

**HIPAA PREEMPTION TABLE
2002 OREGON REVISED STATUTES
CHAPTER 746**

Statute and Title	Summary	Preempted?	Policy Issues/Comments
746.135 Genetics Tests	Authorization for genetic testing in insurance application established by DCBS rule.	No. Can comply with both federal and state law.	If CE involved, then DCBS-approved authorization form should meet HIPAA standards. Since (3) prohibits use of genetic information with respect to policy of health insurance then HIPAA not implicated.
746.600 Use and Disclosure of Insurance Information	Definition of "Medical Record Information" (20) and "Personal Information" (22)	No. Can comply with both federal and state law but recommend clarification in state law.	ORS 746.600(22) Definition of "Personal Information" includes information from insurance transaction from which judgements can be made about individual's 'character, habits, avocations, finances, occupations, general reputation, credit, health or other personal characteristics'. State law appears broader than 164.501 (definition of phi and individually identifiable information) thus providing individual greater protections.
746.620 Notice of insurance practices (GLB) ¹	Notice of Privacy Practices	No. By July 1, 2003 can comply with state or federal law. Some risk of duplication and/or confusion between April and July 2003 but risk may be avoided, or minimized particularly if clarified in state law.	Differences between HIPAA and current state GLB law (with regard to notice of use of personal medical information) include: (i) HIPAA-notice be issued to insured; state GLB-notice to policyholder; (ii) HIPAA-notice at commencement and then every 3 years and 60 days after material change; state GLB-notice required at commencement and annually; (iii) HIPAA-6 year look-back for disclosure of phi; State GLB-2 year look-back for disclosure of phi and other information. *Recommend clarification and guidance directing how licensee may use one or more notices to comply with state law.
746.625 Marketing and Research Survey	Insurer/agent shall identify those survey questions to obtain info for market and research purposes.	No. Can comply with state and federal law.	If licensee/insurer is CE and wants to disclose phi for marketing purposes, then HIPAA compliance authorization shall be required. If licensee that is a CE complies with HIPAA authorization requirements for personal information that is phi, then will be deemed in compliance with corresponding state law.
746.630 Authorization ²	Licensee disclosure must be clear and contain all this information.	Yes to the extent "licensee" attempting to obtain authorization for disclosure = CE under HIPAA. CE includes health insurance issuer 160.103.	State insurance law authorization "less stringent" in that it fails to include following HIPAA requirements (164.508(c)(1)): (i) name of person authorized to make disclosure (ii); certain required statements under (c)(2): inability to condition payment, treatment or, benefits on authorization; and potential for re-disclosure (iii) copy to individual (c)(4). However state law imposing <u>24 month</u> (or 30 month under Proposed Revisions) maybe more stringent than federal law and in those circumstances would prevail. *Recommend DCBS adopt rule or issue guidance on constructing HIPAA compliant authorization, for use under the Insurance Code.

¹ State GLB (Section 27A) dictates that Dir. DCBS will rule which privacy laws are more stringent and applicable to insurers and licensee by no later than July 1, 2003.

² Proposed revisions dated 4/26/02 "LL Proposed Revisions" (section 10) makes State authorizations "less stringent" by deleting certain requirements.

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746.640 Access to personal information	Terms and obligations governing request by consumer to access personal information, which may include phi ³ .	Yes to the extent access to phi is limited or less available under this state law and is available under 164.524. However to the extent state law is "more stringent" State law will prevail.	HIPAA appears to be "more stringent" concerning individual access and amendment see (160.202) as follows: (i) grants review procedure upon denial of access (164.524 (4)); (ii) doesn't predicate access on records being "reasonably locatable and retrievable" as state law does, (iii) under state law must respond to request for access for PHI on-site within <u>30 business days</u> vs. HIPAA time period of <u>30 days</u> . However <u>state law is more stringent in that it does not provide for denial of access ORS 746.640</u> ; and access to PHI off-site still must be granted if reasonable locatable within 30 business days vs. 60 days under HIPAA.
746.645 Correction/Amendment or deletion of recorded personal information	Provides individuals right to amend, correct, delete, recorded Personal information in the possession of insurer, agent, ISO.	No. Can comply with both federal and state law.	State law more stringent as follows: <u>30 day time period to respond to request is shorter, better for individual</u> (ORS 746.645(1) v. 164.524(b)(2)). <u>And state law does not allow for rebuttal to individual's statement of disagreement as HIPAA does</u> (164.526(d)(3)). HIPAA more stringent: requires written denial (164.526(d)) and the provision of certain rights to individual, including complaint procedures. Unclear which is most stringent: <u>upon Amendment state law requires notice to anyone designated who may have received record in preceding 2 years and certain ISOs for preceding 7 years 746.645 (2)</u> v. HIPAA certain persons identified by individual without time limitation 164.526(c).
746.650 Adverse Underwriting Decision	(2)(b)(B) Specific items of medical record may be disclosed to medical professional <u>designated</u> by individual.	No. Can comply with state and federal law.	If disclosures for PTO, then it is a permitted use and disclosure may occur without authorization. Also when disclosure is directly to the individual.
746.655 and 746.660 Information concerning adverse underwriting decision	An insurer, agent, ISO may not use information of previous adverse underwriting decision in making an underwriting decision; but may use other information.	No. Can comply with both state and federal law:	If information obtained and used is considered eligibility which falls under "payment" activities or "health care operations", then it would be a permitted use by CE 164.501.
746.665 Limitations and Conditions on Disclosures	(1) Licensee/ISO shall not disclose personal or privileged information about individual from insurance transaction unless...	No. Can comply with both state and federal law.	See comments in connection with ORS 746.600.
746.665	(1)(a)(A) is with written authorization from licensee or ISO pursuant to ORS 746.630...	<i>Possibly</i>	See comments in connection with ORS 746.630.

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³ Accounting for previous disclosures under this section limited to 2year look-back 746.640(1)(c) v. HIPAA Accounting provision with look-back of 6 years 164.528 (1).

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746.665	(1)(a)(B) from other than licensee or ISO, then authorization must be: (i) dated; (ii) signed; (iii) no more than 1-year old.	<i>Possibly.</i>	If disclosure not allowed under HIPAA or only pursuant to authorization (164.508) then federal law would preempt. To the extent the disclosure would be by a CE for PTO or under other circumstances when authorization not required, then state law more stringent. The state law 1-year time limit for authorizations for this purpose is more stringent, however recommended made that DCBS provide clarification on use of authorizations by licensees.
746.665	(1)(b) is to other than licensee or ISO, if reasonably necessary to... (A) perform a business, professional, or insurance function for the disclosing licensee + Agreement prohibiting further disclosure UNLESS: (i) allowed by law, or (ii) reasonably needed to perform other agreed upon functions	No. Can comply with both state and federal law.	Assumes "business, professional, insurance" function falls somewhere under PTO; and "Agreement prohibiting further disclosure" is B.A. Agreement; and subject to 'minimum necessary' standard.
746.665	(1)(b)(B) provides for information to the disclosing licensee or ISO to determine (i) eligibility; (ii) detecting fraud/criminal activity.	No. Can comply with both state and federal law.	Eligibility falls under "payment" and fraud detection falls under "Health Care Operations" permitted uses. See 164.500 and 164.502, respectively.
746.665	(1)(c) Is to a licensee or ISO or self-insurer IF: reasonably necessary, (A) to detect/prevent criminal/fraudulent activity; (B) to enable licensee or ISO to perform insurance transaction functions.	No. Can comply with both state and federal law	Eligibility falls under "payment" and fraud detection falls under "Health Care Operations" permitted uses . See 164.500 and 164.502, respectively.
746.665	(1)(d) is to medical provider to (A) verify insurance coverage; (B) inform individual of medical problem; (C) operations, service audit	No. Can comply with both state and federal law	Eligibility falls under "payment" and fraud detection and service audit fall under "Health Care Operations" permitted uses. See 164.500 and 164.502, respectively. ⁴
746.665	(1)(e) is to an insurance regulatory authority (f) is to a law enforcement or other governmental authority (g) is otherwise permitted or required by law. (h) in response to admin/judicial order ⁵ .	<i>Possibly.</i>	Unless otherwise permitted under other sections of HIPAA; e.g. for health oversight activities 164.512(d); to the extent disclosures hereunder are of phi and voluntary (i.e. <u>not required</u> by law 164.501) then should be preempted under HIPAA law.

⁴ Question remains whether Health Plan CE can rely on this term as a permitted disclosure when a health plan does not render treatment, only providers do.

⁵ Subsections (1)(e) through (h), LL Proposed Revisions appear to clarify and strengthen these terms so as to fall under HIPAA "required by law" exemption. However, additional basis for permitted disclosures have been added by LL Proposed Revision and further analysis and discussion is necessary before final conclusion.

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746.665	(1)(i) for purpose of conducting actuarial, research studies if: (A) No individual identifiable in resulting report (B) Materials returned or destroyed at conclusion (C) Non-Disclosure terms	No. Can comply with state and federal law.	Agreement terms should comport with B.A. Agreement see 164.514 Re: de-identification.
746.665	(1)(j) for proposed/consummated sale, transfer, merger---if (A) minimum necessary (B) Non-disclosure Agreement	No. Can comply with state and federal laws, to the extent 'merger' is with another CE (Definition of Health Care Operation 164.501)	Federal privacy a little more "stringent".
746.665	(1)(k) to a non-affiliated 3rd party in connection with marketing IF: (A) No personal, privileged, medical information; (B) GLB Notice issued (see exception for joint marketing agreement) and individual objects to disclosure; (C) Recipient agrees to limited use ⁶ .	No. Can comply with state and federal law.	No phi involved so HIPAA marketing provisions not implicated 164.508(a)(3).
746.665	(1)(l) to an affiliate for audit of licensee or marketing of financial product or service.	<i>Possibly.</i>	To the extent this state law applies to phi (<u>i.e. exception for "medical record information" is not as broad as phi</u>) then state law would be preempted.
746.665	(1)(m) by a consumer reporting agency to other than licensee ⁷ .	<i>Possibly.</i>	Depends on where, how the agency obtained phi; if still phi may be prohibited.
746.665	(1)(n) to group policyholder to report claims experience or areas necessary for audit.	No. Can comply with state and federal law.	Phi could be shared only with group policyholder that is a group health plan for payment purposes (164.506) or as otherwise not prohibited under HIPAA law. If disclosure is to plan sponsor or employer (vs. the Plan itself) phi not allowed unless de-identified or converted to summary information for certain purposes.
746.665	(1)(o) to PRO for peer review	No. Can comply with state and federal law	Can be disclosed for CE's own health care operations 164.506 as well as for purpose of reviewing the service/conduct of a medical provider.

⁶ Many details and additional responsibilities are deleted per LL Proposed Revisions.

⁷ LL Proposed Revisions clarifies that this law intended to allow reporting by a consumer reporting agency in compliance with Federal Fair Credit Reporting Act-not clear whether allowed under HIPAA law.

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746.665	(1)(p) to governmental agency to determine eligibility for individual.	No. Can comply with state and federal law	Can be disclosed for CE's own health care operations 164.506 as well as for purpose of reviewing the service/conduct of a medical provider.
746.665	(1)(q) to policyholder Re: status of insurance transaction.	No. Can comply with both state and federal law.	Only to the extent disclosure to policyholder is not prohibited as phi of another (e.g. an emancipated minor). Some commentators believe this state law is sufficient basis to disclose otherwise protected personal information; this is not commonly held belief. E.g. 746.665(1)(q) does not trump ORS 109.675 prohibiting disclosure of MH Treatment records of minor 14 years and older without authorization. See also 743.847
746.665	(2) Personal/privileged information may be acquired by group practice PP HCSC and transferred among contracted providers.	No. <u>Can</u> comply with both state and federal law.	If group practice prepaid health care service contractor=OHCA should comply with federal HIPAA.
746.680	Private Right of Action to individuals for equitable relief and monetary damages not to exceed actual damages + claim for costs and fees to prevailing party (2 year SOL). Applies only to violation of ORS 746.640, 746.645 and 746.650.	No. Can Comply with state and federal law.	These state remedies are presumably "more stringent" (i.e. better for the individual) than federal HIPAA law and do not appear to stand as an obstacle to the accomplishment of HIPAA 160.202.

B.A. Business Associate
CE Covered entity under HIPAA
ghp group health plan defined by HIPAA
IRO Independent Review Organization for external review
NAR No Action Required
OQ Open Question
phi protected health information under HIPAA
SBG Small business group plans defined under Oregon Law