TAKING CARE OF LIABILITY:

A Guide for Nurse Contractors, Independent Nurse Practitioners, and Travel Nursing Businesses
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>TITLE</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>An Introduction to Independent Nurses’ Liabilities</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>Commercial Auto Liability Exposures for Nurses</td>
<td>4</td>
</tr>
<tr>
<td>3</td>
<td>General Liability Exposures for Nurses</td>
<td>6</td>
</tr>
<tr>
<td>4</td>
<td>Cyber Liability Exposures for Nurses</td>
<td>9</td>
</tr>
<tr>
<td>5</td>
<td>Definition of HIPAA &amp; HITECH</td>
<td>12</td>
</tr>
<tr>
<td>6</td>
<td>Financial Penalties for HIPAA Violations</td>
<td>16</td>
</tr>
<tr>
<td>7</td>
<td>When HIPAA Causes More than Fines</td>
<td>19</td>
</tr>
<tr>
<td>8</td>
<td>Risks from Your Business Associates</td>
<td>22</td>
</tr>
<tr>
<td>9</td>
<td>The Rising Tide of Data Breach Awareness</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>Preparing for HIPAA Audits</td>
<td>27</td>
</tr>
<tr>
<td></td>
<td>Conclusion: Final Thoughts on Nurse Liability Insurance</td>
<td>30</td>
</tr>
</tbody>
</table>
AN INTRODUCTION TO INDEPENDENT NURSES' LIABILITIES

When nurses work in a private practice or as contractors, they enjoy the flexibility and autonomy of operating independently. Though being your own boss does have its perks, the added responsibility brings new liabilities.

Malpractice is a concern for any healthcare professional, and even non-independent nurses have to worry about it. But while the biggest liability exposure and financial threat to independent nurses may indeed be malpractice claims, nurses face other liability exposures they should be aware of.

In this guide, you’ll explore three key types of risk:

- **Auto liability.**
- **General liabilities (e.g., premises and advertising liability).**
- **Cyber liability and HIPAA.**

Because HIPAA violations stemming from data breaches are a top concern in your field today, we’ll discuss cyber security issues in a little more depth.

When you finish this guide, you should have a firm grasp on your HIPAA-mandated responsibilities and why violations are among your most costly risks.

Specifically, you’ll learn about...

- HIPAA requirements.
- HIPAA fines for violations.
- Recent court cases that may change the future of medical privacy lawsuits.

You’ll also learn how to manage your liabilities with business insurance and how the appropriate risk management strategies help you provide better service to your patients. With a little preparation, you’ll be able to protect yourself from accidents and mistakes that may happen at one point or another in your nursing career.

So what are you waiting for? Let’s get started.

Nurses are bound by HIPAA laws, which means they must carefully secure patients’ medical records.
COMMERCIAL AUTO LIABILITY EXPOSURES FOR NURSES
COMMERCIAL AUTO LIABILITY EXPOSURES FOR NURSES

As a nurse, you may not immediately think of driving as an important part of caring for patients, but you have to get to them somehow. And if you drive for work, your personal auto insurance policy may not be enough to protect you. Why? Two reasons:

1. Personal auto policies often exclude coverage for accidents that happen during business driving.
2. If you work as an independent contractor and drive to and from your patients’ homes to treat them, you may need a Commercial Auto Insurance policy.

Many nurses and nurse contractors work at their patients’ homes and rely on their own cars to get them around. An accident that’s excluded from a personal auto policy can leave a nurse stranded, both literally and financially.

Fortunately, you can easily add a Commercial Auto policy to your business protection plan to ensure your business is protected on the road. It’s worth noting that you must have this policy if your car is in your business’s name.

Personal auto insurance may not cover accidents that happen during work trips.
CHAPTER 2

GENERAL LIABILITY EXPOSURES FOR NURSES
GENERAL LIABILITY EXPOSURES FOR NURSES

Nearly every business has some form of liability. Most of the time, the insurance industry uses the term “general liability” to talk about universal risks, such as...

- Visitor slips, trips, and falls on commercial property.
- Damage to someone else’s property.
- Advertising injuries (e.g., lawsuits over libel or copyright infringements).

Basically, if you break something that belongs to someone else or someone accidentally gets hurt on your premises, that’s a general liability exposure. And a General Liability Insurance policy can address these risks.
Need a better understanding of this kind of insurance? Here are a few examples that show when General Liability might come in handy:

• **You’re a nurse practitioner** who owns your own practice, and your clinic is open on a cold, snowy day. People are tracking in mud and water on your tile floor, but before somebody can get to it with a mop, a visitor slips on a puddle, falls, and breaks his arm. Luckily, you have the knowledge to treat him. Unluckily, he’s angry and decides to sue over the injury.

• **You work in private homecare**, and you’re taking care of an elderly patient. You misjudge the distance when placing a glass of water on the patient’s bedside table and end up spilling water all over her laptop computer. She’s furious when the computer won’t start and tells you that she had all sorts of important documents on there (e.g., tons of photos of her grandkids). She tells you to leave, and a few days later, you receive notification that you’re being sued over the incident.

• **You start a travel-nursing agency** and advertise for your new business. But in your advertisement, you say some untrue things about your competitor that they take personally, so they sue you, alleging you committed libel.

If you’re a nurse who works in a healthcare facility as an employee, then you don’t have to worry about General Liability Insurance. The facility should have its own coverage. But if you’re an independent nurse contractor or a nurse practitioner operating on your own or you run a travel-nursing agency, consider purchasing a General Liability policy. Accidents happen all the time, and in the business world, they cost a pretty penny. Fortunately, getting coverage is relatively inexpensive.

For example, you can purchase a Business Owner’s Policy (BOP), which bundles General Liability with Property Insurance at a reduced yearly rate. For nurses, a BOP usually starts at about $500 a year, depending on your business’s characteristics. It’s a small price to pay for protection against a wide range of accidents and mishaps.

*General Liability Insurance protects nurses from third-party injuries and property damage.*
When health information is stored digitally, it’s especially important to mitigate the chance of data breaches. In fact, HIPAA and HITECH regulations make a point to address this issue and outline strict penalties for professionals who don’t do enough to protect medical information from a hack or leak (more on that in the next section).

But even with lots of preparation, it’s prudent to have a backup plan for the worst-case scenario. After all, a single data breach (resulting from stolen hard drives, malicious hackers, or mistaken disclosure) costs quite a bit in cleanup costs. On top of HIPAA fines, you’d likely have to pay for credit-monitoring services, patient notification, and rebuilding your business reputation. A single data breach could conceivably cost you hundreds of thousands of dollars.

That’s why nurses working with electronic health information should carry Cyber Liability Insurance. This policy covers the immediate costs following a data breach and protects your personal assets from the resulting fallout.

Talk to your insurance agent to see whether your Cyber policy covers HIPAA and HITECH fines.
Depending on your policy, Cyber Liability Insurance may offer coverage for...

- **Client notifications** to let those affected by the data breach know about the situation and to monitor their information. Most state laws require you to make these notifications, depending on the size of breach.
- **Credit-monitoring services**, which monitor the credit of affected parties in case fraudsters try to steal their identities. You're often required to offer this service to those affected by a breach.
- **Good-faith advertising** to market and rebuild your reputation following a breach.
- **Cyber extortion expenses** in case hackers or cyber criminals hold the information hostage until you pay them.

Some Cyber Liability policies may cover the cost of HIPAA and HITECH fines, too. Be aware that this isn’t necessarily guaranteed in your Cyber Liability policy and the coverage likely depends on the specifics of both your policy and the breach incident. Nurses should consult with their insurance agent to determine what their policy does and doesn’t cover and ask about the HIPAA penalty coverage.

With data breach risks becoming more widespread and the penalties associated with them becoming increasingly severe, Cyber Liability Insurance makes sense for healthcare professionals worried about their cyber exposure. It can provide the necessary financial backing to survive a data crisis, but it can’t prevent one from happening. You’ll still need to implement good risk management strategies when handling and storing sensitive data.

For more information on how healthcare professionals can manage their data breach risk and how Cyber Liability Insurance can protect them, read this article by Woodruff Sawyer and Company.

And now that you know there’s an insurance policy to address your data security risks, let’s take an in-depth look at what HIPAA and HITECH require of small nurse businesses.
CHAPTER 4

DEFINITION OF HIPAA & HITECH
DEFINITION OF HIPAA AND HITECH

The Health Insurance Portability and Accountability Act of 1996, or HIPAA, is legislation that...

- Establishes national standards for electronic healthcare records and patient privacy.
- Defines policies, procedures, and guidelines for maintaining the privacy and security of individuals’ health information.

The Health Information Technology for Economic and Clinical Health Act, or HITECH, is a 2009 update to HIPAA that...

- Aims to improve the privacy and security of sensitive medical data.
- Incentivizes and improves the meaningful use of electronic health records across the medical industry.
- Expands the types of entities that must adhere to HIPAA privacy guidelines and increases the penalties for those who don’t follow the rules.
GREAT DEFINITIONS! WHAT DO THEY MEAN?

Basically, HIPAA and HITECH are the rules that hospitals, doctors, healthcare insurance providers, and healthcare workers have to follow when dealing with what’s known as “protected health information” (PHI). PHI is any information concerning an individual’s health status, provision of healthcare, or payment for healthcare. In other words, it’s any part of an individual’s medical record or payment history.

In a nutshell, these laws aim to protect patient privacy.

So what do nurses need to know in order to comply with these laws? To get a good understanding of the requirements, you should read the Summary of the HIPAA Privacy Rule by the US Department of Health and Human Services. But for a quick breakdown, here are some key details:

• The rules apply to protected health information in any form: electronic, paper, or oral.
• A nurse is only required to disclose PHI in two situations:
  • To individuals or their personal representatives when they request access to their PHI.
  • To the Department of Health and Human Services when under investigation.
  • A nurse is permitted, but not required, to disclose PHI without an individual’s authorization...
    • When speaking to the individual.
    • For treatment, payment, and healthcare operations.
    • In a situation where the individual needs to agree or object.
    • When required by law (e.g., situations of abuse, law enforcement purposes, or judicial proceedings).
    • In a limited data set for medical research.

Another key point is that the law generally states that when PHI is disclosed, only the minimum amount of information necessary should be included.

HIPAA establishes standards for protecting, storing, and transmitting confidential health information.
HIPAA and HITECH also include administrative requirements to keep PHI safe. Generally, covered entities must:

- Have privacy policies and procedures in place.
- Train staff members on privacy regulations.
- Use physical, administrative, and technical safeguards when it comes to data, such as shredding documents, limiting access, or encrypting information and requiring passwords.

From a risk perspective, HIPAA violations are the most significant concern for nurses after malpractice exposures. Failure to stay compliant with HIPAA regulations can result in serious civil fines and even lawsuits.

Depending on your services, you may have to approach HIPAA regulations differently. An independent nurse will have different responsibilities than a nurse practitioner running a clinic, for example. Be sure to study the law and know how to stay compliant. Most of it is largely common sense, fortunately, but that sense can be the difference between a happy patient and a hefty fine.

HITECH increases HIPAA fines and expands covered entities.
CHAPTER 5

FINANCIAL PENALTIES FOR
HIPAA VIOLATIONS

© 2015 insureon, a BIN Insurance Holding Agency
FINANCIAL PENALTIES FOR HIPAA VIOLATIONS

Healthcare entities – from doctors and nurses to hospitals and health insurers – all need to follow the patient privacy regulations put forth by HIPAA. Failure to do so can result in seriously expensive fines ever since HITECH increased the maximum penalties in 2009.

Worth noting: in addition to HIPAA penalties, you can face criminal charges and jail time if you knowingly violate privacy laws by wrongfully obtaining or disclosing individually identifiable health information.

If a breach or an audit by the Department of Health and Human Services (HHS) reveals that a nurse failed to comply with HIPAA, the nurse can face steep financial penalties, usually at the discretion of the HHS. HIPAA fines are based on the nature and extent of the violation and the nature and extent of the harm the violation caused.

The American Medical Association outlines the penalties based on specific types of violations:

<table>
<thead>
<tr>
<th>HIPAA VIOLATION</th>
<th>MINIMUM PENALTY</th>
<th>MAXIMUM PENALTY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual did not know (and by exercising reasonable diligence would not have known) that they violated HIPAA</td>
<td>$100 per violation with an annual maximum of $25,000 for repeat violations</td>
<td>$50,000 per violation with an annual maximum of $1.5 million</td>
</tr>
<tr>
<td>HIPAA violation due to reasonable cause and not due to willful neglect</td>
<td>$1,000 per violation with an annual maximum of $100,000 for repeat violations</td>
<td>$50,000 per violation with an annual maximum of $1.5 million</td>
</tr>
<tr>
<td>HIPAA violation due to willful neglect but violation is corrected within the required time period</td>
<td>$10,000 per violation with an annual maximum of $250,000 for repeat violations</td>
<td>$50,000 per violation with an annual maximum of $1.5 million</td>
</tr>
<tr>
<td>HIPAA violation is due to willful neglect and is not corrected</td>
<td>$50,000 per violation with an annual maximum of $1.5 million</td>
<td>$50,000 per violation with an annual maximum of $1.5 million</td>
</tr>
</tbody>
</table>

Source
While HIPAA protects the health information of individuals, it doesn’t create a private cause of action for the individual affected by a violation. This means that an individual can’t use a HIPAA violation as reason to sue. However, that might be changing as some state courts rule that upholding HIPAA privacy standards is part of a healthcare professional’s job. In other words, a HIPAA violation may constitute a form of professional negligence. We’ll talk about that more in the next section.
CHAPTER 6

WHEN HIPAA CAUSES MORE THAN FINES
WHEN HIPAA CAUSES MORE THAN FINES

Only the Department of Health and Human Services can issue penalties against entities that violate HIPAA laws. It’s generally been ruled that individuals who were affected can’t sue over those same violations. However, a recent ruling in Connecticut has opened the door for private actions following a HIPAA violation, albeit in an indirect manner. Similar rulings in West Virginia, Missouri, and North Carolina may indicate the trend is taking hold.
HIPAA LAWSUITS: THE CONNECTICUT CASE THAT SET A PRECEDENT

The most recent ruling comes from the case Byrne v. Avery Center for Obstetrics and Gynecology, P.C. According to Inside Counsel, the case involves Emily Byrne, whose private health information was shared with her former significant other without her permission. The Avery Center for Obstetrics and Gynecology was served a subpoena after the significant other filed a paternity suit, but it failed to get Byrne’s approval to release the information and it didn’t attempt to fight the subpoena. Byrne then filed a lawsuit, claiming the Avery Center acted negligently by sharing her private health records without her consent.

In the initial trial, the lower court ruled that HIPAA preempted the negligence suit. But the case went on to the Connecticut Supreme Court, where it was ruled that...

- HIPAA may inform the applicable standard of care in certain circumstances.
- Violation of that standard was cause for a negligence claim.

The case was sent back to lower court and will return to trial as a negligence case. For more information, read about the case in Westfair Online.

WHAT DOES THE HIPAA CASE MEAN FOR NURSES?

Because of the Connecticut ruling, HIPAA violations could mean more than just a fine for practitioners. A HIPAA violation could be considered a breach in the standard of care and be grounds for a malpractice claim, too. This would mean that in addition to being fined for HIPAA violations, a nurse could also be sued if they accidentally expose protected health information.

However, the ruling is still new, so the likelihood of facing a HIPAA lawsuit depends on state law and future cases. Stay current on any HIPAA rulings in your state to better understand your risk.

Rulings in state courts have allowed patients to bring negligence suits over HIPAA violations.
Risks From Your Business Associates

Understanding who falls under HIPAA’s jurisdiction can be tricky. Healthcare providers, including doctors and nurses, are the main and most obvious group. But the reality is that HIPAA regulations are quite widespread and apply to a range of companies that don’t necessarily belong to the healthcare industry.

In 2009, HITECH mandated that all “business associates” of HIPAA-covered entities must comply with HIPAA guidelines. What is a business associate in this scenario?

According the Department of Health and Human Services (HHS), a business associate is a contractor or business whose work with the covered entity involves access to protected health information.

So if a company or person is involved in the creation, receipt, maintenance, or transmission of protected health information, that entity or person is a business associate and must be HIPAA-compliant.

For example, the following groups could be business associates that are subject to HIPAA laws:

- Group health plans.
- Data storage providers.
- Accountants.
- Lawyers.
- Consultants.

HITECH requires that the business associates of HIPAA-covered entities also comply with HIPAA regulations.
What’s more, any subcontractors working with a business associate can be considered a business associate if they’re involved with PHI. For help determining whether someone is a business associate, check out this article by Inside Counsel.

NURSES AS BUSINESS OWNERS: WHAT YOU NEED TO KNOW

If you’re a sole proprietor or have employees working for your nursing business, know that all of your business associates must be HIPAA-compliant. You may be found liable for their noncompliance if any data breaches occur.

To communicate this, nurses should have a business associate agreement (BAA) in place with any business associate. A BAA should include...

- An agreement that the business associate will follow HIPAA and HITECH guidelines and restrictions.
- An agreement that the business associate will hold any applicable subcontractor to the same guidelines and restrictions.
- Explicit steps for how the business associate will report and respond to a data breach, including those caused by a subcontractor.
- A demonstration of how a business associate will respond to an investigation by the Office for Civil Rights (part of the HHS).

For a fully detailed business associate agreement form, consult the HHS’s Sample Business Associate Agreement Provisions.

Having these contracts helps protect you from the repercussions of a data breach caused by a business associate and can prevent breaches in the first place. The BAA can educate the individuals or companies you work with on HIPAA’s reach and their responsibilities. Just remember: those who can access protected health information must follow the same privacy rules that apply to your nursing business.
THE RISING TIDE OF DATA BREACH AWARENESS

Society at large is becoming more and more tech-savvy, and with that awareness comes an increased interest in hacking and data breaches. As more Americans become insured under the Affordable Care Act, as health information becomes increasingly digitized, and as the threat of missing or stolen personal information becomes more prevalent in mainstream news, people are undoubtedly going to have an increased awareness of HIPAA requirements. In fact, the industry has already seen an increase in complaints and investigations, and some legal experts think the future will bring even more legal complications.

As you provide health and healing services, be aware that patients will probably become more knowledgeable about your responsibilities to keep their data safe. They may also be more likely to pursue private action in the event of a breach than they would have in the past (especially after the success of the Connecticut case).

But as the saying goes, a rising tide lifts all boats. Your patients are more aware of data breaches, and you are, too, which means you can take steps to reduce your exposures. Remember that following HIPAA regulations and adhering to strict data security policies will help minimize your risks and keep your patients’ confidential medical information safe.

Increased data breach awareness means higher patient expectations for data security.
CHAPTER 9

PREPARING FOR HIPAA AUDITS
PREPARING FOR HIPAA AUDITS

Data breaches and lawsuits aren’t the only ways that nurses can face fines. In order to ramp up enforcement of the HITECH Act, the Office for Civil Rights (OCR) of the HHS can randomly audit covered entities (including private healthcare practices). Those found noncompliant with current standards can face financial consequences.

The bad news is these audits aim to be comprehensive and detailed and will likely look at the compliance of your business associates. The good news is you’re not alone if you’re unprepared.

According to HITECH News, 89 percent of organizations that were included in the first round of audits in 2013 had compliance issues. Indeed, the whole health industry has some catching up to do, hence the second auditing round.

As an independent nurse or nurse practitioner, make sure that you’re up to date on the latest regulations concerning the privacy and security of health information. As a general rule, keep documentation that shows your procedures for accessing, storing, and transmitting PHI. If you have any employees, your preparation will need to be a bit more comprehensive.
Preparing for HIPAA Audits

To get you started, here are some steps you can take to prepare for an audit:

- **Review and retrain.** Go over your policies and procedures to verify that they conform to HIPAA protocol, and update documents accordingly. Retrain your staff on updated procedures, and update your training documentation, too. Ensure that you have a policy for breach notification and that health information is protected by access controls and encryption.

- **Contact your business associates.** Have a list of your BAs and what services they provide for you. Ask each BA for an updated Business Associate Agreement.

- **Conduct a risk assessment.** Identify areas of risk within your practice and how you can either fix or respond to them. Go over security and privacy safeguards and ensure that they’re adequate. You can even replicate the auditing process internally to find areas that need improvement.

These resources may aid in your preparation:

- HIPAA risk assessment tool for small providers.
- HIPAA audit program protocol.

A random audit will either be onsite or require you to submit requested information electronically. Be prepared for either scenario. Even if you don’t get audited, the advice above will help you maintain HIPAA compliance and prevent unnecessary vulnerabilities. It will also help your case should a data breach actually happen and you have to defend yourself against a lawsuit or penalty.

---

89% of audited organizations had HIPAA compliance issues in 2013.
FINAL THOUGHTS ON NURSE LIABILITY INSURANCE

Nurses should be aware of their liability exposures beyond just malpractice. Though a mistake in your care can cost a patient dearly, so can a slippery clinic floor or a stolen hard drive full of data. And if you’re going to run a successful nursing practice or nurse contractor business, you have to be ready to address these risks.

So keep in mind that you may need...

- General Liability Insurance to shield you from the cost of third-party lawsuits over bodily injuries, property damage, and advertising injuries.
- Commercial Auto Insurance to account for costly accidents in business-owned vehicles.
- Cyber Liability Insurance to help you handle the high price of data breaches (and HIPAA fines, but that depends on your policy).

Being proactive about managing these risks will save you money in the long term and prevent mishaps in the first place. Protect yourself and the patients you care for by staying knowledgeable about regulations and by having a business insurance plan in place.