



The Network
for Public Health Law

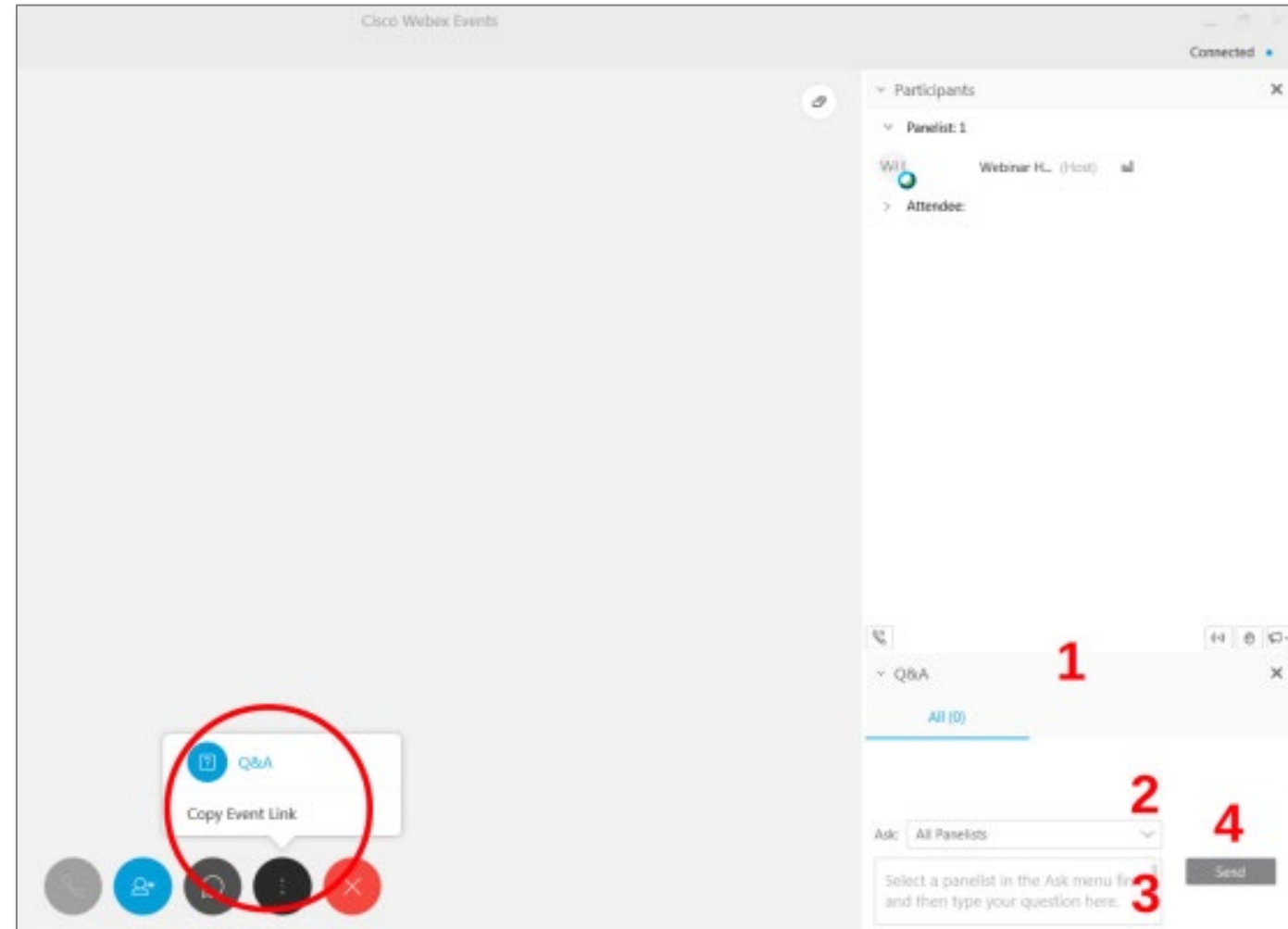
Ideas. Experience. Practical Answers.

COVID-19: Data Sharing for Public Health Surveillance, Investigation and Intervention

1:00 – 2:00 PM EST | April 2, 2020

How to Use WebEx Q & A

1. Open the Q&A panel
2. Select “All Panelists”
3. Type your question
4. Click “Send”



Presenter



Jennifer Bernstein, Deputy Director, the Network for Public Health Law – Mid-States Region Office

- J.D., M.P.H., University of Iowa
- Research interests/areas of expertise:
 - Public Health Data
 - Adults at Risk
 - Maternal and Child Health
 - Statutory and Regulatory Public Health

Presenter



Sallie Milam, Deputy Director, the Network for Public Health Law – Mid-States Region Office

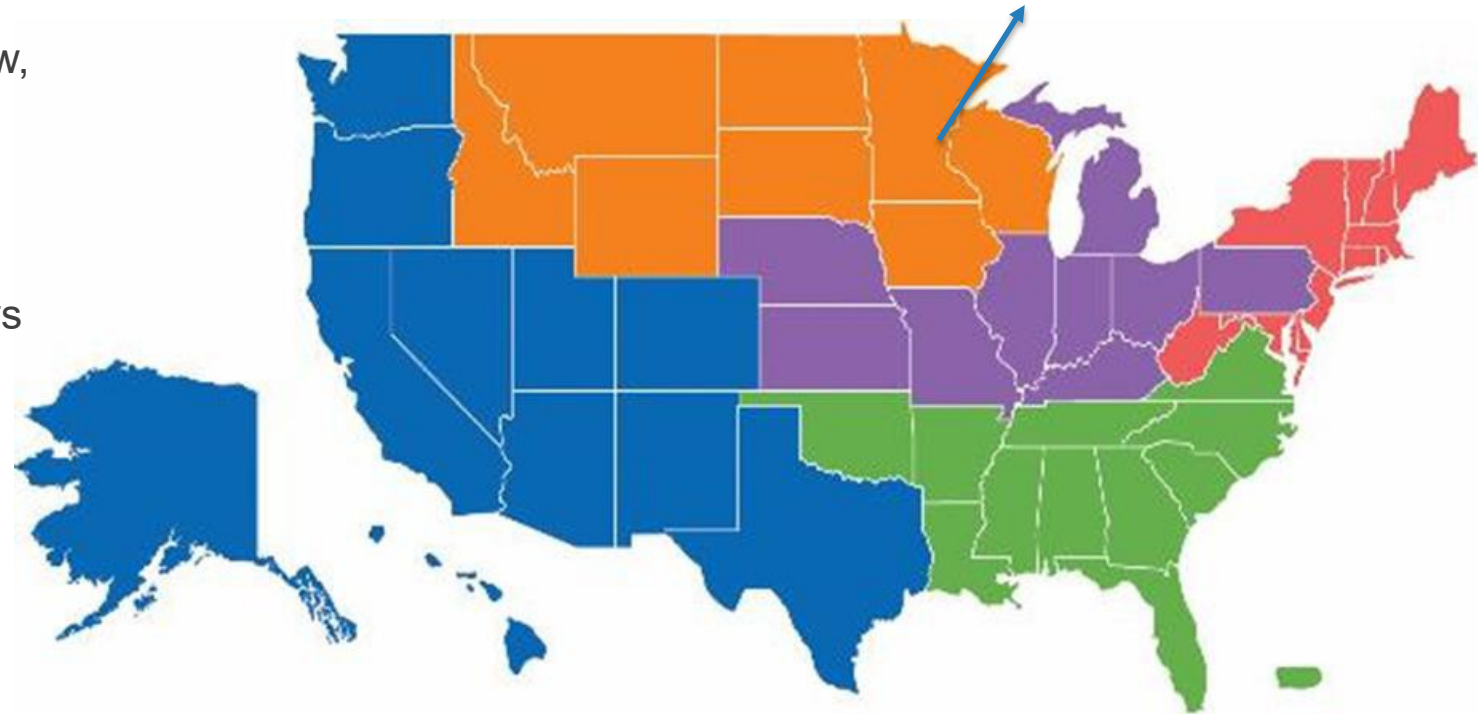
- J.D., University of Richmond School of Law
- C.I.P.P./U.S./G., International Association of Privacy Professionals
- Research interests/areas of expertise:
 - HIPAA Privacy Laws
 - Health Information and Data Sharing
 - De-identification

National Reach

Experts in public health law, our leadership team is comprised of a National Director and five Regional Office Directors who lead teams of Network attorneys across the U.S.

Eastern Region
Mid-States Region
Northern Region
Southeastern Region
Western Region

The Network's National Office is located in Edina, Minnesota



We Can Expand Your Capacity to Do More

- find answers to specific legal questions
- use law to strengthen your public health programs and policies, and address emerging public health issues
- find resources, such as legal briefs, fact sheets, surveys of laws in all 50 states, or other available data
- benefit from the best practices of others
- connect with additional experts in public health law, including attorneys in the Network's other regions

Services provided by the Network are provided at no cost!
Contracts for larger projects are available.



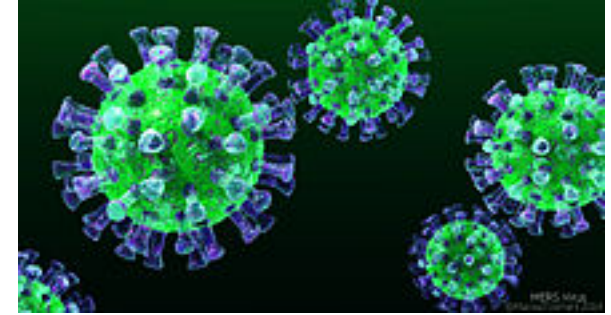
The Fine Print

This presentation is for informational purposes only. It is not intended as a legal position or advice from the presenters or their employers.

For legal advice, attendees should consult with their own counsel.

Agenda

- **HIPAA Basics**
- **HIPAA's Application to Public Health**
- **HIPAA Waivers**
- **Other Federal and State Law Considerations**
- **COVID-19 Frequently Asked Questions**



HIPAA Basics

- » **Sets minimum national standards for privacy and security**
- » **Gives patients rights regarding their health information**
- » **Applies to most health care providers and to health plans (“covered entities”)**
- » **Covered entities are prohibited from using or disclosing identifiable health information unless required or allowed by HIPAA privacy rule**

To whom does HIPAA apply?

- Covered entities
 - Certain (most) health care providers, **but** only if they transmit information in electronic form in connection with an electronic standard transaction that HHS has adopted a standard
 - Health plans
 - Health care clearinghouses
- Business Associates



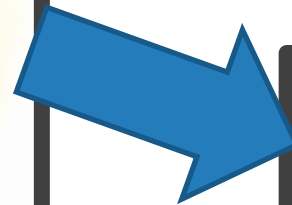
Juggling multiple roles and competing interests

- » **Manage and improve population health AND provider of primary health care**
- » **Protecting individual privacy**
- » **Protecting the public**
- » **Informing the public**

Does HIPAA apply to:

- » All of my health department?
- » Some of my health department?
- » None of my health department?

With only one HIPAA covered program...



But, HIPAA provides options

Single covered entity,
default classification

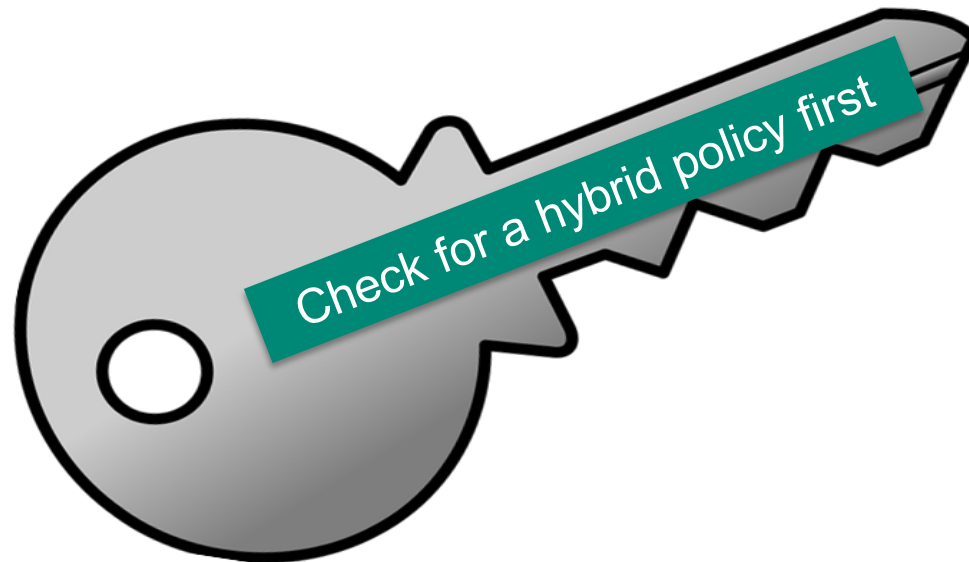


Hybrid entity



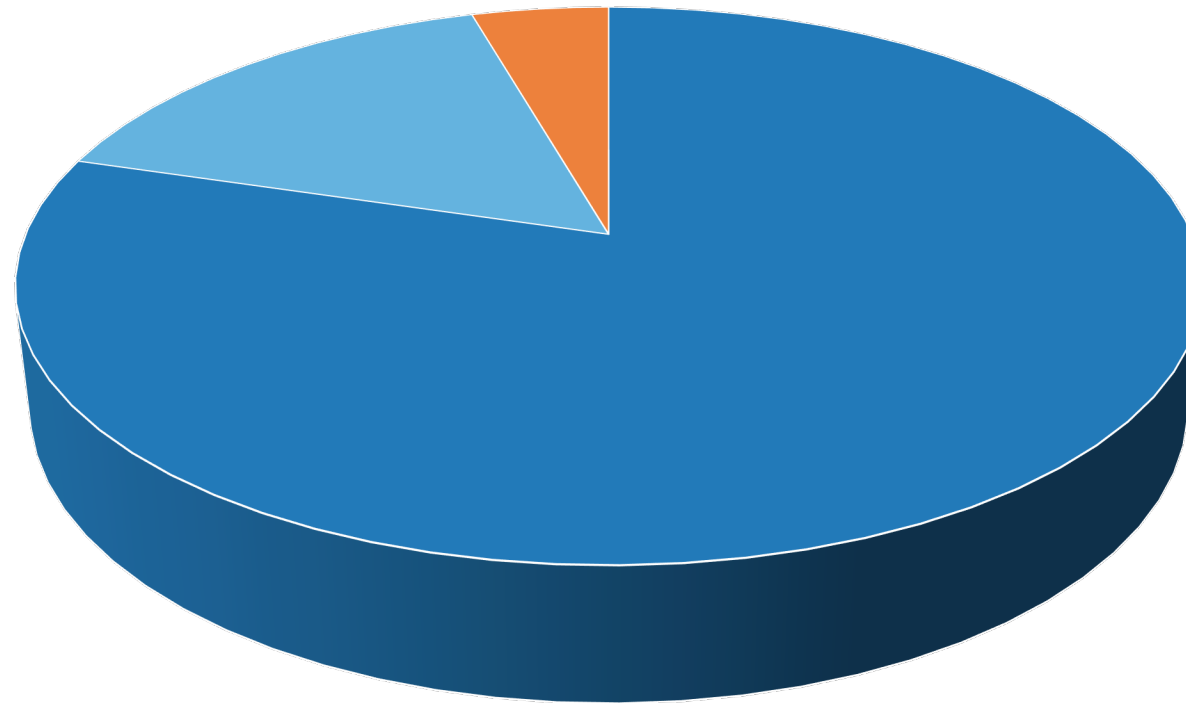
Hybrid entity means a single legal entity:

- » That is a covered entity
- » Whose business activities include both covered and non-covered functions; and
- » That designates health care components by separating them from its other components and documenting the designation



2018 HIPAA Coverage Classification

State Health Departments



■ Hybrid ■ Fully Covered ■ Not Covered

HIPAA Waivers

- **HHS waived** sanctions and penalties against *covered hospitals* in very narrow area:
 - Failure to obtain patient consent to speak with a family member or friend involved in the patient's care
 - Failure to honor a request to opt out of the facility directory
 - Failure to distribute a privacy notice
 - Failure to honor a patient's right to request restrictions
 - Failure to honor a patient's right to request confidential communications
- OCR issued a **Notification of Enforcement Discretion** for telehealth remote communications during the COVID-19 nationwide public health emergency, including **guidance**.
- HIPAA Security Rule is not suspended.

Note: all links are **red** through the deck.

Keep in mind with every data disclosure question...

1. **HIPAA may or may not apply to the disease surveillance, investigation and intervention functions within your health department. Make this determination your first priority.**
2. **If HIPAA applies to the program within the health department making the disclosure, such as a communicable disease program, follow HIPAA and any state law more stringent than and not preempted by HIPAA. State law often provides more privacy protections for specially protected information such as mental health, HIV/AIDS and STDs.**
3. **If HIPAA does not apply to your health department, follow state law. Always follow other applicable federal law that applies to certain types of information. An example of a federal law that provides additional privacy protection is 42 CFR Part 2 which regulates substance use disorder information.**



What are examples of HIPAA covered COVID-19 Protected Health Information (PHI)

- **Specific information about treatment of an identifiable patient, such as specific tests, test results or details of a patient's illness**
- ***Aggregate reports of COVID-19 case counts or deaths by county or any geographic subdivision smaller than a state**
- ***Aggregate reports of COVID-19 case counts or deaths by state for any time period less than one year**

***Except where de-identification is performed in accordance with the HIPAA Privacy Rule's expert determination method.**

COVID-19 Data FAQs

***Caveat for all FAQs – check state and other federal law**

If a health department's communicable disease program is covered by HIPAA, to whom may it share COVID-19 PHI without patient authorization under the public health exception?

- To a public health authority, such as a state or local health department authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury or disability**
- At the direction of a public health authority, to a foreign government working with the public health authority**
- To persons at risk of infection or spreading disease, if authorized under other law, such as state law**

If a health department's communicable disease program is covered by HIPAA, may it share COVID-19 PHI for treatment purposes?

- HIPAA does not require patient authorization for a covered entity sharing for its own treatment purposes.
- HIPAA does not require patient authorization for sharing for treatment activities of a health care provider.
- Treatment includes care coordination and care management.

If a health department's communicable disease program is covered by HIPAA, may it *re-disclose* COVID-19 PHI it received from non-state labs, such as commercial labs and pop-up labs, for treatment purposes?

- **Yes. HIPAA allows re-disclosure for treatment purposes.**

If a health department's communicable disease program is *NOT* covered by HIPAA, may it release COVID-19 county level case information (number of COVID-19 cases by county) to the press?

- Most state health department's disease prevention and control programs are *not* covered by HIPAA.
- State law and other applicable federal law, such as 42 CFR Part 2 (SUD) control.
- Law may provide broad discretion to public health. Considerations:
 - Release as much as possible, as allowed by law
 - Withhold only when there is a clear justification, such as privacy, and explain rationale.
 - Explain all legal reasoning and provide citation.
 - These considerations as well as recommendations on data release come from [Guidance](#) developed by ASTHO, NACCHO and the Assoc. of Health Care Journalists

If a health department's communicable disease program is covered by HIPAA, may it release COVID-19 county level case information (number of COVID-19 cases by county) to the press?

- HIPAA's safe harbor method is not helpful
- Evaluate utilizing HIPAA's expert method
- Evaluate novel, emerging legal theory that is plausible, but not yet supported in OCR guidance: Certain areas of law, such as the conduct of public health surveillance, investigation and intervention are *not* preempted by HIPAA and only subject to state and local law.

If a health department's communicable disease program is covered by HIPAA, may it release COVID-19 PHI to first responders?

- For treatment, such as when emergency medical transport personnel will need to provide treatment to an individual with COVID-19 while transporting that person to a hospital.
- When first responders may be at risk of infection, as authorized by state law. An example is where a county health department, in accordance with state law, discloses identifiable COVID-19 information to a police officer or others to prevent or control the spread of COVID-19.
- To prevent or lessen a serious and imminent threat to the health and safety of person or the public. See details in [FAQs](#).

Disclosures to first responders at risk of infection:

- **If authorized by other law, such as state law, a fully covered health department could provide a list of names and addresses of all individuals who have tested positive or received treatment for COVID-19 to an EMS dispatch.**
- **On a per call basis, EMS dispatch would use the information on the list to inform the EMS personnel who are responding to the particular call so that they can use personal protective equipment or take extra precautions.**

Can (or must) an emergency responder be notified if they have assisted with transporting an individual who tests positive for COVID-19?

- Yes! As of March 27, 2020, the CDC National Institute for Occupational Safety and Health (NIOSH) has added COVID-19 to its list of potentially life-threatening diseases to which emergency response employees (ERE) may be exposed in the course of their work.
- If a medical facility determines that an emergency victim has COVID-19, it must promptly (within 48 hours of the determination) notify the designated officer of the ERE agency that transported the victim.

May a health department provide the names and residential addresses/locations of all positive COVID-19 cases to all first responders to protect their health?

- The answer is not clear.
- A health department might use the following framework to evaluate how to proceed: Can I? Must I? Should I?

Is it appropriate for public health to request consent from asymptomatic medium risk travelers to provide their name and residential address/location to emergency responders (EMS) in order to protect the health of EMS personnel?

There is no clear answer to the question.

A health department might use the following framework to evaluate how to proceed. Can I? Must I? Should I?

Does HIPAA allow sharing COVID-19 PHI with law enforcement?

HIPAA provides several options for sharing PHI with law enforcement without patient authorization:

- **To the extent that disclosure is required by other law, such as state law.**
- **To persons at risk of contracting or spreading a disease or condition.**
- **To prevent or lessen a serious and imminent threat to the health and safety of a person or the public – consistent with applicable law (such as state statutes, regulations, or case law) and the provider's standards of ethical conduct.**

If the health department receives an order from a court or administrative tribunal requesting patient identifiable COVID-19 information, may it share the requested PHI with the court or administrative tribunal?

For those health departments that are fully covered by HIPAA, law allows a health department to respond to a court or administrative tribunal's order, but only to the extent as specified in the order. Only the minimum necessary PHI may be disclosed.

All health departments must comply with state law and other federal law regarding confidentiality of information. Relevant law should be consulted.

If the health department receives a subpoena, discovery request or other lawful process requesting patient identifiable COVID-19 information that is unaccompanied by an order, is disclosure is permissible?

- Disclosure is permissible if the health department receives “satisfactory assurances” from the party seeking the information that reasonable efforts have been made to put the subject individual on notice of the request; or
- That reasonable efforts have been made by the health department to secure a HIPAA compliant qualified protective order.
- Only the minimum necessary PHI may be disclosed.
- All health departments must comply with state law and other federal law regarding confidentiality of information.

If a health department receives a request for personally identifiable COVID-19 information under the applicable state Freedom of Information Act or other open records law, how should it respond?

- Health departments must comply with both applicable open records law as well as state and federal confidentiality and privacy law as they respond to requests for personally identifiable COVID-19 information.
- The Reporters Committee for Freedom of the Press provides an Open Government Guide which offers a compendium of each state's open records laws.
- For those health departments that are fully covered by HIPAA, they may only release PHI that is required to be released by applicable state public records law

What information may be shared by a public health agency with a COVID-19 patient's friends or family?

- The HIPAA Privacy Rule specifically permits covered entities to share information that is directly relevant to the involvement of a spouse, family members, friends, or other persons identified by a patient.
- The Privacy Rule permits covered entities to disclose necessary PHI without individual authorization to persons at risk of contracting or spreading a disease if other law, such as state law, authorizes the covered entity to notify such persons to prevent or control the spread of the disease or carry out public health interventions or investigations.

Is it appropriate for public health agencies to share protected health information of an employee with other employees at the same place of work during this COVID-19 crisis?

- The HIPAA Privacy Rule recognizes the legitimate need for public health authorities to access PHI that is necessary to carry out their public health mission.
- The Privacy Rule permits a covered entity that is also a public health authority to use PHI for the purpose of preventing or controlling disease, including the reporting of disease and the conduct of public health surveillance, public health investigations, and public health interventions.
- The Privacy Rule permits covered entities to disclose necessary PHI without individual authorization to persons at risk of contracting or spreading a disease if other law, such as state law, authorizes the covered entity to notify such persons to prevent or control the spread of the disease or carry out public health interventions or investigations.

May a health department share COVID-19 test results with health care providers and other health departments through an HIE for treatment, care coordination and public health activities?

- HIPAA permits a covered health department to share COVID-19 test results through an HIE with any organization it is permitted to share PHI with directly. A signed Business Associate Agreement is required which obligates the HIE to protect the information.
- Generally, all health departments must comply with state law and other federal law regarding confidentiality of information. This resource links to state health IT privacy and consent laws. State law and other applicable federal law should be reviewed

If a health department shares COVID-19 test results through an HIE, will the health department be responsible for another HIE participant's unauthorized disclosure of the test results?

- OCR states that “a covered entity [such as a covered health department] is not liable for a disclosure that is based on the non-compliance of another entity within the health information exchange, as long as the covered entity [covered health department] has complied with the Privacy Rule.” [OCR FAQ](#).
- Health departments should review state law within their jurisdictions. As of 2018, forty-two states, the District of Columbia and two territories have laws related to HIEs. Eight states do not have HIE laws: Alabama, Georgia, Hawaii, Indiana, Michigan, Montana, South Dakota, and Tennessee. Twenty-one states grant immunity to HIE participants. For more information about HIEs and state law, please see this [resource](#).

If a health department shares COVID-19 test results through an HIE, will the health department be responsible for the HIE's unauthorized disclosure of the test results?

- Where a covered health department has an appropriate Business Associate Agreement in place with the HIE, it is not directly liable for the HIE's HIPAA violations. The Business Associate Agreement obligates the HIE to safeguard the COVID-19 test results and to report noncompliance to the covered health department.
- Health departments should review state law within their jurisdictions. As of 2018, forty-two states, the District of Columbia and two territories have laws related to HIEs. Eight states do not have HIE laws: Alabama, Georgia, Hawaii, Indiana, Michigan, Montana, South Dakota, and Tennessee. Twenty-one states grant immunity to HIE participants. For more information about HIEs and state law, please see this [resource](#).

Resources

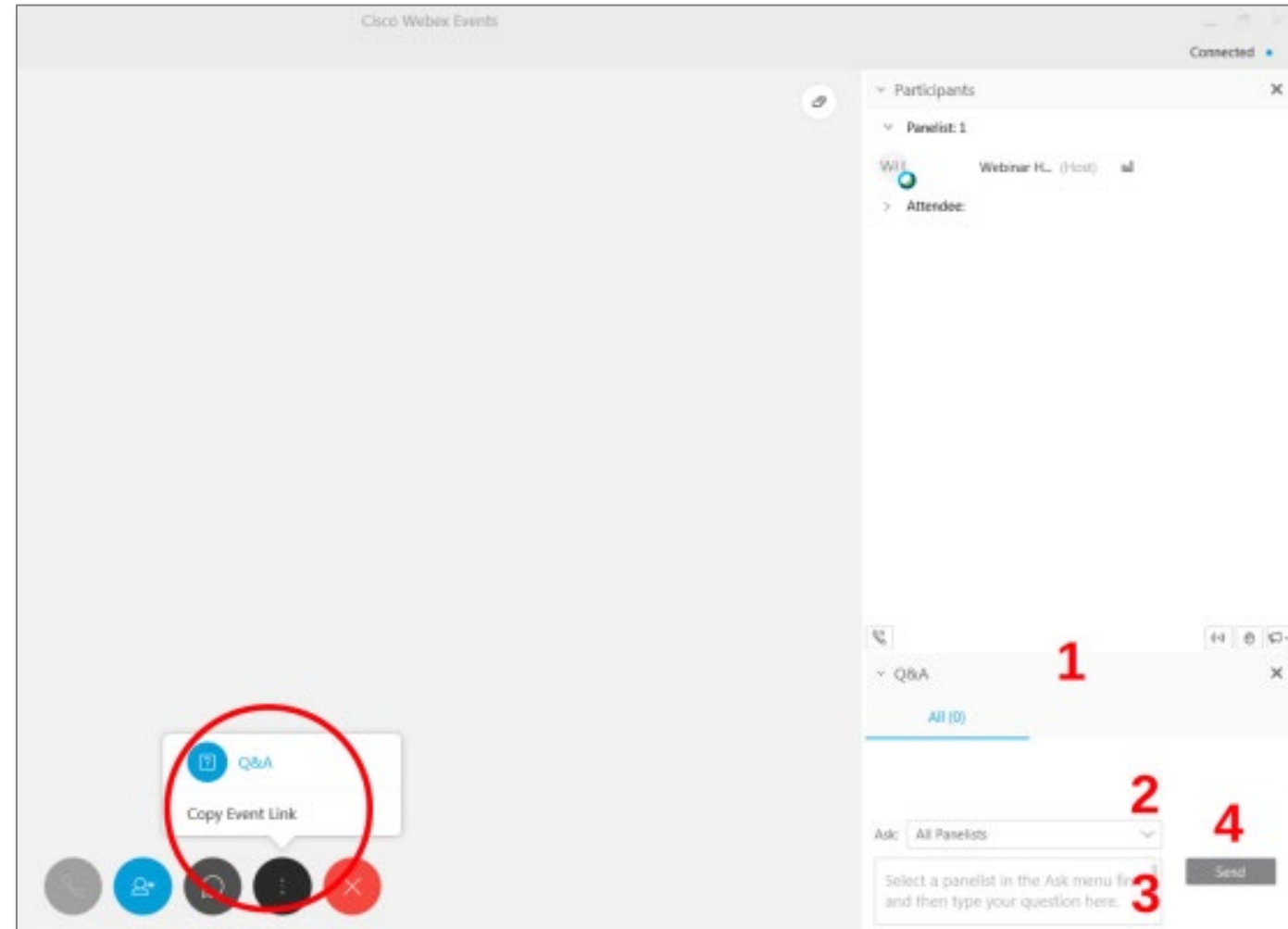
Network for Public Health Law [COVID-19 Resources](#)

Network for Public Health Law [Federal Privacy Law Snapshots](#)

Data Across Sectors for Health and Network for Public Health Law
[Legal Bibliography](#)

How to Use WebEx Q & A

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Thank you for attending

For a recording of this webinar and information about future webinars, please visit networkforphl.org/webinars

COVID-19: State and Local Government Actions to Address Housing Insecurity

1:00 – 2:00pm EST | April 6

COVID-19: Real-Time Guidance, Resources and Information

View resources & request assistance at networkforphl.org/covid19

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Building and Supporting Healthy Communities for All

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