

Information Blockage: A Costly Error

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Patients' Right of Access to Their Medical Records

The patient is at the center of the 21st Century Cures Act. Putting patients in charge of their health records is at the center of the Department of Health and Human Services' (HHS') work toward a value-based healthcare system. Giving patients control of their electronic health information (EHI) is the first step in transparency in healthcare information.

As outlined in the Office of the National Coordinator for Health Information Technology's (ONC's) Cures Act final rule (45 CFR part 171), patients need more power in their healthcare choices, and access to information is key to making that happen.

Nov 2, 2020 was the original deadline for the implementation of the ONC's Cures Act final rule, but it wasn't implemented until April 5, 2021, in light of COVID-19 pandemic challenges. Here's what every HIPAA-covered entity needs to know to uphold the law and prevent legal repercussions.

What is the ONC's Cures Act?

This final rule requires providers to cease all efforts of information blocking with respect to their electronic records, and to encourage and promote interoperability and allow for communication and cooperation with third-party application program interfaces. With respect to portions of the clinical notes, there appear to be certain exceptions where physicians can block access, including psychotherapy notes, HIV testing results, and any notes that, in a physician's judgement, could cause harm to an individual.

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The interim final rule also revised the information blocking definition in 45 CFR 171.103 to adjust the timeframe for the “USCDI limitation.” Before Oct. 6, 2022, EHI for the purposes of the information blocking definition was limited to the EHI identified by the data elements represented in the United States Core Data for Interoperability (USCDI) standard.

Enforcement of the information blocking regulations depends on the individual or entity that is subject of an enforcement action. For health IT developers and health information networks/exchanges, the HHS Office of the Inspector General (OIG) is currently engaged in rulemaking to establish enforcement dates. For healthcare providers, HHS must engage in future rulemaking to establish appropriate disincentives as directed by the 21st Century Cures Act.

Individuals' Rights Under HIPAA

The HIPAA Right of Access (45 CFR § 164.524) gives people the right to inspect their protected health information (PHI) that is held by a HIPAA-covered entity, check the information for errors, and request that any errors be corrected. People can also request a copy of their PHI from healthcare providers and health plans.

When such a request is made, the requested information must be provided in full within 30 days of receipt of request. In very limited circumstances, a 30-day extension is allowed. Requests can be submitted by patients or their nominated representatives, and parents and legal guardians of minors are permitted to obtain a copy of their minor's records. Any individual requesting a copy of their records can only be charged a reasonable cost-based fee for obtaining a copy of their records. The records should be provided in the format requested by the patient, provided the HIPAA-covered entity has the technical capability to provide records in that format.

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Further, if the patient wants their records in a phone app or digital access that is HIPAA protected, and the physician or facility has that capability, then this is how it must be delivered. If the HIPAA-covered entity does not have the requested platform of delivery, it can ask the HHS Office for Civil Rights (OCR) to assist in implementing that electronic capability. There is also an option to direct the patient to their password-protected patient portal if the patient is given easily accessible instructions for use and agrees to that form of delivery.

HIPAA Right of Access Penalties

Per the *HIPAA Journal*, the latest penalties for information blocking were all imposed for the failure to provide timely access to an individual's medical records, rather than for charging unreasonable fees for the information. All but one of these cases was settled with OCR, with the covered entities also agreeing to a corrective action plan to address the noncompliance and to prevent further violations.

One HIPAA-covered entity refused to cooperate with OCR's requests, resulting in a civil monetary penalty (CPM). ACPM Podiatry Group had received a request from a former patient for a copy of his medical records. OCR was notified on April 8, 2019, that ACPM had refused to provide those records. OCR provided technical assistance to ACPM on April 18, 2019, confirming that the records must be provided under HIPAA. A second complaint was then filed with OCR a month later when the records had still not been provided.

Many HIPAA-covered entities believe that if the patient has an outstanding balance with that entity or physician practice that they can hold the patient's records based on that issue. That is an inaccurate assumption.

References: AAPC, HIPAA Journal