

## Data Privacy and Cybersecurity

# Office of Civil Rights Issues Notification of Enforcement Discretion for Community-Based Testing Sites



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On April 9, 2020, the US Department of Health and Human Services (HHS) Office of Civil Rights (OCR) issued a [Notification of Enforcement Discretion](#) related to community-based testing sites (CBTS). The Notification announces that OCR will exercise enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under the Privacy, Security, and Breach Notification Rules under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) against covered health care providers or their business associates in connection with the good faith participation in the operation of a COVID-19 CBTS during the COVID-19 public health emergency. The Notification is effective immediately, but will have retroactive effect to March 13, 2020, and will remain in effect until the public health emergency no longer exists.

A CBTS, for purposes of the Notification, includes mobile, drive-through, or walk-up sites that only provide COVID-19 specimen collection or testing services to the public. The actions within the scope of operating a CBTS include all activities supporting COVID-19 specimen collection or testing services to the public.

While OCR has indicated that it will not pursue enforcement actions against entities that, despite good faith efforts, fail to comply with HIPAA or its implementing regulations while supporting CBTSs, the Notification also reminds companies covered by HIPAA – business associates and covered entities alike – that despite the COVID-19 emergency, entities regulated by HIPAA should continue to strive to adhere to the basic requirements of the privacy and security rules promulgated under HIPAA.

### Reasonable Safeguards for the Operation of CBTSs

The Notification includes a list of recommended best practices to be implemented in connection with the operation of a CBTS:

- Using and disclosing only the minimum PHI necessary except when disclosing PHI for treatment.
- Setting up canopies or similar opaque barriers at a CBTS to provide some privacy to individuals during the collection of samples.
- Controlling foot and car traffic to create adequate distancing at the point of service to minimize the ability of persons to see or overhear screening interactions at a CBTS. (A six-foot distance would serve this purpose as well as supporting recommended social distancing measures to minimize the risk of spreading COVID-19.)
- Establishing a “buffer zone” to prevent members of the media or public from observing or filming individuals who approach a CBTS and posting signs prohibiting filming.
- Using secure technology at a CBTS to record and transmit electronic PHI.

- Posting a Notice of Privacy Practices (NPP), or information about how to find the NPP online, if applicable, in a place that is readily viewable by individuals who approach a CBTS.

## Entities Not Covered by the Notification

The Notification does not apply to health plans or health care clearing houses when they are performing health plan and clearinghouse functions. If an entity performs both plan and provider functions, the Notification applies to the entity only in its role as a covered health care provider and only to the extent that it participates in a CBTS.

The Notification also does not apply to covered health care providers or their business associates when such entities are performing non-CBTS related activities. One such example, included in the Notification, is a covered health care provider that experiences a breach of PHI in its existing electronic health record system, which includes PHI gathered from the operation of a CBTS. It could be subject to a civil money penalty for violations of the HIPAA Breach Notification Rule if it fails to notify all individuals affected by the breach (including individuals whose PHI was created or received from the operation of a CBTS).

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