

COUNTY OF VENTURA	2018 ADMINISTRATIVE POLICY MANUAL	LEGAL CHAPTER VI
Originating Agency: County Counsel	Last Issued 2018	Revised 2019
<u>Policy No. Chapter VI - 9</u> HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT BUSINESS ASSOCIATE AGREEMENTS		
Policy Change Requires: <input type="checkbox"/> Board of Supervisors Approval <input type="checkbox"/> CEO Approval Forms Change Requires: <input checked="" type="checkbox"/> County Counsel Approval		

POLICY

1. Pursuant to the federal Health Insurance Portability and Accountability Act (HIPAA), the County of Ventura must enter into "business associate agreements" with contractors that perform certain services involving the disclosure or use of confidential health information they obtain from the County. Under HIPAA, a "business associate" is any person or entity that (1) performs or assists in the performance of a function or activity involving the use or disclosure of individually identifiable health information, including claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, billing, benefits management, practice management, and repricing, or (2) provides legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services, if the provision of services involves the disclosure of individually identifiable health information. (For example, a law firm that obtains the medical files of an individual from the County in connection with the performance of legal services is a business associate of the County.) Business associate agreements are also subject to the requirements of the federal Health Information Technology for Economic and Clinical Health Act (HITECH Act).
2. Business associate agreements are required only with respect to contractors providing services to agencies or departments included in the "health care component" of the County. The Board of Supervisors has designated the following agencies/departments as the County's health care component.

Area Agency on Aging
Auditor-Controller's Office
County Counsel's Office
County Executive Office (Human Resources and Risk Management only)
District Attorney's Office (health care operations components only)
Health Care Agency (excluding the Medical Examiner)
Human Services Agency (Public Guardian only)
Information Technology Services Department
Probation Agency (health care operations components only)

Sheriff's Department (health care operations components only)
Ventura County Fire Protection District

3. The County must have a business associate agreement with every business associate that enters into a new or modified contract with the County.
4. Business associate agreements shall not be subject to approval by the Board of Supervisors unless they are entered into in connection with a separate contract for services requiring expenditure by the County in excess of the amount specified in Government Code section 25502.5.
5. Business associate agreements are subject to Policy VI-1, *County Contracts and Agreements* in this manual and must contain the required provisions set forth in the attached model agreement (with modifications as needed to account for the specifics of the underlying contractual arrangement).

PROCEDURES

1. County staff within each agency and department included in the County's health care component should review all proposed contracts with outside contractors to determine whether the contractors are business associates for purposes of HIPAA.
2. Business associate agreements must be prepared in accordance with this policy and Policy VI-1, *County Contracts and Agreements* in this manual and contain the required provisions set forth in the attached model agreement (with modifications necessitated by the underlying contractual arrangement).
3. Prior to signing, business associate agreements should be submitted for review and approved in accordance with Policy VI-1, *County Contracts and Agreements* in this manual.

NOTE: Words or phrases in bold-face type contained in brackets are intended as either optional language or as instructions to the users of these sample provisions and are not intended to be included in the contractual provisions.

MODEL BUSINESS ASSOCIATE AGREEMENT CONTRACT PROVISIONS

Definitions (Alternative Approaches)

Catchall Definition

Terms used, but not otherwise defined, in this Agreement shall have the same meaning as those terms in the Privacy Rule, Security Rule or HITECH Act, as applicable.

Examples of Specific Definitions

- a. *Breach* shall have the same meaning as the term “breach” in 45 C.F.R. part 164.402.
- b. *Business Associate* shall mean **[insert name of the business associate]**.
- c. *Covered Entity* shall mean **[insert name of the covered entity]**.
- d. *Electronic Health Record* shall have the same meaning as the term “electronic health record” in section 13400 of the HITECH Act (42 U.S.C. § 17921).
- e. *HITECH Act* shall mean the Health Information Technology for Economic and Clinical Health Act of 2009, Public Law 111-05, and the regulations promulgated thereunder.
- f. *Individual* shall have the same meaning as the term “individual” in 45 C.F.R. part 164.501 and shall include a person who qualifies as a personal representative in accordance with 45 C.F.R. part 164.502(g).
- g. *Privacy Rule* shall mean the standards for the privacy of individually identifiable health information at 45 C.F.R. part 160 and part 164, subparts A and E.
- h. *Protected Health Information* shall have the same meaning as the term “protected health information” in 45 C.F.R. part 164.501, limited to the information created or received by Business Associate from or on behalf of Covered Entity.
- i. *Required by Law* shall have the same meaning as the term “required by law” in 45 C.F.R. part 164.501.
- j. *Secretary* shall mean the Secretary of the Department of Health and Human Services or his or her designee.
- k. *Security Rule* shall mean the security standards for the protection of electronic protected health information at 45 C.F.R. part 160 and part 164, subparts A and C.

- I. *Unsecured Protected Health Information* shall have the same meaning as the term "unsecured protected health information" in section 13402 of the HITECH Act (42 U.S.C. § 17932).

Obligations and Activities of Business Associate

- a. Business Associate agrees to not use or disclose Protected Health Information other than as permitted or required by this Agreement or as Required by Law.
- b. Business Associate agrees to use appropriate safeguards to prevent use or disclosure of Protected Health Information other than as provided for by this Agreement. Such safeguards shall include compliance with the requirements of the Security Rule, including the administrative, physical, and technical safeguards and documentation requirements set forth in 45 C.F.R. parts 164.308, 164.310, 164.312, and 164.316.
- c. Business Associate agrees to mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of Protected Health Information by Business Associate in breach of the requirements of this Agreement.
- d. Business Associate agrees to report to Covered Entity, in writing, within five calendar days of the discovery of such disclosure, any Breach of Protected Health Information of which it becomes aware, including any Breach of Unsecured Protected Health Information. Such notice shall include the identity of each individual whose Protected Health Information or Unsecured Protected Health Information was, or is reasonably believed by Business Associate to have been, accessed, acquired or disclosed during the Breach.
- e. Business Associate agrees to ensure that any agent, including a subcontractor, to which it provides Protected Health Information received from, or created or received by Business Associate on behalf of, Covered Entity agrees to the same restrictions and conditions that apply through this Agreement to Business Associate with respect to such information.
- f. Business Associate agrees to provide access, at the request of Covered Entity, within 20 calendar days of such request, to Protected Health Information in a Designated Record Set (at that phrase is defined in 45 C.F.R. part 164.501), to Covered Entity or, as directed by Covered Entity, to an Individual in order to meet the requirements under 45 CFR 164.524. **[Not necessary if Business Associate does not have Protected Health Information in a Designated Record Set.]**
- g. Business Associate agrees to make any amendment(s) to Protected Health Information in a Designated Record Set that Covered Entity directs or agrees to pursuant to 45 C.F.R. part 164.526 at the request of Covered Entity or an Individual, within 30 calendar days of such request. **[Not necessary if Business Associate does not have Protected Health Information in a Designated Record Set.]**

- h. Business Associate agrees to make its internal practices, books and records, including policies and procedures, relating to the use and disclosure of Protected Health Information received from, or created or received by Business Associate on behalf of, Covered Entity available to the Secretary for the purposes of the Secretary determining Covered Entity's compliance with the Privacy Rule.
- i. Business Associate agrees to provide to Covered Entity or an Individual, within 30 calendar days of a request therefor, information collected in accordance with **[identify the services agreement pursuant to which Business Associate collects/receives Protected Health Information]**, to permit Covered Entity to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with 45 C.F.R. part 164.528.
- j. Upon request by an Individual, Business Associate shall provide an accounting to the Individual of disclosures of Protected Health Information made by Business Associate. The accounting shall include disclosures made in the six years prior to the date the accounting is requested, unless Business Associate maintains the Protected Health Information in an Electronic Health Record, in which case the accounting shall include disclosures made in the three years prior to the date the accounting is requested. The accounting shall include all information required by 45 C.F.R. part 164.528 and the HITECH Act.
- k. Business Associate shall not directly or indirectly receive remuneration in exchange for any Protected Health Information concerning an Individual unless Business Associate obtains from the Individual, in accordance with 45 C.F.R. part 164.508, a valid authorization that includes a specification of whether the Protected Health Information can be further exchanged for remuneration by the entity receiving Protected Health Information of that Individual. This paragraph shall not apply to remuneration received in circumstances specified in section 13405(d) of the HITECH Act (42 U.S.C. § 17935(d)(2)).

Permitted General Uses and Disclosures by Business Associate

Except as otherwise limited in this Agreement, Business Associate may use or disclose Protected Health Information to perform functions, activities or services for, or on behalf of, Covered Entity as specified in **[identify the services agreement pursuant to which Business Associate collects/receives Protected Health Information]**, provided that such use or disclosure would not violate the Privacy Rule if done by Covered Entity or the minimum necessary policies and procedures of Covered Entity.

Specific Use and Disclosure Provisions

[Only necessary if parties wish to allow Business Associate to engage in such activities]

- a. Except as otherwise limited in this Agreement, Business Associate may use Protected Health Information for the proper management and administration of Business Associate or to carry out the legal responsibilities of Business Associate.
- b. Except as otherwise limited in this Agreement, Business Associate may disclose Protected Health Information for the proper management and administration of Business Associate, provided that disclosures are Required by Law, or Business Associate obtains reasonable assurances from the person to whom the information is disclosed that it will remain confidential and used or further disclosed only as Required by Law or for the purpose for which it was disclosed to the person and the person notifies the Business Associate of any instances of which the person is aware in which the confidentiality of the information has been breached.
- c. Except as otherwise limited in this Agreement, Business Associate may use Protected Health Information to provide data aggregation services to Covered Entity as permitted by 45 C.F.R. part 164.504(e)(2)(i)(B).
- d. Business Associate may use Protected Health Information to report violations of law to appropriate federal and state authorities, consistent with 45 C.F.R. part 164.502(j)(1).

Obligations of Covered Entity

Provisions for Covered Entity to inform Business Associate of privacy practices and restrictions **[provision is dependent on business arrangement]**.

- a. Covered Entity shall notify Business Associate of any limitation(s) in its notice of privacy practices in accordance with 45 C.F.R. part 164.520, to the extent that such limitation may affect Business Associate's use or disclosure of Protected Health Information.
- b. Covered Entity shall notify Business Associate of any changes in, or revocation of, permission by an Individual to use or disclose Protected Health Information, to the extent that such changes may affect Business Associate's use or disclosure of Protected Health Information.
- c. Covered Entity shall notify Business Associate of any restriction on the use or disclosure of Protected Health Information that Covered Entity has agreed to in accordance with 45 C.F.R. part 164.522, to the extent that such restriction may affect Business Associate's use or disclosure of Protected Health Information.

Permissible Requests by Covered Entity

Covered Entity shall not request Business Associate to use or disclose Protected Health Information in any manner that would not be permissible under the Privacy Rule if done by Covered Entity. **[Include an exception if the Business Associate will use or disclose**

Protected Health Information and the services agreement includes provisions for data aggregation or management and administrative activities of Business Associate].

Term and Termination

- a. *Term.* The Term of this Agreement shall be effective as of **[insert effective date]**, and shall terminate when all of the Protected Health Information provided by Covered Entity to Business Associate, or created or received by Business Associate on behalf of Covered Entity, is destroyed or returned to Covered Entity, or, if it is infeasible to return or destroy the Protected Health Information, protections are extended to such information, in accordance with the termination provision in this section.
- b. *Termination for Cause.* Upon Covered Entity's knowledge of a material breach by Business Associate, Covered Entity shall either:
 - i. Provide an opportunity for Business Associate to cure the breach or end the violation and terminate this Agreement **[and the [identify the services agreement]]** if Business Associate does not cure the breach or end the violation within the time specified by Covered Entity.
 - ii. Immediately terminate this Agreement **[and the [identify the services agreement]]** if Business Associate has breached a material term of this Agreement and cure is not possible; or
 - iii. If neither termination nor cure is feasible, Covered Entity shall report the violation to the Secretary. **[Bracketed language in this provision may be necessary if there is an underlying services agreement. Also, opportunity to cure is permitted, but not required.]**
- c. *Termination by Business Associate.* Upon Business Associate's knowledge of a material breach by Covered Entity, Business Associate shall either:
 - i. Provide an opportunity for Covered Entity to cure the breach or end the violation and terminate this Agreement **[and the [identify the services agreement]]** if Covered Entity does not cure the breach or end the violation within the time specified by Business Associate.
 - ii. Immediately terminate this Agreement **[and the [identify the services agreement]]** if Covered Entity has breached a material term of this Agreement and cure is not possible; or
 - iii. If neither termination nor cure is feasible, Business Associate shall report the violation to the Secretary **[Bracketed language in this provision may be necessary if there is an underlying services agreement. Also, opportunity to cure is permitted, but not required.]**

d. *Effect of Termination*

- i. Except as provided in paragraph (ii) of this section, upon termination of this Agreement, for any reason, Business Associate shall return or destroy all Protected Health Information received from Covered Entity or created or received by Business Associate on behalf of Covered Entity. This provision shall apply to Protected Health Information that is in the possession of subcontractors or agents of Business Associate. Business Associate shall retain no copies of the Protected Health Information.
- ii. In the event that Business Associate determines that returning or destroying the Protected Health Information is infeasible, Business Associate shall provide to Covered Entity notification of the conditions that make return or destruction infeasible. Business Associate shall extend the protections of this Agreement to such Protected Health Information and limit further uses and disclosures of such Protected Health information to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such Protected Health Information.

Miscellaneous

- a. *Regulatory References.* A reference in this Agreement to a section in the Privacy Rule, the Security Rule or the HITECH Act means the section as in effect or as amended.
- b. *Amendment.* The parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary for Covered Entity to comply with the requirements of the Privacy Rule, the HITECH Act, the Security Rule and the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191.
- c. *Survival.* The respective rights and obligations of Business Associate under section [insert section number related to “Effect of Termination”] of this Agreement shall survive the termination of this Agreement.
- d. *Interpretation.* Any ambiguity in this Agreement shall be resolved to permit Covered Entity and Business Associate to comply with the Privacy Rule, the Security Rule and the HITECH Act.