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# **COVID-19 Privacy Concerns & Response Strategies**

Elizabeth Litten, Mark McCreary and Stephen Ludwig

# Cybersecurity and Privacy Considerations for Remote Working

- Issues Inherent to Remote Access
- Resiliency of Remote Systems
- Use of Personal Computers
- Paper!
- Heightened Risk of Phishing and Scams
- IT Department Concerns
- Data Incidents



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# Issues Inherent to Remote Access

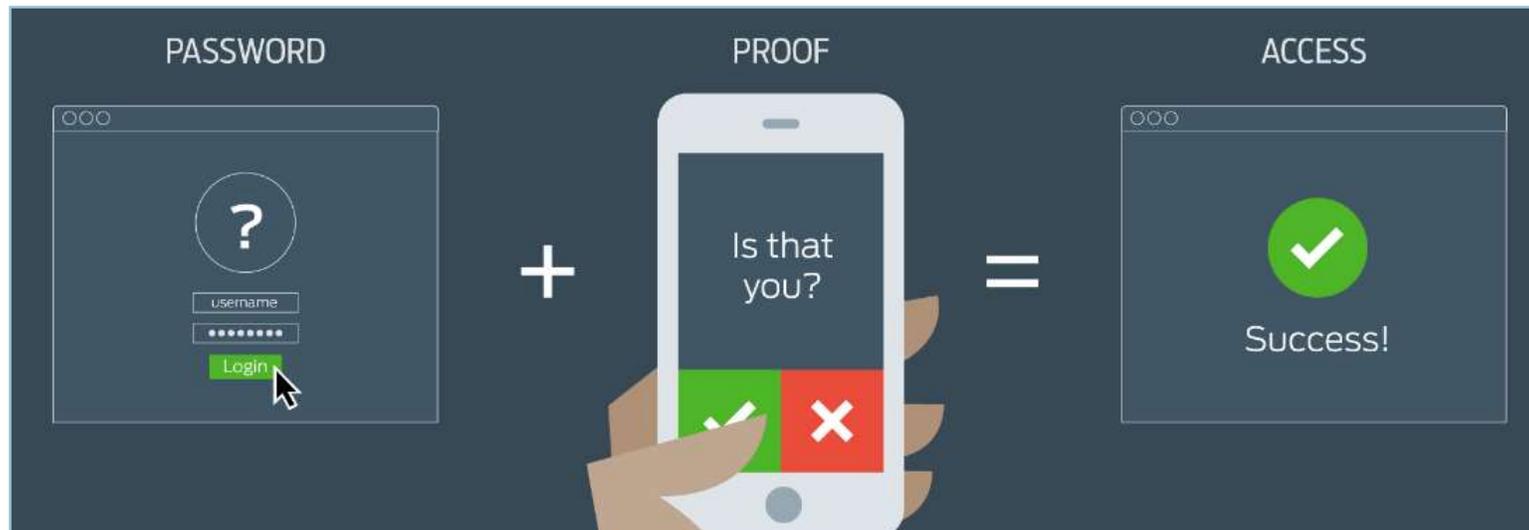
- Connecting through company-issued computers (VPN)
- Transporting desktop computers to homes
- Citrix, Remote Desktop Service



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# Issues Inherent to Remote Access

- Multi-factor security
  - Licensing
  - Training
  - Mobile and home numbers



# Issues Inherent to Remote Access

- Unsafe Wi-Fi



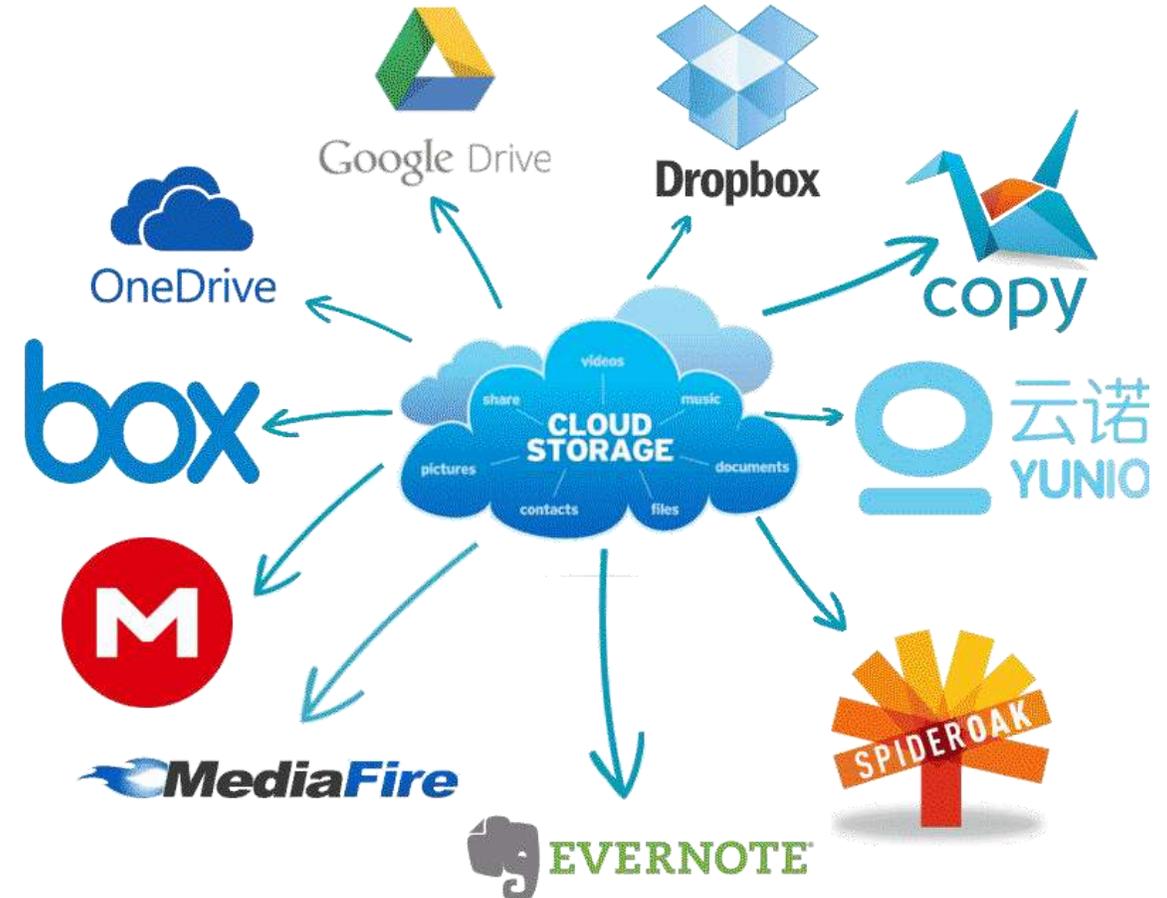
# Resiliency of Remote Systems

- Adequate systems to support all remote workers must be tested
- Workload is difficult to predict
  - Changes constantly
  - Time zone loads can be sudden
- Inadequate bandwidth or resources can lead to immediate loss of ability to work
  - Hard to communicate with users
  - Results in users working off the secure system



# Use of Personal Computers

- Personal email becomes an easy option
- File sharing services may be used to store and transport data



# Use of Personal Computers

- Priority one is to avoid extra (unknown) copies of data in disparate locations
- Data placed in personal email and file share services will likely never get deleted
- Company has no control over those personal email and file share accounts



# Paper!



Secure Shredding Bin

Dimensions: 42" H X 25" W X 26" D  
Max. Capacity: 210 lbs. (est.)



Security Console

Dimensions: 40" H X 19" W X 19" D  
Max. Capacity: 70 lbs. (est.)



Mini Security Console

Dimensions: 27" H X 19" W X 19" D  
Max. Capacity: 40 lbs. (est.)

- Printing at home should be discouraged, if not prohibited
  - If allowed, instruct users to limit printing
  - If allowed, suggest creating a “print” folder for when back in the office
- Insist that all sensitive documents be brought back to office for secure disposal
- Instruct users to be mindful of who can read documents, including family members and other “trusted” individuals



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# Paper!

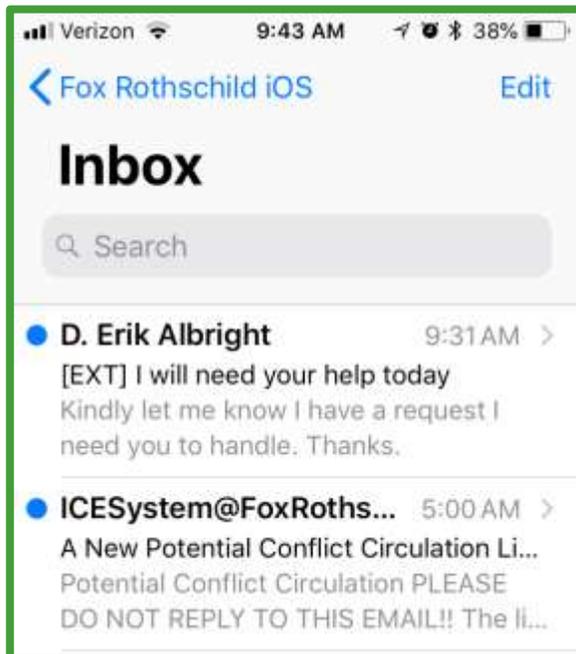
- Transportation of files should be discouraged
  - Personal vehicles preferred over public transportation



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# Heightened Risk of Phishing and Scams

- Out of office locations are distracting and guards may be down
- COVID-19 scams and ALERTS! are rampant and tempting
- We are inherently tricked more easily on mobile devices



**From:** D. Erik Albright <[paulramsey176@gmail.com](mailto:paulramsey176@gmail.com)>  
**Sent:** Sunday, December 2, 2018 9:31 AM  
**To:** Jefferson, Mike <[MJefferson@foxrothschild.com](mailto:MJefferson@foxrothschild.com)>  
**Subject:** [EXT] I will need your help today

Kindly let me know I have a request I need you to handle.

Thanks.



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# IT Department Concerns

- Skeleton and remote crew is likely
- Augmented help desk may be a good option, but means new people on unfamiliar systems with access to your data
- Security Information and Event Management (SIEM) will likely have more false positives
- Still MUST patch while workers are working remotely
- Split tunneling may not be appropriate and/or prohibited by client data security obligations



# Data Incidents

- Data breaches happen at seemingly the worst times
- Executing even the best Incident Response Plan is extremely difficult when all are remote
- Practicing (tabletop exercise) a remote workforce event
- Limited resources will slow things down
- Forensic experts and data coaches may also have workforce issues and/or be overwhelmed with cases



# Governance Considerations

- **E. Environmental**
- **S. Social**
- **G. Governance**
  
- Where do the boardroom and leadership fit into the response to COVID-19?
- With new costs, hectic markets, skittish investors, will ESG continue to reign supreme?



# Governance Considerations

- Some companies will experience working remotely on a large scale for the first time
- Silicon Valley has already predicted those employees will never return to the office
- Will employee relations change with a remote workforce?
  - Of course!
- Will leadership be prepared to adapt?



# Governance Considerations

- Leading an organization that is spread in many directions requires more than good communication
- Proper governance will have to continue the same goals of improving environmental, social and governance concerns
- Whether the commitment will continue with decimated profits and investors who suddenly have new priorities will be a huge test for the ESG efforts and gains



# Data Privacy Versus Public Health

“Ethical decision-making requires minimizing not only the risk of data misuse, but also that of missed use, that is, of leaving crucial data resources untapped in the global fight against famine, plague and war.”

— *Robert Kirkpatrick, director of UN Global Pulse, 2018*



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# Public Health Service Act

## Who has the authority to enforce isolation and quarantine because of a communicable disease?

- The federal government derives its authority for isolation and quarantine from the Commerce Clause of the U.S. Constitution. Under section 361 of the Public Health Service Act (42 U.S. Code § 264), the U.S. Secretary of Health and Human Services is authorized to take measures to prevent the entry and spread of communicable diseases from foreign countries into the United States and between states.
- The authority for carrying out these functions on a daily basis has been delegated to the Centers for Disease Control and Prevention (CDC).



# Centers for Disease Control and Prevention (CDC)

- Under 42 Code of Federal Regulations parts 70 and 71, CDC is authorized to detain, medically examine and release persons arriving in the U.S. and traveling between states who are suspected of carrying communicable diseases. As part of its federal authority, CDC routinely monitors persons arriving at land border crossings and passengers and crew arriving at U.S. ports of entry for signs or symptoms of communicable diseases.
- When alerted to an ill passenger or crew member by the pilot of a plane or captain of a ship, CDC may detain passengers and crew as necessary to investigate whether the cause of the illness on board is a communicable disease.



# State, Local and Tribal Law (CDC)

- States have police power functions to protect the health, safety and welfare of persons within their borders. To control the spread of disease within their borders, states have laws to enforce the use of isolation and quarantine.
- In some states, local health authorities implement state law. In most states, breaking a quarantine order is a criminal misdemeanor.
- Tribes also have police power authority to take actions that promote the health, safety and welfare of their own tribal members. Tribal health authorities may enforce their own isolation and quarantine laws within tribal lands, if such laws exist.



# Notification — Provider Responsibilities

## CDC Guidance

**Q:** *Who should health care providers notify if they suspect a patient has COVID-19?*

**A:** Health care providers should consult with local or state health departments to determine whether patients meet [criteria for a Person Under Investigation \(PUI\)](#). Providers should immediately notify infection control personnel at their facility if they suspect COVID-19 in a patient.

<https://www.cdc.gov/coronavirus/2019-nCoV/hcp/index.html>



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# Notification — Patient Permission?

**Must a health care provider or other covered entity obtain permission from a patient prior to notifying public health authorities of the occurrence of a reportable disease?**

- **Answer:** No. All states have laws that require providers to report cases of specific diseases to public health officials. The HIPAA Privacy Rule permits disclosures that are required by law. Furthermore, disclosures to public health authorities that are authorized by law to collect or receive information for public health purposes are also permissible under the Privacy Rule. In order to do their job of protecting the health of the public, it is frequently necessary for public health officials to obtain information about the persons affected by a disease. In some cases they may need to contact those affected in order to determine the cause of the disease to allow for actions to prevent further illness.

<https://www.hhs.gov/hipaa/for-professionals/faq/294/must-a-health-care-provider-obtain-permission-to-notify-public-health-authorities/index.html>



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# When is Health Information HIPAA-protected?

- Covered entities include group health plans and most health care providers
- Business associates include persons or entities that provide services to covered entities that involve the creation, receipt, maintenance or transmission of PHI, and their subcontractors



# When is Health Information NOT HIPAA-Protected?

- Disclosed by the individual or authorized representative
- The subject of a signed HIPAA Authorization
- Created, received, maintained or transmitted by an employer that is not a covered entity or business associate
  - Workers' compensation information
  - Disability/return-to-work information



# When is Health Information NOT HIPAA-Protected?

## BUT BEWARE:

- Employer self-funded health plan (HIPAA covered entity)
- State privacy laws



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# **BULLETIN: HIPAA Privacy and Novel Coronavirus (HHS OCR 2/3/20)**

Clarification re: Permitted Disclosures

## **1. For Public Health Activities**

- Includes disclosure to those at risk of contracting or spreading, if authorized by law

## **2. To Family, Friends, and Others Involved in Care and for Notification**

## **3. To Prevent Serious and Imminent Threat**



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# **BULLETIN: HIPAA Privacy and Novel Coronavirus (HHS OCR 2/3/20)**

Reminders re: Non-Permitted Disclosure

## **1. To Media and Others Not Involved in the Care of the Patient**

- Generally need patient's written permission (HIPAA Authorization) to disclose PHI to media or public at large
- Unless patient objects, hospital may disclose patient name and limited information upon specific request: "Yes, Jane Doe is a patient here and is in critical/stable condition."\*
- May disclose if patient is incapacitated and believe it's in best interest of patient

## **2. More than Minimum Necessary**

*\*Unless hospital is subject to limited HIPAA waiver described in March Bulletin*



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# MARCH Update: COVID-19 & HIPAA Bulletin

- Effective March 15, 2020, certain hospitals that fail to comply with specific HIPAA Privacy Rule requirements will not be subject to HIPAA sanctions and penalties
- Applies to (1) hospitals located in an emergency area identified in a public health emergency declaration; (2) hospitals that have instituted a disaster protocol; and (3) for up to 72 hours after the hospital institutes its disaster protocol
- Waives specific HIPAA Privacy Rule requirements, such as ability to opt out of directory and patient right to restrict disclosure to a health plan when paying out-of-pocket



# Covered Entities and Business Associates Working From Home

## HIPAA Privacy and Security Rules Follow You Home!

- Security Risk Assessment must cover personal and mobile devices used to create, receive, maintain or transmit PHI
- Vulnerability to PHI Breach when working remotely
- Data loss or breach for Covered Entities and Business Associates means not only business interruption and customer mistrust, but HIPAA violation



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# Equal Employment Opportunity Commission

- ADA: Prohibits discrimination on the basis of disability, perceived disability or association with a person with a disability
  - Rules about medical examinations and inquiries
- Requirement for reasonable accommodation provided it does not interfere with or prevent employers from following the guidelines and suggestions made by the CDC about steps employers should take regarding COVID-19



# EEOC Guidance

- Pandemic Preparedness in the Workplace and the Americans with Disabilities Act
  - Issued 10/9/2009
  - “The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.”



## EEOC Guidance (cont.)

- How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce?
- When may an employer take the body temperature of employees?
- Does the ADA allow employers to require employees to stay home if they have symptoms of COVID-19?
- When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?



# ADA Compliance Impact

- Protects applicants and employees from disability discrimination
- Regulates employers' disability-related inquiries and medical examinations for all applicants and employees
- Prohibits employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a “direct threat” (i.e., a significant risk of substantial harm even with reasonable accommodation)
- Requires reasonable accommodations for individuals with disabilities (absent undue hardship)



# Direct Threat Under ADA

- A significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation
- Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information, “not on subjective perceptions ... [or] irrational fears”
- Four factors:
  1. Duration of the risk
  2. Nature and severity of the potential harm
  3. Likelihood that potential harm will occur
  4. Imminence of the potential harm



# Pandemic Designation – EEOC’s View

- Whether a pandemic disease such as COVID-19 rises to the level of a direct threat depends on the severity of the illness
- If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations
- By contrast, if the CDC or state or local health authorities determine that a pandemic disease is significantly more severe, it could pose a direct threat



# What Can You Ask Employees?

- Would you be able to come to work if:
  - Schools or child care centers were closed?
  - Public transportation was interrupted or unavailable?
- Are you experiencing symptoms of COVID-19 (fever, cough, shortness of breath)?
  - Keep confidential
    - Except**, you should inform employees of their possible exposure to the virus
  - You can send employees home
  - Contact your local health department if one of your employees has been diagnosed with COVID-19
- Have you been to an area where the virus is widespread?
  - If “yes,” you can send employee home and require doctor’s note to return



# What Can't You Ask?

- You generally cannot ask employees to disclose whether they have a compromised immune system or chronic health condition that makes them susceptible to the virus
  - Pandemic designation may change this
- If an employee volunteers that information
  - Keep it confidential
    - Keep medical documentation confidential and separate from employee's personnel file
  - Ask the employee what type of assistance they may need



# Could This Advice Change Since There is a Pandemic Designation?

- If a pandemic disease becomes more severe or serious according to the assessment of public health officials, employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract the pandemic disease
- Only in this circumstance may employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of disease complications



# Can an Employer Ask Whether Employees Are More Likely to be Unavailable for Work Since There is a Pandemic?

- Yes
- Employers may make an omnibus inquiry
  - Since pandemic declaration, disability-related inquiry may be permissible
- The answer need not be given anonymously



# May an Employer Require Applicants to Have a Post-Offer Medical Examination to Determine Their General Health Status?

- Yes, if:
  - All entering employees in the same job category are required to undergo the medical examination and if the information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record



# May an Employer Rescind a Job Offer Made to an Applicant Based on the Results of a Post-Offer Medical Examination if it Reveals That the Applicant has a Medical Condition That Puts Her at Increased Risk of Complications From Influenza?

- No, unless the applicant would pose a direct threat
- A finding of “direct threat” must be based on reasonable medical judgment that relies on the most current medical knowledge and/or the best available evidence
- The finding must be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job, after considering, among other things, the imminence of the risk; the severity of the harm; and the availability of reasonable accommodations to reduce the risk



# Can We Require Employees to Present a Doctor's Note to Show They're Cleared to Return?

- Probably
- Some state and local leave laws let employers require employees to present a doctor's note after an absence of three or more consecutive workdays
- If FMLA leave, you can require certification
- If ADA accommodation, you can require medical documentation
  - Is it a direct threat to employee or co-workers?
- You can require a note for an employee who has traveled to a CDC-designated country where the number of infections is high



# Pandemic Problems

- What if the health care system is overstressed?
  - Impracticable to provide care?
- Large portion of human population will become infected
  - Not necessarily ill
  - Half, 2/3, 70%?
  - Watch for case fatality rate



# During a Pandemic, May an ADA-Covered Employer Take Employee Temperatures to Determine Whether They Have a Fever?

- Measuring an employee's body temperature is a medical examination
  - If COVID-19 becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature
- Assess the type of workplace (e.g., nursing home, prison)
- However, employers should be aware that some people with COVID-19 do not have a fever or are entirely asymptomatic



# Can We Prevent Employees From Wearing Masks or Respirators?

- Unclear
- In most situations, yes, especially since widespread use of masks isn't considered necessary at this point
- If the employee has a disability, you may be required to allow the use of protective gear as an accommodation



# Can We Require Employees to Wear Personal Protective Gear (Masks, Gloves, etc.) Designed to Reduce the Risk of Exposure?

- Yes, if there is a legitimate basis
- If an employee with a disability needs an accommodation, you may need to provide it



# If a Client Asks if Any of Our Employees Are Infected, What Can We Say?

- You must protect employees' confidential medical information
- You can disclose whether any employees recently traveled to a CDC-designated area or have been diagnosed with COVID-19 (without naming the employee)
- You can also disclose what steps you're taking to minimize the risk of transmission



# If a Vaccine Becomes Available, Can We Require Employees to Get it?

- Not necessarily
- If the employee has a disability or a sincerely held religious belief, they may be entitled to an exemption
- Check state law
- Practical consideration of whether enough vaccines are available





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