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State Regulation of De-Identified Health Information

How States like New Hampshire Are Getting It Wrong on Privacy and Might Kill Health Care's Golden Goose

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Manatt recently teamed with health care privacy expert Janlori Goldman of Columbia's Mailman School of Public Health to explore the public policy ramifications of state efforts to regulate use of patient de-identified health information. In an article published in the April 6 issue of BNA's *Privacy & Security Law Report*, they highlight the unintended consequences of restricting access to this information, which is integral to evaluating and improving health care quality.

The article comes on the heels of litigation between two health information companies and the state of New Hampshire, which passed a law that makes it a crime – a felony for businesses – to transfer or use for commercial purposes information about doctors' prescribing behavior, including information that does not identify the patient. In the proceedings, the health information companies have asserted that the New Hampshire law violates the First Amendment. The United States District Court agreed, holding the law unconstitutional. The First Circuit reversed. The case may now head to the Supreme Court.

As stated in the article, the New Hampshire law, and others like it, is directly at odds with Congress's intent in passing the federal stimulus package known as the American Recovery and Reinvestment Act, which committed \$36 billion in outlays to spur health information technology adoption to enable health care providers to collect, exchange, aggregate, analyze, and

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communicate health information to improve the quality and efficiency of care, public health outcomes, and clinical research. State-level restrictions on use of de-identified data are also inconsistent with the Health Insurance Portability and Accountability Act (“HIPAA”), which sets national standards for the use and disclosure of health information and which expressly does *not* restrict the use or disclosure of de-identified health information. Instead, HIPAA allows the free exchange of de-identified health information, recognizing that such data does not pose significant privacy issues and that its use is vital to evaluating and improving health care.

A full copy of the BNA article is available [here](#).

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