

## Privileged Health Information for Workers' Compensation - Related Statutes and History

| Montana Statute   | Subject entities   | Provisions   |
|---|--|--|
| 26-1-805, MCA (civil)<br>enacted 1867, included dentists in 1987  | Licensed physicians, surgeons, dentists  | Establishes physician/patient privilege from testimony in a civil action, with exceptions under Rule 35 of the Montana Rules of Civil Procedure (court may order the party to submit if the mental or physical condition is contested).  |
| 33-19-105, MCA (Insurance code)<br>enacted 2001<br><br>relevant amendments in 2007 to cover business associates (not TPAs) only   | Those subject to the chapter include:<br><ul style="list-style-type: none"> <li>insurers not considered a "covered entity" under HIPAA. - i.e. work comp insurers.</li> <li>business associates (i.e. Third Party Administrators) are also subject to Title 33, chapter 19.</li> </ul> | Under the chapter for "Insurance Information and Privacy Act" generally enacted in 1981. Additionally, those subject to HIPAA must (1)(a) provide an annual notice of privacy practices and (1)(b) a Montana-specific notice for collection, disclosure or use of protected health information. The notification lasts 24 months (1)(c).<br><br><b>SUGGESTION:</b> Make the same provisions part of the WORK COMP statute.   |
| 39-71-604, MCA (work comp law)<br>Enacted in 1915 -- with reference under Plan 3 to a worker filing an application with a certificate from the attending physician and the physician's duty "to lend all necessary assistance...without charge" to the worker. Major change in 2003. See other history below.<br><br><b>More history below.</b> | workers, "attending" physician   | <ul style="list-style-type: none"> <li>Requires worker to file with insurer reasonable information needed to determine compensability.</li> <li>Says physician's duty is to lend necessary assistance in making application for compliance and proof of other matters as required by department rule.</li> <li>A signed claim for benefits authorizes disclosure to the insurer or to the agent of the insurer by the health care provider of information relevant to the claimant's condition.</li> <li>Relevant health care information: "may include past history of the complaints of or the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery".</li> <li>Limits authorization to the time when claimant is claiming benefits.</li> <li>Says statute does not restrict discovery or disclosure allowed under MT Rules of Civil Procedure.</li> <li>The signed claim authorizes communication by the insurer or insurer's agent by any means with a physician or other health care provider about relevant health care information without prior notice to the injured employee, the employee's authorized representative or agent or in the case of death the employee's personal representative.</li> <li>Describes claim responsibilities in event of worker's death.</li> </ul> |

| Montana Statute  | Subject entities  | Provisions  |
|--|---|---|
| 50-16-502, MCA<br>(health & safety laws)<br><br>Enacted 1987 | <ul style="list-style-type: none"> <li>patients - for access to own info</li> <li>health care providers not subject to HIPAA -- <i>by implication that would mean any work comp "treating physician"</i> (50-16-505)</li> <li>persons other than health care providers</li> </ul> | Legislative findings about health care information as personal and sensitive and, if improperly used may harm patient's interest in privacy. Outlines scope of Part 5 of Ch. 16.  |
| 50-16-505, MCA<br><br>Enacted 2003                           | <ul style="list-style-type: none"> <li>health care providers not subject to HIPAA</li> </ul>  | Provisions of part 5 apply only to health care provider not subject to the privacy provisions of HIPAA.<br><b>SUGGESTION:</b> May expand 50-16-505 to include persons other than health care providers, referenced in 50-16-502(4)  |
| 50-16-527, MCA<br>Enacted 1987                               | <ul style="list-style-type: none"> <li>health care providers not subject to HIPAA</li> </ul>  | Identical language to 39-71-604 regarding the signed claim for workers' compensation allowing disclosure of relevant health information.  |
| 50-16-529, MCA<br><br>Enacted 1987                           | <ul style="list-style-type: none"> <li>health care providers not subject to HIPAA</li> </ul>  | Provides for disclosure without patient's authorization on a need to know basis, primarily to other health care providers, to those involved in health care education and research if patient unidentified, to health care payors, to immediate family members/individuals with close personal ties unless instructed otherwise by the patient, to auditors, to penal or custodial institutions if patient is detained, and to contacts of infectious disease if the provider believes the contact to be in danger. |
| 50-16-530, MCA<br><br>Enacted 1987                           | <ul style="list-style-type: none"> <li>health care providers not subject to HIPAA</li> </ul>  | Provides for disclosure without patient's authorization to law enforcement officers, federal/state/local authorities to protect public health, and specified others, including coroners and morticians.   |
| 50-16-531, MCA<br>Enacted 1993                               | <ul style="list-style-type: none"> <li>health care providers not subject to HIPAA</li> </ul>  | Provides immunity from any civil cause of action by the patient related to the patient's health care information delivered to the patient or the patient's designee.  |
| 50-16-535, MCA<br><br>Enacted 1987                           | <ul style="list-style-type: none"> <li>health care providers not subject to HIPAA</li> </ul>  | Spells out when a health care provider can disclose health care information under a compulsory process or discovery request. Requirements include: a patient's signed authorization or waiver of the right of confidentiality; the patient is a party to the proceeding or law enforcement investigation; the patient's physical or mental condition is relevant to the execution or witnessing of a will or other document; the information is to be used in the patient's commitment proceeding.                  |

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|---|--|--|
| 50-16-536, MCA<br>Enacted 1987          | • health care providers not subject to HIPAA | Spells out requirements for compulsory process and allows denial of access to health care information when authorized by law.  |
| 50-16-542, MCA<br>Enacted 1987          | • health care providers not subject to HIPAA | Allows denial of access to health care information by a patient under spelled out circumstances, including harm to patient's health, harm to another's health or safety, information was obtained from someone other than the patient, the information may lead to identification of another person expecting confidentiality.   |
| 50-16-801, MCA<br>Enacted 2003          | • health care providers subject to HIPAA     | Subsection (4) provides that "it is in the best interest of the citizens of Montana to have certain requirements, with respect to the use or release of health care information by health care providers, that are more restrictive than or additional to the health care privacy protections of HIPAA".   |
| 50-16-805, MCA<br>Enacted 2003          | • health care providers subject to HIPAA     | References 39-71-604 and 50-16-527 and says a signed claim authorizes disclosure to the workers' compensation insurer by the health care provider. Includes disclosure for enforcement purposes to federal/state/local law enforcement to the extent required by law or to a law enforcement officer about the general physical condition if the patient's injury is related to another's crime. |
| 50-16-811, MCA<br>Enacted 2003          | • health care providers subject to HIPAA     | Similar to 50-16-535 regarding compulsory process.   |
| 50-16-812, MCA<br>Enacted 2003, Ch. 396 | • health care providers subject to HIPAA     | Similar to 50-16-536 regarding compulsory process requirements.  |
| 50-16-818<br>Enacted 2003               | • health care providers subject to HIPAA     | Health care representative to act in good faith to represent the best interests of the individual  |

**☑ History Key Point: Health information protection began with health and safety statutes then moved into work comp.**

**Statutory History of 39-71-604 (in the Workers' Compensation Act):**

- Original reference was to the duty of physicians to provide care [under Plan 3] without charge to an individual filing an application for workers' compensation. (1915)
- Intervening amendments made section applicable to all benefits (not just those under Plan 3).
- A major change in 2003 included the signed claim as authorization for disclosure to the workers' compensation insurer or agent of

information relevant to the claimant's condition. This now did not require discovery in court before the process begins (as apparently occurred since a 1987 court case said discovery allowed sharing of confidential health information to determine compensability. See Bowen below). The changes spelled out what the health information may include. Also, the signed claim authorizes the insurer to communicate with the health care provider without prior notice.

- At the same time (2003), the workers' compensation references regarding communication without prior notice in 50-16-527, MCA, were included. (This report does not include changes unrelated to actual communication -- such as timing, minor changes.)

#### **Case History of 39-71-604 (starting with latest):**

- **Thompson v. State**, 2007 MT 185, 338 M 511, 167 P3d 067 (2007). Workers' Compensation Court ruled -- and was overturned by the Montana Supreme Court -- that the claimant disclosure waiver procedures in 39-71-604 and 50-16-527, MCA, violated the claimant's right of privacy and due process. The Montana Supreme Court's decision was that the Workers' Compensation Court, as a court of limited jurisdiction relegated to determining workers' compensation benefits and the applicability of statutes to disputed benefits, did not have jurisdiction to issue a declaratory judgment on constitutionality. A further statement by the Montana Supreme Court -- that the Workers' Compensation Court was not a court of record -- resulted in a statutory change making it a court of record as of Oct. 1, 2007.
- **Linton v. State Compensation Insurance Fund**, 230 M 122, 749 P2d 55, 45 St. Rep. 68 (1988). Montana Supreme Court ruled that the physician/patient privilege in 26-1-805, MCA, prevents the insurer defendant from having private interviews with a claimant's physician.
- **Bowen v. Liberty Mutual Insurance Co.**, 229 M 84, 745 P2d 330, 44 S. Rep. 1799 (1987). Notes for this 1987 case say that, although there is no direct statement of a waiver of the physician/patient privilege, the implication of 39-71-604 and 39-71-605 is that an injured employee must waive any privilege or claim of confidentiality as to medical information relating to compensability if the injured employee wants to sustain a right to workers' comp benefits. The court said that the Work Comp Court should authorize an order for discovery relevant to a claim for compensability, even if a claimant has exercised a right to prevent disclosure of confidential health information, as far as the discovery is needed to determine compensability. Bottom line: in order to get benefits, a claimant has to allow some health information to be reviewed to determine benefit compensability.

#### **History of Title 50, chapter 16, parts 5 and 8 (in the Health and Safety Statutes) plus crossover history with 39-71-604.**

1987 The "Uniform Health Care Information Act", the basis of Title 50, chapter 16, part 5, was enacted in 1987, many years after Congress enacted the Privacy Act in 1974 (U.S.C. §552a, which regulates federal agencies' handling of health care information) and 2 years after the National Conference of Commissioners on Uniform State Laws approved a Uniform Health Care Information Act, which was the basis for HB 752. The parts listed in the Table (above) that were enacted in 1987 include: 50-16-502, 50-16-527 (excluding the references to workers' compensation), 50-16-529, 50-16-530, 50-16-535, 50-16-536, and 50-16-542, MCA.

1989 After two Montana Supreme Court decisions related to physician/patient privilege (see above), the Montana

Legislature passed HB 347 in 1989 that, among general work comp revisions, included language in 50-16-527 that said a signed claim for workers' compensation benefits authorizes disclosure to an insurer of health information relating only to information concerning the claimant's condition. No testimony on HB 347 mentioned sharing information with employers.

1999 HB 557 clarified 50-16-527 by spelling out what information may be relevant, including past history of complaints or treatment similar to that presented in the claim or in the same body part or conditions for which benefits are subsequently claimed or that may affect recovery. Language also was included to prevent restrictions on the scope of discovery or disclosure allowed under the rules of civil procedure or by the Workers' Compensation Court or as otherwise provided by law.

2003 With the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, taking effect for privacy concerns in April 2003, changes were needed in Montana law to clarify its own health information act. Changes enacted in 2003 through **HB 647 (see more information below)** included making Title 50, chapter 16, part 5 apply to health care providers not covered by HIPAA and creating Title 50, chapter 16, part 8 to mirror part 5 in relevant areas for HIPAA-covered health care providers. This meant state laws would apply that otherwise would not have encompassed HIPAA-covered health care providers, including workers' compensation disclosures to insurers of health information relevant to claims. The language of 50-16-805 incorporated references to workers' compensation claims in 39-71-604 and 50-16-527.

Also in 2003, **SB 450 (see more information below)** included in the Workers' Compensation Act those references already in law under the Uniform Health Information Act in Title 50 that a signed claim for benefits authorized a health care provider to disclose information relevant to the claimant's condition to a workers' compensation insurer and added the language "or agent of the insurer". The bill also amended Title 50, chapter 16, part 5, to include the reference to the work comp insurer's agent. SB 450 further included in both 39-71-604 and 50-16-527 that the signed claim or a signed release allowed the insurer or agent of the insurer to communicate in various ways with -- and receive information from -- a health care provider about a claimant's relevant health information without prior notice to the injured worker.

#### **Proponents' comments behind passage of HB 647 -- No opponents**

- HB 647 was developed by MHA, An Association of Montana Health Care Providers to update existing statutes on health care information and provide compatibility and coordination with HIPAA.
- Noted was that HIPAA exempts health care organizations employing fewer than 25 persons and not using standardized electronics for health care

### **Proponents' comments behind passage of SB 450 regarding privacy issues**

- No one spoke specifically to the privacy issue in the Senate Business and Labor Committee. Proponents included: Sponsor Sen. Vicki Cocchiarella, Oliver Goe (for the MT Municipal Insurance Authority), Aidan Myhre (for the MT Chamber of Commerce), Jerry Driscoll (for AFL-CIO), Nancy Butler (for MT State Fund), Larry Jones (for Liberty Northwest), Riley Johnson (for the National Federation of Independent Businesses), Spook Stang (for MT Motor Carriers), Jacqueline Lenmark (for the American Insurance Assn.), George Wood (for the MT Self-Insurers Assn.), Keith Olson (for the MT Logging Assn.), and Cory Swanson (for Coventry First).
- In the House Business and Labor Committee, Jerry Driscoll said the bill would speed up the process of getting information by a claims adjuster to acquire information from a doctor regarding a client's case. Other proponents included (in addition to those listed above as testifying in the Senate hearing): Bob Pavlovich, Bob Worthington (for MT Municipal Insurance Authority), Steve Turkiewicz (for the MT Auto Dealers Assn.), Don Allen (for Cenex), Shawn Bubb (for the MT School Boards Assn.), and Carl Schweitzer (for the Subcontractors Assn.)

### **Opponents' comments regarding passage of SB 450 regarding privacy issues**

- In the Senate hearing Dean Blackman (Blackaby?), commented that whatever is gained in efficiency -- by allowing workers' compensation representatives to speak with doctors -- will be lost in fundamental fairness and the trust of workers.
- Other opponents, many protesting the exclusion of common fund for attorneys, included: Al Smith (for MT Trial Lawyers Assn.): Larry Anderson, attorney: Lee Miller: Allan McGarvey, attorney: Lon Dale, attorney: Don Judge (for Teamsters Local 190): and Gene Fenderson (for MT Progressive Labor Caucus).
- In the House hearing, Larry Anderson, attorney, expressed concern about ex parte communication between doctors and claims examiners.
- Other opponents included an injured worker, Charley Fish, Al Smith, Don Judge.

**Note:** A letter from the Department of Health and Human Services Office of Civil Rights to the Social Security Administration in 2003 said a HIPAA-covered entity may not condition treatment, payment, or eligibility for benefits on an individual's authorization.