

Introduced by

Representatives Gulleason, Clark, DeKrey, S. Kelsh

Senator Every

1 A BILL for an Act to provide for privacy of health information; to provide an effective date; and to
2 declare an emergency.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. Disclosure of individually identifiable health information for**
5 **marketing purposes.**

- 6 1. As used in this section, unless the context otherwise requires:
- 7 a. "Health care oversight agency", "individually identifiable health information",
8 and "research" have the same meanings as provided under title 45, Code of
9 Federal Regulations, part 164, section 501.
- 10 b. "Health care provider" and "health plan" have the same meanings as provided
11 under title 45, Code of Federal Regulations, part 160, section 103.
- 12 c. "Marketing" means to make a communication about a product or service to
13 encourage a recipient of the communication to purchase or use the product or
14 service. The term does not include communications made as part of the
15 treatment of a patient for the purpose of furthering treatment unless the health
16 care provider receives direct or indirect remuneration from a third party for
17 making the communication.
- 18 2. Except as provided under subsection 3, a health care provider, a pharmacy, a
19 health researcher, a health plan, a health oversight agency, a public health
20 authority, an employer, a health or life insurer, or a school or university may not
21 disclose individually identifiable health information to any person for marketing the
22 products or services of that person and may not use individually identifiable health
23 information in that health care entity's possession to provide marketing services to
24 any person.

- 1 3. A health care provider, a pharmacy, a person conducting health research, a health
2 plan, a health oversight agency, a public health authority, an employer, a health or
3 life insurer, or a school or university may provide marketing services to a
4 pharmaceutical company if that health care entity provides clear and conspicuous
5 notice to the individual involved concerning the health care entity's disclosure
6 practices for all individually identifiable health information collected or created with
7 regard to the individual and obtains the consent of the individual involved to use
8 the information and that consent is manifested by an affirmative act in a written
9 communication that only references and applies to the specific marketing purpose
10 for which the information is to be used.

11 **SECTION 2. Uses or disclosures of protected health information - Consent -**

12 **Exceptions.**

- 13 1. As used in this section, unless the context otherwise requires:
- 14 a. "Disclosure", "organized health care arrangement", "health care operations",
15 "indirect treatment relationship", "payment", "protected health information",
16 "research", and "treatment" have the same meanings as provided under
17 title 45, Code of Federal Regulations, part 160, section 103.
- 18 b. "Health care provider" and "health plan" have the same meanings as provided
19 under title 45, Code of Federal Regulations, part 160, section 103.
- 20 2. Except as otherwise provided under this section, a health care provider shall obtain
21 the individual's consent before using or disclosing the protected health information
22 of that individual to carry out treatment, payment, or health care operations.
- 23 a. A health care provider may use or disclose protected health information to
24 carry out treatment, payment, or health care operations without consent if the
25 health care provider has an indirect treatment relationship with the individual
26 or if the health care provider created or received the protected health
27 information in the course of providing health care to an individual who is an
28 inmate.
- 29 b. A health care provider may use or disclose protected health information
30 created or received under this subdivision to carry out treatment, payment, or
31 health care operations, without consent:

- 1 (1) In emergency treatment situations if the health care provider attempts
2 to obtain such consent as soon as reasonably practicable after the
3 delivery of such treatment;
- 4 (2) If the health care provider is required by law to treat the individual and
5 the health care provider attempts but is unable to obtain consent; or
- 6 (3) If a health care provider attempts to obtain consent from the individual
7 but is unable to obtain such consent due to substantial barriers to
8 communicating with the individual and the health care provider
9 determines that the individual's consent is clearly inferred from the
10 circumstances.
- 11 c. A health care provider that fails to obtain consent under subdivision b shall
12 document the health care provider's attempt to obtain consent and the reason
13 why consent was not obtained.
- 14 d. A health care provider may use or disclose protected health information to
15 carry out treatment, payment, or health care operations without consent if the
16 health care provider uses the protected health information in the course of
17 filling or dispensing a prescription, searching for drug interactions related to
18 that prescription, and determining eligibility and obtaining authorization for
19 payment regarding that prescription.
- 20 e. A health care provider may use or disclose protected health information to
21 carry out treatment, payment, or health care operations without consent if:
- 22 (1) The individual and the health care provider have not had in person
23 communication regarding such treatment;
- 24 (2) Obtaining consent would be impracticable;
- 25 (3) The health care provider determines that the individual's consent is
26 clearly inferred from the circumstances, such as an order or referral
27 from another health care provider; and
- 28 (4) The health care provider obtains written consent from the individual as
29 soon as practicable.
- 30 f. If a person is not required to obtain consent under this section, that person
31 may obtain an individual's consent for that person's own use or disclosure of

- 1 protected health information to carry out treatment, payment, or health care
2 operations if such consent meets the requirements under this section.
- 3 g. Except as provided under subsection 7, a consent obtained by a health care
4 provider under this section does not authorize another health care provider to
5 use or disclose protected health information.
- 6 3. A health care provider may condition treatment on the provision by the individual of
7 a consent under this section. A health plan may condition enrollment in the health
8 plan on the provision by the individual of a consent under this section sought in
9 conjunction with such enrollment.
- 10 a. A consent for use or disclosure may be combined with other types of written
11 legal permission from the individual if the consent under this section:
- 12 (1) Is visually and organizationally separate from such other written legal
13 permission; and
- 14 (2) Is separately signed and dated by the individual.
- 15 b. An individual may revoke a consent under this section at any time, except to
16 the extent that the health care provider has taken action in reliance on that
17 consent. A revocation of consent must be in writing.
- 18 c. A health care provider shall document and retain for six years any signed
19 consent under this section.
- 20 4. A consent under this section must be in plain language and:
- 21 a. Must inform the individual that protected health information may be used and
22 disclosed to carry out treatment, payment, or health care operations;
- 23 b. Must refer the individual to the health care provider's privacy notice for a more
24 complete description of such uses and disclosures and state that the
25 individual has the right to review the notice before signing the consent;
- 26 c. If the health care provider has reserved the right to change the health care
27 provider's privacy practices that are described in a privacy notice, must state
28 that the terms of the health care provider's privacy notice may change and
29 describe how the individual may obtain a revised privacy notice;
- 30 d. Must state that:

- 1 (1) The individual may request that the covered entity restrict how
2 protected health information is used or disclosed to carry out treatment,
3 payment, or health care operations;
- 4 (2) The health care provider is not required to agree to requested
5 restrictions; and
- 6 (3) If the health care provider agrees to a requested restriction, the
7 restriction is binding on the health care provider;
- 8 e. Must state that the individual may revoke the consent in writing, except to the
9 extent that the health care provider has taken action in reliance on the
10 consent; and
- 11 f. Must be signed and dated by the individual.
- 12 5. A consent is not valid under this section if the document submitted lacks an
13 element required under subsection 4 or if the consent has been revoked.
- 14 6. If a health care provider has obtained a consent under this section and receives
15 any other authorization or written legal permission from the individual for a
16 disclosure of protected health information to carry out treatment, payment, or
17 health care operations, the health care provider may disclose such protected
18 health information only in accordance with the more restrictive consent,
19 authorization, or other written legal permission from the individual. A health care
20 provider may attempt to resolve a conflict between a consent and an authorization
21 or other written legal permission from the individual by:
- 22 a. Obtaining a new consent from the individual under this section for the
23 disclosure to carry out treatment, payment, or health care operations; or
- 24 b. Communicating orally or in writing with the individual in order to determine the
25 individual's preference in resolving the conflict, in which case the health care
26 provider shall document the individual's preference and may only disclose
27 protected health information in accordance with the individual's preference.
- 28 7. Health care providers that participate in an organized health care arrangement and
29 have a joint privacy notice may comply with this section by a joint consent. If an
30 individual revokes a joint consent, the health care provider that receives the
31 revocation shall inform the other health care providers covered by the joint consent

1 of the revocation as soon as practicable. In addition to the other requirements
2 under this section, a joint consent must include the name or other specific
3 identification of the health care providers or must include the classes of health care
4 providers to which the joint consent applies. However, under this subsection, the
5 statements required by this section may be altered to reflect the fact that the
6 consent covers more than one health care provider.

7 **SECTION 3. EFFECTIVE DATE.** This Act becomes effective on April 14, 2003.

8 **SECTION 4. EMERGENCY.** This Act is declared to be an emergency measure.