

NEBRASKA HOSPITAL ASSOCIATION

NHA: UPDATED HIPAA PREEMPTION ANALYSIS FOR PROVIDERS

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DISCLAIMER NOTICE TO READERS

While intended to be reasonably comprehensive with respect to health care providers, this report may not include every statute, regulation, case or other aspect of law that is affected by the HIPAA privacy regulations. It is provided for information purposes only and should not be adopted or used exclusively as a substitute for individual legal advice or professional legal services in regard to compliance with State law or the HIPAA privacy regulations.

PREFACE

NHA: UPDATED HIPAA PREEMPTION ANALYSIS

IMPACT OF HIPAA ON CONTRARY PROVISIONS OF STATE LAW

To: NHA Members
Draft: #2 HIPAA Preemption Update
Draft Date: April 15, 2003
Prepared For: NHA for its Members
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This is a planning/reference document to help covered entities understand which law applies when the mandates of HIPAA interact with State law.

It is subject to ongoing change and updating because (i) additional conflicting State law will be identified, analyzed and added in the future and (ii) the relationship between HIPAA and State law is dynamic – State laws will change, HIPAA will change, and the Secretary has authority to designate the preemptive effect on certain State laws.

This is a *planning and reference document* because, by itself, it does not solve any of the problems Nebraska health care providers will face in complying with HIPAA. It provides baseline information which members will need when drafting specific policies and procedures which the workforce can translate into action.

PREEMPTION: BACKGROUND

Title II of the Health Insurance Portability and Accountability Act of 1996¹ titled “Administrative Simplification” requires the adoption and use of certain transactional standards in connection with nine standard health care transactions.² It also requires the adoption of supporting security and privacy³ standards to safeguard individually identifiable health information.

HIPAA has teeth. Section 1176 of the Social Security Act sets forth civil penalties (not more than \$100 for each violation, not to exceed \$25,000 per calendar year for identical violations) and states that these fines are to be collected as civil monetary penalties pursuant to the civil monetary penalty provisions of Medicare.⁴ Even more compelling, Section 1177 of the Social Security Act creates *criminal* penalties, including fines and imprisonment, for one who knowingly obtains or discloses individually identifiable health information in violation of the statute.⁵ Thus, covered entities want to take HIPAA compliance seriously, and this includes

¹ Sections 261-264, P.L. 104-191.

² (i) health claims or equivalent encounter information; (ii) health claims attachments; (iii) enrollment and disenrollment in a health plan; (iv) eligibility for a health plan; (v) health care payment and remittance advice; (vi) health plan premium payment; (vii) first report of injury; (viii) health claim status; and (ix) referral certification and authorization. Section 1173(a) of the Social Security Act.

³ Section 1173(b) of the Social Security Act.

⁴ Section 1128(A) of the Social Security Act.

⁵ A fine of not more than \$50,000 and imprisonment for not longer than one year, unless the offense is

understanding the preemptive effect of HIPAA in certain situations in order to know which law applies.

WHAT IS PREEMPTED?

Subject to important exceptions, Congress gave HIPAA preemptive effect over certain contrary provisions of State law. The intent was to substitute a generally higher and uniform *federal* privacy standard for what already existed at the State level. Reading HIPAA and the final privacy regulations⁶ together yields the following general rule and exceptions:

General Rule: Statutory parts of HIPAA and any standard or implementation specification adopted by regulation ***shall supersede any contrary provision of State law, including a provision of State law that requires medical or health plan records (including billing information) to be maintained or transmitted in written rather than electronic form.*** This general preemptive effect attaches to all of the administrative simplification standards – transactional standards, code sets, unique health identifiers, privacy and security. This analysis is limited to the preemptive effect of the HIPAA privacy standards and implementation specifications.

Exceptions: HIPAA standards ***shall not supersede a contrary provision of State law meeting one of the following requirements–***

- 1. The provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation.***⁷ Thus, if State law provides more protection or greater rights to the individual, State law controls. The preemption analysis always looks for the stricter standard, unless another exception applies.
- 2. HIPAA does not preempt the authority, power or procedures established under any law providing for the reporting of disease or injury, child abuse, birth or death, public health surveillance, or public health investigation or intervention.***
- 3. HIPAA does not preempt State requirements that a health plan report or provide access to information for management audits, financial audits, program monitoring and evaluation, facility licensure or certification, or individual licensure or certification.*** Note that this is applicable only to rules governing health plans – not providers generally.
- 4. HIPAA does not preempt provisions of State law as to which the Secretary makes a written determination that such provisions need to remain intact to promote certain purposes.*** This exception is not expected to have much early

“committed under false pretenses” in which case the fine is not less than \$100,000 and imprisonment is for not more than five years. Additionally, if the offense is committed with the intent to sell, transfer or use individually identifiable health information “for commercial advantage, personal gain, or malicious harm,” the fine rises to not more than \$250,000 and imprisonment to not more than 10 years, or both.

⁶ 45 C.F.R. Parts 160 and 164.

⁷ Section 1178(a)(2)(B) of the Social Security Act and Section 264(c)(2) of P.L. 104-191.

application. It applies only to advance written determinations given at the request of a governor or his or her designee.

5. HIPAA does not preempt any State law to the extent that it authorizes or prohibits disclosure of protected health information about a minor to a parent, guardian, or person acting in loco parentis of such minor.⁸ This is a regulatory exception from preemption which does not have a statutory basis in HIPAA itself.

KEY DEFINITIONS⁹

1. **“State Law”** – As noted above, HIPAA preempts contrary “State law.” The Secretary defines “State law” to mean a “constitution, statute, regulation, rule, common law, or other State action having the force and effect of law.” Thus, this analysis is not limited to State statutes.

2. **“Contrary”** – HIPAA only has a preemptive effect when a standard or implementation specification under HIPAA is “contrary” to State law. The Secretary defines “contrary” to mean:

“(1) A covered entity would find it impossible to comply with both the State and Federal requirement; or

(2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [administrative simplification].”

3. **“More Stringent”** – Refer back to exception list. One key exception to preemption is where State law is more “stringent” than the standards or implementation specifications of HIPAA. “More stringent” means:

a. With respect to use and disclosure of protected health information, State law provides for greater privacy than HIPAA.

b. With respect to the rights of an individual who is the subject of individually identifiable health information, State law provides greater access or greater right to amend an individual’s record.

c. With respect to the quantum and form of information to be provided to an individual about a covered entity’s use or disclosure or the individual’s rights and remedies, provides the greater amount of information.

d. With respect to the form or substance of an authorization or consent to use or disclose information, has the effect of narrowing the scope or duration, or increasing the privacy protections, or reducing the coercive effect of the circumstances surrounding the document, as applicable.

⁸ 45 C.F.R. § 160.202.

⁹ 45 C.F.R. § 160.202.

- e. With respect to recordkeeping or requirements relating to accounting for disclosures, provides for the longer retention period or the more detailed information.
- f. “With respect to any other matter, provides greater privacy protection for the individual who is the subject of the individually identifiable health information.”

4. “**Relates to the Privacy of Health Information**” – Finally, the regulations include a provision that State law will only be considered “more stringent” than HIPAA if it “relates to the privacy of health information.” The Secretary added this proviso and defines the term to mean that the State law “has the specific purpose of protecting the privacy of health information or affects the privacy of health information in a direct, clear and substantial way.”

PREEMPTIVE EFFECT

Comparing HIPAA standards and implementation specifications to State law relating to the privacy of individually identifiable health information leads, in each case, to one of following conclusions:

Preempted: The provision of State law is contrary to a provision of HIPAA and is preempted. For example, if a State statute permits a licensee to dispose of certain privacy compliance records after three years, and a contrary HIPAA standard requires that they be maintained for six years, HIPAA preempts State law on the subject.

Partially Preempted: A subpart of the State law under examination is contrary to HIPAA and is preempted; the balance of the State law is not.

Not Preempted: A State law under examination is either not contrary to HIPAA or, if it is, it is saved by one of the exceptions to preemption. For example, if HIPAA requires furnishing an individual with a copy of his or her record within 30 days, and State law requires furnishing that copy within two days, State law is more stringent and controls.

Unclear: It is simply not possible to generalize the preemptive effect.

It is often extremely difficult to reduce the analysis to one of the first three conclusions, because the interplay of State law and HIPAA is not simple. For this reason, we included a column in the analysis of State laws allowing for comments and explanations. Here, we try to supplement the preemption conclusion with an explanation to put it into context.

For example, what is the effect of concluding that a State law is “not preempted” by HIPAA? It means that a covered entity can do what the law requires or permits. ***It does not mean, however, that the subject matter is not otherwise regulated under HIPAA.*** For example, a Nebraska law requiring certain disease reporting to DHHS is exempted from the preemptive effect of HIPAA because it fits squarely within one of the exceptions. However, the covered entity would still need to meet all other HIPAA requirements that can be read together with the State reporting requirement. That is, the provider would still need to describe the fact that it releases information in compliance with State disease reporting requirements in its notice of privacy practices to patients.

SPECIAL INSTRUCTIONS RE: LICENSED PROVIDERS

In sections 10 and 11, we have divided Nebraska providers into two categories. Group 1 consists of providers who may use and disclose protected health information for their own TPO or disclose to other qualified entities for their own treatment, payment, and health care operations (“TPO”) without consent. They can, in other words, follow the approach taken in the final HIPAA Privacy Rule.

Group 1 - Providers Which Do Not Need Consent to Use or Disclosure for TPO

All licensed Nebraska facilities and practitioners are subject to confidentiality rules. The distinction between providers in Group 1 and Group 2 is whether State law allows disclosure without consent if *permitted* or *authorized* by law, rather than as *required* by law.

We believe most licensed practitioners in Nebraska are in the same position as the listed health care facilities. They are bound by general statements on confidentiality, but nothing specifically requiring them to obtain consent or permission before routine disclosures otherwise permitted by law.

Group 2 - Nebraska Providers Which Need Consent to Use or Disclose for TPO

The rules applicable to Group 2 providers are quite different. Instead of allowing disclosure with consent or as permitted by law, several categories of facilities are subject to a rule that permits disclosure only with consent or as *required by law*.

Where does this leave Nebraska providers in this second group? Nebraska law, past practice and operating necessity suggest the following analysis:

1. There are no disclosures mandated by HIPAA (other than to the individual or his or her personal representative). Thus, if release is permitted only with consent or as *required by law*, look for Nebraska or other federal authority, not HIPAA.

2. If Nebraska or other law requires the disclosure, disclose. The condition is satisfied.

If another Nebraska law expressly *permits* you to disclose protected health information in a specific situation, and you are in that situation, you may disclose. Here, the more specific Nebraska rule would displace the general Nebraska rule.

3. Use a traditional view of what a disclosure is in the first place. There are many exchanges of protected health information that have never been viewed as disclosures. For example, exchanging information within a licensed facility or practitioner’s office among members of the workforce, volunteers and even independent practitioners with a need to know has never been treated as a *disclosure*. Existing State law does not prohibit these routine exchanges of information.

4. Other disclosures outside of the licensed facility or practitioner’s office typically *would* be a release or disclosure. Here, the stricter Nebraska language would appear to require

that providers in this second group obtain consent, unless the particular disclosure is required by law or permitted by a more specific State law. This reading is more restrictive than HIPAA, but it is the same set of State rules that have been in place since long before HIPAA. It should not have significant impact on real operations.

Consent or authorization?

Providers in Group 2 need consent to serve State law purposes, not HIPAA purposes. Remember, HIPAA would not require any consent for uses and disclosures for TPO. Since the document does not serve a HIPAA purpose, Group 2 providers may fashion their own form of consent.

SUMMARY OF PREEMPTION EFFECTS

All statutes and regulations included in this preemption analysis that are not listed below are not preempted; even in part.

Partially Preempted

- (Records of) Developmentally Disabled Persons--Access by Protection & Advocacy System; Neb. Rev. Stat. §§ 20-164(2) and 20-165
- (Access to Records for) Inmates in Correctional Facilities, Neb. Rev. Stat. §§ 83-178(2) and 83-178(6)
- Jail Physician's Report; Neb. Rev. Stat. § 47-110
- Mental Health Commitment Act; Neb. Rev. Stat. § 83-1068(1)
- Rule 26; Nebraska Discovery Rules
- Assisted Living Facilities; 175 NAC 4-004.11H
- Mental Health Centers; 175 NAC 19-006.18B2
- Patient Access to Medical Records; Neb. Rev. Stat. § 71-8403(1)
- Skilled Nursing Facilities; 175 NAC 12-006.05-3
- EMS Patient Data; Neb. Rev. Stat. § 71-5185

Preempted

- DHHS Databases; Violations; Neb. Rev. Stat. § 81-674
- Sexual Offenders--Disclosure of Discharge Plan; Neb. Rev. Stat. § 29-2930
- Sexual Offenders--Progress Reports; Neb. Rev. Stat. § 29-2929

ANALYSIS:

1. Public Health Activities.

Abortion Reporting; Neb. Rev. Stat. § 28-343			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 28-343 – Reporting abortions to Department on form prescribed by Department.	Not preempted	The information required to be reported does not identify patients, so meets the standards under § 164.514 for de-identification of data. May also rely on § 164.512(a) which permits uses and disclosures “required by law.”	Follow both.

Births; Neb. Rev. Stat. § 71-604			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-604 - Records of live births filed with DHHS.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

(Nebraska) Birth Defects Registry; Neb. Rev. Stat. §§ 71-645 to 648			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§§ 71-645 to 648 – Birth defects registry.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Brain Injury Registry; Neb. Rev. Stat. §§ 81-653 to 662

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§§ 81-653 to 662 – Brain injury registry.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Cancer Registry; Neb. Rev. Stat. §§ 81-642 to 650

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§§ 81-642 to 650 – Cancer registry.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Child Death; Neb. Rev. Stat. §§ 71-3404 to 3411

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§§ 71-3404 to 3411 – Investigation of child deaths in Nebraska.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Deaths; Neb. Rev. Stat. §§ 71-605 to 605.04

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§§ 71-605 to 605.04 – Reporting of deaths.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

E-Code Registry; Neb. Rev. Stat. §§ 71-2078 to 2082

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§§ 71-2078 to 2082 – Injury surveillance registry.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Certificate of Fetal Death; Neb. Rev. Stat. § 71-606

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-606 – Reporting of fetal death.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

(Right to an Anonymous) HIV Test; Neb. Rev. Stat. § 71-531

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-531(3) – Right to remain anonymous.	Not preempted	No HIPAA provision directly on point. § 164.522 grants the right to receive confidential communications, but does not seem to affect this State law.	Follow both.

(Reporting of) HIV Virus; Neb. Rev. Stat. § 71-532

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-532 – HIV virus reportable as communicable disease.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Immunization Requirements--Records and Reporting; Licensed Child Care Providers; Neb. Rev. Stat. §§ 71-1913.01 to 71-1913.02

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-1913.01 - Licensed child care programs must obtain and maintain proof of immunization as part of each child's file and disclose such record to DHHS for review and inspection.	Not preempted	Disclosure permitted under §164.512(d) for health oversight activity.	Follow State law.

Infectious Disease Reporting; Neb. Rev. Stat. § 71-514.02

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-514.02 – Infectious disease reporting.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Laboratory; Test Results; Notification Required; Neb. Rev. Stat. § 71-502.04

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-502.04 - Persons in charge of labs showing results of evidence of disease, illness, or poisoning shall notify the local health department or DHHS.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Medically Handicapped Children--Reporting Congenital Deformities; Neb. Rev. Stat. § 71-1405

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-1405 Within 30 days after birth, the physician or midwife must report visible congenital abnormalities to DHHS.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

(Tests on Infants for) Metabolic Disease; Reports to State; Neb. Rev. Stat. § 71-519 et seq. and Related Regulations; 181 NAC 2-006.04, 181 NAC 2-007 et seq.

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-519 et seq. – Reports to State of infant metabolic diseases.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Morbidity and Mortality Studies; Neb. Rev. Stat. § 71-3401

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 71-3401 – Grants broad authority to providers to furnish information to certain bodies for morbidity and mortality studies.</p>	<p>Not preempted</p>	<p>Not “contrary” – Can be read with HIPAA. Note – which HIPAA requirements apply depends upon determining what a particular study is. If QI/QA and therefore “health care operations” under § 164.501, only inclusion in the notice of privacy practices is required. IF a Group 2 provider, consent is also required. If study is aimed at obtaining “generalizable knowledge,” it is “research” and full authorization under § 164.508, along with inclusion in notice of privacy practices, is required. If study is a public health activity under § 164.512(b)(i), no consent or authorization is required, but the practice must be noted in the notice of privacy practices.</p>	<p>Follow both. Determine which HIPAA category the study fits and follow the HIPAA rules applicable to that category.</p>
<p>Immunity for providing such information for morbidity and mortality studies.</p>	<p>Not preempted</p>	<p>Not “contrary” – There is no equivalent HIPAA “immunity.” State immunity is effective as to unique State law causes of action, but State immunity would not protect against civil or criminal penalties for HIPAA violations.</p>	<p>Follow both in order to avoid State or HIPAA liability.</p>
<p>Immunity extends to releasing findings and conclusions or a summary.</p>	<p>Not preempted</p>	<p>Not “contrary” – There is no equivalent HIPAA “immunity.” State Immunity is effective as to unique State law causes of action, but State immunity would not protect against civil or criminal penalties for HIPAA violation.</p>	<p>Follow both in order to avoid State or HIPAA liability.</p>

Motor Vehicle Accidents--Body Fluid Testing & Reporting; Neb. Rev. Stat. § 60-6,104 (cross-reference)

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 60-6,104 - test results of blood and body fluid in connection with motor vehicle accidents shall be reported for the official submitting the sample.	Not preempted	Section 164.512(f) permits uses and disclosures for law enforcement purposes. Note that where the law enforcement official has submitted the sample or requested the test, State law affords greater protection and does not authorize release of test results without patient authorization. This is consistent with HIPAA, with the exception of decedents. Under 164.512(f)(4), HIPAA permits disclosure of a deceased person's PHI to a law enforcement officer if there is suspicion by the provider that death resulted from criminal conduct.	Follow both regarding living subjects of test. Follow State law in the case of deceased test subjects.

Nebraska Parkinson's Disease Registry; Neb. Rev. Stat. §§ 81-681 to 696 and Related Regulations; 174 NAC 17

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 81-681 to 696 – Parkinson's disease reporting.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Pregnant Women; Subject to Syphilis Test; Neb. Rev. Stat. § 71-502.03

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-502.03 – Pregnant women must be tested and results reported by the physician to DHHS. In addition, birth and stillbirth reports must state on the birth certificate whether a syphilis test was performed, but the results shall not be shown on the certificate	Not preempted	Statutorily excluded from preemption	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

(Records of) Radiation Exposure; 175 NAC 9-003.03B6

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
9-003.03B6 – Records of radiation exposure.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Sexually-Transmitted Disease Reporting; Neb. Rev. Stat. § 71-503

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-503 – Attending physician shall report contagious disease including sexually transmitted diseases or poisonings to the local health department or DHHS.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).
§ 71-503.01 - Physician's reports of contagious diseases are confidential and privileged, not subject to subpoena or disclosure to any other state department other than those changed with the conduct of immunization programs	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).
State programs making reports to the CDC shall not disclose individual's identity. Disclosures may be made to other States as necessary to ensure that necessary investigations are made.	Not preempted	Not subject to HIPAA because state agencies making reports may not be covered entities; also, information is de-identified and the particular use and disclosure is "required by law" under § 164.512(a).	Follow both

Significant Exposure Reports/EMS Personnel; Neb. Rev. Stat. § 71-507 et seq.

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-507 et seq. – Significant exposure reports/EMS personnel.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

**Significant Exposure to Blood or Bodily Fluid--Testing/Reporting (Health Care Providers);
Neb. Rev. Stat. §§ 71-514.01 to 514.05**

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 71-514.04 - Patient and test result information confidential except for mandatory reporting under 71-503.</p> <p>§ 71-514.05 - Records of test results kept only for purposes of care of the health care provider.</p>	Not preempted	With respect to reference to mandatory reporting, §164.512(a) permits uses and disclosures "required by law." Otherwise, the statute does not conflict with greater protections afforded under HIPAA.	Follow both.

State-Wide Trauma Registry; Neb. Rev. Stat. § 71-8201

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-8201 – State-wide trauma registry.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

(Records of) Tuberculosis Patients; 173 NAC 2

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
2-008.01 – Records available to Department and to Tuberculosis Consultant.	Not preempted	Excluded from preemption analysis based on statutory exception for public health surveillance and intervention.	Follow both.

“Vital Events” Records; Neb. Rev. Stat. §§ 71-601 to 649

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§§ 71-601 to 649 – Vital events records.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

2. Victims of Abuse, Neglect, and Violence.

Adult Abuse Reporting; Neb. Rev. Stat. §§ 28-349 to 387			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§§ 28-349 to 387 – Adult abuse reporting.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).
§§ 28-380 to 381 – Amendment expungement of records reported vulnerable adult abuse.	Not preempted	Pertains strictly to DHHS records not within scope of HIPAA as DHHS is not a covered entity for these purposes.	No effect; follow State law.

Child Abuse Reporting; Neb. Rev. Stat. §§ 28-707 to 733			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 28-711 – Mandatory reporting of child abuse. § 28-730 - Releases of medical record information to child abuse and neglect teams.	Not preempted	Statutorily excluded from preemption.	Comply with State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Child Death; Neb. Rev. Stat. §§ 71-3404 to 3411 (cross-reference)			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§§ 71-3404 to 3411 – Investigation of child deaths in Nebraska.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Nebraska Crime Victim's Reparation Act; Victim Compensation; Submission of Medical Reports; Neb. Rev. Stat. § 81-1808

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 81-1808 – Medical reports submitted to support claim for victim compensation.	Not preempted	Pertains to medical reports submitted by alleged crime victim to State Crime Victims Reparation Board. Not within scope of statute as Board is not a covered entity.	No effect; follow State law

(Reporting) Wounds of Violence; Neb. Rev. Stat. § 28-902

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 28-902 – Reporting wounds of violence.	Not preempted	Statutorily excluded from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Victim Notification Law; Neb. Rev. Stat. § 81-1850

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 81-1850 – Notification to victim.	Not preempted	Outside scope of HIPAA; disclosure mandates are on county attorney, Board of Parole, Department of Correctional Services, and HHS.	Follow both.

3. State Government Agencies and Departments.

Adoptions and Medical Histories; Neb. Rev. Stat. § 43-107; §§ 43-119 to 146.03			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 43-107 – In adoption, judge <i>shall</i> require complete medical history on child; shall require medical history on biological mother and father, if available.	Not preempted	Not “contrary” – Does not affect HIPAA obligations of health care providers.	Follow HIPAA if asked to prepare or disclose medical histories.
§ 43-129 – Permits physician and psychologist to petition court for access to adopted person’s birth certificate for treatment purposes.	Not preempted	Not “contrary” – Does not deal with disclosure by a covered entity. Covered entity must still comply with State law requirements related to disclosure of PHI for treatment purposes. Analysis depends upon whether the provider falls into Group 1 or Group 2.	Follow both.
§ 43-146.03 – Permits physician and psychologist to petition court for access to adopted person’s birth certificate for treatment purposes.	Not preempted	See explanation above.	Follow both.

(Release of Information to) Adopted Person by Bureau of Vital Statistics; 74 NAC 6-003			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
003 – Requirements for access to records about adopted persons.	Not preempted	Outside scope of HIPAA; pertains to release of information by Bureau of Vital Statistics.	No effect on covered entities.

(Records of) Developmentally Disabled Persons--Access by Protection & Advocacy System; Neb. Rev. Stat. §§ 20-161 to 166

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 20-163 – Protection and advocacy system access to individual's records who resides in a facility. When a complaint has been received.</p>	<p>Not preempted</p>	<p>Disclosure permitted under § 164.512(d) – health oversight activities.</p>	<p>Follow State law.</p>
<p>§ 20-164 –</p> <p>(1) Access to records by protection and advocacy system.</p> <p>(2) The protection and advocacy system will not grant records access to the mentally ill person if detrimental to his or her health of if access is denied by court order pursuant to civil commitment proceedings.</p>	<p>Not preempted</p> <p>Partially preempted</p>	<p>Disclosure permitted under § 164.512(d) – health oversight activities.</p> <p>Access may not be denied unless the more stringent HIPAA standard is met: "a licensed health care professional has determined, in the exercise of professional judgment, that the access requested is <i>reasonably likely to endanger the life or physical safety of the individual or another person.</i>"</p>	<p>Follow State law.</p> <p>Follow the HIPAA standard regarding "detrimental to health" basis for denial; follow State law when court order limits access.</p>
<p>§ 20-165 – No re-disclosure of records held by the protection and advocacy system without the authorization of the subject or the subject's legally authorized representative. In addition, the protection and advocacy system is required to give 7 days notice to the facility from which the records were received. The facility may seek to enjoin the re-disclosure on the grounds that the disclosure is contrary to the interests of the subject of the record. Such notice shall not be required if re-disclosure is to an entity with legal authority to protect the legal and human rights of the subject.</p>	<p>Partially preempted</p>	<p>HIPAA does not include a prohibition against re-disclosure, therefore the state standard here is higher and should be followed. If a facility seeks to enjoin the disclosure of a record to the subject of the record or his or her legal representative, the HIPAA standard for refusal of access to the individual is higher than that stated in 20-165. Section 164.524 governing access of individuals to PHI should be followed.</p>	<p>Follow State law regarding redisclosure in general; HIPAA, if redisclosure is to the individual.</p>

DHHS Databases, Immunity; Neb. Rev. Stat. § 81-672

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 81-672 – Establishes immunity for receipt and disclosure of information as permitted by §§ 81-663 to 675	Not preempted	Pertains to state database of health registry information. Immunity provisions are outside the scope of the statute since DHHS is not a covered entity with respect to database administration.	No effect; follow State law.
§ 84-1211 – Individuals listed in state database are not required to submit to medical examination or supervision by DHHS or an approved research accessing the database. No person obtaining database information shall contact a patient or his or her family without the patient's permission.	Not preempted	It is the duty of the state registry to obtain consent, so the requirement is outside the scope of HIPAA since the registry is not a covered entity.	

DHHS Databases; Violations; Neb. Rev. Stat. § 81-674

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 81-674 – Establishes Class IV misdemeanor penalties for wrongful disclosure of confidential information from medical records and health care registries applicable to private or public entity, individuals or approved researchers.	Preempted	Under Neb Rev. Stat. § 28-106, a Class IV misdemeanor is not subject to imprisonment, but is punishable by a minimum \$100 fine and maximum \$500 fine. HIPAA at 42 USC §1320d-5(1) imposes a minimum \$100 fine per violation up to a maximum of \$25,000 for all violations.	Follow HIPAA.

DHHS Medical Records, Databases, and Health Information--Release of Information to the Public; Neb. Rev. Stat. §§ 81-676 to 680

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§§ 81-676 to 680 – Establishment of and duties of state health care data analysis section to conduct research initiatives	Not preempted	Purpose of State law is to promote efficiency of data management. Consistent with § 164.512(d) of HIPAA allowing for disclosures without authorization or consent for health oversight activities.	Follow State law.

Public Records--Records Management Act; Neb. Rev. Stat. § 84-1201 *et seq.*

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 84-1211 – Treatment of confidential records under Records management Act.	Not preempted	Pertains to PHI in the hands of state officials. Outside the scope of HIPAA as state officials/offices are not covered entities for these purposes.	No effect; follow State law.

Records Which May Be Withheld From the Public By State Officers and Lawful Custodians; Neb. Rev. Stat. § 84-712.05

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 84-712.05 – Establishes confidentiality of medical records except birth and death records.	Not preempted	Pertains to records of state officers/offices. Outside the scope of HIPAA as Nebraska State offices/officers are not covered entities for these purposes.	No effect; follow State law.

State Departments' Subpoena Power; Neb. Rev. Stat. § 81-119

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 81-119 – Power to compel release of records, testimony, and administer oaths for purpose of carrying out department duties and enforcing the law.	Not preempted	Depending on the subject matter, could be a statutory exception under §160.203(c) when involving public health surveillance. If not, §164.512(d) provides an exception to requirement for consent, authorization, or opportunity to object for health oversight purposes.	Follow both.

4. State Institutions, Correctional Facilities, and Other Custodial Arrangements.

Children in State Custody; Sharing Information Authorized By Court Order; Neb. Rev. Stat. § 43-3001

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 43-3001 – Juvenile court records and other pertinent information held by agencies and health care practitioners may be disclosed without consent or authorization to individuals and agencies identified in a court order.	Not preempted	Disclosure is permitted "as required by law" under § 164.512(e)--disclosures for judicial and administrative proceedings.	Follow State law.

(Access to Records by Office of) Juvenile Services; Neb. Rev. Stat. § 43-409

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 43-409 – The “office may obtain all records, including medical records of juveniles committed to it or placed with it.”	Not preempted	Not “contrary” – This disclosure is permitted under §164.512(a) for uses and disclosures “required by law.” HIPAA imposes the additional requirement that when making such a disclosure, the individual must be notified. See §164.512(a)(2) and (c).	Follow both.

(Access to Records for) Inmates in Correctional Facilities; Neb. Rev. Stat. §§ 83-178 to 83-180

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 83-178(2) – Establishes inmate records maintained by the Department of Corrections as confidential; inmate may access his or her own record under §§ 71-8401 to 8407.</p>	<p>Partially preempted</p>	<p>State law is stricter in some respects, HIPAA is stricter in others.</p> <p>When the medical records of an inmate are maintained by a provider in the community, § 164.524(a)(2)(ii) of HIPAA allows a covered provider acting under the direction of the correctional institution to deny an inmate's request to obtain a copy of his or her records if obtaining such a copy would jeopardize the healthy, safety, security, custody or rehabilitation of the inmate or other inmates, or the safety of any officer, employee or other person at the correctional institution or responsible for transport. State law limits the ability to withhold records to mental health information of inmates under both §§ 83-178(2) and 71-8403. The provider would look to the HIPAA standard stated above (jeopardize health and safety) for determining that release would not be in the best interest of the patient.</p>	<p>Follow State law in providing access to their PHI; look to HIPAA for grounds on which denial may be based – jeopardize health or safety.</p>
<p>§ 83-178(6) – Public Counsel may inspect inmate's records except for medical or mental health records which requires the inmate's consent.</p>	<p>Partially preempted</p>	<p>Section 164.512(k)(5) (correctional institutions) does not identify Public Counsel as a recipient of inmate PHI in the absence of authorization by the inmate.</p> <p>To the extent that the inmate's records (other than medical or mental health records) include PHI, State law is preempted and even Public Counsel may not have access without the inmate's authorization.</p> <p>HIPAA and State law are consistent in regard to medical and mental health records.</p>	<p>Follow HIPAA with respect to PHI in inmate records (other than medical or mental health records). Follow both regarding medical and mental health records--get inmate's consent.</p>

(Access to Records of) Patients in State Institutions; Neb. Rev. Stat. § 83-109

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 83-109 – Records shall be accessible only to:</p> <ol style="list-style-type: none"> (1) • Department. • Legislative Committee. • Governor. • Public or private agency under contract to provide facilities, programs, and patient services. (2) Court order. (3) Pursuant to laws for developmentally disabled. (4) State patrol for handgun checks. (5) Pursuant to victim notification laws. 	<p>Not preempted</p>	<p>All of the disclosures permitted under this statute are also permitted under a HIPAA exception; so with respect to the disclosures listed, State law and HIPAA are consistent. However, State law <u>limits</u> disclosures only to those listed, which is narrower than HIPAA. Thus, State law is more stringent.</p>	<p>Follow State law with respect to rules for disclosure; follow HIPAA for other provisions such as notice, etc.</p>

Jail Physician's Report; Neb. Rev. Stat. § 47-110

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 47-110 – Jail physician authorized to make written reports to County Board, Jail Standards Board, or grand jury.	Partially preempted	Disclosures permitted under § 164.512(d) for health oversight activities with respect to disclosure to County Board and Jail Standards Board. Disclosures to the grand jury may be permitted under §164.512(e) – judicial and administrative proceedings. The State statute does not indicate whether disclosure to the grand jury is in response to subpoena or court order, only states “when required by law.” Absent a subpoena or court order, the assurances and notice provisions of § 164.512(e)(1)(ii) must be met.	Follow State law in the case of disclosures to the County Board and Jail Standards Board; follow HIPAA in the case of grand jury disclosures.

Juvenile Preadjudication Physical/Mental Evaluation; Reports; Restrictions; Neb. Rev. Stat. § 43-258

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 43-258 – Practitioners are authorized to disclose reports of court-ordered examinations of juveniles to the Juvenile Court.	Not preempted	Court-ordered reports may be disclosed to the court under § 164.512(e) – disclosures for judicial and administrative proceedings.	Follow State law.

(Release of Information Regarding) Juveniles in the Custody of the Nebraska Department of Social Services; 390 NAC 1-007 et seq.

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
390 NAC 1-007 et seq. – Authorizes release of information about juveniles by DHHS to various entities.	Not preempted	Pertains to information in the hands of DHHS. Outside the scope of HIPAA as DHHS is not a covered entity for these purposes.	Follow State law.

Medical Issues Relating to Children in the Custody of the Nebraska Department of Social Services; 390 NAC 11-002 et seq.

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>11-002.01D – Authorized disclosures regarding death or imminent death of State ward.</p> <p>11-002.01R – Release of photographs and identifying information of State wards.</p> <p>11-002.04A – Notification of parents of State ward regarding abortion.</p> <p>11-002.04B – Notices/authorization for autopsy of State ward.</p> <p>11-002.04C – Authorization for birth control for State wards.</p> <p>11-002.04D – AIDS/HIV testing of State wards.</p> <p>11-002.04E – Disclosures related to informed consent for medical diagnosis and treatment of State wards.</p> <p>11-002.04F – Medical decision making by foster parents.</p> <p>11-002.046G – Disclosures and authorization for organ donation by State wards.</p> <p>11-002.04H – Disclosures and authorization for sterilization of State wards.</p>	<p>Not preempted in cases where minor has no capacity to consent. Regulation invalidated when State statute authorizes minor’s consent.</p> <p>State statute provides for judicial bypass.</p> <p>State statute authorizes minor consent.</p> <p>Under State law, minors may consent for STD testing and treatment.</p> <p>State permits minors “of sound mind” to donate organs; presumably includes minors.</p>	<p>Each of these sections of regulation cover State agency use and disclosure of the PHI of minors in the custody of the State.</p> <p>In many cases, the regulation specifies the persons, in addition to the State social worker, who should be notified and/or consulted under the particular circumstances. HIPAA Section 164.502(g)(3)(i) governs personal representatives of unemancipated minors and permits, in addition to parents and guardians, other persons acting “in <i>loco parentis</i>” to make health care decisions for the minor, unless the minor has authority to act on his or her own behalf. Because § 164.502(g)(3)(i) appears to permit more than one personal representative, the consultation and notice provided for in these regulations does not conflict with HIPAA.</p> <p>There is a potential conflict between State statutes and these administrative regulations which potentially invalidates the regulations. Separate Nebraska statutes permit minors to give informed consent in the cases of:</p> <ul style="list-style-type: none"> (i) Examination and treatment for sexually transmitted diseases (Neb. Rev. Stat. § 71-504); (ii) Alcohol or drug abuse counseling (Neb. Rev. Stat. § 71-5041); (iii) Blood donation when the minor is at least 17 years of age and does not receive compensation (Neb. Rev. Stat. § 71-4808); (iv) HIV testing (Neb. Rev. Stat. § 71-531(i)); and (v) Judicial bypass for abortion in the case of mature minors states that “any individual of sound mind” may make an anatomical gift – suggesting that mature minors may do so (Neb. Rev. Stat. § 71-4802). 	<p>HIPAA defers to State law. Follow State statute when minor is authorized to give consent, as noted in the column to the left. Otherwise, follow administrative regulations.</p>

Medical Issues Relating to Children in the Custody of the Nebraska Department of Social Services; 390 NAC 11-002 *et seq.* (Cont.)

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
11-002.04I – Disclosures and authorization for withholding or withdrawing life support from State wards.	Not preempted	See explanation above.	Follow administrative regulation.
11-002.04K – Disclosures and authorization regarding participation by State ward in medical research projects.	Not preempted		

Medical Records in Juvenile Detention Facilities; 83 NAC 6-013 to 6-015

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
6-014 – Facility administrator shall establish procedures to determine access to medical records.	Not preempted	Not preempted, provided that such procedures are consistent with or stricter than HIPAA.	Follow both.

Mental Health Commitment Act; Neb. Rev. Stat. § 83-1001 et seq.

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 83-1068 (1) – Commitment records are confidential unless released: per exception to subject’s guardian, to the mental health board with jurisdiction, to persons authorized by a judge or court order, to persons authorized by permission of subject, or to the Nebraska State patrol or DHHS under §69-2409.01 (handgun checks).</p>	<p>Partially preempted; except for unauthorized release to legal counsel.</p>	<p>Except for disclosures to legal counsel, HIPAA exceptions permit releases without consent, authorization, or opportunity to object:</p> <p>§164.512(e) disclosures for judicial and administrative proceedings;</p> <p>§164.512(f) disclosures for law enforcement purposes</p> <p>Where subject authorizes; HIPAA detailed requirements for authorizations apply. See §164.502(a)(1)(iv).</p> <p>HIPAA does not explicitly include legal counsel in definition of “personal representative.” See §164.502(g)(1) and Preamble discussion of “personal representative.”</p>	<p>Follow both; except that, releases to legal counsel must be authorized by the subject.</p>
<p>§ 83-1068 (3) – “When a subject is absent without authorization from a hospital or treatment program as described in §83-1071 and is currently considered to be dangerous to others, the subject’s name and description and a statement that the subject is believed to be considered currently dangerous to others may be disclosed in order to aid the subject’s apprehension and to warn of such dangerousness.”</p>	<p>Not preempted</p>	<p>Permitted under § 164.512(j) - Uses and disclosures to avert a serious threat to health and safety. This exception applies when the patient has escaped from a correctional institution or from lawful custody, involving civil commitments. (See § 164.501.)</p>	<p>Follow both.</p>
<p>§ 83-1071 – Authorized disclosures by hospital in the event of a committed person’s absence without authorization.</p>	<p>Not preempted</p>	<p>Disclosure permitted under § 164.512(j)(1)(ii)(B) - Uses and disclosures to avert a serious threat to health or safety, specifically governing escapes from lawful custody.</p>	<p>Follow both.</p>

**Mental Health Commitment and Release; Individualized Treatment Plan; Progress Reports;
Neb. Rev. Stat. §§ 83-1040 to 83-1047**

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 83-1040 – Authorizes disclosure of report of mental health board – ordered treatment by practitioner.	Not preempted	Section 164.512(e)(1)(i) permits disclosures for administrative and judicial proceedings pursuant to an order.	Follow both.
§§ 83-1044 to 1045 – Authority to disclose treatment plan and progress to mental health board and to the county attorney, the patient, his or her legal counsel and his or her guardian.	Not preempted	Disclosures are permitted under 164.512(e) – Disclosures for judicial and administrative proceedings because the disclosures are pursuant to the Board’s “order of final disposition under Neb. Rev. Stat. § 83-1037.”	Follow both.
§ 83-1044.01 – Subject is entitled to know the extent of the individualized treatment plan and requirements, changes, or discharge from the plan.	Not preempted	HIPAA does not specifically address access to treatment plans by a committed individual but generally requires providing an individual with access to his or her PHI.	Follow both.
§ 83-1045.01(i) – Disclosures by outpatient treatment providers to the mental health board.	Not preempted	Because the purpose of these disclosures is to alert the Board when a Board-ordered outpatient commitment plan is not being followed by the patient, it is permitted under § 164.512(e) – disclosures for judicial and administrative proceedings.	Follow both.

5. Judicial and Administrative Proceedings/Privileges.

(Disclosure of Results of) Blood Sample to Prosecuting Attorney in Criminal Prosecution; Neb. Rev. Stat. § 60-6,210

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 60-6,210(2) – Disclosure of blood results to prosecuting attorney in criminal prosecution.	Not preempted	Not “contrary” – § 164.512(f) permits disclosures to a law enforcement official for law enforcement purposes if certain conditions are met. One condition is for disclosures “required by law” which include State law. Assuming a prosecuting attorney in a criminal case is a law enforcement official, disclosure would be permitted under this HIPAA exception without consent or authorization.	Follow both.

Evidence Under a Protective Order; 184 NAC 1-011.06

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
184 NAC 1-011.06 – Authorizes “in camera” review of evidence subject to a protective order	Not preempted	Outside the scope of HIPAA. Pertains to PHI in the hands of DHHS hearing officer. No apparent disclosure by a covered entity.	No effect. Follow State law.

Invasion of Privacy Tort; Neb. Rev. Stat. § 20-202 et seq.

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 20-203 – Establishes right of action under tort for trespass or intrusion upon a person’s solitude.	Not preempted	Not inconsistent with HIPAA; rights of action under State law are cumulative to federally-protected rights under HIPAA.	Follow both.
§ 20-204 – Establishes invasion of privacy tort for placing a person before the public in a false light.	Not preempted	Not inconsistent with HIPAA; rights of action under State law are cumulative to federally-protected rights under HIPAA.	Follow both.
§ 20-205 – Consent is a defense to invasion of privacy tort.	Not preempted	<p>Under both HIPAA and State law, consent/authorization is not required where the disclosure is legally required.</p> <p>In the case of some mandatory reporting statutes, immunity is expressly granted to reporters.</p> <p>Where immunity is not expressly granted by statute, the Nebraska case of <i>Simonsen v. Swenson</i>, 177 N.W. 831 (Neb. 1920) denied a claim for damages arising from a physician’s report of contagious illness without the patient’s authorization. The Court held that no liability results “when a physician, in response to a duly imposed by statute, makes disclosure to a public authority . . . to the extent only of what is necessary . . . , in the manner prescribed by law.” <i>Id.</i> at 832.</p>	Follow both.

Rule 26: Nebraska Discovery Rules; General Provisions Regarding Discovery

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>Rule 26(a) – Outlines general discovery methods which could be used to access PHI.</p> <p>Rule 26(b)(i) – authorizes discovery of relevant, non-privileged information.</p> <p>Rule 26(c) – Sets out method for obtaining a protective order.</p>	<p>Partially preempted if notice not given</p>	<p>Section 164.512(e)(1)(ii) permits disclosures for judicial or administrative proceedings in response to a discovery request <u>if</u> certain assurances and notices have been obtained or given: Subject of PHI has notice of discovery request or seeking party has obtained a qualified protective order. This sets higher requirements than Rule 26, with the effect that Rule 26 is preempted by HIPAA if notice meeting HIPAA requirements was not given, a qualified protective order must be obtained.</p>	<p>Follow State law and HIPAA regarding notice to subject of PHI.</p> <p>Follow HIPAA if notice not given to obtain qualified protective order.</p>

Health Clinic Peer Review; Neb. Rev. Stat. § 71-7901 (cross-reference)

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-7901 – Licensed health clinic or other association of practitioners may form or contract for peer review committee.	Not preempted	Not “contrary” – The function described in the statute appears to be “health care operations” to be conducted either internally or by external body as business associate.	Follow both.

(Hospital) Peer Review and Utilization Review; Neb. Rev. Stat. §§ 71-2046 to 2048 (cross-reference)

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 71-2046 – Hospitals must form Med Staff Committee and UR Committee to review quality and efficiency at the Hospital.</p>	Not preempted	Not “contrary” – As described, the committees and their function should come within “health care operations” at § 164.501.	Follow both; follow State law with respect to forming and charging the committees and any required consent for health care operations based on which group the provider is in; follow HIPAA requirements applicable to health care operations and notice.
<p>§ 71-2047 – Licensees and other personnel are required to furnish information to such committees upon request.</p> <p>One furnishing information to a committee has a privilege to refuse to disclose to anyone else the information so provided, unless a court orders disclosure and the patient waives the privilege.</p>	Not preempted	<p>Permitted under HIPAA if the entity meets requirements for health care operations. Additionally, a covered entity may use or disclose PHI “to the extent that such use or disclosure is <i>required by law</i> and the use or disclosure complies with and is limited to the relevant requirements of such law. § 164.512(a).</p> <p>More stringent; HIPAA has numerous exceptions which would permit compelling the individual to disclose the information without consent or authorization; here State law appears to trump and eliminate those exceptions.</p>	<p>Follow both.</p> <p>Follow State law, unless the provider chooses not to exercise the privilege; then follow HIPAA to determine if the disclosure is permitted.</p>
<p>§ 71-2048 – Work product of committees is privileged unless waived by the patient and a court orders disclosure.</p> <p>Privilege does not apply to medical records or fact information.</p>	Not preempted	<p>Not “contrary” – HIPAA permits disclosure without consent or authorization of the patient (§§ 164.506 and .508) and per court order in legal proceedings (§ 164.512(e)).</p> <p>Not “contrary” – HIPAA continues to apply to PHI, even in the absence of a State privilege.</p>	<p>Follow both; be sure HIPAA requirements for the two State law conditions for disclosure are fully satisfied.</p> <p>Follow HIPAA in evaluating disclosures not protected by the privilege.</p>

Hospital-Medical Liability Act--Medical Review Panels; Evidence Considered; Neb. Rev. Stat. §§ 44-2840 to 2847

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 44-2842 – (Medical Review panels review all malpractice claims against health care providers covered by the Hospital-Medical Liability Act prior to filing an action.)</p>	<p>Not preempted</p>	<p>Outside the scope of HIPAA; medical review panels are not covered entities for these purposes.</p>	<p>Follow State law.</p>
<p>Medical review panels may review medical records submitted by the parties and disclose copies of the information to the patient that would be admissible in a court of law.</p>	<p>Not preempted</p>	<p>Outside the scope of HIPAA; medical review panels are not covered entities for these purposes.</p>	<p>Follow State law.</p>
<p>§ 44-2846 –</p> <p>(1) The report of the medical review panel may be submitted into evidence, but all other proceedings and material submitted to the panel by the parties shall be treated as confidential.</p> <p>(2) When a patient or his or her representative initiates a proceeding before a medical review panel, the patient waives any privilege or rights under Chapter 27, article 5 as to any hospital records or testimony of any records of any physician.</p>	<p>Not preempted</p>	<p>Outside the scope of HIPAA; medical review panels are not covered entities for these purposes.</p>	<p>Follow State law.</p>

Medical Staff Committee and Utilization Review Committee Record; Neb. Rev. Stat. §§ 25-12,120 to 12,123

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 25-12,120 – Hospital and extended care facility patients are deemed to have consented to an examination of their records by a Medical Staff Committee or Utilization Review Committee for quality and utilization purposes.	Not preempted	HIPAA permits use and disclosure for healthcare operations without consent or authorization.	Follow HIPAA notice requirements; operate the committee to qualify as “health care operations.”
§ 25-12,123 – Confidentiality and privilege of certain peer review information of professional societies.	Not preempted	Not “contrary”; more stringent– Adds a layer of protection by imposing a State privacy duty on professional associations which are probably not “covered entities” under HIPAA.	Follow both; State law does not relieve <i>covered health care providers</i> of any duties to protect health information.

Physician/Patient–Client/Counselor Privilege; Court–Ordered Evaluations; Neb. Rev. Stat. § 27-504

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 27-504(2)(a) – Patient has privilege to refuse to disclose and to prevent others from disclosing confidential communications.	Not preempted	Not “contrary” – HIPAA § 164.512(e) allows for disclosures for judicial and administrative proceedings either pursuant to (i) court order or (ii) subpoena, discovery request, or other lawful process not accompanied by a court order if (a) satisfactory assurances of reasonable efforts to provide notice to patients. The above conditions should allow for the patient to raise the privilege under State law.	Follow both.
§ 27-504(4)(b) – No privilege for communications made during a court-ordered examination.	Not preempted	Not “contrary” – Under § 164.512(e), can disclose pursuant to court order.	Follow both.
All other sections regarding when there is no privilege.	Not preempted	Even though no privilege under State law, HIPAA still applies. Enforcement of HIPAA obligations does not depend on State privilege statute, so absence of privilege in any particular proceeding is not contrary to any HIPAA rule.	Follow both.

Preferred Provider Arrangements; Neb. Rev. Stat. §§ 44-4110.01 to .03

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 44-4110.01 – Clinical data held by a PPO is confidential; no disclosure unless one of three exceptions is present.</p>	<p>Not preempted</p>	<p>More stringent in the sense that State law provides fewer grounds for disclosure without consent than HIPAA. Actual disclosure would also need a HIPAA exception, unless the entire subject is excepted from the preemption analysis by virtue of Section 1178(b) of the Social Security Act and Section 160.203 of the regulations.</p>	<p>Follow State law to determine grounds for disclosure; then verify that a disclosure permitted under State law is also permitted under HIPAA; follow HIPAA requirements as to notice and authorization.</p>
<p>§ 44-4110.02 – Immunity for one who serves on or furnishes information to a health care review committee.</p>	<p>Not preempted</p>	<p>Not “contrary” – Only provides immunity from unique State causes of action. HIPAA immunity is measured by HIPAA compliance.</p>	<p>Follow both.</p>
<p>§ 44-4110.03 – Health care review committee records are confidential; not subject to subpoena or order to produce “except in proceedings before the appropriate State licensing or certifying agency . . . “</p>	<p>Not preempted</p>	<p>More stringent; State law narrows the possible disclosures of PHI in health care review committee records to health care oversight activities.</p>	<p>Follow State law.</p>

Psychologists – Privilege Against Disclosing; Waiver; Neb. Rev. Stat. § 71-206.29

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 71-1,206.29 – psychologist-patient relationship has same confidentiality footing as physician-patient relationship. Psychologist can claim privilege on behalf of patients.</p> <p>Psychologists <i>cannot claim privilege</i> in judicial, administrative, legislative or similar proceedings in any of 9 listed situations.</p>	<p>Not preempted</p>	<p>Not “contrary” – This is only a State privilege statute. Enforcement of HIPAA obligations does not depend on State privilege statute, so absence of privilege in particular proceedings is not contrary to any HIPAA rule. The psychologist, as a covered entity, would still need a HIPAA exception, consent or authorization in any of the 9 listed proceedings in order to disclose PHI. The statute simply withholds the evidentiary privilege as a basis for refusing to disclose, so the psychologist looks to HIPAA.</p> <p>Additionally, if when the psychologist is asked or compelled to disclose where there is no HIPAA exception applicable to the subject matter or circumstances, the psychologist would cite HIPAA preemption rules to the court, but ultimately comply with any court order to disclose pursuant to §164.512(d).</p>	<p>Follow HIPAA in deciding whether the psychologist has authority to disclose in the listed circumstances. Follow State law in determining whether State privilege applies.</p>

Quality Improvement Act; Neb. Rev. Stat. §§ 44-7209 to 7210

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 44-7210 – Clinical information is confidential; may not be disclosed except in the case of several listed exceptions.</p>	<p>Not preempted</p>	<p>More stringent in the sense that it limits disclosure to fewer grounds without patient authorization than HIPAA. Also, each State exception must have a comparable HIPAA exception to be effective.</p>	<p>First, follow State law and eliminate all additional HIPAA grounds for release not described in the State law. Next, test actual releases under State law to be sure they are <i>also</i> authorized by HIPAA. Finally, follow HIPAA with respect to the mechanics of notice/authorization.</p>
<p>Immunity for furnishing information to a health carrier's quality committee in furtherance of the Act.</p>	<p>Not preempted</p>	<p>Appears to fit within the statutory and regulatory exception from preemption at Section 1178(d) of the Social Security Act and Section 160.203 of the regulations.</p>	<p>Also, follow HIPAA as to notice and authorization.</p>
<p>Information considered by quality committee is confidential and not subject to subpoena or other discovery except proceedings before the State licensure agency.</p>	<p>Not preempted</p>	<p>More stringent; only one exception to confidentiality in the case of quality committee records.</p>	<p>Follow State law to determine authority to release; verify that the authority is also consistent with a HIPAA exception.</p>
<p>To fulfill their obligations, health carriers "shall have access to treatment records and other information pertaining to the diagnosis, treatment, or health status of any covered person."</p>	<p>Not preempted</p>	<p>Not "contrary" – But a covered entity disclosing PHI would still need to determine that its acts are authorized by HIPAA.</p>	<p>Follow both.</p>

6. Law Enforcement Purposes.

Controlled Substance; Practitioner Provide Information; Limitation on Liability or Penalty; Neb. Rev. Stat. § 28-1438.01 (related to Neb. Rev. Stat. § 28-418(1)(c) controlled substances violations (obtaining controlled substances by misrepresentation)).

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 28-1438.01 – Provides immunity to any practitioner who discloses information to law enforcement or a professional licensure board regarding unlawfully obtaining or attempting to obtain a controlled substance or prescription for a controlled substance.</p>	<p>Not preempted</p>	<p>Disclosure permitted under § 164.512(d) – health oversight activities.</p>	<p>Follow State law.</p>

Death During Apprehension or Custody; Neb. Rev. Stat. § 23-1821

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 23-1821 – “(1) Every hospital, emergency care facility, physician, nurse, out-of-hospital emergency care provider, or law enforcement officer shall immediately notify the county coroner in all cases when it appears that an individual has died while being apprehended by or while in the custody of a law enforcement officer or detention personnel.”</p>	<p>Not preempted</p>	<p>Not “contrary” – HIPAA §164.512(g) permits disclosures to coroners and medical examiners without consent, authorization, or opportunity to object.</p>	<p>Follow both.</p>

DNA Samples and Records; Neb. Rev. Stat. §§ 4105- to 4111

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 29-4105(2) – Nebraska State Patrol may contract with the University of Nebraska Medical Center to establish the State DNA Sample Bank at UNMC, which shall serve as the repository of DNA samples collected under the Act.</p>	<p>Not preempted</p>	<p>DNA samples and records become PHI once in the hands of UNMC. UNMC must follow HIPAA as to all administrative, technical and physical safeguards of such information, as well as notice and policy requirements.</p>	<p>Follow both.</p>
<p>§ 29-4107(1) – The DNA sample and thumbprint drawn pursuant to this section shall be delivered to the Nebraska State Patrol within 5 working days after drawing the sample.</p>	<p>Not preempted</p>	<p>Not “contrary” – Must rely on HIPAA exception found at § 164.512(a) which authorizes uses and disclosures required by law. May <u>only</u> disclose the DNA sample and thumbprint.</p>	<p>Follow both.</p>
<p>§ 29-4107(2) – Person drawing sample and transmitting DNA records not criminally liable if done in good faith; not civilly liable if done in reasonable manner.</p>	<p>Not preempted</p>	<p>Not “contrary” – Immunity from civil and criminal liability is only applicable to unique State causes of action. May be civilly or criminally liable for HIPAA violations independent of this State law immunity.</p>	<p>Follow both.</p>
<p>§ 29-4110(1) – Any person who has possession of or access to records in the State DNA Sample Bank shall not disclose such in any manner to any person or agency knowing that such person or agency is not authorized to receive them.</p>	<p>Not preempted</p>	<p>Not “contrary” – Cannot disclose except pursuant to State law and HIPAA authority.</p>	<p>Follow both.</p>

DNA Samples and Records; Neb. Rev. Stat. §§ 4105- to 4111 (Cont.)

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 29-4110(2) – Obtaining individually identifiable DNA samples or records without authorization is a Class III misdemeanor.</p>	<p>Not preempted</p>	<p>Not “contrary” – HIPAA may impose additional penalties for any violations of HIPAA.</p>	<p>Follow both to avoid State or HIPAA penalties.</p>
<p>§ 29-4111(1) – Any person with possession of or access to DNA samples or records in the DNA Data Base or DNA Sample Bank who discloses such info for pecuniary gain to unauthorized recipient is guilty of a Class III misdemeanor.</p>	<p>Not preempted</p>	<p>Not “contrary” – HIPAA may impose additional penalties for violations which also amount to violations of HIPAA.</p>	<p>Follow both to avoid State or HIPAA penalties.</p>

Motor Vehicle Accidents--Body Fluid Testing & Reporting; Neb. Rev. Stat. § 60-6,104 (cross-reference)

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 60-6,104 – Authorizes disclosure of test results to the official submitting the sample.	Not preempted	Disclosure permitted pursuant to “authorized investigative demand” under § 164.512(f)(1)(ii)(C) to official submitting sample	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such notice in disclosure).

Motor Vehicle Operators’ Licenses; Medical Reviews; Health Advisory Board; Reports; Neb. Rev. Stat. § 60-4,118

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 60-4,118.03 – Authorizes disclosure of physical or mental findings by practitioners to Health Advisory Board without the individual’s consent or authorization.	Not preempted	Disclosure permitted pursuant to “authorized investigative demand,” under § 164.512(f)(1)(ii)(C).	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e. describe such disclosure in notice)

Release of Records to Law Enforcement Training Center; 79 NAC Chapter 8

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>004.01A7c – Applicants complete a health questionnaire; the regulations specify minimum information, including: “a signed release by the examinee to allow doctors, hospitals or clinics involved in treatment of the examinee to release the examinee’s medical records to the Training Center.”</p>	<p>Not preempted</p>	<p>Not “contrary” – Merely describes contents of the health questionnaire.</p> <p>However, and importantly, a covered entity <i>could not rely on the release in the health questionnaire</i> as a basis to disclose PHI. The provider will need an authorization meeting the requirements of § 164.508 which cannot be a “compound” authorization combined with any other subject matter.</p>	<p>The covered entity should comply with HIPAA.</p>

Sexual Offenders--Disclosure of Discharge Plan; Neb. Rev. Stat. § 29-2930

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 29-2930 – Authorizes disclosure of findings of inpatient program and aftercare treatment plan for sexual offenders by treatment programs to the Department of Correctional Services, the Parole Board and the designated aftercare treatment program without consent or authorization.	Preempted	Disclosure is permissive and does not clearly fall within any of the HIPAA provisions. Therefore, HIPAA provides greater protection and State law is preempted.	Obtain authorization or court order to release information to Department of Corrections and Parole Board. Release to aftercare program permitted without consent for treatment purposes.

Sexual Offenders--HIV Testing; Neb. Rev. Stat. § 29-2290

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 29-2290 – Authorizes release of HIV test results of sexual offender by the Department of Corrections to the victim of a crime.	Not Preempted	Outside the scope of HIPAA, the Department of Corrections is not a covered entity for these purposes.	Follow state law.

Sexual Offender--Progress Reports; Neb. Rev. Stat. § 29-2929

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 29-2929 – Authorizes disclosures of progress reports of sexual offenders by treatment programs to the Department of Correctional Services without consent or authorization.	Preempted	Disclosure is permissive and does not clearly fall within any of the HIPAA provisions, therefore, HIPAA provides greater protection and State law is preempted.	Obtain authorization or court order to release information to Department of Corrections.

Sexual Offenders--Release of Information/Sex Offender Registration Act; Neb. Rev. Stat. § 29-4013

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 29-4013(f) – Authorizes access to records, including birth certificates, regarding sexual offenders, by mental health professional working in connection with the Nebraska State Patrol Sex Offender registration and community notification program.</p>	<p>Not preempted</p>	<p>Disclosure permitted pursuant to “authorized investigative demand,” under § 164.512(f)(1)(ii)(C).</p>	<p>Follow both.</p>

7. Organ/Tissue/Blood/Cadaveric Donation Purposes.

Blood Donation; Neb. Rev. Stat. § 71-4808			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-4808 – No person seventeen or eighteen years of age shall receive compensation for any donation of whole blood without parental permission or authorization.	Not preempted	Not “contrary” – Required notices to parents are expressly not preempted. See § 160.202 and definition of “more stringent.”	Follow State law.

(Authorization for) Removal and Transport of Organs; Neb. Rev. Stat. § 71-1341			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-1341 – Provides for authorization of donation by survivors(s) and disclosure to various organ procurement organizations.	Not preempted	HIPAA §164.152(h) permits uses and disclosures for cadaveric organ, eye, or tissue donation purposes without consent, authorization or opportunity to object.	Follow both.

8. Employers.

Employers--Discrimination on Basis of Genetic Information of Employee Prohibited; Neb. Rev. Stat. § 48-236

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 48.236 – Prohibits employers from using genetic information to refuse to hire or otherwise affect the employment of an individual.	Not preempted	Subject matter not specifically addressed by HIPAA for providers. Group health plans are not permitted to disclose PHI to employer for employment-related decisions.	Follow both.

Employment Practices--Genetic Testing Requirement Prohibited; Neb. Rev. Stat. § 77-5537

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 77-5537 – Prohibits companies with agreements under the Invest Nebraska Act from requiring genetic testing or disclosure of genetic information as a condition of employment.	Not preempted	Subject matter not specifically addressed by HIPAA.	Follow State law.

Workplace Inquiries and Fatalities; Reporting to Department of Labor; Neb. Rev. Stat. § 48-421

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 48-421 – Requires plants using machinery to report all accidents, fatal or otherwise, to the Department of Labor.	Not preempted	Statutorily excluded from preemption as workplace-related public health activity.	Follow State law.

9. Workers' Compensation.

Workers' Compensation; Neb. Rev. Stat. § 48-120			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 48-120(4) – Records relevant to the injury shall be made available on demand to employer, employee, the carrier, and the compensation court.	Not preempted	Not “contrary” – § 164.512(l) provides for release of records without consent or authorization as authorized by and to the extent necessary to comply with workers' compensation laws.	Follow both.

10. Health Care Facilities. Please read discussion on pages 12 and 13 regarding Group 1 and Group 2 providers.

Assisted Living Facilities' Licensure Regulations; 175 NAC 4-004			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
4-004.03S – Requirement that residents have a right “to review and receive a copy, within two working days of their permanent record . . .”	Not preempted	More stringent; HIPAA requires action on an individual’s request for access to their records no later than thirty days after receipt of the request. See §164.524(b)(2).	Follow State law.
4-004.11H – States: “the facility shall keep such records confidential unless medically contraindicated.”	Partially preempted	Access may only be denied if the more stringent HIPAA standard for claiming the therapeutic privilege at § 164.524(a)(3)(i) is met. Use this HIPAA standard to measure when release would be “medically contraindicated.”	Follow HIPAA standard to determine if State exception is met.
4-004.11H, cont. – “Records shall be subject to inspection by authorized representatives of the department [DHHS].	Not preempted	Not “contrary” – HIPAA §164.512(d)(iii) permits disclosure of PHI to a health oversight agency.	Follow both.
4-006.12A4 – “Resident information and/or records shall be released only with the consent of the patient or designee or as permitted by law.”	Not preempted; Group 1	HIPAA is the law that permits disclosure without authorization or consent as “required by law.”	Follow both.
4-006.12A3 – “The facility must keep such records confidential and available only for use by authorized persons or as otherwise permitted by law.”	Not preempted; Group 2	HIPAA is the law that permits disclosure without authorization or consent as “required by law.”	Follow both.

Adult Day Services; 175 NAC 5-006.15A3 and 5-006.15A4, 473 NAC 5-002.08D3

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>175 NAC 5-006.15A3 – “The ADS must keep client records confidential and available only for use by authorized persons or as otherwise permitted by law. The ADS must make records available for examination by authorized representatives of the Department.”</p>	<p>Not preempted</p>	<p>Disclosures to department permitted under § 164.512(d) for “health oversight activities.” Otherwise, HIPAA is the law that authorizes disclosure without authorization or consent.</p>	<p>Follow both.</p>
<p>175 NAC 5-006.15A4 – “The ADS must release client information and records only with consent of the client or designee or as permitted by law.</p>	<p>Not preempted; Group 1</p>	<p>Disclosures to department permitted under § 164.512(d) for “health oversight activities.” Otherwise, HIPAA is the law that authorizes disclosure without authorization or consent.</p>	<p>Follow both.</p>
<p>473 NAC 5-002.08D3 – “Adult day services staff shall maintain the following records: . . . signed consents for release of information about clients (i.e., for information-sharing with county staff regarding client needs assessment).</p>	<p>Not preempted</p>	<p>Disclosures to department permitted under § 164.512(d) for “health oversight activities.” Otherwise, HIPAA is the law that authorizes disclosure without authorization or consent.</p>	<p>Follow both.</p>

Centers for the Developmentally Disabled; 175 NAC 3-005.05H

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>3-005.05H – “Each resident shall be assured of confidential treatment of all information contained in his or her records and his or her written, informed consent, or the written, informed consent of his or her family, guardian, or representative, if applicable, shall be required for the release of information to persons not authorized under law to receive it.</p>	<p>Not preempted; Group 1</p>	<p>HIPAA permits disclosure without authorization or consent.</p>	<p>Follow both.</p>

Health Clinics Licensure Regulations; 175 NAC 7-006.04

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>175 NAC 7-006.04.7 – Health clinics are required to establish patients’ rights policies and procedures including personal privacy and confidentiality of medical records.</p>	<p>Not preempted</p>	<p>Not inconsistent with HIPAA. Policies may include or be comprised of HIPAA-required policies and procedures.</p>	<p>Follow both.</p>
<p>175 NAC 7-006.07A5 – “Patient information and records will be released only with consent of the patient or designee or as required by law.”</p>	<p>Not preempted; Group 2</p>	<p>State law sets higher standard; no permissive disclosures; only required disclosures without consent or authorization.</p>	<p>Obtain consent for disclosures other than those required by law.</p>

Home Health Agencies; 175 NAC 14

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
009.01H – Patient shall have access unless it is medically contraindicated in record.	Not preempted	Access may not be denied unless the more stringent HIPAA standard for claiming the therapeutic privilege at § 164.524(a)(3)(i) is met. Use this HIPAA standard to measure when release would be “medically contraindicated.”	Follow HIPAA standard to determine if State exception is met.
006.03 – Records must be available for inspection and copying by Department.	Not preempted	Health care oversight activity permitted under § 164.512(d).	Follow both.
006.01K – For transfer of patient to another agency, must transfer appropriate information with consent of patient.	Not preempted; Group 2	State law sets higher standard; requires consent for disclosure for treatment.	Follow state law.
006-01J – Must maintain information in parent home health agency office.	Not preempted	Would be included as health care operations under HIPAA.	Follow both.
006.0111 – Destruction of records by shredding, mutilation, or burning.	Not preempted	Not “contrary” – State law adds stricter requirements than HIPAA. HIPAA privacy rule requires administrative, physical, and technical safeguards, but does not specify approach.	Follow both.
006.01H – Clinical records shall be kept in locked storage.	Not preempted	Same as above.	Follow both.
006.01H – Written policies and procedures shall be developed regarding use and removal of records and conditions for release.	Not preempted	Policies and procedures must be consistent with HIPAA, or more stringent.	If more stringent, follow State law as to those issues. Follow HIPAA on remaining issues. If consistent, follow both.
006.01H – The patient’s or legal representative’s consent shall be required for the release of records not authorized by law.	Not preempted; Group 2	State law sets higher standard; no permissive disclosures, only disclosures required by law without consent or authorization.	Obtain consent when disclosure not required by law.

Home Health Agencies; 175 NAC 1 (Cont.)

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
005.03B – Agency providing care shall send a written summary report to the attending physician.	Not preempted	Consistent with HIPAA; may disclose for treatment without consent.	Follow both.

Hospices; 175 NAC Chapter 16

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
006.12C – Confidential information released only with consent of the patient or “as required by law.”	Not preempted; Group 2	More stringent; narrows the list of exceptions to those <i>required by law</i> . No permissive disclosures without consent.	Obtain consent when disclosure not required by law.
006.12D – If a patient is transferred to another health care provider, a copy of the record must be sent with the patient.	Not preempted	Not “contrary” – Subject to meeting HIPAA notice requirements, the sending facility can disclose to the receiving facility for treatment purposes without consent pursuant to § 164.506 or because the disclosure is “required by law” under § 164.512(a).	Follow both.
006.12D – The record must be subject to inspection by an authorized representative of Department.	Not preempted	Not “contrary” – HIPAA exception for health oversight activities at § 164.512(d).	Follow both.
006.12E – Destruction by shredding, mutilation or other means to preserve confidentiality.	Not preempted	Not “contrary.”	

Hospitals; 175 NAC 9-003.04A

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
.04A – Requires medical record; limits access to “authorized persons” and representatives of the Department.	Not preempted	Not “contrary” – Reference to “authorized persons” must be read to mean authorized per HIPAA; release to representatives of “Department” covered by § 164.512(d) (“uses and disclosures for health oversight activities”).	Follow both.
.04A6 – In case of closure, medical records “shall be transferred” to the hospital or other facility to which the patient is transferred.	Not preempted	Not “contrary” – HIPAA permits disclosures “required by law” when done in accordance with that law. §164.512. Additionally, HIPAA permits disclosure for treatment purposes when included in the notice.	Follow both.
“All other” hospital medical records not governed by specific provision “shall be disposed of” by shredding, mutilation, burning, or another equally effective protective measure.	Not preempted	Not “contrary” – There is no HIPAA medical record retention period, so disposition is permitted. State mandate on method is consistent with general provider obligation to assure privacy.	Follow both.
.07A – “. . . information may be released only with consent of the patient or designee or as permitted by law.”	Not preempted; Group 1	HIPAA may be source of disclosures “permitted by law.” May disclose without consent or authorization for permitted purposes under State law and HIPAA.	Follow both.

(Medicaid (NMAP) Requirements for) Hospital Medical Records Services; 471 NAC 10-013.01 (cross-reference)

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>471 NAC 10-013.01 “The hospital must have a procedure for ensuring the confidentiality of patient records. Information from, or copies of records may be released only to authorized individuals, and the hospital must ensure that unauthorized individuals cannot gain access to or alter patient records. Original medical records must be released by the hospital only in accordance with federal or State laws, court orders or subpoenas.”</p>	<p>Not preempted</p>	<p>Not “contrary” – HIPAA §164.530(c)(2) requires covered entities to provide protection for intentional or unintentional use or disclosure in violation of HIPAA.</p> <p>Authorizes releases without consent or authorization for permitted purposes under HIPAA, other federal, and State law.</p>	<p>Follow both.</p>

Intermediate Care Facilities; 175 NAC Chapter 8

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
003.02F3 – “[Resident] is fully informed by a physician of his or her health and medical condition unless medically contraindicated (as documented by a physician in the resident record...)”	Not preempted	Not “contrary” – Can be read together with the more stringent HIPAA standard for claiming the therapeutic privilege at § 164.524(a)(3)(i). Use this HIPAA standard to measure when release would be “medically contraindicated.”	Follow both; use HIPAA standards to determine if State exception is met.
003.02F8 – “[The Resident] is ensured confidential treatment of all information contained in his or her records, including information contained in an automatic data bank. His or her written consent or that of his or her guardian shall be required for the release of information to persons not otherwise authorized under law to receive it.”	Not preempted; Group 1	Not “contrary” – HIPAA expands on which releases would be “authorized under law.”	Follow both.
003.02F8a – “The facility shall limit access to any medical records to staff and consultants providing medical services to the resident. This is not meant to preclude access by representatives of State and Federal regulatory agencies.”	Not preempted	Access by regulatory agencies is excepted from consent, authorization, and objection requirements under §164.512(d) health oversight activities.	Follow both.

Intermediate Care Facilities; 175 NAC Chapter 8

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>003.02F8b – “Similar procedures must safeguard the confidentiality of a resident’s personal records (e.g., financial records and social services records). Only those personnel concerned with the fiscal affairs of residents are permitted to have access to their financial records.”</p>	<p>Not preempted</p>	<p>Under HIPAA §164.501, the definition of “individually identifiable health information,” includes all aspects of the record listed under the State regulation.</p>	<p>Follow both.</p>

Intermediate Care Facilities for the Mentally Retarded; 175 NAC Chapter 17

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>175 NAC 17-006.02 – Develop procedures which require reporting of any evidence of abuse, neglect or exploitation of any individual served by the facility in accordance with Neb. Rev. Stat. §§ 28-732 and 28-711. (There are no express medical records or confidentiality requirements pertinent to ICF-MR facilities.)</p>	<p>Not preempted</p>	<p>Reports of abuse and neglect are statutorily excluded from preemption.</p>	<p>Follow State law.</p>

Mental Health Centers; Neb. Rev. Stat. § 71-423 and Related Regulations; 175 NAC Chapter 19

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-423 – Merely establishes mental health centers as a facility category.	Not preempted	No preemptive effect.	Follow State law.
175 NAC 19-006.18B2 – “The facility must keep records confidential unless medically contraindicated.	Partially preempted	HIPAA does not permit records to be withheld from an individual for reason of “medical contraindication” alone. Must meet higher standard of “access is reasonably likely to endanger the life or physical safety of the individual or another person.”	Follow HIPAA.
“Records are subject to inspection by an authorized representative of the Department.”	Not preempted	Permitted under § 164.512(d) as a “health oversight activity.”	Follow both.
175 NAC 19-006.18B4 – “Client information and/or records may be released only with the consent of the client or client’s designee or as required by law.	Not preempted; Group 2	Higher standard under State law. No permissive disclosures without consent or authorization.	Obtain consent for disclosures not required by law.
When a client is transferred to another facility or service, appropriate information must be sent to the receiving facility or service.”	Not preempted	This disclosure to another covered entity is permitted for treatment purposes without consent under § 164.506	Follow both.

§ 71-8405 – No copying charge permitted in certain cases.	Not preempted	State law is more stringent and controls.	Follow State law.
§ 71-8407 – The Act [relating to access, copies, therapeutic privilege and fees] does not apply to records under the Workers' Comp Act.	Not preempted	Not "contrary" – HIPAA requirements continue to apply to PHI in the hands of covered health care providers, even if State rules do not.	Follow HIPAA.

Skilled Nursing Facilities; 175 NAC Chapter 12

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
006.05-3 – Residents have the right to be informed by a physician of their health and medical condition “unless medically contraindicated.”	Partially preempted	Access may be denied only if the stricter HIPAA standard for invoking the therapeutic privilege at §164.524(a)(3)(i) is met.	Follow HIPAA standard to determine if State exception is met.
006.05-18 – Residents have the right to “receive a copy of their permanent record within 2 working days.”	Not preempted	More stringent; HIPAA standard is 30 days.	Follow State law.
006.05-20 – All information confidential. Release requires consent of the resident unless “otherwise authorized under law.”	Not preempted; Group 1	Not “contrary” – Read with HIPAA which establishes other circumstances in which release is “authorized by law” without patient consent..	Follow both.
006.16C2 – Facility must protect confidentiality, regardless of the form or method of storage, except when release is authorized by:			
(1) Transfer agreement to another facility.	Not preempted	Not “contrary” – Can be read together with HIPAA requirement that the SNF include this type of disclosure in its notice of privacy practices.	Follow both.
(2) Law.	Not preempted	Not “contrary” – Incorporates HIPAA and HIPAA preemption principles.	Follow both.
(3) Third party payment contract.	Not preempted	Not “contrary” – Can be read together with HIPAA notice requirements for disclosure of information for payment purposes without consent.	Follow both.
(4) The resident or designee.	Not preempted	Not “contrary” – Can be read together with HIPAA notice and authorization requirements.	Follow both.
006.16C3 – Records subject to inspection by authorized representatives of the Department.	Not preempted	Not “contrary” – HIPAA exception for health oversight activities at § 64.512(d).	Follow both.

(Regulations for Certifying) Substance Abuse Programs; 203 NAC 15-012.02 and 203 NAC 15-015

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
012.02 – Must have written procedures to ensure coordination and continuity of care which comply with confidentiality requirements.	Not preempted	Not “contrary” – § 164.506 governs uses and disclosures for treatment purposes without consent.	Follow both.
015 – All information concerning the identity of clients in substance abuse programs is confidential.	Not preempted	HIPAA’s definition of individually identifiable information (§ 164.501) is broader.	HIPAA places additional requirements; follow both.
Requires policy describing specific procedures used to ensure confidentiality.	Not preempted	Policy must be consistent with HIPAA.	Follow both.
Policy must include procedures for release of information to, and obtaining information from, other providers.	Not preempted	Policy must be consistent with or more stringent than HIPAA.	Follow both.
Forms for release of information must be attached to policy.	Not preempted	Forms must comply with HIPAA.	Follow both.
Must have policy for storage of records.	Not preempted	HIPAA requires physical, technical, and administrative safeguards, but does not expressly mandate storage policy.	Follow both.
Copy of 42 CFR, Part 2, must be included.	Not preempted	Not “contrary” – State law adds requirement.	Follow both.

(Regulations for Certifying) Substance Abuse Programs; 203 NAC 15-012.02 and 203 NAC 15-015 (Cont.)

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>Client record must document that confidentiality procedures are followed for each release.</p>	<p>Not preempted</p>	<p>Not “contrary” – State law adds this requirement not found in HIPAA.</p>	<p>Follow both.</p>
<p>175 NAC 18-006.16B4 – “Client information and/or records may be released only with the consent of the client or the client’s designee or as required by law.”</p>	<p>Not preempted; Group 2</p>	<p>State law sets higher standard; no permissive disclosures without consent or authorization.</p>	<p>Obtain consent or authorization for disclosures not required by law.</p>

(Confidential Records of) Substance Abuse Treatment Centers; 175 NAC 18-006.16B to.16B5

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
006.16B4 – Confidential information may be released with consent of the client or designee “or as required by law.”	Not preempted	More stringent; narrows the list of exceptions to those <i>required</i> by law. The phrase “required by law” would mean by State law or HIPAA or other applicable law. Be sure when releasing because disclosure is “required by” State law that there is a corresponding HIPAA exception or that the HIPAA exception for disclosures “required by law” at §164.512(a) is met.	Follow State law regarding consent; follow HIPAA with regard to authorization/notice.
006.16B4 – When a patient is transferred to another facility or service, appropriate information must be sent to the receiving facility.	Not preempted	Not “contrary” – HIPAA permits disclosures for treatment purposes if described in facility’s notice. Also, HIPAA permits disclosures “required by law” at § 164.512.	Follow both.
006.16B5 – All records remain with the facility if there is change of ownership. In case of dissolution, facility notifies Department of location and storage of records.	Not preempted	Not “contrary” – While leaving records with the facility is a disclosure to the new owner, the disclosure is required by State law pursuant to §164.512(a).	Follow both; follow HIPAA with respect to notice.

11. [Licensed Professionals/Providers](#). Please read discussion on pages 12 and 13 regarding Group 1 and Group 2 providers.

Confidentiality Requirements for Licensed Professionals; Neb. Rev. Stat. § 71-148(9)			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-148(9) – For disciplinary purposes, “unprofessional conduct” includes “willful betrayal of a professional secret except as otherwise provided by law.”	Not preempted; Group 1	Not “contrary” – This is simply State law grounds for an additional penalty and has no effect on HIPAA grounds and penalties. HIPAA privacy standards may become the basis for measuring what is a “willful betrayal of a professional secret” in the future.	Follow both.

Advanced Practice Registered Nurses; 172 NAC 100-008.02			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
172 NAC 100-008.02 – [Grounds for denial of a license or discipline of a license.] – “Violating the confidentiality of information or knowledge concerning a patient.”	Not preempted; Group 1	Does not conflict with HIPAA.	Follow both.

Audiologists/Speech Pathologists; 172 NAC 23-013.0310

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>172 NAC 23-013.0310 – “Without the prior written consent of a patient, an Audiologist or Speech Pathologist holds in confidence information obtained from a patient, except in those unusual circumstances in which to do so would result in a clear danger to the person or others, or where otherwise required by law.</p>	<p>Not preempted; Group 2</p>	<p>State law provides higher standard. No permissive disclosures, only required disclosure without consent or authorization.</p>	<p>Obtain consent or authorization when disclosure not required by law.</p>

Certified Nurse Midwife; 172 NAC 104-008.02B

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
172 NAC 104-008.02B [Grounds for denial of a license or discipline of a license.] – “Violating the confidentiality of information or knowledge concerning the patient.”	Not preempted; Group 1	Does not conflict with HIPAA.	Follow both.

Certified Registered Nurse Anesthetist; 172 NAC 103-006.02B

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
172 NAC 103-006.02B [Grounds for denial of a license or discipline of a license.] – “Violating the confidentiality of information or knowledge concerning the patient.”	Not preempted; Group 1	Does not conflict with HIPAA.	Follow both.

Chiropractors; 172 NAC 29-009.10b

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
172 NAC 29-009.10b – “A chiropractor/ chiropractic physician must hold in confidence information obtained from a patient, except in those unusual circumstances in which to do so would result in clear danger to the person or to others, or where otherwise required by law. Failure to do so constitutes unprofessional conduct.”	Not preempted; Group 2	State law provides higher standard. No permissive disclosures, only required disclosure without consent or authorization.	Obtain consent or authorization when disclosure not required by law.

Emergency Medical Service (EMS) Patient Data; Neb. Rev. Stat. § 71-5185 (and Related Regulations at 172 NAC 12)

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-5185 – EMS providers must keep patient data confidential except to disclose to the receiving facility, as aggregate data reports or as “case specific data to approved researchers for specific research projects pursuant to § 81-666.	Partially preempted	Data may be released to receiving facility without consent for treatment purposes under § 164.506(a); aggregate data would meet standards for de-identified data under § 164.514(a). Uncertain regarding research purpose. HIPAA requires research to be approved by IRB or Privacy Board. Unclear whether state department as described in § 81.666 meets this standard.	Follow State law except, obtain authorization for data released to researchers.

Emergency Medical Service Providers; 172 NAC 12-006.0302

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
172 NAC 12-006.0302 – “An emergency medical services provider must hold in confidence information obtained from a patient, except in those unusual circumstances in which to do so would result in clear danger to the person or to others, or where otherwise required by law. Failure to do so shall constitute unprofessional conduct.”	Not preempted; Group 2	State law provides higher standard. No permissive disclosures, only required disclosure without consent or authorization.	Obtain consent or authorization when disclosure not required by law.

(Licensed) Dentists--Incident Reports; Neb. Rev. Stat. § 71-193.34

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-193.34 – Licensed dentists are required to submit reports of death or physical or mental injury to patients requiring hospitalization resulting from inhalation analgesia, parenteral sedation, or general anesthesia.	Not Preempted; Group 1	Information required to be reported does not identify patients, so meets the standards under § 164.514 for de-identification of data. May also rely on § 164.5121(a) which permits uses and disclosures “required by law” for public health purposes.	Follow both.

Licensed Health Practitioners' Peer Review Committees--Proceedings & Records; Neb. Rev. Stat. § 25-12,123

§ 25-12,123 – Confidentiality and privilege of certain peer review information of professional societies.	Not preempted	Not “contrary”; more stringent– Adds a layer of protection by imposing a State privacy duty on professional associations which are probably not “covered entities” under HIPAA.	Follow both; State law does not relieve <i>covered health care providers</i> of any duties to protect health information.
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Licensed Mental Health Practitioners; Neb. Rev. Stat. §§ 71-1,295 to 1,338

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 71-1,335 – LMHP duty of confidentiality; Exceptions for:</p> <p>(1) written consent of the individual(s). (2) As limited by NAC. (3) When the individual “waives the privilege by bringing charges against the licensee.” (4) When there is a duty to warn per statute.</p>	<p>Not preempted</p>	<p>Not “contrary”</p> <p>(1) Can be read to incorporate HIPAA notice and authorization requirements. (2) Depends upon particular rule. Evaluate. (3) The activity may be “health care operations” or other specific disclosure exceptions may apply. (4) See analysis of 71-1,336 (“duty to warn”).</p>	<p>Follow both; under (2) examine the particular NAC rule for HIPAA compliance; for (4) follow analysis of § 71-1,336.</p>
<p>§ 71-1,336 –</p> <p>(1) No liability for failure to warn except when “the patient has communicated . . . a serious threat of physical violence against [self] or a reasonably identifiable victim or victims.” (2) Duty to warn limited to the circumstances described above; Can warn intended victim and law enforcement agency. (3) No liability to licensee for complying.</p>	<p>Not preempted</p>	<p>Not “contrary” – § 164.512(j) permits disclosure without consent or authorization “consistent with applicable law and standards of ethical conduct” when necessary to prevent or lessen a serious or imminent threat to the health or safety of a person or the public. HIPAA and State standards can be read as consistent; State law can be read as creating a duty.</p>	<p>Follow both. Include in notice of privacy practices.</p>
<p>172 NAC 94-011.02 – “A licensee/certificate holder must hold in confidence information obtained from a patient/client, except in those unusual circumstances in which to do so would result in clear danger to the person or where otherwise required by law.”</p>	<p>Not preempted; Group 2</p>	<p>State law provides higher standard. No permissive disclosures, only required disclosures without consent or authorization.</p>	<p>Consent when disclosure not required by law.</p>

***Lipari v. Sears, Roebuck & Co.*; 497 F. Supp. 185 (Neb. 1980)**

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p><i>Lipari v. Sears, Roebuck & Co.</i> – Common law; duty to warn.</p> <p>(See also analysis of Neb. Rev. Stat. §§ 71-1,295 to 1,338 (duty to warn for LMHPs) and § 71-206.29 (duty to warn for psychologists). The relationship between a psychotherapist and his patient gives rise to an affirmative duty for the benefit of third persons. This duty requires the therapist to initiate whatever precautions are necessary to protect potential victims of his patient. The duty arises when, in accordance with the standards of his profession, the therapist knows or should know that his patient's dangerous propensities present an unreasonable risk of harm to others. (Applies to professions other than LMHPs or psychologists.)</p>	<p>Not preempted</p>	<p>Not “contrary” -- § 164.512(j) permits good faith disclosures to “avert a serious or imminent threat to health or safety.” There are limitations as to the type of information that may be disclosed depending on the circumstances, so case-by-case analysis is required and HIPAA may impose additional requirements.</p>	<p>Follow both.</p>

Mammography Supplier; Eligibility for State Reimbursement; Neb. Rev. Stat. § 71-7004

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 71-7004(5) – “Mammogram supplier agrees to provide to the department a written report of the interpretation of the results of the screening mammogram procedure.” Submission of report appears to be prerequisite for payment.</p>	<p>Not preempted</p>	<p>Not “contrary” – HIPAA §164.512(d) permits uses and disclosures for health oversight activities (ii) Gov’t benefit programs for which health information is relevant to beneficiary eligibility. HIPAA also permits disclosures for payment purposes without consent.</p>	<p>Follow both.</p>

Mammograms--Interpreting Physician--Inclusion in Medical Records; Neb. Rev. Stat. § 71-7007

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 71-7007 – Physician authorized to send written report and films to mammogram supplier for the patient’s medical records.</p>	<p>Not preempted</p>	<p>Disclosure to another health care provider for purposes of health care operations is permitted under § 164.506(c) without consent.</p>	<p>Follow both.</p>

Medical Nutrition Therapists; 172 NAC 61-010.05

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
172 NAC 61-010.05 – [Grounds for denial of a license or discipline of license.] – [Unprofessional conduct includes . . .] “Failure to maintain confidentiality of information.”	Not preempted; Group 1	Does not conflict with HIPAA.	Follow both.

Nursing Home Administrator; 172 NAC 106-015.5

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
172 NAC 106-015.5 – [Grounds for denial of a license or discipline of a license.] – “Violating the confidentiality of information or knowledge concerning the patient or resident.”	Not preempted; Group 1	Does not conflict with HIPAA.	Follow both.

Nurses; 172 NAC 101-007.03.5

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
172 NAC 101-007.03.5 – [Grounds for denial of a license or discipline of a license.] – “Violating the confidentiality of information or knowledge concerning the patient or resident.”	Not preempted; Group 1	Does not conflict with HIPAA.	Follow both.

Occupational Therapists; 172 NAC 114-008.03.105

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
172 NAC 114-008.03.105 – [Grounds for denial of a license or discipline of a license.] – “Violating the confidentiality of information or knowledge concerning the patient or resident.”	Not preempted; Group 1	Does not conflict with HIPAA.	Follow both.

Pharmacist/Pharmacy Confidentiality Requirements; Neb. Rev. Stat. §§ 71-1,147.33 and 71-1,147.36

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-1,147.33 – Pharmacy techs may not release confidential information maintained by the pharmacy. § 71-1,147.36	Not preempted	Higher standard than HIPAA.	Pharmacy techs may not release any information.
(1) Patient information is privileged and confidential and may be released only to: the patient or designee, the patient's physician, other physicians or pharmacists when necessary to protect the patient's health or well-being, or other persons or government agencies authorized to receive the information.	Not preempted; Group 1	Wording does not limit disclosures only to those required by law, but to other persons or government agencies authorized to receive. Authority could then include all HIPAA provisions.	Follow both.
(2) Confidential information may be released to researchers approved by an IRB compliant with 21 CFR Parts 50 and 56 or 45 CFR Part 46.	Not preempted	Permitted by HIPAA under § 164.512(i) disclosures for research purposes.	Follow both.

Pharmacy Regulations; Recordkeeping of Drugs Dispensed Pursuant to a Prescription or Prescription Order; 172 NAC 178-005.12

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
005.12C – Shall generate a daily printout of controlled substances.	Not preempted	State law does not include any requirements regarding maintenance, use, or disclosure.	Follow both.

Physical Therapists; 172 NAC 137-019.03.10b

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>172 NAC 137-019.03.10b – “Without the prior consent of a patient, a physical therapist/physical therapist assistant must hold in confidence information obtained from a patient, except in those unusual circumstances in which to do so would result in clear danger to the person or to others, or where otherwise required by law. Failure to do so shall constitute unprofessional conduct.”</p>	<p>Not preempted; Group 2</p>	<p>State law provides higher standard; no permissive disclosures, only those required by law without consent or authorization.</p>	<p>Obtain consent or authorization when disclosure not required by law.</p>

Physicians and Surgeons and Osteopathic Physicians and Surgeons; 172 NAC 88-013.002

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>172 NAC 88-013.002 – [Unprofessional conduct includes . . .] “Willfully or negligently violating the confidentiality between physician and patient except as required by law.”</p>	<p>Not preempted; Group 2</p>	<p>State law provides higher standard; no permissive disclosures, only those required by law without consent or authorization.</p>	<p>Obtain consent or authorization when disclosure not required by law.</p>

Physician Assistants; 172 NAC 90-004.18b

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>172 NAC 90-004.18b – [Unprofessional conduct includes . . .] “Willfully or negligently violating the confidentiality between physician and patient except as required by law.”</p>	<p>Not preempted; Group 2</p>	<p>State law provides higher standard; no permissive disclosures, only those required by law without consent or authorization.</p>	<p>Obtain consent or authorization when disclosure not required by law.</p>

Psychologists; 172 NAC 156-006

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
172 NAC 156-006 – “A psychologist must hold in confidence information obtained from a client, except in those unusual circumstances in which to do so would result in clear danger to the person or to others or where otherwise required by law. Failure to do so shall constitute unprofessional conduct.”	Not preempted; Group 2	State law provides higher standard; no permissive disclosures, only required disclosures without consent or authorization.	Obtain consent or authorization when disclosure not required by law.

Respiratory Therapists; 172 NAC 162-010.03.10b

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
172 NAC 162-010.03.10b – “A respiratory care practitioner must hold in confidence information obtained from a client, except in those unusual circumstances in which to do so would result in clear danger to the person or to others or where otherwise required by law. Failure to do so shall constitute unprofessional conduct.”	Not preempted; Group 2	State law provides higher standard; no permissive disclosures, only those required by law without consent or authorization.	Obtain consent or authorization when disclosure not required by law.

12. Insurance/Managed Care/HMOs.

Genetic Testing Requirement For Policies--Prohibited; Neb. Rev. Stat. § 44-7,100			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 44-7,100 – Hospital, medical, or surgical insurance policies/ certificates or self-funded employee benefit plans “shall not require a covered person or a dependent or a symptomatic applicant for coverage of an asymptomatic dependent to undergo any genetic test before issuing, renewing, or continuing the policy or certificate . . .”	Not preempted	Not within the scope of HIPAA.	Follow State law.

HMO; Confidentiality of Enrollee Information; Neb. Rev. Stat. §§ 44-32,172 to 32,174

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 44-32,172 – Clinical information in the hands of an HMO is confidential; can only be released with patient consent or in three other listed circumstances.	Not preempted	More stringent in the sense that this statute sets forth only three grounds for release without patient consent. Additionally, eliminate any of the listed State grounds which do not also have a basis in HIPAA.	First, follow State law and eliminate all additional HIPAA grounds for release not described in the State law. Next, test actual releases under State law to be sure they are <i>also</i> authorized by HIPAA. Finally, follow HIPAA with respect to the mechanics of notice and authorization.
§ 32,173 – Immunity for furnishing information to an HMO health care review committee.	Not preempted	Not “contrary” – Only grants immunity from unique State causes of action. Liability under HIPAA still measured by HIPAA rules.	Follow both.

HMO Quality Assurance Program--Requirements; Neb. Rev. Stat. § 44-32,127

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 44-32,127(2)(d) – HMOs are required to maintain quality assurance programs which include confidential policies and procedures.	Not preempted	“Confidential policies and procedures” should include HIPAA requirements.	Follow both.

Insurers--Reporting Violations of Professional Regulations by Health Care Practitioners to the Department; Neb. Rev. Stat. § 71-1,199

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 71-1,199 – “Unless such knowledge or information is based on confidential medical records protected by [federal substance abuse information confidentiality regulations]:</p> <p>(1) Any insurer having knowledge of any violation of the regulatory provisions governing the profession of the practitioner being reported shall report the facts of the violation . . . to the department; and</p> <p>(2) All insurers shall cooperate with the department and provide such information as requested by the department concerning any possible violations by any practitioner.</p>	<p>Not preempted</p>	<p>Disclosures permitted pursuant to § 164.512(d) “disclosures for health oversight activities” of state professional licensure boards.</p>	<p>Follow State law.</p>

Preferred Provider Arrangements; Neb. Rev. Stat. §§ 44-4110.01 to .03

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 44-4110.01 – Clinical data held by a PPO is confidential; no disclosure unless one of three exceptions is present.	Not preempted	More stringent in the sense that State law provides fewer grounds for disclosure without consent than HIPAA. Actual disclosure would also need a HIPAA exception, unless the entire subject is excepted from the preemption analysis by virtue of Section 1178(b) of the Social Security Act and Section 160.203 of the regulations.	Follow State law to determine grounds for disclosure; then verify that a disclosure permitted under State law is also permitted under HIPAA; follow HIPAA requirements as to consent/notice and authorization.
§ 44-4110.02 – Immunity for one who serves on or furnishes information to a health care review committee.	Not preempted	Not “contrary” – Only provides immunity from unique State causes of action. HIPAA immunity is measured by HIPAA compliance.	Follow both.
§ 44-4110.03 – Health care review committee records are confidential; not subject to subpoena or order to produce “except in proceedings before the appropriate State licensing or certifying agency . . . “	Not preempted	More stringent; State law narrows the possible disclosures of PHI in health care review committee records to health care oversight activities.	Follow State law.

NOTE: The Privacy of Insurance Consumer Information Act; Neb Rev. Stat. §§ 44-901 to 44-925 enacted in 2001, governs licensees of the Department of Insurance with respect to the “nonpublic personal health information” and nonpublic personal financial information” of insureds. We have not included this Act in our analysis here as our focus is health care providers, rather than the insurance industry.

13. [Nebraska Medical Assistance Program \(Medicaid\)](#).

Medicaid (NMAP) Requirements for Hospital Medical Records Services; 471 NAC 10-013.01 (cross-reference)

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>471 NAC 10-013.01 “The hospital must have a procedure for ensuring the confidentiality of patient records. Information from, or copies of records may be released only to authorized individuals, and the hospital must ensure that unauthorized individuals cannot gain access to or alter patient records. Original medical records must be released by the hospital only in accordance with federal or State laws, court orders or subpoenas.”</p>	<p>Not preempted</p>	<p>Not “contrary” – HIPAA §164.530(c)(2) requires covered entities to provide protection for intentional or unintentional use or disclosure in violation of HIPAA.</p>	<p>Follow both.</p>

Nebraska Medical Assistance Program; Applicant Information; Confidentiality; Assignment of Rights; Neb. Rev. Stat. §§ 68-1025 to 68-1026

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 68-1025 – “Information regarding applicants for or recipients of medical assistance shall be safeguarded and may be used only for purposes connected with the administration of such medical assistance.</p>	<p>May Be Partially Preempted</p>	<p>Relates strictly to disclosures by DHHS. HIPAA provides special rules under § 164.512(K)(6) for “covered entities that are government programs providing public benefits” that can be read as narrower than § 68-1025 of Nebraska law, provided that DHHS would be considered a covered entity for this purpose.</p>	<p>If DHHS is a covered entity, follow HIPAA.</p>

14. Parents and Guardians.

Divorced Parents Access to Child’s Medical Record; Neb. Rev. Stat. §§ 42-364(4) and 381			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§§ 42-364(4) and 381 – Divorced parents access to child’s medical record.	Not preempted	Regulatory exclusion from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

Guardianship Act; Neb. Rev. Stat. § 30-2601 et seq.			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 30-2628 – (General Powers of Guardians) (3) “A guardian may give consents or approvals that may be necessary to enable the ward to receive medical, psychiatric, psychological, or other professional care, counsel, treatment, or service . . . Notwithstanding this provision or any other provision of the Nebraska Probate Code, the ward may authorize the release of financial, medical, and other confidential records pursuant to §§ 20-161 to 20-166.” (Governing rights of developmentally disabled persons to consent to release of their own records. (See complete analysis in separate section.)	Not preempted	If ward is a minor, there is an exception under HIPAA §160.502 for release to parents, guardians, or those acting in <i>loco parentis</i> for minors. §164.502(g)(1) specifies that covered entities must treat a personal representative as the individual except where minors are authorized by law to consent to the health care procedure; subject to judicial order; or when the parent or guardian has consented to confidentiality between the minor and the provider. Guardians are personal representatives. See Preamble discussion of “personal representative at p. 82633. HIPAA contains a stricter requirement at §164.514(h) requiring verification of authority of the personal representative.	Follow both.

Involvement of Family in Alcohol and Drug Treatment of Minor; Neb. Rev. Stat. § 71-5041

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-5041 – Shall attempt to involve the minor’s <u>family</u> .	Not preempted	Family: (1) Parents – Regulatory exclusion from preemption for any laws governing parental access to records of minors. (2) Other Family – § 164.510(b) allows disclosure to family member or relative information directly relevant to such person’s involvement with the individual’s care if (i) obtain individual’s agreement; (ii) provide individual an opportunity to object and does not; or (iii) infer from the circumstances that person does not object.	Follow both. State law requires an <u>attempt</u> to involve family. Involvement in treatment inevitably includes disclosure of information covered under HIPAA. If the individual objects to such involvement or disclosure, duty under State law would be discharged.

Notification to Parent of Minor Abortion; Neb. Rev. Stat. §§ 71-6902 to 6906

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§§ 71-6902 to 6906 – Prior notice to parents of abortion; judicial bypass.	Not preempted	Regulatory exception – HIPAA does not preempt any State law that authorizes or prohibits disclosure of PHI about a minor to a parent, guardian, etc. See § 160.202.	Must comply with State law and all HIPAA provisions which can be read together with this notification requirement.

Parenting Act; Neb. Rev. Stat. § 43-2981 *et seq.*

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 43-2981 – Parental access to child’s medical record.	Not preempted	Regulatory exclusion from preemption.	Follow State law as to subject matter. Where State law and HIPAA can be read together, follow both (i.e., describe such disclosure in notice).

**Parental Support and Paternity--Genetic Testing Authorized and Admissible as Evidence;
Neb. Rev. Stat. §§ 43-1414 to 43-1418**

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 43-1414 – “Establishes procedures for court-ordered genetic testing in paternity proceedings.</p>	<p>Not preempted</p>	<p>In general, disclosures are permitted as a court-ordered test under § 164.512(e) as a “disclosure for judicial or administrative proceedings.”</p>	<p>Follow State law.</p>
<p>§ 43-1414(4) – “If a man is found not to be the father, the genetic testing material will be destroyed by the lab in the presence of a witness and will keep a written record of the destruction and expunge its records of the test results.</p>	<p>Not preempted</p>	<p>Offers greater protection than HIPAA in regard to amendment of records.</p>	<p>Follow State law.</p>
<p>§ 43-1414(5) – Testing labs are required to protect the confidentiality of genetic testing material and may not disclose such information for a purpose other than paternity determination.</p>	<p>Not preempted</p>	<p>Disclosure permitted as a court-ordered test under § 164.512(e) “disclosures for judicial and administrative proceedings.”</p>	<p>Follow State law.</p>

(Genetic Testing and) Support Orders; Access to Records; Neb. Rev. Stat. § 43-3327

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 43-3327(2) – <i>Notwithstanding any other provision of law regarding the confidentiality of records</i>, the Director of HHS, a county attorney or an authorized attorney (employed by county, DHHS, or appointed by court to prosecute child support cases) may (without a court order):</p>	<p>Italicized sentence is partially preempted</p>	<p>“Any other provision of law regarding the confidentiality of records” would include HIPAA, and this State law does not preempt all requirements of HIPAA.</p>	<p>Must continue to follow HIPAA confidentiality provisions unless a specific State law is contrary and more stringent.</p>
<p>(a) compel by subpoena genetic testing information relevant to establishing, modifying, or supporting court order.</p>	<p>Not preempted</p>	<p>(a) Must rely on § 164.512(a) which permits disclosures to the extent that such disclosure is required by law and the use or disclosure complies with the requirements of such law.</p>	<p>(a) Follow both; must include in notice.</p>
<p>(b) Obtain access to information contained in records of State agencies pertaining to genetic testing.</p>	<p>Not preempted</p>	<p>(b) Outside the control of covered entities.</p>	<p>(b) No requirements on covered entities.</p>

(Genetic Testing and) Support Orders; Access to Records; Neb. Rev. Stat. § 43-3327 (Cont.)

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
43-3327(4) – All info acquired pursuant to this section is confidential and can only be re-released pursuant to this section	Not preempted	Outside control of covered entities.	No requirement on covered entities.
Person who receives info pursuant to this section or provides records or info pursuant to this section is immune from civil or criminal liability.	Not preempted	Not “contrary” – There is no equivalent HIPAA “immunity.” State immunity is effective as to unique State law causes of action, but State immunity would not protect against civil or criminal penalties for HIPAA violation.	Follow both in order to avoid State or HIPAA liability.
Any person acquiring information pursuant to this section who discloses or re-releases info is guilty of a Class III misdemeanor.	Not preempted	Not “contrary” – Penalties for State law causes of action only. Additional penalties may be imposed for HIPAA violations.	Follow both in order to avoid State or HIPAA penalties.

15. [Health Oversight Activities.](#)

Health Care Data Analysis; Neb. Rev. Stat. §§ 81-676 to 680			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 81-676 to 680 – Establishment and duties of health care data analysis section to conduct data and research initiatives.	Not preempted	Not “contrary” – Purpose of State law is to improve efficiency and effectiveness. Consistent with § 164.512(d) of HIPAA allowing for uses and disclosures without authorization for health oversight activities.	Follow both.

Insurers--Reporting Violations of Professional Regulations by Health Care Practitioners to the Department; Neb. Rev. Stat. § 71-1,199			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 71-1,199 – “Unless such knowledge or information is based on confidential medical records protected by [federal substance abuse information confidentiality regulations]:</p> <p>(1) Any insurer having knowledge of any violation of the regulatory provisions governing the profession of the practitioner being reported shall report the facts of the violation . . . to the department; and</p> <p>(2) All insurers shall cooperate with the department and provide such information as requested by the department concerning any possible violations by any practitioner.</p>	Not preempted	Disclosures permitted pursuant to § 164.512(d) “disclosures for health oversight activities” of state professional licensure boards.	Follow State law.

Uniform Reporting Act; Neb. Rev. Stat. §§ 71-168 and 168.01

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
§ 71-168(1) – Every credentialed person listed under (4) shall furnish evidence he or she may have relative to violation of Uniform Licensing Law which is being investigated.	Not preempted	Consistent with HIPAA § 164.512(d) which allows for disclosure of information for health oversight activities, including civil, administrative, or criminal investigations and licensure or disciplinary actions. May also rely on § 164.512(a) which permits uses and disclosures “required by law.”	Follow both.
§ 71-168(2) – Listed credentialed person must report to the Department first-hand knowledge of acts indicative of gross incompetence, negligent conduct, impaired by emotional disability, or in violation of regulations governing that provision. Also must report when he or she is the subject of certain actions.	Not preempted	Same as above—health oversight for licensure or disciplinary actions.	Follow both.

16. Other.

Early Intervention Services Coordination; Confidentiality; 480 NAC 10-006			
<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
006(A)(1) – Parent/guardian consent for disclosure.	Not preempted	More stringent; requires parent/guardian consent before personally identifiable information is disclosed to <u>anyone</u> other than service coordination staff. § 164.512 of HIPAA allows for disclosures without consent or authorization in several circumstances.	Follow State law as to this subparagraph; comply with other consistent requirements of HIPAA.
006(A)(2) – Contracting agency must protect confidentiality.	Not preempted	Can meet both HIPAA and State law requirements.	Follow both.
10-006(A)(3) – Storage of information.	Not preempted	More stringent; § 164.530(c)(1) generally requires physical safeguards. State law is more stringent by specifying types of required safeguards.	Follow State law.
006(A)(4) – Responsible official; list of employees with access.	Not preempted	Second sentence more stringent; § 164.530(a)(1) mandates designation of privacy official. Can meet both State law and HIPAA requirements. State law adds requirement to maintain, for public inspection, a list of all employees with access to health information.	Follow both. Must comply with this additional requirement.
006(A)(5) – Maintain record of persons accessing records, except access by parents or staff members (name, date, purpose).	Not preempted	More stringent; § 164.528 is broader in terms of when such an accounting is not required (i.e., payment for health care, law enforcement).	Follow State law.

Nebraska Telehealth Act; Neb. Rev. Stat. §§ 71-8501 to 71-8508 and Related Regulations; 471 NAC 1-006.10

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 71-8505 (1) and 1(b) – Requirement of written consent re: confidentiality and other issues as responsibility of telehealth practitioner prior to telehealth services.</p>	<p>Not preempted</p>	<p>More stringent; State law requires consent where HIPAA would not for an “indirect” treatment relationship. Contrast § 164.506(a)(2)(l).</p>	<p>Follow State law.</p>
<p>§ 71-8505(c) – The consent must State that the patient will have access to all telehealth medical information as provided by law for all medical records.</p>	<p>Not preempted</p>	<p>Not “contrary” - HIPAA will be the “law” in effect and contains detailed provisions for release of PHI to the individual. See §164.524.</p>	<p>Follow both.</p>
<p>§ 71-8505(d) – The consent must include a Statement that dissemination of telehealth images or information to “researchers or other entities” will not occur without patient consent.</p>	<p>Not preempted</p>	<p>More stringent; HIPAA permits disclosure for treatment, payment and healthcare operation without consent (§164.506). The cited State law effectively eliminates these.</p>	<p>Follow both. Limit disclosure per State law and follow HIPAA for notice and authorization.</p>
<p>§ 71-8505(3) Substitute consent permitted by “the patient’s legally authorized representative.”</p>	<p>Not preempted</p>	<p>Not “contrary” - HIPAA §164.508(c)(viii) permits authorizations to be signed by “a personal representative of the individual, [accompanied by] a description of such representative’s authority to act for the individual.”</p>	<p>Follow both</p>
<p>§ 71-8505(4) – Provides emergency exception to consent requirement when patient is incapable and legally authorized representative is unavailable.</p>	<p>Not preempted</p>	<p>Not “contrary” – HIPAA permits disclosures related to treatment, payment, or health care operations without consent. Emergencies would fall under this provision.</p>	<p>Follow both.</p>

Physician Ordered Genetic Test--Patient's Written Consent Required; Neb. Rev. Stat. § 71-1,104.01, as amended by LB 119 (2003)

<u>Citation and Subject</u>	<u>Preemptive Effect</u>	<u>Explanation/Comment</u>	<u>Practical Effect</u>
<p>§ 71-1,104.01 – Patient consent for predictive genetic test must include confirmation that the patient understands the future uses of the genetic sample and who will have access to the genetic sample and the genetic information obtained from the test and the patient's right to confidential treatment of the sample and the genetic information.</p>	<p>Not preempted</p>	<p>HIPAA does not cover informed consent issues. State law offers greater protection.</p>	<p>Follow State law.</p>

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