

# Legal Update

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## ALLOWANCE OF ACTIONS FOR BREACH OF CONFIDENTIALITY OF HEALTHCARE RECORDS SHOULD GIVE COMPANIES PAUSE

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In *Byrne v. Avery Center for Obstetrics*, the Connecticut Supreme Court recognized a new type of lawsuit for the breach of the duty of patient confidentiality based on a failure to comply with the requirements of the Health Insurance Portability and Accountability Act (HIPAA) and a related state statute. Connecticut is not the first state to permit such a lawsuit. This development creates a tricky environment for HIPAA covered entities as well as any other entities that use or hold medical records. So far, eight jurisdictions, including New York, Massachusetts, and South Carolina, have also recognized a similar cause of action. More will likely follow.

In *Byrne*, the plaintiff sued Avery Center for Obstetrics for releasing her private medical records pursuant to a subpoena issued by Ms. Byrne's ex-boyfriend, who had initiated a paternity suit. Despite the plaintiff's prior contrary request, Avery Center produced all of Ms. Byrne's medical records. Avery Center argued that it complied with HIPAA and state law because it was complying with a subpoena.

While HIPAA allows for the production of patient records pursuant to a subpoena, it does so only in limited circumstances. These include when the subpoena contains satisfactory assurances that the party seeking the information has, among other things, (a) made a reasonable effort to notify the patient, and (b) has obtained, or sought to obtain, the required protective order. State laws usually have similar provisions.

The *Byrne* court recognized that the physician-patient relationship is one based on trust and confidence, and found that the new type of lawsuit is necessary to reinforce that bond. Other courts recognizing a similar type of lawsuit have emphasized the same concept.

HIPAA does not explicitly allow private suits for HIPAA violations. These new types of lawsuits allow the private enforcement of HIPAA, and similar state laws. These developments should cause entities that create, encounter, or use medical records, some concern. Such entities must understand the state and federal statutes that govern the privacy and confidentiality of patient records and be sensitive to how such records should be protected, handled, and disclosed. Entities should also review and ensure their policies and practices are up to date and comply with applicable law. They should also consult an attorney when records are sought by, or being provided to, outside parties. Otherwise, such entities risk significant regulatory liability, potential money damages, and, perhaps more importantly, loss of credibility and damage to their reputation.

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