What Advertisers Need to Know About Health Data Privacy Regulation

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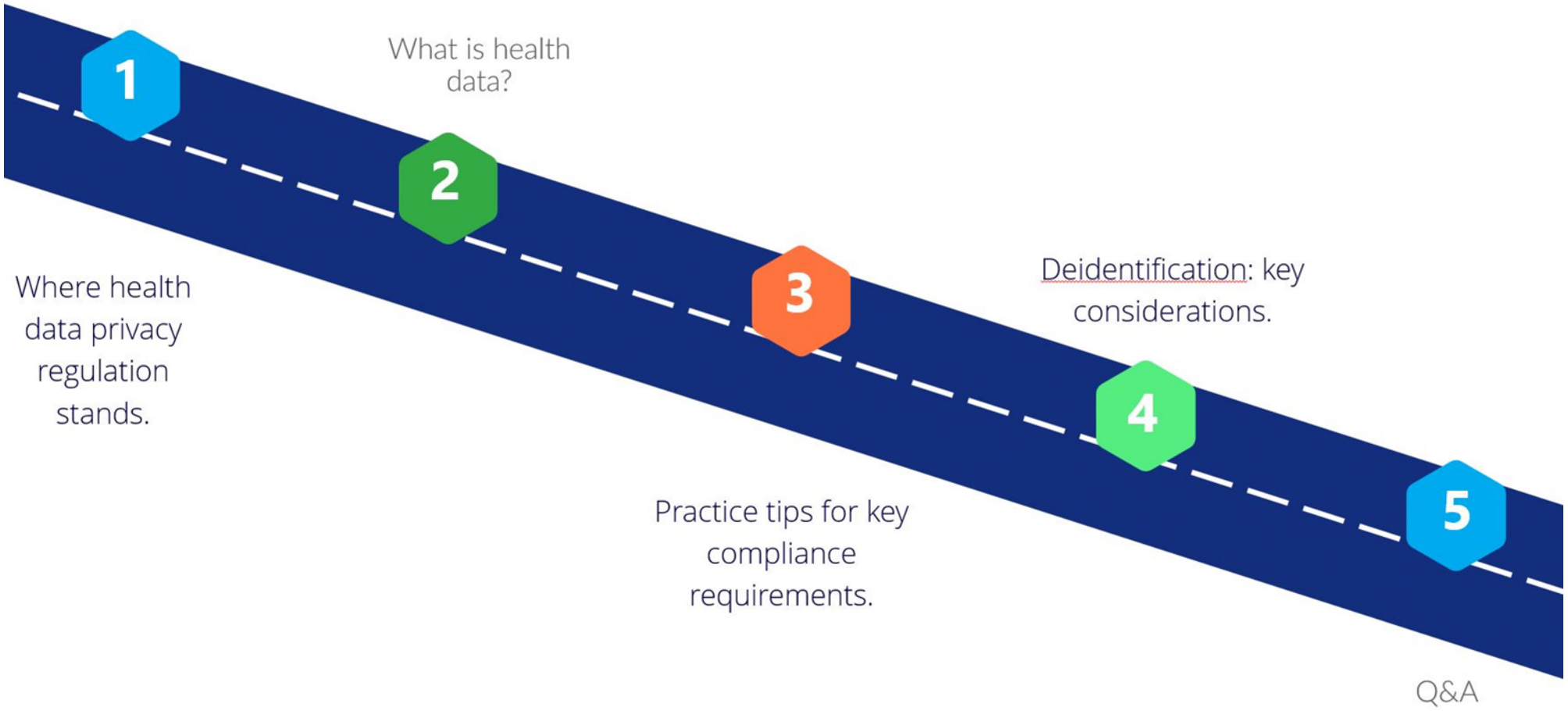
Aaron Burstein, Partner
Privacy and Information Security

Chris Tarbell, Special Counsel
Privacy and Information Security

Kelley Drye

Our Roadmap for Today



Setting the Scene

- ***16 states*** have enacted laws requiring opt-in consent to process health data
- "Consumer Health Data" laws in WA and NV (effective 3/31/24) require consent or authorization to use health data for advertising
  - What have we seen (or not seen) since then?
- FTC is sharply focused on health data
  - Cerebral, Monument, Premom, BetterHelp, and other enforcement actions
  - "Baker's Dozen" "Hashing Doesn't Make Your Data Anonymous" blog posts

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What is Health Data?

- Washington's "My Health My Data Act" (MHMDA) vs. other state laws
- FTC trends
  - Health information is "anything that conveys information – or enables an inference – about a consumer's health"
  - Includes presence at a sensitive health-related *location* (e.g., reproductive health clinic)
- Challenges to broad definitions of health data
  - *American Hospital Association v. Becerra*
  - *FTC v. Kochava*: district court held that invasion of privacy and potential discrimination, stigma, etc. are forms of "substantial injury"

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What is Health Data?

- No uniform definition across the legal landscape.
- Approach to identifying health data for any particular company needs to be tailored to risk tolerance, operational capabilities, scalability, ease of use, and business priorities.
- Key Questions:
  - What is the data (e.g., personal data, data type (e.g., employee, consumer))?
  - Where does the data come from (e.g., geography, source (e.g., survey, website, third party))?
  - What does the data reveal or relate to (e.g., health condition, sensitive health matter, health services)?
  - How is the data being used (e.g., make an inference, to identify, to collect and analyze)
  - Are there any objective factors to consider (e.g., contracts, HSA/FSA, public statements)?

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Key Compliance Scenarios

- Website data collection + health data policy
- Personalization and other internal uses
- Audience creation with first-party data. Is the audience health data to:
  - The advertiser?
  - Adtech vendors?
  - The publisher that displays an ad?

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Key Considerations for Advertisers

- First-party data ≠ carte blanche for advertising
  - Regulators will focus on consumers' expectations
  - Notices, choices must be consistent with all advertising use cases
- Partner diligence is a must
  - Targeting: Are segment definitions/descriptions sensitive? Are they built on sensitive data?
  - Measurement: How will measurement be performed? What data will partners collect? What data will they provide to you?

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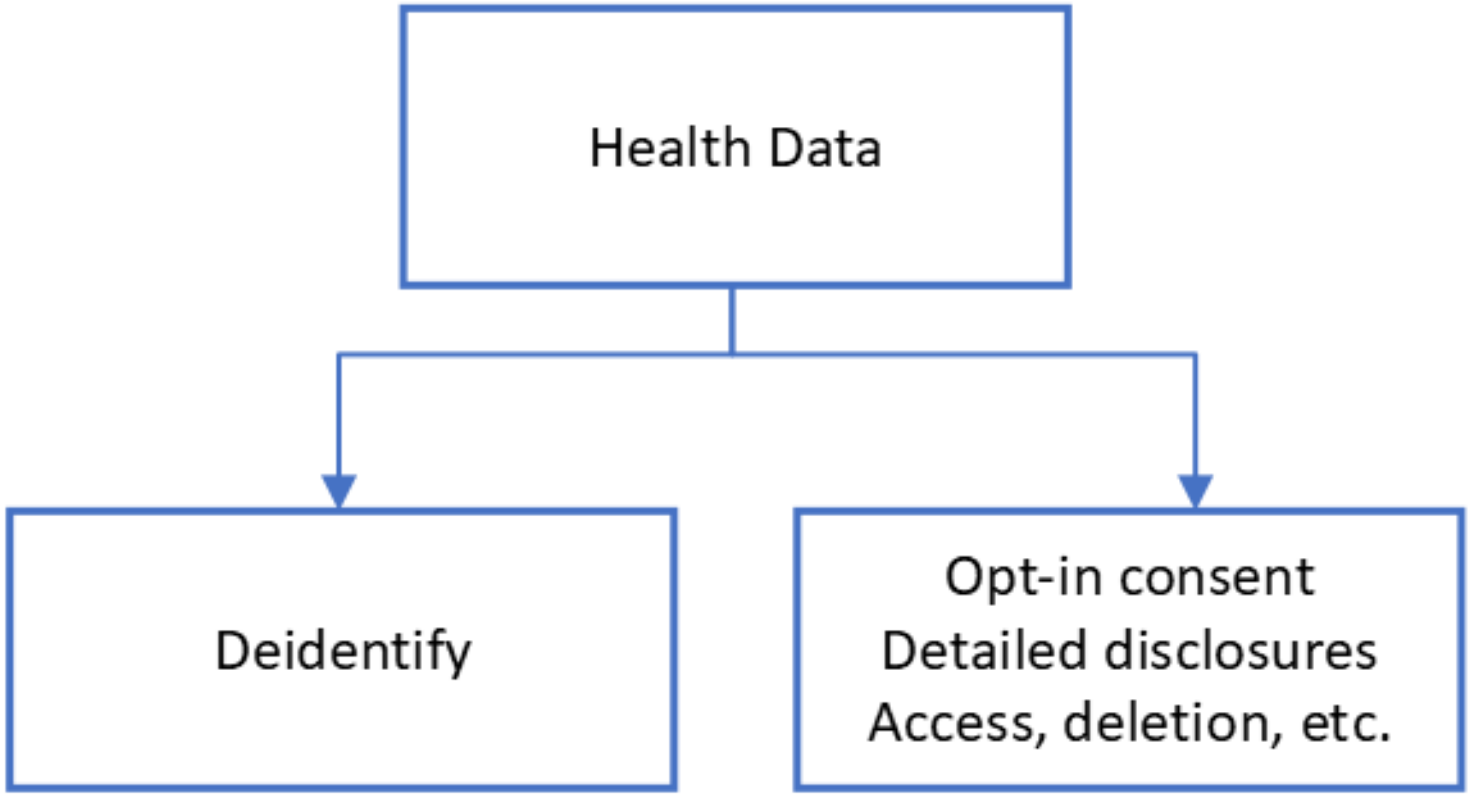
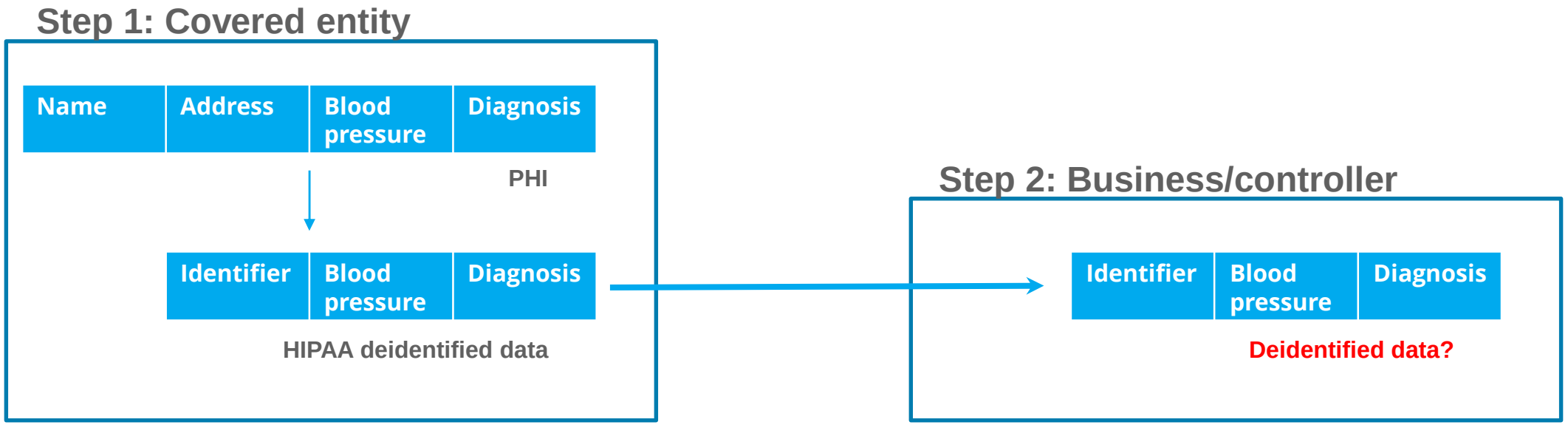
The Allure of Deidentification



Health Data Deidentification: The Basics



Key considerations

- Breadth of HIPAA exemption: CCPA (data-level) vs. other state laws (entity-level)
- Under § 1798.146, CCPA does not apply to information that is:
  - Deidentified in accordance with HIPAA and
  - "Derived from" PHI originally from a covered entity or business associate
- Does data ***remain*** deidentified throughout the lifecycle (step 2 and beyond)?

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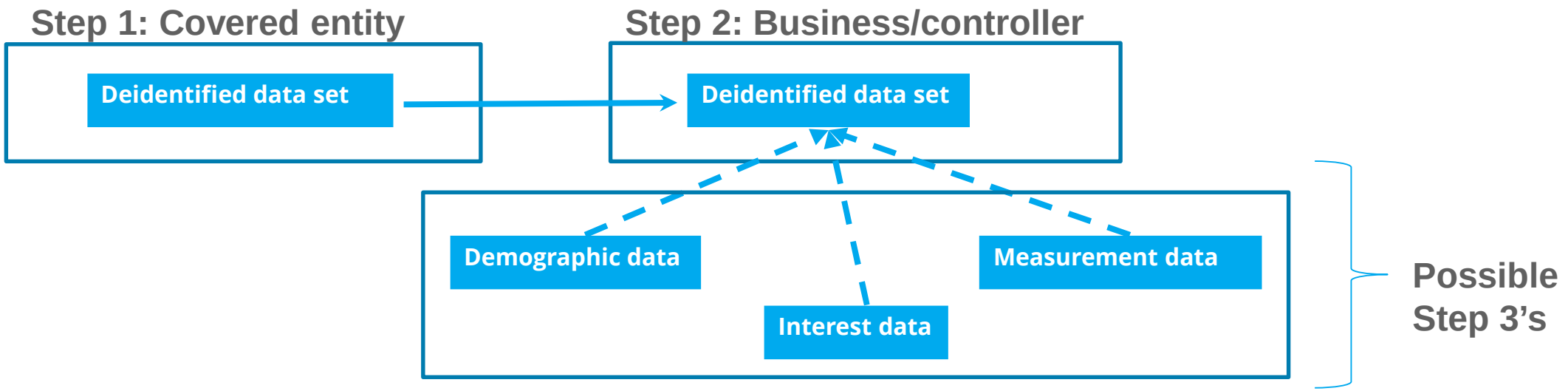
Common Deidentification Scenarios



Key considerations

- What is the business/controller's use case?
- Which use cases are covered by deidentification analysis?
- Which identifiers are used?
- Where does matching occur?

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FAQs

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Key Takeaways

- ✓ Focus on the fundamentals: transparency, clear consent, data security
- ✓ Consider an entity's role and use case details to identify health data
- ✓ Map (potential) health data disclosures to third parties
- ✓ Elevate health data in due diligence of data vendors and other partners
- ✓ Consider a broad range of health data-related harms
- ✓ Relief in sensitive data cases is extensive

Kelley Drye

QUESTIONS 

THANK YOU!

Aaron Burstein, Partner
aburstein@kelleydrye.com

Chris Tarbell, Special Counsel
ctarbell@kelleydrye.com