Madison Pool, Marci Rosenberg, Bill Sage, Robert Schapiro, Eric Segall, Fred Smith, Nick Terry, Alex Wallach, and Paul Zwier as well as by faculty attending the American Society of Law, Medicine & Ethics Health Law Professors Conference; Law and Society Annual Meeting; and Southeastern Association of Law Schools Annual Meeting. I thank Andrew Jones, Rachel Leff, Mayra Roman, and Sangita Sahasranaman for their able research assistance. This work was supported by Emory University School of Law and the Georgia Legal Foundation, a foundation for which I consulted on the *Arby's Restaurant Group, Inc. v. McRae* litigation.

PROCEEDINGS	1565
1. SECTION 164.512(<i>l</i>)’S EXCEPTION FOR WORKERS’ COMPENSATION AND OTHER PERMITTED PHI DISCLOSURES	1566
2. AUTHORIZED PHI DISCLOSURES	1567
3. SCOPE OF PHI DISCLOSURE IN WORKERS’ COMPENSATION PROCEEDINGS	1567
A. STATE RESTRICTIONS	1567
B. PROVIDER RESTRICTIONS	1569
II. MEDICAL PRIVACY AND PREEMPTION CHALLENGES	1570
A. HIPAA PRIVACY RULE’S PREEMPTION PROVISION	1571
B. JUDICIAL INTERPRETATION OF § 164.512(<i>l</i>)	1574
1. RECOGNIZING AN EXCEPTION	1575
2. READING STATE WORKERS’ COMPENSATION STATUTES “THROUGH” THE HIPAA PRIVACY RULE.....	1578
C. HEALTH AND HUMAN SERVICES’ INTENT BEHIND § 164.512(<i>l</i>)	1580
1. FACILITATING ADMINISTRATIVE PROCEEDINGS.....	1580
2. SEEKING A BALANCED EXCHANGE BETWEEN EMPLOYEES AND EMPLOYERS.....	1581
D. STATE GAPS IN PROTECTING PRIVACY	1583
III. NATIONAL SURVEY OF STATE ACTION	1585
A. SCOPE OF DISCLOSURE	1586
B. EX PARTE COMMUNICATIONS	1590
C. NOTICE	1593
D. PROTECTIVE ORDERS	1594
E. CONCLUSION: NOT MINDING THE GAP	1597
IV. “SYMBIOTIC FEDERALISM” AND PROTECTING MEDICAL PRIVACY IN WORKERS’ COMPENSATION.....	1597
A. “SYMBIOTIC FEDERALISM”.....	1600
B. FEDERAL ACTION TO PROTECT INJURED WORKERS’ MEDICAL PRIVACY.....	1605
1. CLARIFYING REQUIREMENTS AND ENCOURAGING STATE ACTION	1605
2. PREEMPTING CONTRARY STATE LAW	1607
C. OTHER STATE ACTIONS TO PROTECT INJURED WORKERS’ MEDICAL PRIVACY	1609
CONCLUSION.....	1610

INTRODUCTION

While on a break at Arby’s, Laura McRae accidentally consumed lye that had been left in the break room in a drinking cup like her own.¹ She suffered third-degree

1. *McRae v. Arby’s Rest. Grp., Inc.*, 721 S.E.2d 602, 603 (Ga. Ct. App. 2011), *rev’d*, 734 S.E.2d 55 (Ga. 2012).

burns to her esophagus and sixty-five percent permanent disability to her entire body.² As a result, McRae filed for workers' compensation.³

Prior to the workers' compensation board's hearing about McRae's disability, Arby's attorneys attempted to meet alone with her personal treating physician, with no limits on the scope of protected health information (PHI) to be disclosed.⁴ The physician declined, absent express permission from McRae.⁵ Responding to a motion from defense counsel, the administrative law judge (ALJ) ordered McRae to authorize the ex parte communication.⁶ The ALJ also denied McRae's request for immediate review of that decision because "McRae could informally contact the treating physician herself and 'inquire about any communications made between [the physician] and the Employer/Insurer.'" ⁷ McRae refused to sign the release, and her hearing was removed from the calendar.⁸ She appealed the decision, and the appellate division of the workers' compensation board and subsequently the Superior Court in her county affirmed the ALJ's decision.⁹ While the Court of Appeals of Georgia reversed the Superior Court,¹⁰ the Georgia Supreme Court overturned that decision,¹¹ and the ex parte conversation was allowed.¹²

The outcome would have been very different had this been a medical malpractice or other tort case for bodily harm, rather than a workers' compensation case. In fact, less than a year before McRae's case was decided, the Georgia Supreme Court recognized in the medical malpractice case *Baker v. Wellstar Health System*¹³ that "the dangers associated with ex parte interviews of health care providers are numerous," including probing that is prejudicial, disclosing information not documented in the medical record, and influencing health care providers' testimony.¹⁴ The *Baker* court held that if such ex parte communications occur, significant protections must be in place.¹⁵ Pursuant to the Health Insurance Portability and Accountability Act's Privacy Rule (HPR), a plaintiff must be provided notice with an opportunity to refuse the disclosure, or the defendant must

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* (alteration in original) (citation omitted).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Arby's Rest. Grp., Inc. v. McRae*, 734 S.E.2d 55, 58 (Ga. 2012), *rev'g* 721 S.E.2d 602 (Ga. Ct. App. 2011).

12. *McRae v. Arby's Rest. Grp., Inc.*, 742 S.E.2d 510, 510 (Ga. Ct. App. 2013).

13. 703 S.E.2d 601 (Ga. 2010).

14. *Id.* at 604 (finding that "dangers . . . includ[e] (1) the potential for unwarranted probing into matters irrelevant to the litigation yet highly sensitive and possibly prejudicial to the patient-plaintiff; (2) the potential for disclosure of information, such as mental impressions not documented in the medical record, that the health care provider has never actually communicated to the patient-plaintiff; and (3) the potential for defense counsel to influence the health care provider's testimony, unwittingly or otherwise, by encouraging solidarity with or arousing sympathy for a defendant health care provider").

15. *See id.* at 605 (detailing the requirements for ex parte communications).

obtain a protective order to limit the scope of PHI disclosed.¹⁶ Further, to comply with “the spirit of HIPAA’s privacy protections” and state constitutional privacy protections, the court held that a protective order must be “fashion[ed] . . . carefully and with specificity as to scope” as well as entail voluntary physician participation.¹⁷ Additionally, the court found that if there is “any evidence indicating that ex parte interviews have [sic] or are expected to stray beyond their proper bounds,” courts may require that the plaintiff or her representative be permitted to attend the interview or to receive a transcript.¹⁸

The differential treatment of PHI in workers’ compensation compared to almost all other contexts—including other tort and workplace actions—is striking.¹⁹ This is especially so because workers’ compensation proceedings should not require more PHI disclosure than litigation. While the HPR provides rules for notice and scope of PHI disclosure with respect to medical malpractice and other litigation (and even for inmates),²⁰ no federal rules in the HPR or elsewhere govern such practices in workers’ compensation.²¹ Discovery and evidence rules, which serve to safeguard unwarranted disclosure of PHI in litigation, often do not apply to workers’ compensation proceedings.²² Rule 35 of the Federal Rules of Civil Procedure, for example, requires a showing of need for disclosure.²³ Most states have adopted a

16. *See id.* at 603 (citing 45 C.F.R. § 164.512(e) (2018)).

17. *Baker*, 703 S.E.2d at 605 (“[T]rial courts should state with particularity: (1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider’s participation in the interview is voluntary.”).

18. *Id.*

19. *See, e.g.*, *Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594, 608 (D. Nev. 2016) (finding in a transgender discrimination and negligent retention action that: “[T]he court will not compel Roberts to disclose and produce all of his medical records from 2009 to the present [i.e., records pertaining to his gender transition] on the speculation they may contain references to his mental state or [alleged] emotional distress.”); *Bailey v. City of Daytona Beach Shores*, 286 F.R.D. 625, 630 (M.D. Fla. 2012) (limiting PHI disclosure in Family Medical Leave Act (FMLA) interference and retaliation case to that prior to FMLA leave).

20. *See* 45 C.F.R. § 164.512(k)(5). While the HPR applies to inmates, they do not enjoy the same notice requirements. *Id.* § 164.520(a)(3).

21. *Compare* 45 C.F.R. § 164.512(e) (placing limits on the amount of PHI disclosed in judicial and administrative proceedings), *and id.* § 164.512(k)(5) (establishing limits on PHI disclosures for inmates), *with id.* § 164.512(l) (authorizing PHI disclosure in workers’ compensation proceedings “to the extent necessary to comply with” state laws).

22. *E.g.*, FED. R. CIV. P. 26, 35 (providing standards in civil litigation for disclosures and for requiring physical and mental examinations and reports from such examinations).

23. FED. R. CIV. P. 35(a)(2)(A); *see, e.g.*, *Smith v. J.I. Case Corp.*, 163 F.R.D. 229, 230 (E.D. Pa. 1995) (“Under Fed.R.Civ.Proc. 35, the court may order a party to submit to a mental examination only if that party’s mental condition is ‘in controversy,’ and the movant has shown ‘good cause’ for the person to be examined. In *Schlagenhauf v. Holder*, the Supreme Court noted that [these] requirements ‘are not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which an examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.’ . . .

much looser statutory standard in workers' compensation proceedings to allow PHI disclosure "related to" the claim.²⁴ And as *McRae* and *Baker* indicate, disclosure of PHI through ex parte communications with treating physicians may be broad and without notice in workers' compensation, while similar disclosures in medical malpractice, employment discrimination, and other litigation are narrowly cabined.

Further, unlike written medical records obtained during tort and employment litigation, the scope of PHI released through the workers' compensation system is broad. Entire workers' compensation records are public in some states.²⁵ Even if an injured worker does not file a workers' compensation claim, details of her injury must be reported to the workers' compensation board in most states.²⁶ For individuals who file a claim, their medical history may be made available to employers, insurers, and state administrators.²⁷ Once PHI enters the public realm, its uses are endless.

Broad PHI disclosure during workers' compensation proceedings may result in workers being denied compensation for serious injury and disability. Such PHI disclosures may entail either release of written medical records or ex parte communications between an employer or its agent and a treating physician. When disclosure of medical records is not limited in scope, unrelated and possibly prejudicial medical history may be used against workers. Once more aspects of an employee's health status are viewed as relevant, employees may be subject to independent medical examinations and tests not directly related to their claim. The

[A]lthough no 'hard and fast rule' has been articulated, courts seem to allow them when 1) there is a separate tort claim for emotional distress, 2) the plaintiff alleges that he suffers from a severe ongoing mental injury or a psychiatric disorder, 3) the plaintiff will offer expert testimony to support the claim, or 4) the plaintiff concedes his mental condition is in controversy. Thus, a claim of emotional distress, without more, is insufficient to put the plaintiff's mental condition 'in controversy.'" (citations omitted) (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 120 (1964)).

24. See, e.g., GA. CODE ANN. § 34-9-207(a) (2017) ("[A]ny physician who has examined, treated, or tested the employee or consulted about the employee shall provide . . . all information and records *related to* the examination, treatment, testing, or consultation concerning the employee." (emphasis added)).

25. James G. Hodge, Jr., *The Intersection of Federal Health Information Privacy and State Administrative Law: The Protection of Individual Health Data and Workers' Compensation*, 51 ADMIN. L. REV. 117, 126 (1999) ("[M]any workers' compensation claims require litigation before an administrative tribunal. These proceedings are open to the public and involve legal examinations of the injured employee, her treating physicians, and the employer's independent medical examiner concerning the medical treatment and history of the employee. Workers' compensation files, including sensitive medical reports, may be a matter of public record in such cases."). Additionally, private companies collect data about terminated employees that may be used by future employers. *Id.* at 120; see, e.g., *Pre-Employment Screening for Small to Mid-Sized Employers*, PFC INFO. SERV., <https://pfcinformation.com/employers/#services> [<https://perma.cc/8LPY-Y6UJ>] (offering workers' compensation screening services).

26. Hodge, *supra* note 25, at 124.

27. *Id.* at 125–26.

results of these examinations may allow employers to argue another cause of, or precondition to, the injury at stake.²⁸

When *ex parte* communications are allowed, they may be without notice and outside the presence of plaintiff or her counsel.²⁹ These communications may be used to pressure physicians to characterize workers' injuries as less severe than originally diagnosed or as unrelated to workplace incidents.³⁰ This is significant because in workers' compensation, diagnosis determines which benefits are compensable.

The differences between how PHI is handled in workers' compensation versus other tort and employment actions may seem counterintuitive. One might think injured workers would be offered *greater* protections for their PHI for a couple of reasons. First, consent to disclose medical records may not be truly voluntary. In the United States, workers' compensation is often the exclusive remedy for work-related injuries, and injured workers may not have the option of litigating their claims.³¹

28. In one case, a woman who had part of her hand amputated at work was pressured by her employer's insurer to disclose oncology records pertaining to her breast cancer. Employer/Insurer's Motion Seeking an Order Compelling Claimant to Withdraw Objection as to the Request for Production of Documents on Anwan Medical Center-Oncology Division (June 5, 2013) (on file with author) (redacted); Response to Employee/Claimant's Objection to Employer/Insurer's Motion Seeking an Order Compelling Claimant to Withdraw Objection as to the Request for Production of Documents on AnMed [sic] Medical Center-Oncology Division (June 20, 2013) (on file with author) (redacted). The breast cancer was unrelated to her hand amputation. The employer's insurer argued that when the employee mentioned her breast cancer in a counseling session aimed at assisting her cope with her amputation, the employee "made her issue of cancer relevant to the compensable rehabilitation of her psychological state." Employer/Insurer's Motion Seeking an Order Compelling Claimant to Withdraw Objection as to the Request for Production of Documents on Anwan Medical Center-Oncology Division, *supra*. Presumably, the need for counseling for the amputation (the only injury for which she was receiving workers' compensation) could be determined by the records already obtained from the treating psychotherapist. One can only speculate about why oncology records were requested, but they are outside the scope of what is necessary. One hypothesis is that if the cancer is terminal, the insurer might avoid settling the claim. E-mail from Jennifer A. Jarvis, Att'y, Sartain Law Offices, to author (May 3, 2017; 3:43 PM) (on file with author).

29. See, e.g., *Morris v. Consolidation Coal Co.*, 446 S.E.2d 648, 652–53 (W. Va. 1994) (discussing *ex parte* communications when no statute specifically authorizes them).

30. In one situation, a worker with a back injury was caught on his employer's video surveillance allegedly helping a friend carry trash from a construction site on the injured worker's day off. E-mail from Jennifer A. Jarvis, Att'y, Sartain Law Offices, to author (Mar. 28, 2017, 4:26 PM) (on file with author); E-mail from Jennifer A. Jarvis, *supra* note 28. The video, taken through dense trees, barely shows two human images, both the same height, in white shirts and hats, and with facial hair. *Id.* One person is picking up small items, possibly cardboard. E-mail from Jennifer A. Jarvis, *supra*; E-mail from Jennifer Jarvis, *supra* note 28. In an *ex parte* meeting without notice, the employer's attorney showed the video to the authorized treating physician, i.e., the physician responsible for the patient's diagnosis and treatment. E-mail from Jennifer A. Jarvis, *supra*. Based on the video, the physician shifted the worker from light to full duty and discontinued treatment. Report of Authorized Treating Physician (Sept. 24, 2015) (on file with author) (redacted) ("I have put him back to full duty because of his ability seen on a recent video surveillance.").

31. Hodge, *supra* note 25, at 124–25.

Relatedly, work absences may not be tolerated outside a filed claim,³² and health insurers may refuse to pay medical costs that would be covered by workers' compensation.³³ Second, employers often choose the plaintiff's authorized treating physician, so the balance of power is already shifted towards employers in this regard.³⁴

Why must injured workers choose between compensation and medical privacy?³⁵ The HPR contains a widely misunderstood provision, 45 C.F.R. § 164.512(l), which states in part, "[a] covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation."³⁶ State legislatures and courts universally view § 164.512(l) as a privacy waiver.³⁷ As a result, courts do not apply federal privacy protections to workers' compensation proceedings, and states fail to craft workers' compensation statutes to protect privacy meaningfully.³⁸ Injured workers are required to consent to disclosure or to forego compensation, and scope of disclosure is often insufficiently limited.³⁹

The question remains why § 164.512(l) is interpreted as a federal privacy waiver when state gaps in protecting workers' privacy persist. To be sure, state courts and legislatures may falsely believe states are adequately protecting workers' privacy. But the answer is more likely rooted in concerns about federalism. Historically, broad latitude was given to states to administer their own workers' compensation programs and to protect privacy.⁴⁰ The HPR could frustrate the administration of workers' compensation claims by imposing additional requirements on employers and slowing the adjudication process. Workers also could pressure their physicians to limit or not to disclose relevant medical information.

This Article is the first to address the challenges of federalism in protecting medical privacy in workers' compensation after the promulgation of the HPR and to propose legal change.⁴¹ The Article argues that workers' compensation programs

32. *Id.* at 125.

33. *Id.*

34. *See, e.g.*, GA. CODE ANN. § 34-9-201(b)–(c), (d)–(f) (2017) (discussing the employer's choice of physician absent an emergency or the employer's failure to follow specified procedures for physician selection).

35. I use "privacy" loosely in this Article as Congress uses it in the HPR to mean both "privacy" (protection from disclosures one does not want to make to anyone) and "confidentiality" (protection from disclosures one does not want to make to certain people). *See Humphers v. First Interstate Bank of Or.*, 696 P.2d 527, 529–30 (Or. 1985) (discussing the distinction between "privacy" and "confidentiality").

36. 45 C.F.R. § 164.512(l) (2018).

37. *See infra* Part II.

38. *See infra* Part II.

39. *See infra* Section III.A.

40. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,463–64 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160 & 164); Brevard Cihfield, *Foreword* to COUNCIL OF STATE GOV'TS, WORKMEN'S COMPENSATION AND REHABILITATION LAW (REVISED) (1974); MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE 49, 55, 58, 61, 80–87, 90–91, 224, 315 (1999).

41. For an excellent pre-HPR article on this topic, see Hodge, *supra* note 25.

must align with the federal privacy protections of the HPR and proposes actions for the U.S. Department of Health and Human Services (HHS) and states to remedy departures. Part I discusses the complex relationship between the HPR and workers' compensation. This relationship is often misunderstood by legislatures and courts, compounding the challenges of federalism in this area. Specifically, Part I addresses the HPR's § 164.512(l) exception, permitted and authorized disclosures under the HPR, and the scope of such disclosures under legal and practice of medicine restrictions.

Part II examines preemption challenges under the HPR and health information policy. The HPR's § 164.512(l) exception and standard preemption provisions are discussed in the context of HHS's intent to facilitate administrative proceedings, seek a balanced exchange of information between employees and employers, and prevent fraud. Current judicial interpretation of § 164.512(l) stands in stark contrast to these intentions. Courts assume § 164.512(l) is a blanket exclusion from federal privacy protections, rather than an exception that must be read "through," or interpreted in the spirit of, the HPR. While the HPR allows states to develop privacy protections consistent with the Rule, states fail to fill in the legislative gaps given the limited reach of state constitutional provisions, the routine waiver of statutory privacy protections in the context of workers' compensation, and the ineffective statutory limitations on scope of PHI disclosure.

Part III provides the first published survey of states' response to protecting workers' privacy. It examines four areas: scope of PHI disclosure in workers' compensation proceedings, legality of ex parte communications between parties and treating or examining physicians, requirements for notice of such communications, and requirements for protective orders governing disclosure of PHI.

Part IV argues that the gap in legal protection created by § 164.512(l) highlights a federalism relationship best understood as "symbiotic federalism," whereby different levels of government are mutually dependent. While the HPR exclusion recognizes states' historic role in administering workers' compensation programs and assumes that they are in the best position to establish privacy protections to administer claims efficiently, the HPR also serves as a floor for privacy protection. Thus, this Part argues § 164.512(l) affords states opportunities for developing privacy protection but does not authorize legal departures that violate the spirit of the HPR. As a result, HHS must clarify the meaning of § 164.512(l) and encourage states to comply with it. Compliance requires states to create law that imposes meaningful restrictions on PHI disclosures in workers' compensation proceedings, narrowly tailoring them to what is necessary to administrate claims. If states fail to comply, conflicting state workers' compensation statutes must be preempted. Additionally, if HHS authorizes ex parte communications, the agency could require notice and protective orders for PHI disclosures.

I. HIPAA PRIVACY RULE AND WORKERS' COMPENSATION

A. Overview of the HIPAA Privacy Rule

Congress passed the Health Insurance Portability and Accountability Act (HIPAA) in 1996, largely to ensure portability of health insurance for individuals

moving between employer-based group health plans.⁴² Additionally, HIPAA recognizes the increased use of medical information in health care delivery as well as the need to manage and to protect such information.⁴³ While the statute does not protect medical privacy itself, it authorized HHS, the agency tasked with enforcing HIPAA, to promulgate privacy regulations three years from the effective date if Congress failed to act.⁴⁴

Congress did not act, and HHS issued regulations in 2000⁴⁵ (modified in 2002)⁴⁶ often referred to as the “HIPAA Privacy Rule” (HPR), which took effect in 2003.⁴⁷ The HPR is an extensive privacy regulation that addresses a number of concerns, including: inappropriate disclosures and resulting stigma and discrimination, the increasing electronic transmission of data, the growing number of health care professionals with access to health information, and the need for privacy to encourage patients to seek medical care.⁴⁸ HHS’s language is strong: “Privacy is a fundamental right. . . . [I]t must be viewed differently than any ordinary economic good. . . . [I]t speaks to our individual and collective freedom.”⁴⁹ As a result, the HPR restricts the use of “protected health information” (PHI), or information that may be used to link a patient with her medical records.⁵⁰ While HIPAA does not afford a

42. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C.). HIPAA simplifies health insurance administration, provides coverage for individuals with pre-existing conditions, addresses waste as well as fraud and abuse in health insurance and the provision of health care, improves access to long-term care, and provides tax incentives for medical savings accounts. *Id.*

43. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,466 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160 & 164).

44. Health Insurance Portability and Accountability Act § 264, 110 Stat. at 2033 (codified at 42 U.S.C. § 1320d-2 note (2012) (Recommendations with Respect to Privacy of Certain Health Information)).

45. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,462.

46. Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,181 (Aug. 12, 2002) (codified at 45 C.F.R. pts. 160 & 164).

47. *Id.* Large health plans were given until April 14, 2003, to comply and small health plans until April 14, 2004. *Id.* at 53,250. The HPR was subsequently amended in 2009 and 2013. *See* Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules, 78 Fed. Reg. 5566 (Jan. 25, 2013) (codified at 45 C.F.R. pts. 160 & 164); Breach Notification for Unsecured Protected Health Information, 74 Fed. Reg. 42,740 (Aug. 24, 2009) (codified at 45 C.F.R. pts. 160 & 164).

48. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,463–68 (describing the purposes of the HPR).

49. *Id.* at 82,464. Congress later provided even stronger federal protections than the HPR for genetic information, and some states afford heightened protection for genetic and HIV status. *See* Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended in scattered sections of 29 and 42 U.S.C.); *see, e.g.*, N.Y. PUB. HEALTH LAW §§ 2780–2787 (McKinney 2012 & Supp. 2019) (genetic information); Confidentiality of HIV-Related Information Act, 35 PA. STAT. AND CONS. STAT. ANN. §§ 7601–7612 (West 2012).

50. *See* 45 C.F.R. § 164.502(a) (2018) (“A covered entity or business associate may not use or disclose protected health information, except as permitted or required by this subpart or

private right of action, a number of courts apply the federal standard of care in private litigation.⁵¹

One of the ways the HPR protects patients' privacy is by requiring physicians who maintain electronic health or billing records to guard against improper PHI disclosure.⁵² The goal of this privacy protection is to shield patients from harmful disclosures and thereby encourage them to seek needed medical care.⁵³ Notably, some courts even apply the federal privacy standard in medical malpractice when a litigant waives her right to privacy for litigation purposes.⁵⁴ Exceptions to federal protections exist only when information is de-identified, such as for research purposes or for disclosures made in accordance with a compelling state interest, as in the case of law enforcement.⁵⁵

The HPR defines "PHI" and "covered entities" and outlines disclosures that are "required," "permitted," or "authorized."⁵⁶ PHI is "individually identifiable health information."⁵⁷ This is information, including diagnoses and demographic information, that:

[r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to

by subpart C of part 160 of this subchapter."); *id.* § 164.302 ("A covered entity . . . must comply with the applicable standards . . . of this subpart with respect to electronic protected health information of a covered entity.").

51. *See, e.g.*, *I.S. v. Wash. Univ.*, No. 4:11CV235SNLJ, 2011 WL 2433585 (E.D. Mo. June 14, 2011) (upholding a negligence per se claim under the HPR standard); *Byrne v. Avery Ctr. for Obstetrics & Gynecology*, 102 A.3d 32 (Conn. 2014) (using the HPR to establish directly the standard of care in a state negligence action); *Northlake Med. Ctr. v. Queen*, 634 S.E.2d 486 (Ga. Ct. App. 2006) (striking down a Georgia statute with a private right of action that does not meet the HPR standard); *Acosta v. Byrum*, 638 S.E.2d 246, 251 (N.C. Ct. App. 2006) (using the HPR to inform the standard of care in a negligence action); *Sorensen v. Barbuto*, 143 P.3d 295, 299 n.2 (Utah Ct. App. 2006) (noting the plaintiff's argument that the HPR informs a physician's standard of care). Other states have similar laws. *See Individual Right of Action for Medical Records Access: 50 State Comparison*, HEALTH INFO. & L., <http://www.healthinfolaw.org/comparative-analysis/individual-right-action-medical-records-access-50-state-comparison> [<https://perma.cc/NW6N-GGCQ>] (last updated Apr. 3, 2013) (listing thirteen states using the HPR as a standard in patient right of access to medical records cases).

52. 45 C.F.R. § 164.502(a).

53. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,464.

54. *See, e.g.*, *Moreland v. Austin*, 670 S.E.2d 68, 71–72 (Ga. 2008) ("HIPAA requires a physician to protect a patient's health information . . . Georgia law stands in sharp contrast . . . It follows that HIPAA is more stringent and that it governs ex parte communications between defense counsel and healthcare providers." (citing *Allen v. Wright*, 644 S.E.2d 814 (Ga. 2007))).

55. *See* 45 C.F.R. § 164.512(f), (i) (discussing exceptions for law enforcement and research, respectively). Exceptions differ from permitted disclosures of PHI that is otherwise covered by the HPR.

56. *Id.* §§ 160.103, 164.502(a), 164.508.

57. *Id.* § 160.103.

an individual; and (i) That identifies the individual; or (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.⁵⁸

“Covered entities” include health care providers who maintain electronic records (i.e., individuals and institutions providing and billing for health care), health care clearinghouses (i.e., firms that process health information into different formats), and health plans (i.e., providers or payors of health care).⁵⁹ “Business associates,” or individuals or organizations performing services on behalf of covered entities that involve PHI, also are included.⁶⁰ Once an entity is covered, all of its PHI is subject to the HPR, including that stored in paper files.⁶¹

Covered entities must provide notice of the HPR to patients and may not disclose PHI unless “required,” “permitted,” or “authorized.”⁶² “Required” disclosures are made to patients or their legal representatives and for HHS enforcement purposes.⁶³ “Permitted” disclosures include those made to individuals or their representatives outside required disclosures; for medical treatment, billing, and health care operations; out of necessity to treat an incapacitated patient; incidental to a permitted use; and in the public interest, such as those required by law.⁶⁴ Permitted disclosures generally are limited in scope to the “minimum necessary,” outside those made in the course of treatment or in the public interest.⁶⁵ “Authorized” disclosures are made pursuant to patient consent to medical record requests, marketing requests, or sale of PHI.⁶⁶ Authorized disclosures include releases made to third parties in litigation.⁶⁷

B. HIPAA Privacy Rule and Workers’ Compensation Proceedings

The HPR applies to workers’ compensation proceedings, and disclosures of PHI may be permitted or authorized in that context. Physicians treating injured workers—whether worker-selected or insurer/employer-appointed—are covered entities, and they generate medical records containing PHI. The HPR also may apply to workers’ compensation insurers or employers themselves, depending on whether they otherwise are covered entities, and to the business associates of such covered entities. If the HPR contained no additional language, it would be clear that the PHI of patients in workers’ compensation proceedings was protected under federal law. But

58. *Id.*

59. *Id.*

60. *Id.* These services may include billing, claims processing, data analysis, and utilization review. *Id.*

61. *Id.* (describing PHI as information “[t]ransmitted or maintained in any . . . form or medium”).

62. *Id.* §§ 164.502(a), (i), 164.508, 164.520.

63. *Id.* § 164.502(a)(2), (4).

64. *Id.* §§ 164.502(a)(1), (3), 164.510(a)(1), (3), (b)(1)–(2), 164.512.

65. *Id.* § 164.502(b) (discussing when “minimum necessary” applies but not specifically defining it).

66. *Id.* § 164.508(a).

67. *Id.* § 164.508(a)(2)(i)(C). As part of their right to access their own medical records, patients in litigation also may request that their medical records be sent to third-party designees; these are considered “required” disclosures. *Id.* § 164.502(a)(2)(i).

the HPR also contains an exception for PHI disclosed during workers' compensation proceedings in accordance with state law, which is the crux of the problem.

1. Section 164.512(l)'s Exception for Workers' Compensation and Other Permitted PHI Disclosures

Disclosures to facilitate the administration of workers' compensation claims are permitted disclosures under § 164.512(l) of the HPR. Section 164.512(l) states, "[a] covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault."⁶⁸ The language that PHI disclosures may be made "to the extent necessary to comply with" state laws affecting workers' compensation effectively translates to disclosures "necessary to administer claims" under state laws. In contrast, information that is unnecessary for the administration of claims must not be disclosed. Section 164.512(l) thus affords states broad latitude to protect workers' medical privacy and to administrate workers' compensation programs consistent with their historic roles in those areas.

Typically, courts and legislatures find compliance with § 164.512(l) on two grounds. First, authorization is either assumed or provided at filing when the patient enters the workers' compensation system.⁶⁹ Second, the amount of PHI "necessary to comply with [state] laws relating to workers' compensation" is determined entirely by existing state workers' compensation and other state laws, no matter the level of protection.⁷⁰ Missing from this analysis is states' obligation to protect worker privacy in exchange for the broad latitude they have to implement their desired approaches under § 164.512(l). As argued in Part II, § 164.512(l) has been misinterpreted as a complete or very broad waiver of federal privacy protection. Consequently, courts have not preempted state laws failing to protect patients' PHI in workers' compensation proceedings.⁷¹

Under the HPR, other permitted disclosures of PHI in the workers' compensation process include those made for medical treatment as well as payment of treating or examining physicians.⁷² While "permitted" disclosures may be subject to the "minimum necessary" standard for disclosure under the HPR, "required" disclosures

68. *Id.* § 164.512(l). This section applies to both state and federal workers' compensation programs, though the focus of this Article is the legal conflict arising at the intersection of state workers' compensation laws and HIPAA. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,542 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160 & 164) (discussing the application of § 164.512(l) to federal workers' compensation programs under the Black Lung Benefits Act, Employees' Compensation Act, Energy Employees' Occupational Illness Compensation Program Act, and Longshore and Harbor Workers' Compensation Act).

69. *See infra* Section II.B.

70. *See infra* Section II.B.

71. *See infra* Section II.B.

72. *See* 45 C.F.R. § 164.501 (defining "payment" to include reimbursement for physician services); *id.* § 164.502(a)(1)(ii) (listing treatment under "[p]ermitted uses and disclosures" (emphasis omitted)).

are not.⁷³ Thus, states may alter the disclosure standard for PHI in workers' compensation proceedings by permitting or requiring disclosure.⁷⁴

2. Authorized PHI Disclosures

PHI also may be disclosed during the administration of a workers' compensation claim pursuant to the HPR with valid, written authorization of the injured worker.⁷⁵ Under state law, authorization of PHI disclosures may be assumed by filing a workers' compensation claim or otherwise compelled for claims to be compensable.⁷⁶ An injured worker also could authorize disclosure of information that exceeds the scope of what is required under state law for the administration of her claim; such information might be useful, for example, in refuting an argument that she is not disabled.⁷⁷

Unfortunately, the language used by HHS may confuse parties and adjudicating bodies about what is "authorized," "required," or "permitted." This is because HHS refers to "authorized" and "required" disclosures as "permissible," meaning they are legal or allowed rather than "permitted."⁷⁸ Because these "permissible" disclosures are "authorized" or "required" disclosures, they are not subject to the minimum necessary standard for disclosure.⁷⁹

3. Scope of PHI Disclosure in Workers' Compensation Proceedings

a. State Restrictions

While PHI disclosures generally are permitted during workers' compensation proceedings under § 164.512(l), the scope of disclosure in particular instances is determined by state law. States choose whether to apply a "required" or "permitted" standard, and standards may differ across states as well as within states for different aspects of claim administration.⁸⁰ While word choice is vital for protection, choice

73. *Id.* § 164.502(b)(2)(ii), (v)–(vi).

74. *See infra* Section I.B.3.a.

75. 45 C.F.R. § 164.508.

76. *Id.* § 164.512(l); *see also infra* note 177 and accompanying text.

77. *See* NORTH CAROLINA MEDICO-LEGAL GUIDELINES § III(A)(2)(b) (N.C. BAR ASS'N 2014) ("The scope of the authorization determines the scope of the inspection, release, copying or report. If the requesting attorney wants information beyond what is authorized to be released, the attorney must obtain additional authorization.").

78. Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182, 53,199 (Aug. 14, 2002) (codified at 45 C.F.R. pts. 160 & 164).

79. 45 C.F.R. § 164.502(b)(2)(ii)–(iii), (v)–(vi). This nuance is easily misunderstood by adjudicating bodies. *See, e.g.,* Smith v. CSK Auto, Inc., No. 200106934, 2006 AK Wrk. Comp. LEXIS 135, at *1, *17–18, *21–22 (Alaska Workers' Comp. Bd. May 25, 2006) (finding under a state statute mandating disclosure that "45 CFR 164.512(a) limits the amount of protected health information [sic] health care provider is allowed to disclose to the minimum necessary to accomplish the workers' compensation purpose and to the full extent authorized by State or other law").

80. Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. at 53,198–99.

of language often does not appear deliberate, particularly when different parts of the same workers' compensation statute use conflicting language.⁸¹ According to HHS, "[i]n many cases, the minimum necessary standard will not apply to disclosures made pursuant to [workers' compensation] laws. In other cases, the minimum necessary standard applies, but permits disclosures to the full extent authorized by the workers' compensation laws."⁸² Even if disclosure is limited to the "minimum necessary" standard, no guidance is provided by the HPR or federal or state law about what that means in the context of workers' compensation. Without guidance, physicians may rely on the statements of defense counsel or employers' insurers that the information requested is the minimum necessary for the administration of a claim or for reimbursement of services rendered.

HHS provides examples of how scope of disclosure requirements may differ. In Louisiana, disclosures are required and therefore not subject to the minimum necessary standard:

[U]nder Louisiana workers' compensation law, a health care provider who has treated an employee related to a workers' compensation claim is required to release any requested medical information and records relative to the employee's injury to the employer or the workers' compensation insurer. . . . [S]ince such disclosure is required by law, it is permissible under the Privacy Rule at § 164.512(a) and exempt from the minimum necessary standard. The Louisiana law further provides that any information relative to any other treatment or condition shall be available to the employer or workers' compensation insurer through a written release by the claimant. Such disclosure also would be permissible and exempt from the minimum necessary standard under the Privacy Rule if the individual's written authorization is obtained⁸³

In Texas, part of the workers' compensation statute requires disclosure, while another part permits it, which could result in PHI disclosures of different scope for the same claim:

Texas workers' compensation law requires a health care provider . . . to furnish records relating to the treatment or hospitalization for which compensation is being sought. Since such disclosure is required by law, it . . . is permissible under the Privacy Rule . . . and exempt from the minimum necessary standard. The Texas law further provides that a health care provider is permitted to disclose to the insurance carrier records relating to the diagnosis or treatment of the injured employee without the authorization of the injured employee to determine the amount of payment or the entitlement to payment. Since the disclosure

81. *See, e.g., infra* text accompanying note 84 (citing Texas law).

82. Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. at 53,199.

83. *Id.*

only is permitted and not required [T]he minimum necessary standard would apply⁸⁴

Thus, in Texas, disclosures under the same workers' compensation law are subject to different rules about scope. HHS has not challenged this outcome under the HPR.

These examples are noteworthy for a couple of reasons. To start, disclosures vary based on what may be the default rather than the deliberate word choice of state legislatures. Further, when a state statute requires disclosure of medical records to bring a workers' compensation claim, the minimum necessary disclosure standard does not apply,⁸⁵ and the full medical record "related to" an injury may be disclosed. This is the situation in both Louisiana and Texas when an injured worker who files for workers' compensation requests reimbursement for medical expenses.

In practice, varying state standards for the scope of PHI disclosure may have significant consequences for both the content of the medical records disclosed and the way disclosures are made. First, they may create inconsistencies inter- and intra-state with respect to the breadth of PHI disclosed for workers' compensation purposes. More of a medical record may be released for a claim in one state where disclosure is required than in another state where it is permitted. Similarly, the scope of disclosure may vary within a state, if different aspects of workers' compensation proceedings are subject to varying standards of disclosure. Second, varying state standards may affect the manner in which PHI is disclosed. In instances where the minimum necessary standard does not apply—that is, in required or authorized disclosure situations—some courts hold that employers or their legal counsel may engage in *ex parte* communications with treating or examining physicians without notice to, or the presence of, the injured worker or her counsel.⁸⁶

b. Provider Restrictions

The scope of permitted and authorized disclosures under §164.512(*l*) (and the HPR in general) also may be influenced by medical providers. With respect to permitted disclosures, HHS states:

[w]here a covered entity routinely makes disclosures for workers' compensation purposes under 45 CFR 164.512(*l*) or for payment purposes, the covered entity may develop standard protocols as part of its minimum necessary policies and procedures that address the type and

84. *Id.*

85. 45 C.F.R. § 164.502(b) (2018).

86. *See, e.g.,* *Farr v. Riscorp*, 714 So. 2d 20, 22–23 (La. Ct. App. 1998) (holding that physician-patient privilege does not extend to workers' compensation claimants in Louisiana, and *ex parte* communications between a treating physician and compensation carrier are not "confidential communications"); *Simms v. Schabacker*, 339 P.3d 832, 834, 836 (Mont. 2014) (holding that Montana's disclosure statutes and a patient's signed "Notice of Privacy Policy" authorized a physician's *ex parte* communication and "thus provided an exception to the physician-patient privilege"); *Morris v. Consolidation Coal Co.*, 446 S.E.2d 648, 652–54 (W. Va. 1994) (allowing an *ex parte* conversation without notice when limited to PHI related to a claimant's injury).

amount of protected health information to be disclosed for such purposes.⁸⁷

Thus, the content and scope of PHI disclosure could differ among physicians for the same workers' compensation request based on different protocols.⁸⁸ The content and scope of authorized disclosures also may vary based on common law informed consent requirements as well as what physicians believe to be in the best interests of patients therapeutically.⁸⁹

II. MEDICAL PRIVACY AND PREEMPTION CHALLENGES

Having discussed the complexities of the relationship between the HPR and workers' compensation, this Part examines the challenges in protecting workers' privacy under the current legal scheme. Specifically, it addresses federal and state roles in protecting privacy and the difficulty in preempting state law that fails to protect injured workers' privacy. The preemption challenges relate to a misperception about the relationship between the federal privacy right and states' historic role in both protecting privacy and administering their own workers' compensation programs.⁹⁰ Because of this misperception, courts and legislatures wrongfully assume the HPR's § 164.512(l) is a complete or very broad waiver of federal protections. Correcting this problem requires a better understanding of the federalism relationship at stake. The arguments in this Part foreshadow the importance of recognizing the relationship as "symbiotic," whereby the federal and state governments are mutually dependent and must work together to protect privacy. "Symbiotic federalism" is discussed in Part IV.

Part II is divided into three Sections. Section II.A provides background information about the HPR's preemption provisions and presents arguments for preempting contrary state law bearing on workers' compensation. Section II.B discusses why these preemption arguments would fail under current legislative and judicial treatment of § 164.512(l). The Section argues that § 164.512(l) is not a blanket privacy exception, and the HPR is intended to serve as a floor for privacy

87. U.S. DEP'T OF HEALTH & HUMAN SERVS., DISCLOSURES FOR WORKERS' COMPENSATION PURPOSES 2 (Dec. 3, 2002), <https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/coveridentities/workerscompensation.pdf> [https://perma.cc/9SP7-RBJE].

88. *See id.*

89. *See Canterbury v. Spence*, 464 F.2d 772, 786 (D.C. Cir. 1972). Informed consent in negligence may be based on a reasonable patient or a reasonable physician standard, the latter allowing the physician to be more paternalistic in determining materially relevant information to be disclosed. *Id.* at 786–87. Under either standard, a physician may invoke therapeutic privilege and act paternalistically to limit the information a patient receives, if she believes it may be detrimental to the patient's physical or mental health. *Id.* at 789; *see also* Arato v. Avedon, 858 P.2d 598, 601, 607–08 (Cal. 1993) (upholding jury instructions about the reasonable patient informed consent standard "weighing the risks" of disclosure in a case where a physician did not want to give a cancer patient a "cold shower" with statistical mortality information that the patient's estate claims was of material interest to his treatment decision).

90. *See supra* note 40 and accompanying text.

protection. As a result, § 164.512(l) must be read “through” the HPR. To bolster this claim, Section II.C discusses HHS’ intent both to maintain privacy protections for injured workers consistent with the HPR and to allow states the opportunity to implement privacy protections in workers’ compensation proceedings. HHS assumed states are in a better position than the federal government to seek a balanced exchange of PHI between employees and employers. Thus, HHS intended for § 164.512(l) to facilitate state workers’ compensation proceedings while maintaining injured workers’ privacy.

A. HIPAA Privacy Rule’s Preemption Provision

The HPR contains a standard preemption provision. The regulations state in pertinent part: “A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law.”⁹¹ “Contrary” is defined as follows:

(1) A covered entity . . . would find it impossible to comply with both the State and federal requirements; or (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act, section 264 of Public Law 104–191, or sections 13400–13424 of Public Law 111–5, as applicable [i.e., HIPAA or the Health Information Technology for Economic and Clinical Health (HITECH) Act].⁹²

As a result, HHS intended state laws to stand unless they conflict with the HPR, in which case they are preempted. But courts have not found preemption in workers’ compensation cases and rarely hold that the HPR preempts state law in other contexts.⁹³

HHS’s choice of this standard preemption provision in the workers’ compensation context is important for a couple of reasons. First, it indicates that the HPR is meant to serve as a floor for privacy protections. HHS Secretary Donna E. Shalala emphasized this point before Congress prior to HIPAA’s enactment: “[C]onfidentiality protections . . . would be cumulative, and the Federal legislation

91. 45 C.F.R. § 160.203 (2018).

92. *Id.* § 160.202.

93. A few courts have found that the HPR preempts state law in contexts outside workers’ compensation. *See, e.g.,* OPIS Mgmt. Res., LLC v. Sec’y, Fla. Agency for Health Care Admin., 713 F.3d 1291, 1296 (11th Cir. 2013) (preempting Florida nursing home licensing statute section 400.145, which requires disclosure of medical records of deceased residents); *Thomas v. 1156729 Ontario Inc.*, 979 F. Supp. 2d 780, 783 (E.D. Mich. 2013) (“Unlike Michigan law, HIPAA does not allow for automatic waiver of the physician-patient privilege upon the filing of a lawsuit, therefore Michigan law is not ‘more stringent,’ and is superceded [sic] by HIPAA” (quoting *Congress v. Tillman*, No. 09-10419, 2009 WL 1738511, at *1 (E.D. Mich. June 16, 2009))); *Law v. Zuckerman*, 307 F. Supp. 2d 705, 709 (D. Md. 2004) (preempting less stringent Maryland Confidentiality of Medical Records Act standards for ex parte communications in a medical malpractice case); *Moreland v. Austin*, 670 S.E.2d 68, 71 (Ga. 2008) (preempting state law, including O.C.G.A. § 24-9-40(a), which allowed ex parte communications in medical malpractice actions).

would provide a floor. [It] should provide every American with a basic set of rights with respect to health information. All should be assured of a national standard of protection.”⁹⁴ As a result, states may enact laws that parallel the federal standard, but those that fall below it are preempted. Second, states may enact more stringent laws. The HPR contains an explicit exception for states offering stronger privacy protections than the HPR.⁹⁵ This indicates HHS’s desire for robust state protection of privacy. Nevertheless, to date no state has enacted more stringent privacy laws in the workers’ compensation context.⁹⁶

94. *Health Insurance Portability and Accountability Act: Hearing Before the S. Comm. on Labor & Human Res.*, 105th Cong. (1997) [hereinafter *Hearing*] (testimony of Donna E. Shalala, Secretary, Dep’t of Health & Human Servs.), <https://aspe.hhs.gov/testimony-secretary-health-and-human-services-september-11-1997> [<https://perma.cc/KL79-YLRT>].

95. 45 C.F.R. § 160.203(b). The full list of exceptions follows:

(a) [If a] determination is made by the Secretary . . . that the provision of State law: (1) Is necessary: (i) To prevent fraud and abuse related to the provision of or payment for health care; (ii) To ensure appropriate State regulation of insurance and health plans to the extent expressly authorized by statute or regulation; (iii) For State reporting on health care delivery or costs; or (iv) For purposes of serving a compelling need related to public health, safety, or welfare, and, if a standard, requirement, or implementation specification under part 164 of this subchapter is at issue, if the Secretary determines that the intrusion into privacy is warranted when balanced against the need to be served; or (2) Has as its principal purpose the regulation of the manufacture, registration, distribution, dispensing, or other control of any controlled substances (as defined in 21 U.S.C. § 802), or that is deemed a controlled substance by State law. (b) The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter. (c) The provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention. (d) The provision of State law requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals.

Id. § 160.203.

96. A state law is defined as “more stringent” in the following circumstances:

(1) With respect to a use or disclosure, the law prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted under this subchapter (2) With respect to the rights of an individual, who is the subject of the individually identifiable health information, regarding access to or amendment of individually identifiable health information, permits greater rights of access or amendment, as applicable. (3) With respect to information to be provided to an individual who is the subject of the individually identifiable health information about a use, a disclosure, rights, and remedies, provides the greater amount of information. (4) With respect to the form, substance, or the need for express legal permission from an individual, who is the subject of the individually identifiable health information, for use or disclosure of individually identifiable health information, provides requirements that narrow the scope or duration, increase the privacy protections afforded (such

Courts have yet to engage in preemption analysis in the workers' compensation context since, with limited exception, they have held that the HPR does not apply due to § 164.512(l).⁹⁷ Meanwhile, preemption is indicated in three scenarios: state workers' compensation laws directly conflict with the HPR, are construed by courts to conflict with the HPR, or result in processes that conflict with the HPR's protections. State laws may directly conflict with the HPR, or courts may construe these laws to conflict with it, when the state statutory standard for privacy protection falls, or is interpreted to fall, below the federal one. State processes may conflict with the HPR when the administration of workers' compensation claims results in privacy protections that drop below the federal standard, even when state privacy protections may be in place.

If, as this Article proposes, the purpose of § 164.512(l) is not to eliminate federal privacy protections for injured workers but to facilitate the administration of workers' compensation claims, preemption of some state workers' compensation statutes is likely. Under the first part of the HPR's preemption provision, the plain language or interpretation of current state laws may make "it impossible [for physicians or other covered entities] to comply with both the State and federal requirements."⁹⁸ This is because state workers' compensation laws are concerned primarily with efficiency in administering claims and the prevention of fraud, rather than protecting privacy.⁹⁹ State laws may authorize or be interpreted to allow broad portions or the entirety of a medical record to be disclosed during workers' compensation proceedings.¹⁰⁰ This is inconsistent with the HPR's requirements for

as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the express legal permission, as applicable. (5) With respect to recordkeeping or requirements relating to accounting of disclosures, provides for the retention or reporting of more detailed information or for a longer duration. (6) With respect to any other matter, provides greater privacy protection for the individual who is the subject of the individually identifiable health information.

Id. § 160.202.

97. *See, e.g.*, *Jarmuth v. Cox*, No. 1:07CV33, 2007 WL 2892957, at *4 (N.D. W. Va. Sept. 28, 2007) (citing 45 C.F.R. § 164.512(l) to dismiss a breach of confidentiality claim); *Rigaud v. Garofalo*, No. Civ.A.04-1866, 2005 WL 1030196, at *3 (E.D. Pa. May 2, 2005) (citing 45 C.F.R. § 164.512(l) as "permitting the disclosure of health information made for workers' compensation purposes without an individual's authorization"); *Buehler v. Indus. Comm'n of Ariz.*, No. 1 CA-IC 06-0062, 2007 Ariz. App. Unpub. LEXIS 293, at *6 (Ariz. Ct. App. May 22, 2007) (citing 45 C.F.R. § 164.512(l) and stating that "HIPAA does not preclude an employer or carrier from requiring receipt of a claimant's medical records in order to determine workers' compensation benefits"); *Arby's Rest. Grp., Inc. v. McRae*, 734 S.E.2d 55, 57 (Ga. 2012) ("[T]he [HIPAA] privacy provisions do not preempt Georgia law on the subject of ex parte communications because HIPAA exempts [via § 164.512(l)] from its requirements disclosures made in accordance with state workers' compensation laws."); *Holtkamp Trucking Co. v. Fletcher*, 932 N.E.2d 34, 45 (Ill. App. Ct. 2010) ("[The] federal privacy regulations [under § 164.512(l)] make an exception for workers' compensation . . .").

98. 45 C.F.R. § 160.202.

99. *See infra* Section II.C.

100. *See infra* Section II.B.

restricted, if not minimum necessary, disclosure.¹⁰¹ Further, state laws that fail to limit ex parte communications in scope, or to provide notice provisions for such communications, also may violate the HPR.¹⁰²

Additionally, preemption might occur under the second part of the preemption provision, namely, when “[s]tate law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [HIPAA].”¹⁰³ Undoubtedly, workers’ compensation laws are interpreted by courts to impose obstacles to applying the HPR to injured workers. Indeed, that is the premise behind the current legal interpretation of § 164.512(l) as a complete waiver of federal privacy protections.

Section II.B addresses the limits of current judicial interpretation of § 164.512(l) for preemption purposes and proposes an alternative understanding of the relationship between that provision and state law pertaining to workers’ compensation.

B. Judicial Interpretation of § 164.512(l)

The current legal understanding of § 164.512(l) is that it excludes from HPR protections PHI disclosed during workers’ compensation proceedings. The first part of this Section examines cases interpreting § 164.512(l) as a complete federal privacy waiver. The second part discusses overturned or superseded decisions that, alternatively, seek to reconcile the administration of workers’ compensation claims with the HPR’s privacy protections. These courts do not assume that a worker has waived privacy rights by filing for workers’ compensation. The approach of these courts could be understood as reading the state workers’ compensation statutes “through” the HPR. The U.S. Supreme Court has used this technique in Employee Retirement Income Security Act (ERISA) litigation to reconcile two possibly contradictory legal outcomes under different provisions of that statute.¹⁰⁴ When one legal approach is read “through” another, it is understood in light of the overarching legal goal of the other provision; that goal may be complete field preemption in the ERISA context, or privacy protection in the HPR context.¹⁰⁵ This technique could prove useful for simultaneously recognizing the HPR and states’ historic roles in protecting privacy and administering workers’ compensation programs.

101. See 45 C.F.R. § 164.502(b).

102. See *id.* § 164.502(i) (“A covered entity that is required by § 164.520 to have a notice may not use or disclose protected health information in a manner inconsistent with such notice.”); see also *id.* § 164.520(a)(1) (“[A]n individual has a right to adequate notice of the uses and disclosures of protected information that may be made by the covered entity, and of the individual’s rights and the covered entity’s legal duties with respect to protected health information.”).

103. *Id.* § 160.202.

104. See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 217–18 (2004) (discussing how ERISA § 514(b)(2)(A) might save a state law from preemption, while § 502(a) calls for preemption; “§ 514(b)(2)(A) must be interpreted in light of the congressional intent to create an exclusive federal remedy in ERISA § 502(a)”).

105. See *id.*

1. Recognizing an Exception

Most state boards of workers' compensation¹⁰⁶ and courts assume the HPR's § 164.512(l) exception is a complete or very broad waiver of federal privacy protections.¹⁰⁷ This understanding of the HPR is so pervasive that few courts even mention the exception before dismissing privacy claims. This in itself is a legal error, since any PHI disclosed outside the scope of a workers' compensation claim—however broadly that is defined by state law—is undoubtedly subject to HPR protections.¹⁰⁸ At a minimum, a court must define and apply these boundaries. Failing to recognize the application of the HPR has led to some remarkable judicial decisions, including one where a court denied relief to a plaintiff who had medical information unrelated to his workers' compensation claim disclosed pursuant to a falsified authorization form sent by his employer to a medical provider.¹⁰⁹

106. *See, e.g.*, Order, Appeal No. 2010019011 (Ga. Workers' Comp. Bd. Jan. 24, 2011), <http://s3.amazonaws.com/sbwcdocs/google-shared/2010019011TrialAppeal.pdf> [https://perma.cc/43Z4-7V5N], *aff'g* Order, Trial No. 2010019011 (Ga. Workers' Comp. Bd. Sept. 10, 2010) (finding no preemption and a "fairly broad waiver"); Order, Appeal No. 2010019219 (Ga. Workers' Comp. Bd. Dec. 29, 2010), <http://s3.amazonaws.com/sbwcdocs/google-shared/2010019219TrialAppeal.pdf> [https://perma.cc/ZFE8-T6UU], *aff'g* Order, Trial No. 2010019219 (Ga. Workers' Comp. Bd. Dec. 1, 2001) (finding no preemption of state law and a waiver of privacy protections).

107. *See, e.g.*, *Hopkins v. Balachandran*, 76 A.3d 703, 712 (Conn. App. Ct. 2013) (finding no preemption and a complete waiver in a case where a worker submitted a medical claim to his employer for reimbursement, and the employer contacted the physician's office directly and obtained medical information about his treatment because "[o]nce the plaintiff submitted a copy of his superbill to his employer, he relinquished the justified expectation that the document would not be publicly disclosed"); *Holtkamp Trucking Co. v. Fletcher*, 932 N.E.2d 34, 45, 50 (Ill. App. Ct. 2010) (acknowledging in both the majority and dissent that "federal privacy regulations make an exception for workers' compensation"); *id.* at 50 (Myerscough, J., dissenting) (acknowledging the same); *Riley v. F.A. Richard & Assocs.*, 16 So. 3d 708, 720 n.16 (Miss. Ct. App. 2009) (discussing an exemption for all workers' compensation disclosures).

Employers' counsel and insurers also make this assumption. *See, e.g.*, Letter from Trisha Holland Lindsay, Att'y, to Records Custodian, Hartford Ins. Grp. (Mar. 30, 2017) (on file with author) (redacted) ("[The claimant] shall be deemed to have waived any privilege or confidentiality regarding the claim or history or treatment that the employee has had with any medical provider, psychiatrist or psychologist."); Letter from Iwona Patelska, Paralegal, to Cobb Outpatient Adult Servs. (Mar. 27, 2017) (on file with author) ("[W]e are requesting copies of any and all medical records . . . Please note: this request complies with HIPAA regulation CFR § 164.512(l).") (emphasis omitted); Letter from Angela D. Tartline, Att'y, to Dr. Sandea Greene-Harris, Med. Records Librarian (Feb. 9, 2017) (on file with author) (redacted) ("This request is not limited to medical records for the alleged injuries . . . in this workers' compensation claim, but rather covers any medical treatment or examinations either before, on, or after this date which are in your possession." (emphasis omitted)); Letter from Greg Wagner, Att'y, to Moin Kazi, Med. Doctor (Apr. 24, 2017) (on file with author) (redacted) ("As you may know medical records for treatment received pursuant to a Workers' Compensation Claim are not subject to HIPAA.").

108. 45 C.F.R. § 164.512(l) (2018).

109. *Balch v. Pioneer Adjustment Servs.*, No. NNHCV136036452, 2013 WL 4779545, at

With a couple of notable exceptions, the few courts that discuss § 164.512(l) do so in a cursory fashion, simply stating that filing for workers' compensation explicitly or implicitly, depending on the state's process, waives federal medical privacy protections.¹¹⁰ The *McRae v. Arby's Restaurant Group, Inc.*, litigation provides the most insight into judicial analysis of the provision.¹¹¹ *McRae*, which involved the injured worker who was ordered by the state workers' compensation board to consent to an ex parte conversation between her physician and her employer's lawyers, questioned the application of the HPR to state workers' compensation directly.¹¹² Because Georgia's workers' compensation statute is silent about whether ex parte communications are allowed, the court had to determine whether the HPR and its restrictions on ex parte communications applied to workers' compensation proceedings.¹¹³ The Superior Court held that HIPAA and the HPR are "inapplicable" to workers' compensation proceedings.¹¹⁴

The Court of Appeals of Georgia reversed the Superior Court and held that the state workers' compensation statute "does not compel an employee to authorize her treating physician to talk to her employer's lawyer ex parte in exchange for receiving benefits for a compensable injury," thus protecting *McRae's* medical privacy under both Georgia law and the HPR.¹¹⁵ The court found that, "[t]here is no wholesale exemption of the requirements of the Privacy Rule in workers' compensation proceedings. To the contrary, the Privacy Rule applies in the context of such proceedings."¹¹⁶ The court cited the plain language of §164.512(l) as "expressly permit[ting] the disclosure of information 'as authorized by and to the extent necessary to comply' with the requirements of workers' compensation laws."¹¹⁷

*1 (Conn. Super. Ct. Aug. 14, 2013). The court held that "plaintiff's causes of action against the defendants arose out of and occurred in the course of the workers' compensation claims process Therefore, absent the application of an exception, these claims are barred [by state law]. . . . Here, the plaintiff's allegations that the defendants altered the authorization form without his knowledge and used it to obtain his confidential medical information is more akin to the conduct that courts have determined is not sufficiently egregious to warrant an exception" *Id.* at *3–4 (citations omitted). The court then distinguished a case where an employer used "aggressive surveillance tactics" causing emotional distress for the spouse of a worker who filed for workers' compensation. *Id.* at *4 n.3 (citing *Nordstrom v. GAB Robins N. Am., Inc.*, No. 3:09-CV-771 (RNC), 2012 WL 1094645, at *1 (D. Conn. Mar. 31, 2012)). *But see* *Herman v. Kratche*, No. 86697, 2006 WL 3240680, at *1, *5 (Ohio Ct. App. Nov. 9, 2006) ("[W]hen a covered entity makes a disclosure, it must be for a purpose stated under HIPAA and its regulations. . . . nor do we find any authority for an inadvertent disclosure under HIPAA." (citations omitted)).

110. *See supra* note 107 and accompanying text.

111. *See* *Arby's Rest. Grp., Inc. v. McRae*, 734 S.E.2d 55 (Ga. 2012); *McRae v. Arby's Rest. Grp., Inc.*, 742 S.E.2d 510 (Ga. Ct. App. 2013); *McRae v. Arby's Rest. Grp., Inc.*, 721 S.E.2d 602 (Ga. Ct. App. 2011).

112. *McRae*, 721 S.E.2d at 604.

113. *Id.*

114. *Id.*

115. *Id.* at 603.

116. *Id.* at 604 (emphasis added).

117. *Id.* (alteration in original) (quoting 45 C.F.R. § 164.512(l) (2018)).

The next step in the court's reasoning is key. The court interpreted "to the extent necessary to comply with the requirements of workers' compensation laws" to exclude *ex parte* communications on several grounds.¹¹⁸ The court reasoned in part that the scope of the employee's waiver is limited to "[c]ommunications . . . the employee *has had* with any physician."¹¹⁹ This includes medical records leading up to the hearing date.¹²⁰ This time frame is significant for understanding where disclosures under state workers' compensation statutes may end and state overreaching (and federal preemption) may begin. While the court found that the scope of the relevant medical record to be disclosed could not extend past conversations and information already in the written record, it unfortunately did not speak to the scope of disclosure within its approved time frame.

The Georgia Supreme Court overturned this decision, arguing that while the Georgia workers' compensation statute does not specifically address *ex parte* communications, they are allowed pursuant to the waiver of privacy associated with commencing a workers' compensation claim.¹²¹ Because the Georgia statute is silent about the methods by which disclosures of "information" may be made, the court interpreted the statute to allow oral communications between the treating physician and the employer or her representatives.¹²² With respect to the HPR, the court simply cited § 164.512(*l*) and stated that "the [HIPAA] privacy provisions do not preempt Georgia law on the subject of *ex parte* communications because HIPAA exempts from its requirements disclosures made in accordance with state workers' compensation laws."¹²³ The court distinguished the robust privacy protection afforded to patients in medical malpractice cases based on the state privacy waiver associated with workers' compensation and "the goal of our workers' compensation statute of providing equal access to relevant information within an efficient and streamlined proceeding so as not to delay the payment of benefits to an injured employee."¹²⁴

The Georgia Supreme Court's interpretation of the relationship between the HPR and state workers' compensation laws—indeed the current view in every state—is problematic. It assumes that the "to the extent necessary to comply with [state] laws" language of § 164.512(*l*) means that state legislatures may impose any standard for PHI disclosure they choose. Rather, the language, as this Article argues in Section II.C below, is intended to facilitate the efficient administration of workers' compensation claims and to avoid frustrating state processes. Section II.B.2 presents an alternative view of the relationship between the HPR and state workers' compensation statutes.

118. *Id.*

119. *Id.* (emphasis in original) (quoting GA. CODE ANN. § 34-9-207(a) (2017)).

120. *Id.*

121. *Arby's Rest. Grp., Inc., v. McRae*, 734 S.E.2d 55, 56, 58 (Ga. 2012).

122. *Id.* at 56–57.

123. *Id.* at 57.

124. *Id.* at 57–58.

2. Reading State Workers' Compensation Statutes "Through" the HIPAA Privacy Rule

This Section presents an alternative understanding of the HPR and its relationship to state workers' compensation statutes, which would bring medical privacy protections for injured workers more in line with those afforded to medical malpractice litigants. As the Georgia Court of Appeals indicated in *McRae*, the HPR and state workers' compensation statutes are not mutually exclusive.¹²⁵ The relationship may be viewed as symbiotic, whereby both federal and state law are needed to protect privacy in workers' compensation. Federal standards are the floor, and, against that baseline, states may develop privacy protections that further the efficient administration of workers' compensation claims. Under this interpretation, § 164.512(l) may be read "through" the overall protections of the HPR and understood in terms of HHS's goal to protect PHI with limited exception. In other words, § 164.512(l) facilitates disclosures necessary to administrate claims while maintaining privacy rights.

Reading workers' compensation statutes "through" § 164.512(l) has a couple of implications. First, state laws that conflict with the HPR should be preempted as "contrary" to it, unless doing so would frustrate the administration of workers' compensation claims. This means that disclosures must be the minimum required for the efficient administration of such claims. Arguably, this could map onto "minimum necessary" disclosures. Recall that currently only state statutes that "permit" disclosures are subject to this standard, whereas states that "require" disclosures are not governed by the minimum necessary standard.¹²⁶ Thus, one could argue that to support their stated goals of privacy protection under the HPR, HHS must revise their guidelines to impose the "minimum necessary" standard for PHI disclosure in workers' compensation. But even if the minimum necessary standard is not imposed, states must adopt standards that restrict the PHI disclosed to that necessary for the efficient administration of claims. Similarly, applying the HPR to ex parte communications in workers' compensation (in states where they are allowed) would impose requirements like notice and protective orders.¹²⁷

Second, to the extent that state workers' compensation statutes do not address privacy protections or render them unclear, they must be read through the HPR, which assumes no PHI disclosure unless specified.¹²⁸ As the *McRae* appellate court found, § 164.512(l) cannot be interpreted to allow ex parte communications when Georgia law is silent about such communications.¹²⁹ Without notice requirements and other protections in this context, communications easily could involve physician disclosures of PHI that are unrelated to the claim and prejudicial.

The Tennessee Supreme Court employed similar reasoning in *Overstreet v. TRW Commercial Steering Division*, which involved a state workers' compensation statute

125. See *McRae v. Arby's Rest. Grp., Inc.*, 721 S.E.2d 602, 604 (Ga. Ct. App. 2011).

126. See 45 C.F.R. § 164.502(b) (2018).

127. See 45 C.F.R. § 164.512(e) (2018) (establishing standards for disclosing PHI in litigation and administrative proceedings).

128. See *supra* Sections I.A, I.B.1, I.B.2 (discussing required, permitted, and authorized disclosures, respectively).

129. *McRae*, 721 S.E.2d at 604.

that failed to address *ex parte* communications.¹³⁰ In holding that *ex parte* communications between an employer and a treating physician cannot occur without a waiver from the employee, the court reasoned that such communications could result in conflicts of interest with respect to employer-paid physicians, inadvertent disclosures of “sensitive or irrelevant medical information,” and related liability for physicians and employers.¹³¹ While the majority based its conclusions on an implied physician-patient covenant of confidentiality, concurring Judge Koch invoked the HPR:

[E]mployees seeking benefits under the [Tennessee] Workers’ Compensation Act retain their privilege against the non-disclosure of their personal health information except to the extent that this privilege has been altered by federal [the HPR] or state law. Neither . . . requires or permits employers or their agents to have *ex parte* discussions with their employees’ treating physicians.¹³²

Judge Koch cited § 164.512(*l*) as a provision that simultaneously “explicitly exempts disclosures made in accordance with a state’s workers’ compensation laws” and does not support unrestricted disclosure of PHI in the context of workers’ compensation.¹³³ Thus, Judge Koch reconciled the two approaches by situating the state workers’ compensation statute within the broader mandates of the HPR, effectively reading it “through” the privacy protections of the HPR.

Understanding the relationship between state workers’ compensation statutes and the HPR in this manner protects workers’ privacy rights by making the HPR the legal floor for protection. This shields workers from being subject to judicial intuitions about the appropriate scope of disclosure. As discussed, judicial interpretations vary widely. In *McRae*, the Georgia Supreme Court interpreted a statute that does not explicitly authorize *ex parte* communications as allowing them, arguably supporting broad PHI disclosure.¹³⁴ Whereas in *Overstreet*, the Tennessee Supreme Court interpreted a similar statute as disallowing such communications,¹³⁵ though the court’s opinion was later superseded by state statute.¹³⁶

Section II.C discusses HHS’s intent behind § 164.512(*l*) as supporting the “read through” approach outlined in this section. The agency intended the HPR to serve as a floor for privacy standards. Section 164.512(*l*) was meant to facilitate the efficient administration of workers’ compensation claims and to seek a balance between employers’ and employees’ interests in disclosure during that process, rather than to serve as a complete privacy waiver.

130. 256 S.W.3d 626 (Tenn. 2008).

131. *Id.* at 634.

132. *Id.* at 643 (Koch, J., concurring) (footnote omitted).

133. *Id.* at 643 n.11.

134. *Arby’s Rest. Grp., Inc. v. McRae*, 734 S.E.2d 55, 57 (Ga. 2012).

135. *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d 626, 629, 636 (Tenn. 2008); *see also Hayes v. Am. Zurich Ins.*, No. E2010-00099-WC-R3-WC, 2011 WL 2039402, at *1 (Tenn. May 25, 2011).

136. Act of June 23, 2009, ch. 486, 2009 Tenn. Pub. Acts 1 (codified as amended at TENN. CODE ANN. § 50-6-204(a)(2)(A) (LEXIS through 2019)) (allowing *ex parte* communications).

C. Health and Human Services' Intent Behind § 164.512(l)

HHS documents support the view that the agency intended for injured workers to maintain privacy protections under § 164.512(l). The agency discussed the goals of § 164.512(l) as facilitating workers' compensation proceedings and creating a balanced exchange between employers and employees. These goals are furthered by a symbiotic relationship between the HPR and state workers' compensation statutes—namely, reading these state statutes through the HPR.

1. Facilitating Administrative Proceedings

The legislative record suggests that HHS intended § 164.512(l) to facilitate administrative proceedings, not to exempt injured workers entirely from federal medical privacy protections. HHS specifically described the purpose of § 164.512(l) as allowing states to “process or adjudicate claims and/or coordinate care under the workers' compensation system.”¹³⁷ In an earlier document, HHS discussed the relationship between the HPR and workers' compensation as “[an] important national priorit[y],” presumably given the need to protect medical privacy while supporting states' administration of workers' compensation claims.¹³⁸

Most importantly, HHS added § 164.512(l) to the final HPR in 2002—two years after the rule was first published but before it was in force—following many comments on this topic.¹³⁹ HHS responded to these comments, stressing the need to permit disclosures necessary to process claims:

We agree that the privacy rule should permit disclosures necessary for the administration of state and other workers' compensation systems. To assure that workers' compensation systems are not disrupted, we have added a new provisions [sic] to the final rule. The new § 164.512(l) permits covered entities to disclose protected health information as authorized by and to the extent necessary to comply with workers' compensation or other similar programs¹⁴⁰

137. Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182, 53,198 (Aug. 14, 2002) (codified at 45 C.F.R. pts. 160 & 164).

138. See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,795 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160 & 164).

139. The HPR was first published on December 28, 2000, after HHS received over 52,000 public comments on the proposed rule issued on November 3, 1999. Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. at 53,182. HHS received over 11,000 comments about the 2002 changes issued for public comment in March 2002. U.S. DEP'T OF HEALTH & HUMAN SERVS., SUMMARY OF THE HIPAA PRIVACY RULE 2 (2013), <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html> [https://perma.cc/R2U6-SRXT]. Final modifications were published on August 14, 2002, which included the addition of § 164.512(l). Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. at 53,198.

140. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,707–08.

Nowhere during this period does HHS suggest that its intent is to eliminate wholesale the privacy rights of injured workers.

Further, an early report of the National Committee on Vital and Health Statistics (NCVHS), a body that formally advises HHS pursuant to HIPAA's section 1172(f), strongly supports the view that the HPR should facilitate administrative proceedings without eliminating privacy protections:

Workers [sic] compensation is a complex subject that requires special treatment and reasonable accommodation. However, like other casualty insurance, *it is not entitled to a complete exemption*. The Department should not evade its responsibility to address these difficult issues by simply exempting them. If necessary, a separate and subsequent rulemaking should consider how to meet confidentiality interests of patients while allowing workers' compensation to be administered efficiently.¹⁴¹

HHS in fact received comments for a two-year period after this recommendation and prior to adopting § 164.512(l).¹⁴²

2. Seeking a Balanced Exchange Between Employees and Employers

Further evidence that HHS did not intend § 164.512(l) to exclude injured workers from all federal privacy protections is that the HPR seeks to balance interests in disclosure with personal privacy. The "Purpose of the Administrative Simplification Regulations" of the HPR stresses balance, stating "[t]he task of society and its government is to create a balance in which the individual's needs and rights are balanced against the needs and rights of society as a whole."¹⁴³ More specifically, "[n]ational standards for medical privacy must recognize the sometimes competing goals of improving individual and public health, advancing scientific knowledge, enforcing the laws of the land, and processing and paying claims for health care services."¹⁴⁴

"Balance" is discussed at length in the HPR as one of six approaches that HHS took in developing the rule.¹⁴⁵ HHS speaks of balance between stakeholders'

141. National Committee on Vital and Health Statistics: Publication of Recommendations Relating to HIPAA Health Data Standards, 65 Fed. Reg. 42,370, 42,371 (July 10, 2000) (emphasis added).

142. *See supra* note 139.

143. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,468.

144. *Id.*

145. *See id.* at 82,471–74 (discussing balance as a factor in the agency's rulemaking).

interests¹⁴⁶ and others' interests in privacy or disclosure.¹⁴⁷ The HPR states that exceptions to privacy must "serv[e] a compelling need related to public health, safety, or welfare," and "intrusion into privacy is warranted when balanced against the need to be served."¹⁴⁸

Additionally, the function of § 164.512(l) itself is to balance privacy and disclosure: some PHI is disclosed in exchange for the efficient administration of, and compensation for, a work-related injury. In this scenario, both the employee and the employer are vulnerable. The employee is vulnerable to having stigmatizing or otherwise harmful medical information revealed, and the employer is vulnerable to exaggerated or false claims. Both parties may be disadvantaged by the financial and other resources consumed by an inefficient process. The employee desires meaningful, prompt compensation and the employer fair and timely administration of the claim. Ideally, the least PHI required to validate and to administrate a claim efficiently would be released.

To be sure, some could argue that a privacy/disclosure imbalance between employees and employers is supported by a policy argument. The workers' compensation system rests on the assumption that employers—as opposed to society (i.e., taxpayers), the government, or the injured worker herself—should bear the cost of accidents in the workplace.¹⁴⁹ Given this legal posture, one could argue that to guard against fraud, the balance must be tipped toward employers when determining workers' compensation.

This argument fails on several grounds. The prevention of fraud need not involve a wholesale privacy waiver but only "necessary" disclosures. Further, the scale already is tipped in at least one way towards the employer: when forced into the workers' compensation scheme, employees forgo the opportunity to litigate claims and to win potentially larger damage awards.¹⁵⁰ Additionally, HHS understood disclosures necessary to prevent fraud as limited exceptions to, rather than a waiver of, privacy protections. HHS Secretary Donna Shalala gave testimony and lectures prior to the adoption of the HPR in which she described five principles behind the HPR: boundaries, security, control, accountability, and public responsibility.¹⁵¹ The

146. *Id.* at 82,471 ("From the comments we received on the proposed rule, and from the extensive fact finding in which we engaged . . . [w]e learned that stakeholders in the system have very different ideas about the extent and nature of the privacy protections that exist today, and very different ideas about appropriate uses of health information. This leads us to seek to balance the views of the different stakeholders, weighing the varying interests on each particular issue with a view to creating balance in the regulation as a whole.").

147. *Id.* ("Neither privacy, nor the important social goals described by the commenters, are absolutes. In this regulation, we are asking health providers and institutions to add privacy into the balance, and we are asking individuals to add social goals into the balance.").

148. 45 C.F.R. § 160.203(a)(1)(iv) (2018).

149. U.S. DEP'T OF LABOR, DOES THE WORKERS' COMPENSATION SYSTEM FULFILL ITS OBLIGATIONS TO INJURED WORKERS? 7 (2016) (quoting Theodore Roosevelt, President, United States, Sixth Annual Message (Dec. 3, 1906)), <https://www.dol.gov/asp/WorkersCompensationSystem/WorkersCompensationSystemReport.pdf> [<https://perma.cc/69BF-GMVN>].

150. Hodge, *supra* note 25, at 124–25.

151. *See, e.g., Hearing, supra* note 94; Donna E. Shalala, Sec'y, U.S. Dep't of Health & Human Servs., Harper Fellow Lecture at Yale University School of Law: Medical Privacy in

first four principles stress privacy, and the last—public responsibility—addresses limits to privacy rights, including disclosures necessary to prevent health care fraud.¹⁵² Speaking about disclosures for public responsibility, which she describes as “national priorities,”¹⁵³ Shalala cautions, “[a]llowing access doesn’t mean we can forget about protecting privacy. And we shouldn’t.”¹⁵⁴ She then outlined the limited areas where disclosures would be permitted under public responsibility: public health, research (de-identified PHI), and law enforcement.¹⁵⁵

Thus, HHS envisioned a cooperative regime, whereby state governments and the federal government work together to protect privacy. The HPR seeks to balance the interests of employers and employees in disclosure. And the legislative history of the HPR indicates that § 164.512(l) was added to aid states in the administration of their workers’ compensation programs, not to waive federal privacy protections completely. As a result, § 164.512(l) relies on states to address any gaps in privacy protection that bring the level of protection below the floor of the HPR.

D. State Gaps in Protecting Privacy

Section 164.512(l) assumes states will fill in gaps in privacy protections through constitutional, statutory, or common law, but they have not. State constitutions generally target government rather than private intrusions into privacy.¹⁵⁶ Further, when there is evidence of the need for PHI disclosures and reasonable safeguards are in place, courts employ balancing tests that weigh government interests against personal ones.¹⁵⁷ To the extent constitutional safeguards apply, the state’s interest in efficient administration of workers’ compensation claims is falsely viewed as impeded by privacy protections, and such protections are lifted.¹⁵⁸

Post-Industrial America (Oct. 7, 1999) [hereinafter Shalala, Medical Privacy] (transcript available in HHS archive); Donna E. Shalala, Sec’y, U.S. Dep’t of Health & Human Servs., Remarks at the National Press Club: Privacy–Health Care (July 31, 1997) [hereinafter Shalala, Privacy–Health Care] (transcript available in HHS archive).

152. See, e.g., *Hearing, supra* note 94; Shalala, Medical Privacy, *supra* note 151; Shalala, Privacy–Health Care, *supra* note 151.

153. Shalala, Medical Privacy, *supra* note 151.

154. *Hearing, supra* note 94.

155. *Id.*

156. INST. OF MED., BEYOND THE HIPAA PRIVACY RULE: ENHANCING PRIVACY, IMPROVING HEALTH THROUGH RESEARCH 87 (Sharyl J. Nass, Laura A. Levit & Lawrence O. Gostin eds., 2009) (ebook) (“[W]ith limited exceptions, individuals are only protected against governmental intrusions into their personal health information and may not raise constitutional concerns about private action. Even when state action is involved, individuals rarely prevail on claims premised on constitutional rights to informational privacy because state interests generally outweigh the individual’s privacy interest.”); Hodge, *supra* note 25, at 129 (explaining that state and federal “[c]onstitutional provisions only protect against breaches of privacy by government”).

157. Hodge, *supra* note 25, at 129.

158. See, e.g., *Arby’s Rest. Grp., Inc. v. McRae*, 734 S.E.2d 55, 58 (Ga. 2012) (finding state constitutional privacy protections and other state laws do not preclude ex parte communications between a treating physician and an employer or their representatives in workers’ compensation proceedings).

State workers' compensation and other statutes either exempt workers' compensation proceedings from privacy protections or fail to provide meaningful protection. Although many workers' compensation statutes contain language that formally limits the scope of PHI disclosure, in practice, administrative tribunals and courts construe the statutes to allow broad disclosures.¹⁵⁹ Further, workers' compensation statutes may allow ex parte communications, which could result in PHI being disclosed without boundaries and undue influence on treating or examining physicians.¹⁶⁰ Meanwhile, state privacy statutes contain exceptions for workers' compensation.¹⁶¹ This is true even for disease-specific laws, such as state genetic privacy statutes¹⁶² (which track the highly protective federal Genetic

159. For example, in Arkansas, a statute expressly limits scope of disclosure and requires patient authorization for disclosure. *See* 099-00-1 ARK. CODE R. § 099.27 (LexisNexis 2019) (“Medical report filings should be limited to only those reports which provide information relative to diagnosis, prognosis, impairment ratings, and return to work information. The Commission may, at its discretion, request other medical information.”). On its face, this appears to be strong protection from broad PHI disclosure. But in *Arnold v. Atkins Nursing & Rehabilitation Center, Inc.*, the administrative law judge held that “the Claimant has in fact waived her physician/psychotherapist privilege when she signed the approved Workers’ Compensation forms, as required by law. That claimant can not [sic] later invoke the physician/psychotherapist privilege in an Arkansas Workers’ Compensation Case after waiving it to make her claim” No. G406016, 2015 WL 3476549, at *7 (Ark. Workers’ Comp. Comm’n May 29, 2015). Similarly, in Louisiana, the state workers’ compensation statute states: “[i]n any claim for compensation, a health care provider who has at any time treated the employee related to the compensation claim shall release any requested medical information and records relative to the employee’s injury Any information relative to any other treatment or condition shall be available to the employer or his workers’ compensation insurer” LA. STAT. ANN. § 23:1127(B)(1)–(2) (Supp. 2019). In *Hortman v. Louisiana Steel Works*, the Louisiana Court of Appeals held that the filing of a workers’ compensation claim destroys or takes away the physician-patient privilege because Louisiana Code of Evidence Article 510(B)(1) provides no privilege when the disclosure “relates to the health condition of a patient who brings or asserts a personal injury [or workers’ compensation] claim.” 696 So. 2d 625, 627 (La. Ct. App. 1997) (citation omitted). Construing a Washington state statute similar to the one in Louisiana, the Washington Supreme Court held that “RCW 51.04.050 abolishes the physician-patient privilege[] [i]n . . . industrial insurance” proceedings. *Holbrook v. Weyerhaeuser Co.*, 822 P.2d 271, 274 (Wash. 1992) (footnote omitted) (quoting WASH. REV. CODE ANN. § 51.04.050 (West 2010)). Thus, in these and other states, the worker’s consent to disclosure is presumed to be a broad waiver of privacy rights.

160. *See infra* Section III.B.

161. Hodge, *supra* note 25, at 129–30; *see, e.g.*, CAL. CIV. CODE § 56.30(k) (West 2007 & Supp. 2019) (“The disclosure and use of the following medical information shall not be subject to the limitations of this part: Medical information and records disclosed to, and their use by, the Insurance Commissioner, the Director of the Department of Managed Health Care, the Division of Industrial Accidents, the Workers’ Compensation Appeals Board, the Department of Insurance, or the Department of Managed Health Care.”).

162. Hodge, *supra* note 25, at 130; *see, e.g.*, IOWA CODE § 729.6(9)(a) (2019) (“This section does not prohibit the genetic testing of an employee who requests a genetic test and who provides written and informed consent to taking a genetic test for any of the following purposes: a. Investigating a workers’ compensation claim under chapters 85, 85A, 85B, and 86.”).

Information Nondiscrimination Act, which also does not apply to workers' compensation when disclosures are premised on consent),¹⁶³ and state statutes pertaining to sexually transmitted diseases, including HIV status.¹⁶⁴

Additionally, state common law privacy doctrines fail to provide sufficient protection against harmful disclosures in the workers' compensation context.¹⁶⁵ This is because consent is a valid defense against PHI disclosures.¹⁶⁶ Depending on the state, when filing for workers' compensation, claimants either sign a waiver of privacy rights or a waiver is assumed.¹⁶⁷ Generally consent must be "knowing" and "voluntary,"¹⁶⁸ but since entry into a compulsory workers' compensation system is not mandated in the sense that someone could choose to forgo compensation, it is legally considered "voluntary."¹⁶⁹ As for the "knowing" requirement, claimants may not always realize the scope of the PHI to be disclosed (especially in states with unenforced statutes that limit scope of disclosure), but it is doubtful this lack of knowledge would rise to the level of a legal violation.

Part III examines through original empirical work what actions, with a focus on statutes, states have taken to protect injured workers' medical privacy. The Part concludes that states have not sufficiently protected injured workers in this context.

III. NATIONAL SURVEY OF STATE ACTION

States may seek to fill the gaps in worker privacy protection in several ways, including limiting the scope of PHI disclosures, prohibiting ex parte communications between parties and treating or examining physicians, mandating notice with respect to ex parte communications, or requiring protective orders for PHI disclosure during such communications. States may provide these privacy protections via statutes, including workers' compensation statutes, or common law.

To date, no comprehensive survey exists regarding state legislative and judicial action to protect workers' privacy during workers' compensation proceedings. This Part summarizes a survey of state action in four major areas of PHI disclosure: scope, ex parte communications, notice of ex parte communications, and protective orders. This data was collected by running LexisNexis and Westlaw searches to identify

163. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 209, 122 Stat. 881, 918–19 (codified as amended at 42 U.S.C. § 2000ff-8 (2012)).

164. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2782 (McKinney 2012 & Supp. 2019) (HIV status); Confidentiality of HIV-Related Information Act, 35 PA. STAT. & CONS. STAT. ANN. §§ 7601–12 (West 2012).

165. *See infra* Part III.

166. *See, e.g.*, *Arby's Rest. Grp., Inc. v. McRae*, 734 S.E.2d 55, 56 (Ga. 2012) ("Under . . . OCGA § 34-9-207(a), any privilege the employee may have had in protected medical records and information related to a workers' compensation claim is waived once the employee submits a claim for workers' compensation . . .").

167. *See infra* Section III.A.

168. *See, e.g.*, *Jones v. Dressel*, 623 P.2d 370, 374 (Colo. 1981) (upholding an exculpatory agreement when plaintiff had knowledge of the risks associated with declining negligence insurance for skydiving and voluntarily assumed them).

169. *See, e.g.*, *Arby's Rest. Grp.*, 734 S.E.2d at 56 (upholding as valid a "signed [] form authorizing the release of medical information" provided in the process of applying for workers' compensation).

statutory authority in each area. Administrative materials and cases also were consulted in some instances, including when the plain language of the statute did not provide an answer about a state's response. The findings lean in one direction: despite the implicit understanding between the federal and state governments that states will supplement gaps in medical privacy protection resulting from § 164.512(l), states offer limited protections for injured workers seeking workers' compensation.

While the overall trend seems clear, this study has some limitations. First, the research was performed over several years; while every attempt was made to keep the document current prior to publication, some changes may have occurred. Second, interpretation of statutory and other legal authority, especially given conflicting or ambiguous sources, is somewhat subjective. Third, state practice may depart from the plain language of legal sources. To address these limitations, citations are provided to all primary sources used to categorize states' approaches.

A. Scope of Disclosure

States may choose to protect workers' privacy by limiting the scope of PHI disclosed in workers' compensation proceedings. All states have statutes addressing the scope of PHI disclosure,¹⁷⁰ and seventy-four percent (thirty-seven states) have statutes or regulations that formally limit its scope.¹⁷¹ Thirteen states expressly do

170. See *infra* notes 171–72.

171. These states include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See ALA. CODE § 25-5-77(b) (LexisNexis 2016); ALASKA STAT. §§ 23.30.095(h), 23.30.107(a) (2016); ARIZ. REV. STAT. ANN. § 23-908 (Supp. 2018); ARK. CODE ANN. § 11-9-516(a)(1) (2012); 099.00.1 ARK. CODE R. § 099.27 (LexisNexis 2019); CAL. LAB. CODE § 3762 (West Supp. 2019); CAL. CODE REGS. tit. 8, § 41(d) (2019); COLO. REV. STAT. ANN. § 8-47-203(1) (West Supp. 2018); FLA. STAT. ANN. § 440.13(4)(c) (West 2009); GA. CODE ANN. § 34-9-207(a), (b) (2017); HAW. REV. STAT. ANN. § 386-96(a)(3) (West Supp. 2017); KY. REV. STAT. ANN. § 342.020(8) (LexisNexis 2011); LA. STAT. ANN. § 23:1127(A)–(B)(2); ME. REV. STAT. ANN. tit. 39-A, §§ 208(1), 309(2), 312(4) (Supp. 2018); MD. CODE ANN., LAB. & EMPL. § 9-709(2)(a)(i)–(ii) (LexisNexis 2016); 211 MASS. CODE REGS. 110.07(2)(b) (2019) (*but see* MASS. GEN. LAWS. ch. 152, § 20 (LexisNexis 2017)); MICH. COMP. LAWS ANN. §§ 418.222, 418.315(6), 418.385 (West 2015); MICH. COMP. LAWS § 600.2157 (West 2010); MINN. STAT. ANN. § 176.138(a)–(b) (West 2018); MINN. R. 1420.2200(1)(C) (2019); MISS. CODE ANN. §§ 71-3-15, 71-3-66 (West 2009 & Supp. 2018); MO. ANN. STAT. § 287.210(3), (6) (West 2016); MONT. CODE ANN. § 39-71-604(2) (2017); MONT. WORKERS' COMP. CT. R. 24.5.317(2) (adopted 2003); NEB. REV. STAT. ANN. §§ 48-120(4), 48-2704(11) (LexisNexis 2018); 230 NEB. ADMIN. CODE § 6-001(C) (2017); N.H. REV. STAT. ANN. §§ 281-A:38, 281-A:21-b (Supp. 2018); N.H. CODE ADMIN. R. ANN. Lab 503.01(b) (2019); N.M. STAT. ANN. § 52-10-1(A) (West 2003); N.C. GEN. STAT. ANN. §§ 97-25.6, 97-27(a)(2) (West Supp. 2017); N.D. CENT. CODE §§ 65-02-11, 65-05-30(2), 65-05-32 (2011 & Supp. 2017); OR. REV. STAT. §§ 656.260, 656.360 (2017) (*but see* Booth v. Tektronix, Inc., 823 P.2d 402, 406 (Or. 1991)); 34 PA. CODE §§ 127.659(a), 131.61(a) (2019); 5 R.I. GEN. LAWS § 5-37.3-4(b)(11)

not limit the scope of PHI disclosed.¹⁷² Less than half of the states (twenty) require authorization for disclosure.¹⁷³ Four of these states require authorization but do not limit the scope of disclosure.¹⁷⁴

The thirty-seven states that expressly limit the scope of PHI disclosure by statute do so by both using qualifying language to define relevant PHI and preserving a claimant's privilege or confidentiality with respect to PHI unrelated to a claim. Qualifying language includes limiting disclosures to medical information that "relates" to or is "relevant" or "pertinent" to the injury underlying the claim.¹⁷⁵ As

(Supp. 2018); S.C. CODE ANN. § 42-15-95(A)–(B) (2015); S.D. CODIFIED LAWS §§ 62-2-19, 62-4-1.3, 62-4-45 (2015); TENN. CODE ANN. § 50-6-204(a)(2)(A) (LEXIS through 2019); TENN. COMP. R. & REGS. 0800-02-07-.06 (2018); TEX. LAB. CODE ANN. § 408.025(d) (West Supp. 2018); UTAH CODE ANN. § 34A-2-407(2)(C) (LexisNexis Supp. 2018); UTAH ADMIN. CODE r. 612-300-10(C)(1)–(3) (2019); VT. STAT. ANN. tit. 21, § 655a (2016); 13-4 VT. CODE R. § 1:3.0000 (Westlaw through Feb. 2019); WASH. REV. CODE ANN. §§ 51.04.050, 51.36.060 (West 2010); W. VA. CODE ANN. § 23-4-7 (LexisNexis 2017); W. VA. CODE R. § 85-20-8 (2018); WIS. STAT. ANN. §§ 102.13(1)(d)(3), 102.175 (West Supp. 2018); WYO. STAT. ANN. §§ 27-14-502(d), 27-14-610 (2017).

172. These states include: Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Nevada, New Jersey, New York, Ohio, Oklahoma, and Virginia. CONN. GEN. STAT. ANN. § 31-294f(b) (West 2011); DEL. CODE ANN. tit. 19, § 2343(c) (West 2013); IDAHO CODE § 72-432(11) (2017); 820 ILL. COMP. STAT. ANN. 305/8 (West Supp. 2018); *Lakin v. Skaletsky*, No. 08 C 842, 2008 WL 4662846, at *1 (N.D. Ill. Oct. 15, 2008); IND. CODE ANN. § 22-3-3-6 (West 2014); IOWA CODE ANN. §§ 86.38, 86.45(1) (West 2009); KAN. STAT. ANN. § 44-550b(a)(4)(B) (Supp. 2017); KAN. ADMIN. REGS. § 51-9-19(b)(3) (2009); *Russell v. Bank of Am.*, No. 1,012,015, 2004 WL 1810318, at *4 (Kan. Workers Comp. App. Bd. July 30, 2004); NEV. REV. STAT. ANN. §§ 616C.010, 616C.140 (LexisNexis 2012); N.J. STAT. ANN. §§ 34:15-15.3, 34:15-128.3(a) (West 2011); N.Y. WORKERS' COMP. LAW § 110-a (McKinney 2016) (*but see Doe v. Roe*, 588 N.Y.S.2d 236, 247 (N.Y. Sup. Ct. 1992)); OHIO REV. CODE ANN. § 4123.651(B) (LexisNexis 2015) (*but see OHIO ADMIN. CODE. 4123-6-20(F)(2)* (2019)); OKLA. STAT. ANN. tit. 85A, § 58(A)(1) (West 2016); VA. CODE ANN. §§ 65.2-604(A), 65.2-607(A) (2017).

173. These states include: Alaska, Arkansas, Colorado, Delaware, Georgia, Hawaii, Illinois, Kentucky, Maryland, Montana, New Hampshire, New Jersey, North Dakota, Ohio, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming. *See ALASKA STAT. § 23.30.107(a)*; *Arnold v. Atkins Nursing & Rehab Ctr., Inc.*, No. G406016, 2015 AR Wrk. Comp. LEXIS 241, at *1 (Ark. Workers' Comp. Comm'n May 29, 2015) (discussing physician/psychotherapist privilege); 7 COLO. CODE REGS. § 1101-3:5-4(C) (2019); 19-1000-1331 DEL. ADMIN. CODE § 11.4 (2018); GA. CODE ANN. § 34-9-207(b) (2017); HAW. CODE R. § 12-10-30(a) (LEXIS through 2019); *Tom v. First Am. Title Co.*, No. 22222, 2001 Haw. App. LEXIS 97, at *3–4 (Haw. Ct. App. May 2, 2001); 820 ILL. COMP. STAT. ANN. 305/8(a); KY. REV. STAT. ANN. § 342.020; MD. CODE ANN., LAB. & EMPL. § 9-709; MONT. CODE ANN. § 39-71-604(2); N.H. REV. STAT. ANN. §§ 281-A:38, 281-A:21-b; N.H. CODE ADMIN. R. ANN. Lab 503.01(b); N.J. STAT. ANN. § 34:15-15.3; N.D. CENT. CODE § 65-05-30(2); OHIO REV. CODE ANN. § 4123.651(B); *State ex rel. Holman v. Dayton Press, Inc.*, 463 N.E.2d 1243, 1245 (Ohio 1984); S.C. CODE ANN. § 42-15-95(A); S.D. CODIFIED LAWS § 62-4-1.3; UTAH ADMIN. CODE r. 612-300-10(C)(1)–(3); VT. STAT. ANN. tit. 21, § 655a(c); 13-4 VT. CODE R. § 1:3.0000; W. VA. CODE R. § 85-20-8; WYO. STAT. ANN. §§ 27-14-502(d), 27-14-610.

174. These states are Delaware, Illinois, New Jersey, and Ohio. *See supra* note 172.

175. *See, e.g.*, FLA. STAT. ANN. § 440.13(4)(c) ("An employee who reports an injury or illness alleged to be work-related waives any physician-patient privilege with respect to any

discussed in Part II, in practice these limits are interpreted by courts to allow disclosure of large portions of a worker's medical history.

Authorization of PHI disclosures is not required in most states. While authorization is not predictive of the scope of PHI disclosure, it adds another formal layer of privacy protection, if only to alert the claimant that PHI disclosures will be made. Specific authorization for PHI disclosures is required in twenty states.¹⁷⁶ Five states expressly assume authorization with the filing of a workers' compensation claim.¹⁷⁷ Authorization is implicitly assumed in the remaining twenty-five states.

Several other types of laws may bear on the scope of disclosure. At least ten states allow the employer, rather than the claimant, to choose the physician providing the examination and diagnosis for workers' compensation purposes.¹⁷⁸ This situation may affect PHI disclosure if physicians, employed by or affiliated with the firm where the worker was injured, are more willing to disclose larger amounts of PHI to employers and their representatives than physicians unrelated to the employer. Also, at least nine state workers' compensation statutes expressly exempt physicians from liability for unauthorized disclosure of medical records.¹⁷⁹ This eliminates the primary legal incentive to restrict PHI disclosure, especially when disclosing a full

condition or complaint reasonably related to the condition for which the employee claims compensation.”); TENN. CODE ANN. § 50-6-204(a)(2)(A) (“It is the intent of the general assembly that . . . the parties and the department have reasonable access to the employee’s medical records and medical providers that are pertinent to and necessary for the swift resolution of the employee’s workers’ compensation claim.”); CAL. CODE REGS. tit. 8, § 41(d) (“All aspects of all physical and/or psychological comprehensive medical-legal evaluations, including history taking, shall be directly related to contested medical issues as presented by any party or addressed in the reports of treating physician(s).”).

176. *See supra* note 173.

177. These states include: Montana, North Dakota, South Carolina, West Virginia, and Wyoming. *See* MONT. CODE ANN. § 39-71-604(2); N.D. CENT. CODE § 65-05-30(2); S.C. CODE ANN. § 42-15-95(A); W. VA. CODE R. § 85-20-8; WYO. STAT. ANN. § 27-14-502(d).

178. These states include: Alabama, Florida, Indiana, Iowa, Kansas, Missouri, New Jersey, North Carolina, Oklahoma, and South Carolina. *See* ALA. CODE § 25-5-77(a) (LexisNexis 2016); FLA. STAT. ANN. § 440.13(2)(a); IND. CODE ANN. § 22-3-3-4(a)–(b) (West 2014); IOWA CODE ANN. § 85.27(1), (4) (West Supp. 2018); KAN. STAT. ANN. § 44-510h(a)–(b), (e) (Supp. 2017); MO. ANN. STAT. § 287.140(1), (10) (West 2016); N.J. STAT. ANN. § 34:15-15.3 (West 2011); N.C. GEN. STAT. ANN. § 97-25.6(a)–(d) (West Supp. 2017); OKLA. STAT. ANN. tit. 85A, § 64(A), (B)(1), (7) (West 2016); S.C. CODE ANN. REGS. 67-509(A) (2019).

179. These states include Alabama, Idaho, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, and Washington. *See, e.g.*, ALA. CODE § 25-5-77(b) (“A physician, hospital, medical clinic, rehabilitation service, or other person or entity providing written statement of professional opinion or copies of records pursuant to this subsection shall not be liable to any person for a claim arising out of the release of medical information concerning the employee.”); N.D. CENT. CODE § 65-05-30(3)(a)–(b) (“If a health care provider furnishes information or an opinion under this section: a. That health care provider does not incur any liability as a result of furnishing that information or opinion. b. The act of furnishing that information or opinion may not be the sole basis for a disciplinary or other proceeding affecting professional licensure. However, the act of furnishing that information or opinion may be considered in conjunction with another action that may subject the health care provider to a disciplinary or other proceeding affecting professional licensure.”).

record is more efficient than disclosing a partial one based on dates, events, or conditions.

Some states explicitly authorize physicians to comply with employer requests for PHI disclosure.¹⁸⁰ This not only interferes with patient privacy, it disrupts the practice of medicine. Physicians may be forced to engage in disclosures of PHI that they view as violating the law or their professional or other ethical codes.¹⁸¹

Further, some workers' compensation statutes contain statement of purpose clauses that emphasize the efficient administration of claims rather than medical privacy.¹⁸² These clauses may be viewed by courts as a reason not to restrict PHI disclosure.¹⁸³

What do these findings mean for the privacy protection of injured workers? A little less than a third of states considered and dismissed the need to limit PHI disclosure. A little more than two-thirds sought to address privacy by limiting scope of disclosure (though case law suggests that these efforts are ineffective due to judicial interpretation of § 164.512(l) and the implementation of state laws governing privacy).¹⁸⁴ Sixty percent of states do not believe consent through authorization is necessary for PHI disclosure in the context of workers' compensation. While it is unclear how much protection authorization provides other than notice of PHI disclosure, it is an additional safeguard and demonstrates legislative recognition of privacy issues.

180. See, e.g., NEB. REV. STAT. ANN. § 48-120(4) (LexisNexis 2018) ("All physicians and other providers of medical services attending injured employees shall comply with all the rules and regulations adopted and promulgated by the compensation court and shall make such reports as may be required by it at any time and at such times as required by it upon the condition or treatment of any injured employee or upon any other matters concerning cases in which they are employed. All medical and hospital information relevant to the particular injury shall, on demand, be made available to the employer, the employee, the workers' compensation insurer, and the compensation court."); *Arby's Rest. Grp., Inc. v. McRae*, 734 S.E.2d 55, 56 (Ga. 2012) (citing GA. CODE ANN. § 34-9-207(a) for the proposition that an employer may request from a treating physician "all information and records related to" the employee's claim).

181. For example, in *Arby's Restaurant Group*, an injured worker (McRae) was ordered by the state workers' compensation board to consent to her physician speaking with her employer's lawyers. *Arby's Rest. Grp.*, 734 S.E.2d at 56. McRae refused to comply with the order without her attorney being present for the conversation. *Id.* Her treating physician, who did not want to disclose medical information about her patient in this manner, also refused to speak with the employers' lawyers. *Id.* Ultimately the communication was ordered by the court, though the court noted McRae's physician may request her own or McRae's attorney be present. *Id.* at 58.

182. See, e.g., N.Y. WORKERS' COMP. LAW § 313.1 (McKinney 2016) ("To provide a fair, timely, and efficient mechanism for processing uncontroverted claims involving minor injuries, uncontested issues within a claim, and certain penalties."); *Arby's Rest. Grp.*, 734 S.E.2d at 58 ("We believe a complete prohibition on all ex parte communications would be inconsistent with the policy favoring full disclosure in workers' compensation cases, as well as the goal of our workers' compensation statute of providing equal access to relevant information within an efficient and streamlined proceeding so as not to delay the payment of benefits to an injured employee.").

183. See *supra* note 182.

184. See *supra* Section II.B.

B. Ex Parte Communications

Ex parte communications are those that occur to “benefit . . . one party only, and without notice to, or argument by, anyone having an adverse interest.”¹⁸⁵ In the workers’ compensation context, ex parte communications typically are between one party and a treating or examining physician. Issues may arise for the claimant when these communications occur between the claimant’s treating or examining physician and the employer, the employer’s counsel, the employer’s workers’ compensation insurance carrier, or another agent of the employer. Issues may arise for the employer when the communications take place between a treating or examining physician and the claimant, her counsel, or another agent of the claimant.

Results vary among the states, with more allowing ex parte communications than disallowing them. Over half of the states (thirty-three) allow ex parte communications in some contexts between a party and a treating or examining physician, either pursuant to a workers’ compensation statute or case law.¹⁸⁶ Seven

185. *Ex parte*, BLACK’S LAW DICTIONARY (10th ed. 2014).

186. These states include: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, and West Virginia. *See* ALA. CODE § 25-5-77(b) (LexisNexis 2016); *Ex parte* Smitherman Bros. Trucking, Inc., 751 So. 2d 1232, 1237 (Ala. 1999); Woodward v. Twin Cities Veterinary Clinic, Inc., No. 201117536, 2013 AK Wrk. Comp. LEXIS 8, at *30 (Alaska Workers’ Comp. Bd. Jan. 14, 2013) (*but see* ALASKA STAT. ANN. § 23.30.095 (2016)); Salt River Project v. Indus. Comm’n, No. 1 CA-IC 90-122, 1992 WL 383021, at *1, *7 (Ariz. Ct. App. Dec. 29, 1992); *cf.* State Bar of Ariz. Ethics Comm’n, Op. 99-03, Communication with Witnesses; Ex Parte Communications; Physicians (Apr. 1999), <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=497> [<https://perma.cc/4MYL-ZC8Y>]; Arnold v. Atkins Nursing & Rehab. Ctr., Inc., No. G406016, 2015 AR. Wrk. Comp. LEXIS 241, at *1, *20 (Ark. Workers’ Comp. Comm’n May 29, 2015); Nelson v. Conestoga Wood Specialties Corp., No. F706791, 2009 WL 570943, at *1, *4 (Ark. Workers’ Comp. Comm’n Mar. 2, 2009); Colo. Bar Assoc., Op. 71, Ex Parte Communications with Treating Physicians (Sept. 21, 1985) (addendum issued 1992), http://www.cobar.org/Portals/COBAR/repository/ethicsOpinions/FormalEthicsOpinion_71_2011.pdf [<https://perma.cc/25T8-URHB>]; 7 COLO. CODE REGS. § 1101-3:18-6(A) (2019) (*but see* 7 COLO. CODE REGS. § 1101-3:11-6(A) (2019) (“During the DIME process, there shall be no communication allowed between the parties and the DIME physician unless approved by the Director, or an administrative law judge. Any violation may result in cancellation of the DIME.”)); 19-1000-1331 DEL. ADMIN. CODE § 11.4 (2018); FLA. STAT. ANN. § 440.13(4)(c) (West 2009); S & A Plumbing v. Kimes, 756 So. 2d 1037, 1040 (Fla. Dist. Ct. App. 2000); GA. CODE ANN. § 34-9-207 (West 2017); *Arby’s Rest. Grp.*, 734 S.E.2d at 56–57; IDAHO CODE § 72-432(11) (2017); IND. CODE ANN. § 22-3-3-6 (West 2014); IOWA CODE ANN. § 85.27 (West Supp. 2018); Morrison v. Century Eng’g, 434 N.W.2d 874, 875–76 (Iowa 1989); Base v. Raytheon Aircraft Co., 329 P.3d 540 (Kan. Ct. App. 2014); Redrick v. S & J Painting, No. 1,049,017, 2013 WL 1876335, at *1, *7 (Kan. App. Bd. Div. Workers’ Comp. Apr. 3, 2013); LA. STAT. ANN. § 23:1127(C)(1) (Supp. 2019); LA. CODE EVID. ANN. art. 510(b)(1)–(2)(a) (2018); Farr v. Riscorp, 714 So. 2d 20, 23, 27 (La. Ct. App. 1998); MD. CODE REGS. 14.09.07.04 (LexisNexis 2019); MINN. STAT. ANN. § 176.138(a) (West 2018); Hinson v. Miss. River Corp., No. 94-19422-F-4717, 1996 WL 34900915, at *1, *13-14 (Miss. Workers’

states expressly prohibit or limit ex parte communications without consent by statute or case law.¹⁸⁷ Ten states do not address whether ex parte communications are

Comp. Comm'n Aug. 1, 1996); MISS. WORKERS' COMP. EDUC. ASS'N, 2018 MISSISSIPPI WORKERS' COMPENSATION CLAIMS GUIDE 80 (James M. Anderson et al. eds., 2018), <https://acblaw.com/wp-content/uploads/2018/04/Binder1.pdf> [https://perma.cc/GS42-PPV3] (allowing ex parte communications only in noncontroverted cases); MONT. CODE ANN. §§ 39-71-604(2), 50-16-527(4), 50-16-805(1) (2017); *Malcomson v. Liberty Nw.*, 339 P.3d 1235, 1243 (Mont. 2014); *Simms v. Schabacker*, 339 P.3d 832, 834, 836 (Mont. 2014); NEB. REV. STAT. ANN. § 48-120 (LexisNexis 2018); *Scott v. Drivers Mgmt., Inc.*, 714 N.W.2d 23, 35-36 (Neb. Ct. App. 2006); *Bryant v. Drivers Mgmt., Inc.*, No. 1737, 2004 WL 1085511, at *1 (Neb. Workers' Comp. Ct. Jan. 8, 2004); NEV. REV. STAT. ANN. § 616D.330(1) (LexisNexis 2012); N.H. CODE ADMIN. R. ANN. Lab 503.01(c) (2019); *Emp'r: Crucible*, No. 6960 8263, 60102681, 2002 WL 31650656, at *2 (N.Y. Workers' Comp. Bd. Nov. 18, 2002); *Alterra*, No. 7000 7727, 2002 WL 31273429, at *1 (N.Y. Workers' Comp. Bd. Oct. 4, 2002); N.C. GEN. STAT. ANN. § 97-25.6(c)(2)–(3) (West Supp. 2017) (*but see id.* § 97-27(a)(3) (West Supp. 2017) (“Notwithstanding the provisions of G.S. 97-25.6 to the contrary, an employer or its agent shall be allowed to openly communicate either orally or in writing with an independent medical examiner chosen by the employer regardless of whether the examiner physically examined the employee.”)); *Indep. Sch. Dist. No. 1 v. Albus*, 572 P.2d 554, 558 (Okla. 1977) (*but see* OKLA. STAT. ANN. tit. 85, § 4.6(C) (West 2016) (“(1) Direct or indirect ex parte communications with court appointed professionals [including independent medical examiners] regarding specific cases or claimants are prohibited”)); OR. REV. STAT. § 656.252 (2017); *Booth v. Tektronix, Inc.*, 823 P.2d 402, 409 (Or. 1991); 5 R.I. GEN. LAWS ANN. § 5-37.3-4(b)(8)(ii) (West Supp. 2018); *Pitre v. Curhan*, No. CIV.A.00-0053, 2001 WL 770941, at *8 (R.I. Super. Ct. July 10, 2001); S.C. CODE ANN. § 42-15-95(B) (2015); S.D. CODIFIED LAWS § 62-4-45 (2015); S.D. CODIFIED LAWS § 19-2-3 (2016); *Sowards v. Hills Materials Co.*, 521 N.W.2d 649, 651–54 (S.D. 1994); *Citibank v. McDowell*, Declaratory Ruling, S.D. DEP'T LAB. & REG. (Aug. 26, 2006), https://dlr.sd.gov/employment_laws/decisions_declaratory_rulings/62_4_1_44_45.pdf [https://perma.cc/8EUU-E5LD] (*but see* *Dean v. Angostura Irrigation Dist.*, No. 207, 1990/91, 1991 WL 525010, at *1 (S.D. Dep't Labor Oct. 29, 1991) (“In light of the strong reasons supporting denial of ex parte contact by attorneys and lack of express statutory language allowing the same . . . authorization shall be limited to medical records and shall expressly forbid ex parte contact between opposing counsel and the physicians.”)); TENN. CODE ANN. § 50-6-204(a)(2)(A) (LEXIS through 2019); TEX. LAB. CODE ANN. § 408.0041(d) (West 2015); 13-4 VT. CODE R. § 1:3.2140 (2015) (amended 2016); VA. CODE ANN. § 65.2-607(A) (2017); *Wiggins v. Fairfax Park Ltd. P'ship*, 470 S.E.2d 591 (Va. Ct. App. 1996); VA. WORKERS' COMP. COMM'N, VOCATIONAL REHABILITATION GUIDELINES 5 (2015), <http://vwc.state.va.us/sites/default/files/documents/Vocational-Rehabilitation-Guidelines.pdf> [https://perma.cc/TLH2-Z5GR]; WASH. REV. CODE ANN. §§ 51.04.050, 51.36.060 (West 2010); *Holbrook v. Weyerhaeuser Co.*, 822 P.2d 271, 274–75 (Wash. 1992); WORKERS' COMP. ADVISORY COMM., SPECIAL MEETING LABOR & INDUS., MEETING MINUTES (2008), <http://www.lni.wa.gov/ClaimsIns/Files/Wcac/Minutes/2008/WcacMtgMin20080617.pdf> [https://perma.cc/56CN-77W5]; W. VA. CODE ANN. § 23-4-7 (West 2018); W. VA. CODE R. § 85-20-8.5 (2018); *Morris v. Consolidation Coal Co.*, 446 S.E.2d 648, 653, 657 (W. Va. 1994).

187. These states include: California, Connecticut, Illinois, Massachusetts, New Mexico, North Dakota, and Pennsylvania. *See* CAL. LAB. CODE § 4062.3(g) (West Supp. 2019); CAL. CODE REGS. tit. 8, § 10718 (2003); *State Farm Ins. Co. v. Workers' Comp. Appeals Bd.*, 120 Cal. Rptr. 3d 395, 402 (Cal. Ct. App. 2011); *Alvarez v. Workers' Comp. Appeals Bd.*, 114 Cal. Rptr. 3d 429, 431 (Cal. Ct. App. 2010); *Malafrente v. Med-Ctr. Home Health Care Emp'r*,

allowed, in the sense that state law does not seem to provide a general rule about ex parte communications.¹⁸⁸ It is possible in these states that courts could interpret legislative silence or general scope of disclosure laws as allowing ex parte communications. Some courts have held that because a state workers' compensation law does not expressly prohibit ex parte communications, they are allowed.¹⁸⁹

The fact that ex parte communications between a party and a treating or examining physician are completely or partially prohibited in only seven states indicates a lack of state privacy protection in this context. PHI disclosures may not be limited in ex parte communications, and such communications may pressure a treating or examining physician to alter her diagnosis or other assessments of a patient. Further, employers or their agents may be allowed to hold ex parte communications in states where the workers' compensation statute is silent on the issue.¹⁹⁰ The treatment of ex parte communications in workers' compensation stands in stark contrast to other areas of the law, such as medical malpractice, where ex parte communications between a party and a treating or examining physician are restricted under the HPR.¹⁹¹ In fact, the same state may require notice of meeting and protective orders for ex parte communications during medical malpractice litigation but allow such communications during workers' compensation proceedings without protective measures.¹⁹²

No. 03888 CRB-07-98-09, 1999 WL 692467, at *1, *3 (Conn. Workers' Comp. Comm'n Aug. 31, 1999); STATE OF CONN. WORKERS' COMP. COMM'N, PAYOR AND MEDICAL PROVIDER GUIDELINES TO IMPROVE THE COORDINATION OF MEDICAL SERVICES (2010), <https://wcc.state.ct.us/download/acrobat/payor-provider-guidelines.pdf> [https://perma.cc/F5LB-KX4J] (prohibition between payor and attending physician); *Hydraulics, Inc. v. Indus. Comm'n*, 768 N.E.2d 760, 764 (Ill. App. Ct. 2002); MASS. ANN. LAWS ch. 152, § 11A(2) (LexisNexis 2017); 452 MASS. CODE REGS. 1.14(2) (2019); Paganelli, No. 030073-02, 21 Mass. Workers' Comp. Rep. 9, 16–17, 2007 MA Wrk. Comp. LEXIS 4, at *14–15 (Reviewing Bd. Mass. Dep't Indus. Accidents Feb. 6, 2007); *Gomez v. Nielson's Corp.*, 894 P.2d 1026, 1029–31 (N.M. Ct. App. 1995); *State v. Altru Health Sys.*, 729 N.W.2d 113, 120 (N.D. 2007); *Pa. State Univ. v. Workers' Comp. Appeal Bd. (Sox)*, 83 A.3d 1081, 1092 (Pa. Commw. Ct. 2013) (applying 34 PA. CODE §§ 131.61(a) and 131.70(c) in prohibiting ex parte contact between a treating physician who is an employee of the claimant's employer and claimant's employer) (*but see Heacock v. Sun Co. Inc.*, 38 Pa. D. & C. 4th 1 (Pa. Ct. Com. Pl. 1998) (“[Given] the rationale supporting the prohibition against unauthorized ex parte contacts, this court believes that the Pennsylvania Supreme Court, if confronted with the issue, would at least require reasonable notice to a plaintiff or his counsel before defense counsel may communicate with plaintiff's treating physician.” (emphasis omitted))).

188. These states include: Hawaii, Kentucky, Maine, Michigan, Missouri, New Jersey, Ohio, Utah, Wisconsin, and Wyoming.

189. *See, e.g., Woodward*, 2013 AK Wrk. Comp. LEXIS 8, at *30 (citing previous caselaw in holding that “an employee must allow his or her treating doctors to meet informally on an *ex parte* basis with the employer” under Alaska's workers' compensation statute, which does not explicitly address such communications (citations omitted)); *Arby's Rest. Grp.*, 734 S.E.2d at 57 (holding that ex parte communications are allowed under Georgia's workers' compensation statute, which does not explicitly address them).

190. *See supra* note 189.

191. *See supra* notes 14–18 and accompanying text.

192. *Compare* *Moreland v. Austin*, 670 S.E.2d 68, 71 (Ga. 2008) (prohibiting ex parte communications in medical malpractice actions), *with Arby's Rest. Grp.*, 734 S.E.2d at 57

C. Notice

States may limit PHI disclosure by requiring notice of ex parte communications between a party and a treating or examining physician in workers' compensation proceedings. "Notice" is generally defined as "[a] legal notification or warning that is delivered in a written format or through a formal announcement."¹⁹³ In the workers' compensation context, notice to a noncommunicating party about an ex parte communication may be prior to or contemporaneous with its occurrence, though advance notice is most meaningful to allow the noncommunicating party to seek protections for PHI disclosure. Twelve states require notice of ex parte communications during workers' compensation proceedings,¹⁹⁴ with seven of those

(allowing ex parte communications during workers' compensation proceedings).

193. *Notice*, BLACK'S LAW DICTIONARY (10th ed. 2014).

194. These states include: Colorado, Delaware, Maryland, Minnesota, Mississippi, Montana, New Hampshire, New York, North Carolina, South Carolina, Vermont, and West Virginia. *See* 7 COLO. CODE REGS. § 1101-3:11-6(A) (2019); Colo. Bar Assoc., Op. 71, Ex Parte Communications with Treating Physicians, *supra* note 186; 19-1000-1331 DEL. ADMIN. CODE § 11.6 (2018); MD. CODE. REGS. 14.09.07.04(E) (LexisNexis 2019) (vocational rehabilitation practitioner); MINN. STAT. ANN. § 176.138(a) (West 2018); *Hinson v. Miss. River Corp.*, No. 94-19422-F-4717, 1996 WL 34900915, at *1, *13-14 (Miss. Workers' Comp. Comm'n Aug. 1, 1996); MISS. WORKERS' COMP. EDUC. ASS'N, *supra* note 186; *Malcomson v. Liberty Nw.*, 339 P.3d 1235, 1241-42 (Mont. 2014) (holding that "the provision of § 39-71-604(3) . . . permit[ting] an agent of the insurer to communicate directly with a physician or other healthcare provider and receive 'relevant healthcare information' without prior notice to the claimant or her authorized representative or agent" was unconstitutionally broad); N.H. CODE ADMIN. R. ANN. Lab 503.01(c) (2019); *Alterra*, No. 7000 7727, 2002 WL 31273429, at *3 (N.Y. Workers' Comp. Bd. Oct. 4, 2002); N.C. GEN. STAT. ANN. § 97-25.6(c)(2)-(3) (West Supp. 2017) (*but see id.* § 97-27(a)(3) ("Notwithstanding the provisions of G.S. 97-25.6 to the contrary, an employer or its agent shall be allowed to openly communicate either orally or in writing with an independent medical examiner chosen by the employer regardless of whether the examiner physically examined the employee."); S.C. CODE ANN. § 42-15-95(B) (2015); 13-4 VT. CODE R. §§ 1:3.0000, :3.2140 (Westlaw through Feb. 2019); *Morris v. Consolidation Coal Co.*, 446 S.E.2d 648, 652 (W. Va. 1994) (*but see* W. VA. CODE ANN. § 23-4-7(b) (West 2006) ("[A] claimant irrevocably agrees by the filing of his or her application for benefits that any physician may release to and orally discuss with the claimant's employer, or its representative, or with a representative of the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, from time to time, the claimant's medical history and any medical reports pertaining to the occupational injury or disease and to any prior injury or disease of the portion of the claimant's body to which a medical impairment is alleged containing detailed information as to the claimant's condition, treatment, prognosis and anticipated period of disability and dates as to when the claimant will reach or has reached his or her maximum degree of improvement or will be or was released to return to work.")). Section 23-4-7(b) contains a note, which cites *Morris* and states, "This section does not specifically authorize oral discussions by an employer with a claimant's treating physician concerning a claimant's medical condition, and finding otherwise would circumvent the public policy principles behind recognizing a fiduciary relationship between a patient and a physician." W. VA. CODE ANN. § 23-4-7(b) (citation omitted).

states appearing to require advance notice.¹⁹⁵ Twelve states address notice but do not require it.¹⁹⁶ Notice is unaddressed, meaning state law does not seem to provide a general rule about notice during workers' compensation proceedings, in nineteen states that do not prohibit ex parte communications.¹⁹⁷

Thus, states widely lack privacy protections with respect to notice requirements for ex parte communications. The possibility of broad PHI disclosure due to lack of notice exists in at least thirty-one states; that is, those states that allow ex parte communications (thirty-three) or are silent on the matter (ten) minus those that require notice (twelve).

D. Protective Orders

States could require protective orders for disclosure of PHI during ex parte communications between a party and a treating or examining physician. California requires protective orders for mental health records.¹⁹⁸ Protective orders are

195. These states include: Colorado, Delaware, Minnesota, Montana, North Carolina, South Carolina, and West Virginia. *See supra* note 194.

196. These states include: Alaska, Florida, Georgia, Idaho, Iowa, Kentucky, Louisiana, Nevada, Oregon, South Dakota, Virginia, and Washington. *See Miller v. Municipality of Anchorage*, No. 200606082, 2013 AK Wrk. Comp. LEXIS 9, at *19 (Alaska Workers' Comp. Bd. Jan. 14, 2013); STATE OF CONN. WORKERS' COMP. COMM'N, *supra* note 187, at 10; FLA. STAT. ANN. § 440.13(4)(c) (West 2009); S & A Plumbing v. Kimes, 756 So. 2d 1037, 1038–39, 1042 (Fla. Dist. Ct. App. 2000) (*but see Adelman Steel Corp. v. Winter*, 610 So. 2d 494, 499 (Fla. Dist. Ct. App. 1992), *superseded by statute on other grounds*, FLA. STAT. ANN. § 440.13(4)(c)); *Arby's Rest. Grp.*, 734 S.E.2d at 58; IDAHO CODE § 72-432(11) (2017); IOWA CODE ANN. § 85.27(2) (West Supp. 2018); *Morrison v. Century Eng'g*, 434 N.W.2d 874, 875 (Iowa 1989); KY. R. CIV. P. 26.03; 803 KY. ADMIN. REGS. 25:010 (2016); *Reisinger v. Grayhawk Corp.*, 860 S.W.2d 788, 790 (Ky. Ct. App. 1993); *Farr v. Riscorp*, 714 So. 2d 20 (La. Ct. App. 1998); LA. STAT. ANN. § 23:1127 (Supp. 2019); NEV. REV. STAT. ANN. § 616D.330(1) (LexisNexis 2012); NEV. ADMIN. CODE § 616D.450 (2018); *Booth v. Tektronix, Inc.*, 823 P.2d 402 (Or. 1991), Or. State Bar Legal Ethics Comm., Formal Op. 2005-154, *Contacting Adverse Expert Witness in a Workers' Compensation Proceeding* (last updated 2016), https://www.osbar.org/_docs/ethics/2005-154.pdf [<https://perma.cc/9L7D-P6NJ>]; *Sowards v. Hills Materials Co.*, 521 N.W.2d 649, 651–52 (S.D. 1994); *Wiggins v. Fairfax Park Ltd. P'ship*, 470 S.E.2d 591 (Va. Ct. App. 1996); *West v. Southside Reg'l Indem. Ins. Co.*, No. VA00000743432, 2014 WL 686891 (Va. Workers' Comp. Comm'n Feb. 19, 2014); VA. WORKERS' COMP. COMM'N, *supra* note 186; *In re Gish*, No. 89 0914, 1990 WL 264229, at *1 (Wash. Bd. Indus. Ins. App. Dec. 7, 1990).

197. These states include: Alabama, Arizona, Arkansas, Hawaii, Indiana, Kansas, Maine, Michigan, Missouri, Nebraska, New Jersey, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Wisconsin, and Wyoming. *See supra* note 186.

198. *See* CAL. CODE REGS. tit. 8, § 36.5(e) (2019) (“Whenever such a mental health record is filed by a party at the Workers’ Compensation Appeals Board, the party filing such a record shall request and obtain a protective order from a Workers’ Compensation Administrative Law Judge that shall specify in what manner the mental health record may be inspected, copied and entered into evidence.”). Judges may enter protective orders in other situations. CAL. LAB. CODE § 5708 (West 2011) (“All hearings and investigations before the appeals board or a workers’ compensation judge . . . shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and

addressed but not required in twenty-six states, meaning state law does not seem to provide a general rule about requiring protective orders.¹⁹⁹ This includes states with rules about protective orders that are not applied in the workers' compensation context. Some states, like Alaska, allow the workers' compensation board discretion in issuing protective orders.²⁰⁰ Twenty-three states fail to address protective

records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division.”)

199. These states include: Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Virginia, Washington. See ALA. R. CIV. P. 26(c), 81(a)(31); *Ex parte Smitherman Bros. Trucking, Inc.*, 751 So. 2d 1232, 1237 (Ala. 1999); ALASKA STAT. §§ 23.30.107, 23.30.108(a) (2016); ALASKA ADMIN. CODE tit. 8, § 45.095(b) (2018); ARIZ. REV. STAT. ANN. § 23-1026(F) (2016); COLO. R. CIV. P. 26(c); *Powderhorn Coal Co. v. Weaver*, 835 P.2d 616, 620 (Colo. App. 1992); FLA. R. CIV. P. 1.280(c)(4); *Escutia v. Greenleaf Prods., Inc.*, 886 So. 2d 1059, 1061 (Fla. Dist. Ct. App. 2004); GA. CODE ANN. § 34-9-207(a) (2017); *Arby's Rest. Grp.*, 734 S.E.2d at 58; IND. R. TRIAL P. 28(F); *Discovery Under the New Iowa Rules of Civil Procedure and Workers' Compensation Cases, News and Updates*, IOWA WORKFORCE DEV., <http://www.iowaworkcomp.gov/news-and-updates> [<https://perma.cc/NN2F-PFKY>]; *Base v. Raytheon Aircraft Co.*, 329 P.3d 540, 547 (Kan. Ct. App. 2014); LA. STAT. ANN. § 23:1127(B)(1)(d) (Supp. 2019); *Doucet v. Crowley Mfg.*, 846 So. 2d 875, 879–80 (La. Ct. App. 2003); *Pearl v. East Baton Rouge Par. Sch. Bd.*, 665 So. 2d 169, 171 (La. Ct. App. 1995); 211 MASS. CODE REGS. 110.07(2)(b) (2018); MINN. R. 1420.2200 subpt. 6 (2019); *Mid-Delta Home Health, Inc. v. Robertson*, 749 So. 2d 379, 387–88 (Miss. Ct. App. 1999); MO. ANN. STAT. § 287.140(7) (West 2016); MO. CODE REGS. ANN. tit. 13, § 70-4.120(4)(F) (2018); *State ex rel. McConaha v. Allen*, 979 S.W.2d 188, 189–90 (Mo. 1998); *State ex rel. Maloney v. Allen*, 26 S.W.3d 244, 248 (Mo. Ct. App. 2000); MONT. ADMIN. R. 24.5.316(1), 24.5.325(2) (2018); 53 NEB. ADMIN. CODE §§ 4-001.02A, -006.02A (2019); *Bryant v. Driver's Mgmt.*, No. 1737, 2002 WL 31256348, at *1 (Oct. 7, 2007); N.Y. WORKERS' COMP. LAW §§ 118, 300.33(8)(iii) (McKinney 2016); N.Y. C.P.L.R. 3103 notes to decision 50 (Consol., LEXIS through 2019 released Chs. 1–32, 50–59) (AIDS-related information); N.C. GEN. STAT. ANN. § 97-25.6(d)(4) (West Supp. 2017); 11 N.C. ADMIN. CODE 23A.0410 (2019); *State v. Altru Health Sys.*, 729 N.W.2d 113, 120 (N.D. 2007); *Collins v. Interim Healthcare of Columbus, Inc.*, No. 13-CA-00003, 2014 WL 80482, at *3 (Ohio Ct. App. Jan. 3, 2014); *Randall v. Cantwell Mach. Co.*, No. 12AP-786, 2013 WL 3341201, at *5 (Ohio Ct. App. June 27, 2013); OKLA. STAT. ANN. tit. 85A, § 317(E) (West 2016), OKLA. ADMIN. CODE § 810:10-5-31(c) (2019); R.I. WORKERS' COMP. CT. R. 2.13(B) (Orders for the Protection of Parties and Deponents); *Johnson v. C.G. Sargeant's Sons Corp.*, No. C.A. 77-3864, 1979 WL 200311, at *1, *4 (R.I. Super. Ct. Feb. 13, 1979); *Sowards v. Hills Materials Co.*, 521 N.W.2d 649, 652 (S.D. 1994); *Dean vs. Angostura Irrigation Dist.*, No. 207, 1990/91, 1991 WL 525010, at *1 (S.D. Dept. Lab. Oct. 29, 1991); TENN. CODE ANN. §§ 4-5-311(a), 50-6-239(e) (2015 & Supp. 2018); TENN. CODE ANN. § 50-6-236 (2014); TENN. COMP. R. & REGS. 0800-02-21-16(2) (2018); UTAH ADMIN. CODE r. 602-2-1(A)(9) (2019); 16 VA. ADMIN. CODE § 30-50-20 (2019); WASH. SUP. CT. CIV. R. 81.

200. ALASKA STAT. § 23.30.107 (2016) (“Upon written request, an employee shall provide written authority to the employer, carrier, rehabilitation specialist, or reemployment benefits administrator to obtain medical and rehabilitation information relative to the employee’s injury. The request must include notice of the employee’s right to file a petition for a protective order with the division”); *id.* at § 23.30.108(a) (“If an employee objects to a request for

orders.²⁰¹ Clearly, with almost all states failing to require protective orders, they remain an unused tool to limit PHI disclosures. In contrast, protective orders are routinely used in medical malpractice cases to uphold HPR protections.²⁰²

TABLE: NATIONAL SURVEY OF STATE ACTION

Scope of Disclosure	Expressly Limited	37
	Not Expressly Limited	13
	Authorization Required	20
Ex Parte Communications	Prohibited	7
	Allowed	33
	Not Addressed	10
Notice	Required	12
	Addressed but Not Required	12
	Not Addressed	19
	N/A Ex Parte Prohibited	7
Protective Orders	Required	1
	Not Required	26
	Not Addressed	23

written authority under AS 23.30.107, the employee must file a petition with the board for a protective order within 14 days after service of the request.”); ALASKA ADMIN. CODE tit. 8, § 45.095(b) (2018) (“If after a prehearing the board or its designee determines that information sought from the employee is not relevant to the injury that is the subject of the claim, a protective order will be issued.”); *see also infra* note 260 and accompanying text (discussing in camera inspection of records in Ohio).

201. These states include: Arkansas, Connecticut, Delaware, Hawaii, Idaho, Illinois, Kentucky, Maine, Maryland, Michigan, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, West Virginia, Wisconsin, and Wyoming. *See, e.g.,* Arnold v. Atkins Nursing & Rehab. Ctr., Inc., No. G406016, 2015 AR. Wrk. Comp. LEXIS 241, at *1, *20 (Ark. Workers’ Comp. Comm’n May 29, 2015) (assuming without discussion that a protective order was not required); Nelson v. Conestoga Wood Specialties Corp., No. F706791, 2009 WL 570943, at *1, *4 (Ark. Workers’ Comp. Comm’n Mar. 2, 2009) (same). The Arkansas rules of evidence and procedure, including those governing protective orders, generally do not apply to workers’ compensation. *See* ARK. CODE ANN. § 11-9-705 (2012).

202. *See, e.g.,* Thomas v. 1156729 Ont., Inc., 979 F. Supp. 2d 780, 785–86 (E.D. Mich. 2013) (“Protective orders permitting *ex parte* interviews generally must meet several requirements. First, the protective order must prohibit the defendants from disclosing the plaintiff’s protected information outside the scope of the litigation. Second, the protective order must require the defendants to return or destroy the protected information when the litigation concludes. Third, some judges also require the protective order to contain ‘clear and explicit’ notice to the plaintiff’s physician about the purpose of the interview and that the physician is not required to speak to defense counsel. These are all sensible requirements and they advance the goals of HIPAA.” (emphasis in original) (citations omitted)).

E. Conclusion: Not Minding the Gap

Thus, while HHS may have envisioned a scenario whereby states fill in the gaps in privacy protection created by § 164.512(l), it has not occurred. State response is limited and varied. In fact, the only protection that exists in a majority (a little over two-thirds) of states is a limit on the scope of PHI disclosure. Unfortunately, as described in Part II, those limits are routinely interpreted by courts to allow broad PHI disclosure that effectively amounts to a privacy waiver.²⁰³

IV. “SYMBIOTIC FEDERALISM” AND PROTECTING MEDICAL PRIVACY IN WORKERS’ COMPENSATION

As Parts II and III of this Article demonstrate, injured workers filing for workers’ compensation often forgo medical privacy protections. This results from both a misinterpretation of the HPR’s § 164.512(l) as a complete or very broad waiver of privacy and states’ failure to otherwise protect workers’ privacy while administering workers’ compensation claims.²⁰⁴ As part of a solution, Part II argues courts must read state workers’ compensation laws “through” the HPR, as the HPR is a floor for privacy protections.²⁰⁵ In this regard, § 164.512(l) and state workers’ compensation laws have a symbiotic relationship; both levels of government are needed to protect privacy in the workers’ compensation context. This requires states to strike a balance between the efficient administration of workers’ claims and protecting their privacy—a task they may be in a better position to do than HHS. Thus, states must fill in any gaps in privacy protection created by § 164.512(l). Unfortunately, the empirical study described in Part III indicates both an inconsistent and inadequate state response to protecting privacy.

This lack of privacy protection for workers is likely based on more than a problem of “statutory” interpretation.²⁰⁶ At play are strong, historic divisions between the states and the federal government. Long before the HPR, medical privacy was a function of state law.²⁰⁷ And despite discrete examples of federal involvement, states

203. See *supra* Section II.B.

204. See *supra* Section II.B (discussing judicial interpretation of § 164.512(l)); *supra* Part III (providing a survey of state efforts to protect privacy in workers’ compensation proceedings).

205. See *supra* Section II.B.2.

206. The HPR is a regulation, not a statute, but similar principles apply with respect to interpretation.

207. INST. OF MED., *supra* note 156, at 86 (“Prior to HIPAA, health information in the clinical setting was protected primarily under a combination of federal and state constitutional law, as well as state common law and statutory protections.”) In fact, one commentator suggests that federal privacy protections are not politically viable for workers’ compensation because “[f]ailed attempts by Congress beginning in the 1970s to nationalize workers’ compensation through the federal passage of minimum standards suggest that the division of governmental powers may thwart federal attempts to apply broad privacy principles to workers’ compensation.” Hodge, *supra* note 25, at 140 (citations omitted). But arguably nationalizing workers’ compensation standards removes the administrative power from the states altogether, whereas maintaining privacy protections does not.

always administered their own workers' compensation programs.²⁰⁸ Whether Congress intended to federalize medical privacy with HIPAA is debatable, but arguably the development and implementation of the HPR has resulted in something close to that outcome.

So there is, in this sense, a federalism struggle between states' claims to administrate workers' compensation programs and to protect workers' privacy in the spirit of the Tenth Amendment and federal privacy protection under the HPR pursuant to the Commerce Clause.²⁰⁹ This is so, even though state workers' compensation programs are not constitutionally protected.²¹⁰ Workers'

208. See Hodge, *supra* note 25, at 131–32; Ann Clayton, *Workers' Compensation: A Background for Social Security Professionals*, 65 SOC. SECURITY BULL. 7 (2003–2004), <https://www.ssa.gov/policy/docs/ssb/v65n4/v65n4p7.html> [<https://perma.cc/H4WZ-MZ7W>].

209. Hodge, *supra* note 25, at 131–32 (discussing federalism challenges pre-HIPAA); Christopher Howard, *Workers' Compensation, Federalism, and the Heavy Hand of History*, 16 STUD. AM. POL. DEV. 28, 30 (2002) (“Such an explanation hinges on the considerable power of federalism to influence policy debates in the United States. By the time policymakers gave serious thought to involvement by the national government, workmen’s [sic] compensation laws were so firmly entrenched in the states that major change was politically costly. States’ compensation laws created a textbook example of a ‘preempted policy space.’”); HIPAA, 42 U.S.C. § 300gg note (2012) (Congressional Findings Relating to Exercise of Commerce Clause Authority; Severability).

210. Some support exists for a more foundational state constitutional challenge. *Printz v. United States* and *New York v. United States* make clear that the states cannot be commandeered by the federal government. *Printz v. United States*, 521 U.S. 898, 935 (1997) (“The Federal Government may [not] . . . command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program”). An argument could be made that imposing federal privacy protections on states’ workers’ compensation programs rises to the level of commandeering state administrative agencies and thereby raises Tenth Amendment concerns. See *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 771–72 (1982) (Powell, J., dissenting) (discussing the unconstitutionality of “forc[ing] federal procedures on state regulatory institutions”). But it is unlikely that requiring such privacy protections would be viewed as commandeering the state regulatory process of workers’ compensation because it would not impose federal procedures on states. If states choose to do nothing, the HPR serves as a floor for privacy protection. See *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 (1981) (discussing a similar situation with respect to mining regulations under the Surface Mining Control and Reclamation Act of 1977). Another line of cases suggests that protecting privacy in the workers’ compensation context may invoke more classic issues of federalism than the federal-state distinction. In *Armstrong v. Exceptional Child Center Inc.*, the U.S. Supreme Court held that Medicaid providers cannot sue states to enforce section (30)(A) of the Medicaid Act regarding reimbursement rates under the Supremacy Clause, in equity, or under the Medicaid statute itself. 135 S. Ct. 1378, 1387 (2015). Private parties instead must seek relief from HHS, which may put a noncompliant state on notice of violations and subsequently withdraw Medicaid funding. *Id.*; see also *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 616 (2012) (remanding to consider whether providers could challenge, under the Supremacy Clause, California statutes reducing payments when Centers for Medicare and Medicaid Services determined the statutes were consistent with federal law). Both arguments merit exploration elsewhere.

compensation could in fact be federalized, and debate continues around that topic.²¹¹ Thus, the interpretation of the federal and state government boundaries under the HPR relies on “‘soft’ federalism,” defining government roles in an extra-constitutional sense.²¹² According to Abbe Gluck, these boundaries “may be more important to understanding what ‘federalism’ means today than the Constitution, particularly because formal constitutional law no longer frequently operates to police the boundaries of state and federal power.”²¹³

This type of federalism struggle in the administration of workers’ compensation claims may have several implications. First, it might explain why § 164.512(*l*) has been misinterpreted by judges and legislators; perhaps they believe the administration of workers’ compensation should be left at all costs to the states. Second, and for the same reason, it tells a story about why HHS has failed to remedy the situation.

Third, it paradoxically refutes the argument that nothing should change by highlighting both federal restrictions and built-in protections for states. The HPR serves as a floor or limit for states, allowing them only to develop parallel or more stringent protections. Meanwhile, by delegating privacy protection to the states under § 164.512(*l*), the federal government affords a layer of protection to states against overly aggressive implementation of the HPR. Thus, HHS’s intervention to remedy privacy failures in workers’ compensation within the confines of existing state systems could be viewed as consistent with states’ traditional roles in protecting privacy and administering workers’ compensation.

An important insight into the federalism at play is that it requires cooperation and mutual dependence. Protecting privacy in the workers’ compensation context requires the participation of both the federal and state governments. The federal government sets the floor for protection upon which the states may rely, but it delegates power to the states to protect privacy.²¹⁴ States are in the best position to know what gaps in privacy protection exist in the administration of their own programs as well as when disclosures are necessary for the efficient administration of claims. In this way, the two levels of government are mutually dependent to protect privacy in workers’ compensation. This understanding of the federalism relationship gives rise to a type of federalism this Article terms “symbiotic federalism.”

211. See, e.g., U.S. DEP’T OF LABOR, *supra* note 149, at 24–25 (recommending the consideration of a federal workers’ compensation commission and federal standards); Karen C. Yotis, *Federalization of Workers’ Comp: Politics, Opt-Outs and Survival of the State-Based Status Quo*, LEXISNEXIS (Feb. 19, 2016), [https://www.lexisnexis.com/legalnewsroom/workers-comp-politics-opt-outs-and-survival-of-the-state-based-status-quo](https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/posts/federalization-of-workers-comp-politics-opt-outs-and-survival-of-the-state-based-status-quo) [https://perma.cc/CM3Q-TAT3].

212. Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 574 (2011).

213. *Id.*

214. See *Hearing*, *supra* note 94 (“Federal legislation would provide a floor. Federal legislation should provide every American with a basic set of rights with respect to health information. All should be assured of a national standard of protection.”).

Section IV.A introduces the concept of “symbiotic federalism” and situates it in the context of workers’ compensation. It discusses symbiotic federalism as a cooperative scheme that has some similarities to, but is broader than, traditional notions of “cooperative federalism.” Under symbiotic federalism, if states fail to protect workers’ privacy, the federal government must step in.

In light of symbiotic federalism, Section IV.B outlines federal action to protect workers’ privacy. States must be encouraged by HHS to comply with the spirit of the HPR—namely, allowing only narrowly tailored PHI disclosures to facilitate workers’ compensation claims. Given current confusion over the meaning of § 164.512(l), HHS must, at a minimum, clarify through a policy statement or amendment to the HPR that this provision is not a complete waiver of federal privacy protections. If the agency chooses to go further, it could amend the HPR to clarify its intent with respect to the scope of PHI disclosure and ex parte communications. HHS also could consider requiring “permissive” instead of “mandatory” PHI disclosures for workers’ compensation, which are subject to the “minimum necessary” disclosure standard; as explained in Section I.B.3.a, states currently choose their own standards. Regardless of the extent to which HHS seeks to clarify or to strengthen protections, if state law continues to violate the HPR’s requirement for narrowly tailored PHI disclosures, it must be preempted.

Section IV.C suggests some other measures states may take to narrow the scope of PHI disclosure. These include requiring notice and protective orders for ex parte communications, if they continue to be authorized by state law and not prohibited by HHS.

A. “Symbiotic Federalism”

Merriam-Webster’s dictionary defines “symbiosis” as “1. the living together in more or less intimate association or close union of two dissimilar organisms (as in parasitism or commensalism); especially: mutualism, [and] 2. a cooperative relationship (as between two persons or groups).”²¹⁵ Symbiosis is a biological concept that recognizes cooperation may be based on many different, complex relationships.²¹⁶ Benefit levels and conditions of participation may vary between the two entities cooperating.²¹⁷ Cooperation may be obligate (required) or facultative (optional) for either or both entities.²¹⁸

The flexibility of the concept of symbiosis is useful for conceptualizing the federalism challenges involved in protecting injured workers’ medical privacy. Under current law, both the federal and state governments are tasked with protecting medical privacy within the confines of their respective powers. The actions of one

215. *Symbiosis*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/symbiosis> [<https://perma.cc/5RU4-3TQS>].

216. See generally Philip Hunter, *Entente Cordiale: Multiple Symbiosis Illustrates the Intricate Interconnectivity of Nature*, 7 EMBO REP. 861 (2006) (discussing complex symbiotic relationships in nature involving two or more organisms).

217. Eva Boon, Conor J. Meehan, Chris Whidden, Dennis H.-J. Wong, Morgan G.I. Langille & Robert G. Beiko, *Interactions in the Microbiome: Communities of Organisms and Communities of Genes*, 38 FEMS MICROBIOLOGY REV. 90, 92 (2014).

218. *Id.*

level of government influences the other. In this sense, the federal and state governments are mutually dependent to protect privacy, and cooperation is obligate. The HPR establishes the baseline for privacy rights for the states but relies on individual states to determine how best to protect privacy while facilitating the efficient administration of workers' compensation claims under their individual rules.²¹⁹ The HPR is premised on federal power to protect medical privacy under the Commerce Clause.²²⁰ The states historically protected medical privacy and managed workers' compensation programs in the spirit of their reserved Tenth Amendment powers.²²¹ In sum, the task of protecting privacy is shared by the federal and state governments in light of concerns about the efficient administration of workers' compensation claims.

Both levels of government benefit from the traditional division of powers. The states benefit by being able to administer their workers' compensation programs efficiently. The federal government benefits from the states' on-the-ground ability to protect medical privacy in that process. The framework is cooperative in nature, but there is no federal oversight of state workers' compensation programs.

To avoid conflict between states' traditional role in administering workers' compensation and protecting privacy and federal protection of privacy, two scenarios must occur: federal privacy protections must allow for the states' administration of workers' compensation claims, and state workers' compensation programs must narrowly tailor PHI disclosures to protect privacy pursuant to the HPR. As discussed in Parts II and III, the challenges for privacy protection arise with respect to the latter.

When the symbiotic relationship functions well, states will craft and implement privacy protections that guard against the release of PHI that is unnecessary for the administration of workers' compensation claims. In this scenario, one might expect a "race to the top," in the sense that greater privacy protection in some states will increase privacy protection in others.²²² For example, if New York is able to operate a workers' compensation system efficiently with broad privacy protection and no ex parte communications, then greater PHI disclosure and ex parte communications may not be necessary for the successful operation of workers' compensation regimes. This dynamic could advance the federalism relationship that the HPR was designed to promote.

When the symbiotic relationship fails to function well, and PHI is disclosed that is unnecessary for the administration of workers' compensation claims, the federal

219. See *supra* Section II.C.

220. See HIPAA, 42 U.S.C. § 300gg note (2012) (Congressional Findings Relating to Exercise of Commerce Clause Authority; Severability); Marie C. Pollio, *The Inadequacy of HIPAA's Privacy Rule: The Plain Language Notice of Privacy Practices and Patient Understanding*, 60 N.Y.U. ANN. SURV. AM. L. 579, 600 (2004) ("HIPAA and the Privacy Rule have survived at least three legal challenges to date. . . . [including] a Tenth Amendment challenge that it goes beyond Congress' Commerce Clause power to regulate an issue generally left to the states.").

221. See Cihfield, *supra* note 40; MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE 49, 55, 58, 61, 80–87, 90–91, 224, 315 (1999).

222. I am grateful to Robert Schapiro for this point. Cf. *infra* note 230 (discussing California as a "super-regulator").

government must step in. HHS must assist states in protecting workers' privacy by providing clear guidance about federal requirements to tailor PHI disclosures narrowly. HHS also must provide states resources to facilitate their development of workers' compensation programs that honor federal privacy goals. This might include guidance about the HPR itself as well as assessments of existing or proposed workers' compensation programs.

Thus, symbiotic federalism relies on a concept of cooperation that is similar but distinct from some commonly discussed forms of "cooperative federalism." To begin, theories of cooperative federalism envision a relationship between the federal and state governments that is more restrictive in scope.²²³ Two types of regulatory frameworks are considered cooperative federalism: conditional grants to states that require spending in accordance with federal priorities, and conditional preemption whereby states are tasked with carrying out federal programs.²²⁴ In the latter context, states must submit a qualifying implementation plan to the government.²²⁵ Under both understandings of cooperative federalism, the state "steps in the shoes" of the federal government and therefore creates federal law.²²⁶

Neither situation is strongly analogous to the federalism challenges in the workers' compensation context.²²⁷ Despite some notable exceptions for disability

223. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 859–60, 866 (1998).

224. *Id.*

225. *Id.* at 866.

226. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1695–96 (2001).

227. Erwin Chemerinsky's interpretation of cooperative federalism as applied to marijuana regulation is perhaps most analogous. See Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015). Chemerinsky recommends allowing interested states to "experiment with novel regulatory approaches while leaving the federal prohibition intact for the remaining states." *Id.* at 78. Specifically, he advocates that the federal government "adopt a cooperative federalism approach that allows states meeting [specified federal] criteria . . . to opt out of the federal Controlled Substances Act" requirements. *Id.* at 78–79. Presumably with this approach, some states will legalize marijuana in violation of the Controlled Substances Act. While the coexistence of federal and state law in marijuana regulation is analogous to privacy protections in workers' compensation, the HPR should serve as the baseline standard for regulation in the latter context. Similarly, Alice Kaswan proposes applying cooperative federalism to climate-change legislation. Alice Kaswan, *A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System*, 85 DENV. U. L. REV. 791, 792 (2008). Kaswan emphasizes the need for federal regulators to work with states to develop implementation plans primarily because the federal government cannot achieve its goal working alone. *Id.* The cooperative federalism framework also has been extended to police reform. Additionally, Kami Chavis Simmons recommends that Congress use its spending power to require states receiving federal grant funding for law enforcement to enact legislation promoting police accountability. Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 357 (2011). States that fail to adopt such legislation would forfeit five percent of federal funds. *Id.* Further, cooperative federalism has been extended to issues between federal and state courts, where a federal court can certify state law questions for relevant state courts.

and black lung, federal funds typically do not play a role in state workers' compensation.²²⁸ States also are not seeking to carry out a federal program with a qualifying implementation plan. Further, the federalism challenges in workers' compensation arise due to unclear boundaries between federal and state powers protecting privacy, rather than varying state decisions about voluntary compliance with federal programs.²²⁹ State management of workers' compensation may encroach on privacy rights just as underenforcement of federal privacy rights may.²³⁰

See generally Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 181 (2010). Cooperative and symbiotic federalism share a key feature: they envision a balance between federal preemption ("preemptive federalism") and distinct federal and state regulatory powers ("dual federalism"). Weiser, *supra* note 226, at 1697. Under preemptive federalism, "federal courts interpret federal enactments or defer to federal agency action as preempting all state action in a field." *Id.* "Dual federalism regimes, by contrast, separate federal and state authority into two uncoordinated domains," where state governments exercise powers without federal interference. *Id.*

228. *See* Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 121 n.1 (1994).

229. This differs from theories of "balanced federalism," where there is a "tug of war" that arises when state and federal actors regulate within the "interjurisdictional gray area," or an area that implicates both state and national concerns. Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balances in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 516–17, 644 (2007). Specifically, the interjurisdictional gray area is "one whose meaningful resolution demands action from both state and federal regulatory authorities, either because neither has all of the jurisdiction necessary to address the program as a legal matter, or because the problem so implicates both local and national expertise that the same is true as a factual matter." *Id.* at 510. Rather, in the workers' compensation context, regulatory boundaries are simply unclear. Once these boundaries are clarified, both the federal and state governments may realize their goals within their traditional domains. Further, at issue with balanced federalism are "impermissible compromises of fundamental federalism values" due to state regulation in the interjurisdictional gray area. *Id.* at 517. Whereas in the workers' compensation context, the issue is lack of state regulation to protect workers' privacy.

230. One might argue the issue of privacy protection in workers' compensation has some elements of "uncooperative federalism." This arises when states utilize the regulatory power conferred by the federal government in a cooperative federalism context to "tweak, challenge, and even dissent from federal law." Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009). This may take a few forms, but the most applicable to the workers' compensation context may be "dissent made possible by a regulatory gap." *Id.* at 1272. According to Heather Gerken and Jessica Bulman-Pozen, this dissent may have value by generating innovative solutions or higher standards. *Id.* at 1276. For example, the Environmental Protection Agency (EPA) "sets national air quality standards for common pollutants." *Id.* States have "discretion [in] implement[ing] these standards as long as their plans meet national standards," but if the states fall short, the EPA retains the authority to implement air quality standards. *Id.* California, which is considered a "super-regulator" because its vehicle emissions standards surpass federal standards, is exempt from certain EPA requirements. *Id.* at 1277. Other states subsequently adopted California's emissions standards in lieu of federal standards, and the EPA at times has followed California's lead by increasing its own standards. *Id.* These benefits have not surfaced in the workers' compensation context. States used § 164.512(l) to eliminate the application of the HPR without offering other meaningful privacy protections. *See supra* Part III. Thus, this

Most significantly, cooperative federalism emphasizes a voluntary interaction, whereby states may gain funding or powers through cooperation with the federal government.²³¹ Workers' compensation presents a different situation, as the federal and state governments are dependent under current law to protect privacy, and cooperation does not grant states additional funding or powers.

Abbe Gluck's work on "interstatutory federalism" captures some of the dynamic at stake in symbiotic federalism.²³² Gluck, recognizing the limits of cooperative (and uncooperative) federalism doctrines in capturing states' roles in implementing federal legislation, proposes a new statutory lens from which to view federal and state relationships.²³³ The states are viewed as purposeful implementers of federal statutes.²³⁴ Congress drafts statutes in a manner that allows the federal government to harness states' established infrastructure, creativity, and legislative powers to attain federal goals.²³⁵ State implementation of federal statutes is viewed as an expression of federalism in the sense that states' administrative roles highlight state authority, autonomy, and expertise in an area of regulation, despite the umbrella of federal law.²³⁶

Gluck's arguments are helpful for understanding symbiotic federalism and workers' compensation on several fronts. The federalism issue at stake in workers' compensation arises in the context of statutory (regulatory) interpretation rather than foundational constitutional conflict. The issue arises because the boundary between federal and state powers to protect workers' privacy under the HPR is unclear. HHS has done little to resolve the confusion, leaving the states to stumble in and out of privacy protections through the administration of their workers' compensation programs. Further, consistent with Gluck's view about intentional use of state implementers, HHS likely wanted § 164.512(l) to harness states' on-the-ground ability to protect privacy in the manner that best comports with the operation of their individual workers' compensation programs.

But Gluck's concept of interstatutory federalism may not, at least in its current form, capture all of what is involved with respect to protecting privacy in workers'

"dissent" has not produced value for privacy protection.

231. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 248 (2005). "Dynamic federalism" recognizes an obligate relationship to act to resolve jurisdictional conflicts among "overlapping federal and state . . . jurisdictions," creating a model "in which multiple levels of government interact in the regulatory process." J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative States: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 103–04 (2010) (citation omitted). This gives rise to intentional redundancy in regulation, allowing for "governance adaptation to transpire more quickly and with less political jockeying than static, exclusive jurisdiction models." *Id.* at 105; *see also* Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 176 (2006). In the case of workers' compensation, the goal is balancing federal standards for privacy protection and the efficient administration of state workers' compensation programs. A more static model arguably would provide stability on both fronts.

232. *See generally* Gluck, *supra* note 212.

233. *Id.* at 540–42.

234. *Id.* at 537–38.

235. *Id.* at 568–72.

236. *Id.* at 574–76.

compensation. Gluck indicates that Congress's delegation of this administrative power to the states to achieve nationalistic goals is both deliberate and purposeful.²³⁷ This contrasts with the addition of § 164.512(l), which was added to the HPR by HHS after a notice and comment period, to honor states' traditional role in administering their own workers' compensation programs.²³⁸ Section 164.512(l) was intended to allow states to continue efficiently administering their workers' compensation programs, not to nationalize privacy protection.²³⁹ A more analogous situation to the dynamic Gluck describes would be a federal workers' compensation statute defining parameters for state workers' compensation programs (similar to Gluck's example of the states' ability to implement the insurance exchanges of the Patient Protection and Affordable Care Act (ACA)).²⁴⁰ To be sure, this Article argues that the HPR sets a floor for privacy protection in terms of the standard for minimum PHI disclosure, but the details of that protection are not outlined by the HPR in the context of workers' compensation. State protections could take different forms, and they have the potential to be stronger than those of the HPR.

Further, Gluck's theory is applied in situations of relatively clear federal and state statutory boundaries—as in the state-run health insurance exchanges under the ACA—whereas the federal and state roles in privacy protection in workers' compensation are unclear after § 164.512(l). HHS essentially conferred administrative power to the states without guidance about the general applicability of the HPR to workers' compensation. The next Section discusses actions that HHS must take to clarify the application and role of the HPR in protecting workers' privacy, considering the symbiotic relationship that exists between the federal and state governments with regard to protecting such privacy.

B. Federal Action to Protect Injured Workers' Medical Privacy

From a symbiotic federalism perspective, HHS must take several steps to preserve privacy in the context of workers' compensation. These include clarifying aspects of the HPR, applying the “minimum necessary” requirement or a similar limitation to disclosures made during workers' compensation proceedings, and restricting ex parte communications during such proceedings. Once HHS clarifies its position on different parts of the HPR, and after a period for compliance, state workers' compensation laws that continue to fail to protect workers' privacy must be preempted.

1. Clarifying Requirements and Encouraging State Action

HHS's first task is to clarify a couple of aspects of the HPR. First and foremost, the purpose behind the exception in § 164.512(l) must be clearly articulated in the regulations or a policy statement. As argued in Part II, HHS documents suggest §

237. *Id.* at 564–76, 582.

238. *See supra* Section II.C.

239. *See supra* Section II.C.

240. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 186–99 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.); *see also* Gluck, *supra* note 212, at 570 (discussing state insurance exchanges under the ACA).

164.512(l) is intended to facilitate workers' compensation proceedings and to balance the interests of workers and employers, not to serve as a complete waiver of workers' federal privacy protections.²⁴¹ The agency envisioned a scenario in which protecting privacy and facilitating workers' compensation proceedings are not mutually exclusive.²⁴²

Additionally, HHS must clarify the boundaries of § 164.512(l) as applied to workers' compensation proceedings, likely in a policy statement. HHS must address how states can both comply with the HPR and administer their workers' compensation programs. To do so, it is necessary for the agency to explain its interpretation of the relationship between the federal and state governments with respect to protecting privacy in workers' compensation. The HPR is a floor, and states can develop their own protections, but the spirit of the federal rule must be honored. At the most basic level, states must narrowly tailor PHI disclosures, limiting them to what is actually necessary to administrate claims.

The next step for HHS will be to provide guidance about scope of PHI disclosure, either within a policy statement or another administrative document. Individual states currently determine scope of the written record disclosed and whether ex parte communications are allowed, and, if so, how they are structured. General statements about limiting scope to that which is "relevant," "pertinent," or "related" to the injury underlying the claim are ineffective in practice. HHS must clarify what is "necessary" to administrate claims and may need to provide concrete examples of how limits should function in particular situations. This is consistent with the HITECH Act, which requires HHS to develop guidance about "minimum necessary" disclosures.²⁴³ Under this congressional charge, HHS may choose to offer guidance about what a minimum necessary disclosure generally means in the context of workers' compensation and who makes that determination.²⁴⁴

HHS also may decide to reexamine states' discretion in setting standards for PHI disclosure in workers' compensation as "mandatory" or "permissive." As discussed in Part I, only the latter carries the requirement of "minimum necessary" disclosures under the HPR, which seem vital to tailoring disclosures narrowly.²⁴⁵ The "required" versus "permitted" distinction results in differences in the scope of disclosures that violate the spirit of the HPR.²⁴⁶ The apparent randomness of state selection of standards has led not only to inconsistent approaches between states, but also to contradictory standards within the same state statutes.²⁴⁷

Further, HHS may decide to address whether ex parte communications between a party and a treating or examining physician during workers' compensation

241. *See supra* Section II.C.

242. *See supra* Section II.C.

243. Health Information Technology for Economic and Clinical Health (HITECH) Act, Pub. L. No. 111-5, § 13405(b)(1)(B), 123 Stat. 226, 265 (2009) (codified as amended at 42 U.S.C. § 17935(b)(1)(B) (2012 & Supp. IV 2016)) ("Not later than 18 months after [the date of enactment of this section], the Secretary shall issue guidance on what constitutes 'minimum necessary' for purposes of subpart E of part 164 of title 45, Code of Federal Regulation.").

244. *See supra* note 243 and accompanying text.

245. *See supra* Section I.B.

246. *See supra* Section I.B.

247. *See supra* Section I.B.3.a.

proceedings are allowed under the HPR, and, if they are, whether the PHI disclosed must be limited in scope. Notice to the plaintiff or her representative and a protective order may be vital to preserving the integrity of diagnoses and other medical assessments. Changes with respect to communications may require an amendment to the HPR or a policy statement.

2. Preempting Contrary State Law

Once HHS clarifies these aspects of the HPR, states must be provided a reasonable period for compliance. After that time, state workers' compensation statutes that violate the purpose of the HPR must be preempted. Specifically, HHS must preempt state laws that allow overbroad PHI disclosure related to either written medical records or ex parte communications, if the agency continues to allow the latter.

Preemption may be based on the current general preemption provision of the HPR or an amended version. Interestingly, HHS did not intend the preemption provision of the HPR to be its final statement about preemption. The agency discussed the possibility of reexamining preemption if, given *more* protective state statutes, "dual regulation impairs care or the operation of information and payment systems, poses risks to confidentiality because of confusion between two levels of law, or creates uncertainty among patients about their rights and forms of redress."²⁴⁸ Clearly, with less protective state statutes, the latter two circumstances are present: privacy has been compromised in the workers' compensation system, and uncertainty exists about workers' rights and redress.

Regardless of whether HHS amends the HPR's preemption provision, the concept of symbiotic federalism sheds light on the basis for the preemption of state statutes supporting overbroad PHI disclosures, including some ex parte communications. States must administrate their workers' compensation programs in accordance with the HPR. If the federal government provides adequate guidance about how to comply with the HPR in light of § 164.512(l), states must develop their own programs to fill in gaps in privacy protection.²⁴⁹ If states fail to do so, the HPR creates the floor for privacy protection, and conflicting state workers' compensation laws must be preempted.²⁵⁰ Overbroad PHI disclosures, whether through written records or ex parte communications, violate the spirit of the HPR to tailor such disclosures narrowly.²⁵¹

Comparative situations arise in environmental law, which might serve as useful guides. The prevailing regulatory approach in environmental law is a cooperative, conditional- or partial-preemption regulatory strategy, whereby Congress requires a federal oversight agency (typically the Environmental Protection Agency (EPA)) to set national standards and to delegate implementation responsibilities to states with approved programs.²⁵² Unlike total preemption, which requires state performance according to federal prescription, this cooperative arrangement gives states flexibility in program design. States have freedom in implementation and enforcement

248. *Hearing, supra* note 94.

249. *See supra* Section II.D.

250. *See supra* Section II.A.

251. *See supra* Section II.A.

252. *See infra* notes 253–55.

strategies, so long as their laws and regulations are at least as protective as the applicable federal statute. If a state chooses not to implement its own regulatory program, the federal government remains the regulatory agent. Similarly, if an approved state program inadequately enforces national standards, the federal government reserves the right to preempt state authority and to regulate on the state's behalf. This approach is taken with respect to the Clean Water Act,²⁵³ the Clean Air Act,²⁵⁴ and the Surface Mining Control and Reclamation Act.²⁵⁵

253. The Clean Water Act (CWA) is designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Clean Water Act, 33 U.S.C. § 1251(a) (2012). The CWA includes a mandate compelling states to establish, for each of their most polluted waterways, a Total Maximum Daily Load (TMDL)—a measurement intended to regulate the discharge of pollutants into those bodies of water. *Id.* § 1313(d)(1); *Kingman Park Civic Ass’n v. U.S. Env’tl. Prot. Agency*, 84 F. Supp. 2d 1, 2 (D.D.C. 1999). If the EPA administrator disapproves a state’s proposed TMDL, the administrator must devise a binding TMDL for the state. 33 U.S.C. § 1313(d)(2). This is true even though the EPA argued that Congress did not intend for the agency to establish TMDLs if a state chooses not to act. *See Scott v. City of Hammond*, 741 F.2d 992, 998 (7th Cir. 1984) (“The EPA’s inaction appears to be tantamount to approval of state decisions that TMDL’s are unneeded. State inaction amounting to a refusal to act should not stand in the way of successfully achieving the goals of federal anti-pollution policy.”); *Kingman Park*, 84 F. Supp. 2d at 2 (holding that the CWA should be liberally construed to achieve its objectives and to impose a duty on the EPA to establish TMDLs when a state defaults or refuses to act over a long period, in this case 18 years); *Am. Canoe Ass’n, Inc. v. U.S. Env’tl. Prot. Agency*, 30 F. Supp. 2d 908, 921 (E.D. Va. 1998) (“[T]he most compelling reason to follow *Scott* . . . is that the EPA’s alternative interpretation of the statute would allow for recalcitrant states to short-circuit the Clean Water Act and render it a dead letter.” (citation omitted)); *Alaska Ctr. for the Env’t v. Reilly*, 762 F. Supp. 1422, 1427 (W.D. Wash. 1991) (finding that “Congress intended that EPA’s affirmative duties be triggered upon a state’s failure to submit a list, or any TMDL at all”).

254. Congress initially enacted the Clean Air Act (CAA) in 1963 to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1) (2012). The CAA was amended in 1977, in response to deteriorating visibility in wilderness areas, national parks, and other places. *See, e.g., Arizona ex rel. Darwin v. U.S. Env’tl. Prot. Agency*, 815 F.3d 519, 524 (9th Cir. 2016). To improve outdoor visibility, the CAA “invite[d] each State to submit to [the] EPA a ‘State Implementation Plan’ (‘SIP’) setting forth emission limits and other measures necessary to make reasonable progress toward the national visibility goal.” *Id.* (quoting *Nat’l Parks Conservation Ass’n v. U.S. Env’tl. Prot. Agency*, 788 F.3d 1134, 1138 (9th Cir. 2015) (citing 42 U.S.C. §§ 7410(a), 7491(b)(2) (2012))). If a state chooses not to submit a SIP, or if the EPA disapproves a SIP in whole or in part, the CAA requires the EPA to produce a Federal Implementation Plan (FIP) for that State. 42 U.S.C. § 7410(c)(1). The EPA also may issue a FIP for a state with a plan that does not satisfy the minimum criteria of the CAA. *Id.* This applies to partial plans as well. *See Ass’n of Irrigated Residents v. U.S. Env’tl. Prot. Agency*, 686 F.3d 668, 676 (9th Cir. 2011) (holding that the EPA has a “duty to take further action upon partial disapproval” of California’s SIP and to issue a FIP).

255. The Surface Mining Control and Reclamation Act (SMCRA) enables states to implement their own regulatory programs or to opt for direct federal regulation. 30 U.S.C. § 1253 (2012). “If a State does not . . . submit a proposed permanent program that complies with the Act . . . the full regulatory burden [is] borne by the Federal Government.” *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981). Violations unaddressed by the states also fall to the federal government. *See, e.g., Annaco, Inc. v. Hodel*,

While the workers' compensation situation differs because states are not operating programs under federal oversight with the purpose of supporting a distinctive federal goal, the cooperative nature is similar. States are operating programs that must comport with federal privacy law to support the mutual state and federal goal of protecting workers' privacy, and such cooperation avoids the federal government stepping in. Thus, the environmental law experience may prove instructive for HHS when addressing privacy concerns in workers' compensation.

C. Other State Actions to Protect Injured Workers' Medical Privacy

In addition to following HHS guidance to tailor PHI disclosures narrowly, states may take additional measures to protect the medical privacy of injured workers. First and foremost, states allowing *ex parte* communications in workers' compensation proceedings (if they are not prohibited by HHS) could require a notice to the injured worker, her counsel, or other representative. This would guard against unauthorized disclosures of PHI as well as help preserve the integrity of the medical opinions at stake. Currently, notice of *ex parte* communications is required in only twelve of the thirty-three states explicitly allowing *ex parte* communications.²⁵⁶

Additionally, states may require protective orders to control the scope of PHI disclosures in *ex parte* communications. Such protective orders currently are required in California for mental health records, with twenty-six states addressing but not requiring them.²⁵⁷ California requires that:

[w]henever . . . a mental health record is filed by a party at the Workers' Compensation Appeals Board, the party filing such a record shall request and obtain a protective order from a Workers' Compensation Administrative Law Judge that shall specify in what manner the mental health record may be inspected, copied and entered into evidence.²⁵⁸

Other states adopt related protections that fall short of requiring protective orders. Alaska requires that "[i]f after a prehearing the board or its designee determines that information sought from the employee is not relevant to the injury that is the subject of the claim, a protective order will be issued."²⁵⁹ In Ohio, two courts held that medical records must be examined *in camera* to determine whether they are "causally or historically" related to the action.²⁶⁰

675 F. Supp. 1052, 1058 (E.D. Ky. 1987) (holding that the Office of Surface Mining Reclamation and Enforcement has authority to act "if, after ten days, the state has not taken appropriate action" to remedy violations of the SMCRA).

256. *See supra* Section III.C.

257. *See supra* Section III.D.

258. CAL. CODE REGS. tit. 8, § 36.5(e) (2019).

259. ALASKA ADMIN. CODE tit. 8, § 45.095(b) (2018).

260. *Collins v. Interim Healthcare of Columbus, Inc.*, No. 13-CA-00003, 2014 WL 80482, at *2 (Ohio Ct. App. Jan. 3, 2014); *see also* *Randall v. Cantwell Mach. Co.*, No. 12AP-786, 2013 WL 3341201, at *1 (Ohio Ct. App. June 27, 2013) (holding that the trial court erred by ordering plaintiff to grant an unaltered medical release that could lead to the production of privileged information and denying a protective order related to that information).

CONCLUSION

Injured workers are undeniably placed in a different position with the state than other citizens when they must sacrifice medical privacy to obtain compensation for their injuries. This is especially troubling in a country where medical privacy is a federal right. Symbiotic federalism helps identify why injured workers are in this position and how it may be changed. Symbiotic federalism explains the unclear boundary between states' historic roles in protecting privacy and administering their own workers' compensation programs and the federal government's Commerce Clause power to protect workers' privacy. The relationship is one of mutual dependency, as both levels of government are needed under current law to protect medical privacy in workers' compensation. The HPR forms the floor for privacy protection, and the states arguably know best the privacy protections required in the daily administration of their own workers' compensation programs.

In a move toward cooperation with the states, HHS included § 164.512(l) in the HPR. This section exempts workers' compensation from the HPR insofar as it is necessary to lift privacy protections to administrate workers' compensation programs efficiently. In return, HHS envisioned a scenario whereby states would fill in any gaps in privacy protection with their own laws. Unfortunately, states have not done so, and § 164.512(l) is widely misinterpreted by courts as a wholesale waiver of the federal privacy rights of injured workers. Workers, many with severe disabilities, are placed in the position of forgoing compensation or sacrificing their medical privacy.

When such failures occur, HHS must remedy the situation. HHS must clarify the meaning of § 164.512(l) and issue clear guidance about how states can narrowly tailor PHI disclosures to comply with the HPR. HHS may choose to issue guidance on the legality of, and possible conditions for, ex parte communications in workers' compensation proceedings; whether PHI disclosures should be considered "permissive" instead of "mandatory" and thereby subject to the "minimum necessary" disclosure standard of the HPR; and what "minimum necessary" disclosures mean in the context of workers' compensation and who determines them. If after such steps and a period for compliance states continue to fail to protect injured workers' privacy, federal protections control, and conflicting state workers' compensation statutes must be preempted.

Under this vision of governmental cooperation to protect workers' medical privacy, the outcome in *Laura McRae's* case would have been very different. The ex parte communication either would have not taken place or would have taken place with some key restrictions. If ex parte communications during workers' compensation proceedings are prohibited by HHS, sanctions likely would be issued by the agency (recall that Georgia's workers' compensation statute is silent on the issue of ex parte communications). If such communications are allowed but restricted, notice and a protective order to limit the PHI disclosed may be required. Further, the PHI generated would be narrowly tailored and may be subject to the "minimum necessary" disclosure standard of the HPR, rather than defined by defense counsel or other parties to the case. As a result, the PHI disclosed about *McRae* truly would be "related" to and "necessary" for the administration of her claim, and *McRae's* physician would not be pressured to engage in activities she views as inconsistent with the ethical practice of medicine. This vision comes closer to the

goals of both the founders of workers' compensation and HHS for privacy protection, in terms of balancing employer and employee interests post-industrialization.