

SENATE, NO. 2351

[Senate, April 1, 2010 - New draft of Senate, No. 200 reported from the committee on Economic Development and Emerging Technologies.]



The Commonwealth of Massachusetts

IN THE YEAR OF TWO THOUSAND AND TEN

AN ACT TO CLARIFY AND ENHANCE PRIVACY PROTECTIONS FOR ELECTRONIC HEALTH RECORDS.

Be it enacted by the Senate and House of Representatives in General Court assembled,

And by the authority of the same, as follows:

1 **SECTION 1.** . The third paragraph of subsection (d) of section 6D of chapter 40J of the
2 General Laws is hereby amended by striking clause (v) and inserting in place thereof the
3 following clause:—
4 (v) give patients the option of allowing only designated health care providers to
5 disseminate their individually identifiable health information to any statewide interoperable
6 electronic health records network or statewide health information exchange;

7 **SECTION 2.** Section 6F of chapter 40J of the General Laws is hereby amended by
8 striking the first paragraph and inserting in place thereof the following paragraph:—

9 Any plan for a statewide interoperable electronic health records network or statewide
10 health information exchange approved by the health information technology council and every
11 grantee and implementing organization that receives monies for the adoption of health
12 information technology from the E-Health Institute Fund or pursuant to this chapter shall:

13 **SECTION 3.** Said section 6F of chapter 40J of the General Laws, as appearing in section
14 4 of chapter 305 of the acts of 2008, is hereby further amended by inserting after the
15 word “accessed”, in line 396, the following words:— ; and (5) require every grantee and
16 implementing organization funded in whole or in part by the E-Health Institute Fund to conduct
17 privacy and security audits of any and all interoperable electronic health records networks, health
18 information exchanges, and participating entities that maintain electronic health records for
19 potential and actual privacy and security breaches by July 1 of each year. Each grantee and
20 implementing organization shall report the results of the annual audit to the health information
21 technology council by July 1. The council shall report within 30 days to the Attorney General
22 any audit result that indicates a violation of the rules and regulations adopted by the health
23 information technology council or Department of Public Health pursuant to this chapter.

24 **SECTION 4.** Section 6G of said chapter 40J of the General Laws is hereby amended by
25 inserting after the first paragraph the following paragraphs:—

26 For the purposes of this chapter, the health information technology council shall promulgate
27 rules and regulations necessary for the administration and enforcement of this chapter, including but
28 not limited to defining the following terms: “identifiable health information”, “unauthorized access”
29 and “unauthorized disclosure.”

30 Any aggrieved individual claiming that any interoperable electronic health records network
31 or health information exchange, its operators, contractors or agents, and participating entities that
32 maintain electronic health records, funded in whole or in part by the E-Health Institute Fund failed to
33 maintain the privacy and security protections required in Section 6F of this chapter or permitted an
34 unauthorized access or disclosure as defined by the Health Information Technology Council pursuant
35 to Section 6G of this chapter may bring a civil action in Superior Court.

36 The Attorney General may bring a civil action in Superior Court to enforce the privacy and
37 data security obligations of health information network grantees, their operators, agents, and
38 contractors, subject to GL Chapter 40J.

39 A court shall find a violation and order relief if it determines that any of the following
40 circumstances has occurred:

41 (1) any interoperable electronic health records network or health information exchange, its
42 operators, contractors, or agents, and participating entities that maintain electronic health
43 records, funded in whole or in part by the E-Health Institute Fund, failed to maintain
44 safeguards for the confidentiality and security of protected health information in violation
45 of this chapter or any rule or regulation promulgated by the health information
46 technology council pursuant to this chapter; or

47 (2) any interoperable electronic health records network or health information exchange, its
48 operators, contractors, or agents, and participating entities that maintain electronic health
49 records, funded in whole or in part by the E-Health Institute Fund, disclosed without
50 authorization identifiable health information as defined by any rule or regulation
51 promulgated by the health information technology advisory council pursuant to this
52 chapter; or

53 (3) any interoperable electronic health records network or health information exchange, its

54 operators, contractors, or agents, and participating entities that maintain electronic health
55 records, funded in whole or in part by the E-Health Institute Fund, failed to provide
56 notice of an unauthorized access or disclosure as required by Section 6G of Chapter 40J.

57 The court may order any interoperable electronic health records network or health
58 information exchange, its operators, contractors or agents, or any participating entity or individual, to
59 comply with this chapter and may order any other appropriate civil or equitable relief, including an
60 injunction to prevent non-compliance. If the court determines that there has been a violation of this
61 chapter, the aggrieved person is entitled to recover damages for losses sustained as a result of this
62 violation.

63 The measure of damages shall be the greater of the aggrieved person's actual damages, or
64 liquidated damages of \$1,000 for each violation, except that the total amount imposed on the
65 offending party for all violations of an identical requirement or prohibition during a calendar year
66 may not exceed \$100,000. If the court determines that there has been a violation of this chapter that
67 results from willful or grossly negligent conduct, the aggrieved person may recover punitive damages
68 not to exceed \$10,000, exclusive of any other loss, for each violation, except that the total amount
69 imposed on the offending party for all violations of an identical requirement or prohibition during a
70 calendar year may not exceed \$500,000 from the offending party.

71 If the aggrieved person prevails, the court shall assess reasonable attorney's fees and all other
72 expenses reasonably incurred in the litigation against the non-prevailing parties. Responsible parties
73 are jointly and severally liable for any compensatory damages, attorney's fees or other costs awarded.
74 Any action under this section is barred unless the action is commenced within three years after the
75 cause of action accrues or was or should reasonably have been discovered by the aggrieved person or
76 the person's lawful representative.

77 No employee shall be terminated, discharged, or retaliated against because he does any of the
78 following based on a reasonable belief that an activity, policy or practice of the employer or another
79 entity with whom the employer has a relationship violates this chapter or any rule or regulation
80 promulgated pursuant to this chapter:

81 (1) objects to or refuses to participate in any such activity, policy or practice;

82 (2) discloses or threatens to disclose such activity, policy or practice to a supervisor,
83 manager, public official, public body, or other entity; or

84 (3) provides information to or testifies before anybody conducting an investigation, hearing
85 or inquiry into any violation of this chapter, or rule or regulation promulgated pursuant to this
86 chapter.