



Health Information Privacy and Security Collaboration

Interstate Compact Innovation Task

Overview of Task

1. Goal/Product and Purpose of the Interstate Compact Innovation Task:

- To establish a foundational body of knowledge on the concepts that should be included, or considered for inclusion, in an interstate compact addressing consent in the context of electronic health information exchange.

2. The collaborative will:

- Identify and define potential elements and areas for consideration, including the purpose of each element or component.
- Identify various approaches to each element or component, as well as the implications and pros/cons (benefits/risks) of each approach.
- Identify potential challenges and provide analysis related to the feasibility of proposed approaches.

3. The collaborative will not:

- Make any recommendations or advocate for a particular approach/method.

Assumptions

1. Due to the limited time available for the extension project, the specific language for each component of the Compact will not be developed.
2. Each component of the Compact will be researched to identify potential approaches and inform future development of the specific language of the Compact.
3. For clarification purposes, the “Requesting State” is the location where the original request for information is generated. The “Responding State” is the location where the request is received and a reply/action is taken based on the request.
4. An Interstate Compact may be enacted without formal consent of Congress, although Congressional approval may be required if the Compact involves potential federal authority.
5. The intent of the Compact is to:
 - a. Improve access to electronic patient information for permissible purposes where conflicting state laws may impede timely exchange.
 - b. Provide legal protection to Responding States if their laws are more stringent than the laws of the Requesting States.
 - c. Provide an option for states to adopt regarding consent that will preempt inconsistent state laws and therefore not require states to amend their existing laws.

Interstate Compact Development Template

Component, Element, or Area for Consideration:

Methods of Enforcement of an Interstate Compact

Purpose and Description of Component, Element or Area for Consideration:

An interstate compact is essentially a contract among member states that may or may not have/need Congressional approval. If it does have Congressional approval, it is considered federal law. As with any contract, enforcement becomes an issue when the parties to the compact and/or affected third parties allege a breach or challenge the interpretation or applicability of a compact provision. Dispute resolution mechanisms and remedies may be set forth within the compact though, ultimately, a state or federal court may be called upon to address enforcement issues. Appropriate forum and applicable law may depend upon whether the compact has Congressional approval. Also, some disputes/issues under the compact may involve third parties whose rights are impacted by the terms of the compact. Third parties may challenge the authority of the compact members to affect their rights and remedies without affording them their day in court.

Summary of Various Approaches:

1. Create compact administrative body charged with regulating and refereeing issues between the parties and involving third parties

- a. Mandate disputes be resolved by this body
- b. Permit disputes to be resolved by this body

For example, the Interstate Compact on Educational Opportunity for Military Children establishes an interstate commission charged with enforcing compliance, promulgating rules, and pursuing court action when appropriate. The interstate commission pursues enforcement of compact terms first through arbitration or mediation, then through court action which may seek injunctive relief and/or damages.

2. Require mediation or arbitration of disputes

Under the compact for Adult Offender Supervision, and the Interstate Compact on the Placement of Children, the respective interstate commissions provide for binding dispute resolution. Penalties may include fines. Remedial training or technical assistance, or suspension or termination of compact membership. Termination of membership, however, requires an affirmative for of a majority of the compacting states.

3. Designate appropriate jurisdiction(s) and role of court for resolution of disputes.

The Interstate Compact for Adult Offender Supervision also provides for court action, venued in the U.S. District Court for the District of Columbia, to enforce the provisions of the compact, and its rules and regulation. The prevailing party in that litigation is entitled to all costs of litigation, including attorneys' fees. The Interstate Commission on the Placement of Children provides for court action to be brought either in the D.C. District Court, or in the District Court where the interstate commission has its principal office.

4. Remain silent in the compact as to methods of enforcement, and delegate this determination and the promulgation of appropriate rules to the interstate commission.

Implications, Pros/Cons, Benefits/Risks of Each Approach:

Overall, a consistent process or system, established in an interstate compact, to enforce the terms of a compact for health information exchange will result in uniformity of interpretation and application, providing predictability, and facilitating the comfort of providers exchange of health information. Not only should this reduce the administrative burdens on healthcare providers, but should also facilitate the provision of appropriate, quality health care in a mobile society.

1. Delegating the details of enforcement to the interstate commission would provide it with the most flexibility to respond and tailor enforcement mechanisms that are most appropriate for the situations that arise. However, it may be less feasible to obtain legislative support for a compact if the penalties and enforcement mechanisms are not specified. Nevertheless, this approach provides consistency for resolution of issues and puts resolution in hands of "experts" relating to the subject matter and intent of the compact;

fosters clear expectations among participants. The use of an administrative body, such as with the interstate commission for Educational Opportunity for Military Children, gives that commission the ability to deal with enforcement issue in a flexible manner – resolving them through mediation, arbitration or pursuing court action, as may be most appropriate in the particular circumstance. This flexibility should encourage the resolution quickly in those situations in which timelines are necessary for the meaningful exchange of information.

2. While resolving a dispute quickly and without use of an expensive and lengthy formal court process is desirable. Requiring mediation or nonbinding arbitration, however, may not advance the resolution of the dispute if the parties firmly hold to their positions or no middle ground is feasible. In these circumstances, requiring mediation would create an unnecessary burden or obstacle in the enforcement process.

3. If a significant amount of litigation arises under the compact, the designation of a jurisdiction would permit the court to develop some expertise and familiarity with the compact. On the other hand, it may be politically difficult for various states to agree upon a single forum

4. Although a few compacts do not specify an enforcement mechanism, this approach is politically the least feasible, since the states would be delegating all control over the manner of enforcement.

Potential Challenges and Analysis of Feasibility of Each Approach:

All of the approaches listed are feasible, and are currently in use by various compacts.

1. Powers granted to the administrative body cannot exceed the scope of authority delegated by members' legislatures [FTC v. Ruberoid Co., 343 US 470 (1952)]; delegation of authority should not be so broad that it violates constitutional principle of separation of powers [INS v. Chadha, 462 US 919 (1983)]

2. Some states, such as Ohio, have limitations on their ability to agree to arbitration. This may require any arbitration clause to require only the less effective "nonbinding" arbitration.

3. States have the same responsibility to enforce terms of contract as do federal courts, though US Supreme Court retains ultimate authority to interpret Congressionally approved contracts [West Virginia *ex rel.*

Dyers v. Sims, 341 US 22 (1951)]; compacts not Congressionally approved must be construed as state law [McComb v. Wambaugh, 934 F.2d 474 (3rd Cir., 1991)], subject to authority of US Supreme Court where dispute between states [West Virginia *ex rel.* Dyers v. Sims, 341 US 22 (1951)]

4. See above.

Comments: (Includes any comments that would be instructive or helpful as background or to provide a context for evaluating the various approaches that could be considered).

Congressional approval of the compact places the compact on par with federal law [Cuyler v. Adams, 449 US 433(1981)]; congressional approval not necessary where compact accomplishes nothing beyond what member states could do unilaterally [US Steel Corp. v. Multistate Tax Comm'n., 434 US 452 (1978)]

References:

The Evolving Use and Changing Role of Interstate Compacts: a practitioner's guide, Caroline N. Brown, Michael L. Buenger, Michael H. McCabe, Richard L. Masters, ABA, 2007