

# **Stop \$85,000 Penalty: Comply with New Medical Records Fees Rule**



Presented by:  
**Laura Fryan, JD**

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# About Your Expert



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Laura is a partner with Brouse McDowell law firm. As a healthcare attorney, she provides strategic guidance and legal advice on a variety of topics including HIPAA, Stark and Anti-Kickback compliance, vendor agreements, employment contracts, overpayment audits, government investigations, private/government payer reimbursement, and state/federal licensing.

Laura also facilitates transactions for her healthcare clients including joint ventures, leasing of physician practices, buying and selling physician groups, and other health care related entities. Her clients include physician practices, hospitals, home health agencies, ambulatory surgery centers, assisted living facilities, dialysis companies and health plans.

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Expert: Laura Fryan, JD



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Seen one of these?

ATTN: Medical Records

Re: Violation of HITECH Act

Dear Sir/Madam:

I write to inform you that your records custodian is violating my client's right to obtain his medical records at a low-cost under the HITECH Act, 42 U.S.C. § 17935(e).

By correspondence dated [REDACTED] my client, [REDACTED], requested that all of his electronic records be produced in .pdf file format on a compact disc (CD), on a thumb drive or via e-mail hyperlink. In addition, my client requested, clearly, in writing that the records be delivered to Nikhil S. Agharkar, Esq. at Snyder Sarno D'Aniello Maceri & da Costa LLC.

On [REDACTED] my office received a response from the medical records custodian indicating that they would not comply with my client's request. Instead of providing the records/diagnostic studies requested, the records custodian requested payment of \$48.89 for the records in PDF format. This charge, for a digital file that can be copied to a CD, thumb drive or via email attachments is not a reasonable cost-based fee required under the HITECH Act. I write to request that you take the necessary steps to bring your records custodian in compliance with this law.

The HITECH Act provides my client with the right to receive low-cost medical records in electronic format. The act modified HIPAA regulations limiting charges for medical records to labor-only fees. They have the right under this law to send the records to any individual they may designate in writing. Rules promulgated by the Department of Health and Human Services in 2013 clarify the scope of this law and the rights available to my client.

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## Stop \$85,000 Penalty: Comply with New Medical Records Fees Rule

The fee that a covered entity may impose for providing e-health records "shall not be greater than the entity's labor costs" in responding to the request. 42 U.S.C. § 17935(c)(2). The regulations make clear that the costs are limited to labor, the cost of supplies, in this case, the cost of a CD; and postage. See 45 C.F.R. § 164.524(c)(4)(i)-(iii). Moreover, as a covered entity, you are required to answer requests within 30 days. 45 C.F.R. § 164.524(b)(2)(i). The low-cost provisions of the HITECH ACT apply to any individual the patient designates to receive their records. The law requires that you provide the records to "any entity or person designated by the individual, provided that any such choice is clear, conspicuous, and specific . . . ." 42 U.S.C. § 17935(c)(1). This means that a patient has the right to designate an attorney or any other individual they choose.

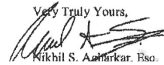
My client only needs to provide a written request. The regulations clarify that the "request must be in writing, signed by the individual, and clearly identify the designated person and where to send the copy of protected health information." 45 C.F.R. 164.524(c)(3)(ii). When a patient has made a request that satisfies these conditions, "the covered entity must provide the copy to the person designated by the individual." *Id.*

My client's letter meets all legal requirements. [REDACTED] clearly requested medical records be released to our office. By law, you must provide the records at a fee no greater than your labor costs. Additional fees are allowed for the cost of media, in this case, a CD and postage. Instead, your medical records department seeks to impose a fee of \$48.89 for electronic records.

The Office of Civil Rights of the Department of Health & Human Services has suggested that an appropriate fee related to a HITECH request should not exceed \$6.50. Clearly, the amount sought far exceeds said amount.

As you know, compliance with HIPAA as amended by the HITECH Act and its regulations are enforced by the Department of Health and Human Services' Office of Civil Rights. If you do not direct your records custodian to comply with my client's request, I will be submitting a copy of this letter along with a complaint on my client's behalf to the New Jersey regional office. For your reference, I enclose regulations explaining that your facility may be fined up to \$1.5 million for its continuous non-compliance. To avoid such an extreme result, please provide a HIPAA compliant invoice for these records.

Thank you in advance for your attention.

Very Truly Yours,  
  
Nikhil S. Ashirkar, Esq.

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## Ciox Health, LLC v. Alex Azar, et al.<sup>1</sup>

- Ciox Health, LLC is a national medical records provider that maintains, retrieves, and produces individual's PHI
- This case concerns what a company like Ciox OR a health care provider can charge for searching for, retrieving, and delivering PHI.
- To ensure that patient access to PHI was not thwarted by excessive fees, the United States Department of Health and Human Services ("HHS") adopted the "Patient Rate"
- For years, the medical records industry understood that the limitations imposed by the Patient Rate applied only to requests for PHI made by the patient for use by the patient.
- For other types of requests, such as those made by commercial entities, like insurance companies and law firms, the records industry understood that the allowable fee was not restricted by the Patient Rate.
- That understanding changed, however, in 2016, when HHS issued a guidance document, which stated that the Patient Rate applies even to requests to deliver PHI to third parties. This change, according to Ciox, caused Ciox and other medical records companies to lose millions of dollars in revenue.

 1435 F.Supp.3d 30 (D.D.C. 2020)

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## 2000: "Patient Rate"

- Let's go back to 2000: The HIPAA Privacy Rule established an individual's right to access PHI and the permissible fee that can be charged for such production.
- For requests brought by an individual seeking his or her own records, the Privacy Rule permits a covered entity to "charge a reasonable, cost-based fee" (the Patient Rate):
- (1) the cost of copying, including the costs of supplies and labor for copying the PHI
- (2) Postage, when the individual has requested the copy, or the summary or explanation, be mailed
- (3) Preparing an explanation or summary of the PHI
- Notably, the Patient Rate excludes other common costs associated with maintaining and producing PHI, such as costs of data storage, data infrastructure, and document retrieval.



## However...

- When the cost of obtaining and transmitting PHI was to be borne by someone other than the patient, HHS did not limit the charge amount to the Patient Rate:  
"We do not intend to affect the fees that covered entities charge for providing protected health information **to anyone other than the individual**. For example, we do not intend to affect current practices with respect to the fees one health care provider charges for forwarding records to another health care provider for treatment purposes."



## 2009: HITECH Act

- Capped fees even further for PHI requested by an individual in electronic form: “[no] greater than the entity’s labor costs in responding to the request for the copy.”
- If PHI is in electronic form, patient has right to have copy in electronic format
- No authorization required for a patient to direct copy of records to a third party (*this is called the third-party directive*)



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## 2013: Omnibus Rule

- Broadened the third-party directive created by the HITECH Act to reach requests for PHI contained in any format, and not just in an EHR.
- Also amended that portion of the Privacy Rule that specifies the costs recoverable under the Patient Rate. HHS broke out, as part of the reasonable cost-based fee, the cost of labor for copying PHI, whether in paper or electronic format.
- Such cost “could include skilled technical staff time spent to create and copy the electronic file, such as compiling, extracting, scanning and burning [PHI] to media, and distributing the media.”
- “[A]ctual labor costs associated with the retrieval of electronic information,” however, would not be recoverable under the Patient Rate.



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## 2016: HHS Guidance

- HHS issued a guidance document in 2016 titled "Individuals' Right Under HIPAA to Access their Health Information 45 C.F.R. § 164.524."<sup>2</sup>
- HHS declared that the Patient Rate applies
- 1) when an individual directs a covered entity to send the PHI to a third party AND
- 2) regardless of whether the access request was submitted to the covered entity by the individual directly or forwarded to the covered entity by a third party on behalf and at the direction of the individual
- To direct a copy to a third party, the individual's access request must be in writing, signed by the individual, and clearly identify the designated person or entity and where to send the PHI. (See 45 CFR 164.524(c)(3)(ii))
- The Patient Rate does not apply when "the third party is initiating a request for PHI on its own behalf, with the individual's HIPAA authorization."
- The Patient Rate *does apply* where the third party is forwarding - on behalf and at the direction of the individual - the individual's access request for a covered entity to direct a copy of the individual's PHI to the third party.

<sup>2</sup> <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html#maximumflatfee>



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## Calculating the Fee



- ❑ The 2016 Guidance also provided direction with respect to determining the Patient Rate.
- First, it reaches only those labor costs incurred after the responsive PHI "has been identified, retrieved or collected, compiled and/or collated, and is ready to be copied"
- Does not include the labor for "[s]earching for, retrieving, and otherwise preparing the responsive information for copying"
- Second, the 2016 Guidance set forth three alternatives for calculating, the "reasonable, cost-based fee"
- (1) by calculating actual allowable costs to fulfill each request; or
- (2) by using a schedule of costs based on average allowable labor costs to fulfill standard requests."
- "Alternatively, in the case of requests for an electronic copy of PHI maintained electronically, covered entities may: (3) charge a flat fee not to exceed \$6.50 (inclusive of all labor, supplies, and postage)."
- The 2016 Guidance notes that "[c]harging a flat fee not to exceed \$6.50 per request is therefore **an option** available to entities that do not want to go through the process of calculating actual or average allowable costs for requests for electronic copies of PHI maintained electronically." [emphasis added]

These alternatives apply to "a covered entity (or business associate operating on its behalf)."



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## So How Did Ciox Get Involved?

- In March 2017, HHS notified CHI Health St. Francis of a patient complaint alleging that Ciox had charged an excessive fee for forwarding her electronic medical records to a law firm.
- HHS warned St. Francis that, as a result of Ciox's actions, St. Francis may have violated the Privacy Rule, but the agency took no further action.
- On November 16, 2018, HHS advised Ciox that it had received a complaint, asserting that "when an individual makes a request through Ciox for his/her medical records to be directed to a third party, such as a law firm, Ciox routinely charges fees that are not compliant with" the Privacy Rule.
- HHS demanded Ciox produce records to aid in HHS's investigation.
- HHS later rescinded its record request but Ciox filed suit against HHS claiming that it did not have the authority to expand the Patient Rate and its scope under the HITECH Act, the Omnibus Rule, and the 2016 HHS Guidance.



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## Ciox Ruling

1. Struck down the 2013 Omnibus Rule expansion of the third-party directive for requests for PHI contained in any format, and not just in an EHR
  - HHS exceeded its rule making authority, can't expand a restriction enacted by Congress in HITECH Act
2. Struck down part of the 2016 HHS Guidance: the Patient Rate does NOT apply to third-party directives
  - Conflicts with 2000 Privacy Rule
3. Upheld the 2016 HHS Guidance on calculating the Patient Rate



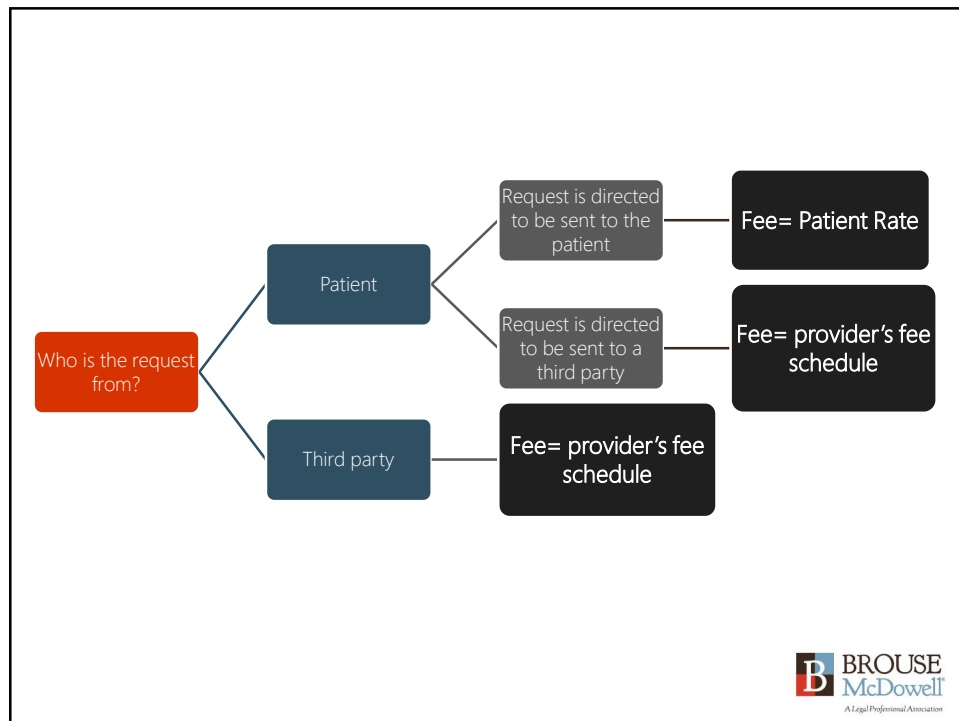
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## So What Does This Mean?

- Fees are only restricted to the Patient Rate when a patient (or personal representative) requests his or her medical records to be sent to himself or herself
- Health care providers can set their own charges for requests made by:
  - 1) A patient, when the patient directs the records to be sent to a third party, OR
  - 2) Third parties (with valid authorization)



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## Let's Dive Into Calculating Fees...

### Actual costs

- Actual labor costs to fulfill the request, as long as the labor included is only for copying (and/or creating a summary or explanation if the individual chooses to receive a summary or explanation) and the labor rates used are reasonable for such activity.
- Can add any applicable supply (e.g., paper, or CD or USB drive) or postage costs.
- Must be prepared to inform individuals in advance of the approximate fee that may be charged for providing the individual with a copy of her PHI.
- An example of an actual labor cost calculation would be to time how long it takes to make and send the copy in the form and format and manner requested or agreed to by the individual and multiply the time by the reasonable hourly rate of the person copying and sending the PHI. What is reasonable for purposes of an hourly rate will vary depending on the level of skill needed to create and transmit the copy in the manner requested or agreed to by the individual (e.g., administrative level labor to make and mail a paper copy versus more technical skill needed to convert and transmit the PHI in a particular electronic format).



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### Average costs

- In lieu of calculating labor costs individually for each request, a covered entity can develop a schedule of costs for labor based on average labor costs to fulfill standard types of access requests, as long as the types of labor costs included are the ones which the Privacy Rule permits to be included in a fee (e.g., labor costs for copying but not for search and retrieval) and are reasonable. Covered entities may add to that amount any applicable supply (e.g., paper, or CD or USB drive) or postage costs.
- This standard rate can be calculated and charged as a per page fee only in cases where the PHI requested is maintained in paper form and the individual requests a paper copy of the PHI or asks that the paper PHI be scanned into an electronic format. *Per page fees are not permitted for paper or electronic copies of PHI maintained electronically.*

### Flat fee for electronic copies of PHI maintained electronically.

- A covered entity may charge individuals a flat fee for all requests for electronic copies of PHI maintained electronically, provided the fee does not exceed \$6.50, inclusive of all labor, supplies, and any applicable postage.



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## \*But Check State Law Too!

- Ohio Revised Code 3701.741
  - Specifies fee schedule for patient requests v. non-patient requestors
    - Allows a records fee search for non-patient requestors
  - Generally follows a per-page fee structure
  - Distinguishes between paper and electronic records fee amounts
  - Allows charging for postage
  - Provides some exceptions when a free copy must be provided
    - BWC, Industrial Commission, some ODJFS records, Social Security-related claims
  - Posted on the Ohio Department of Health website:  
(<https://odh.ohio.gov/wps/portal/gov/odh/know-our-programs/medical-records-price-index/resources>)
- Generally:
  - Some state laws require at least one copy of medical records be provided at no charge to the patient.
  - Some state laws have a maximum amount that is less than the \$6.50 HIPAA amount.



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## Which Law Prevails?

- More stringent laws generally prevail as between state and federal laws... in other words the cheaper rates for the patient
- If the patients request records to be sent to themselves → Patient Rate applies
- If an attorney requests records that includes patient consents, verify whether this is "pass-through" patient request or initiated by the third party



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## Ohio Law Example

- For requests from the patient that are produced directly back to the patient: follow the fee schedule in 3701.741(B)(1) but cap out the total at HIPAA's ceiling of \$6.50.
- For requests from the patient that are directed to a third party: follow the fee schedule in 3701.741(B)(1) (no cap on the total).
- For requests from a third party other than the patient or the patient's personal representative (aka guardian, parent, estate administrator): follow the fee schedule in 3701.741(B)(2) (no cap on the total).



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(C)(1) On request, a health care provider or medical records company shall provide **one copy of the patient's medical record and one copy of any records regarding treatment performed subsequent to the original request**, not including copies of records already provided, **without charge to the following**:

- (a) **The bureau of workers' compensation**, in accordance with Chapters 4121. and 4123. of the Revised Code and the rules adopted under those chapters;
- (b) **The industrial commission**, in accordance with Chapters 4121. and 4123. of the Revised Code and the rules adopted under those chapters;
- (c) **The department of medicaid or a county department of job and family services**, in accordance with Chapters 5160., 5161., 5162., 5163., 5164., 5165., 5166., and 5167. of the Revised Code and the rules adopted under those chapters;
- (d) **The attorney general**, in accordance with sections 2743.51 to 2743.72 of the Revised Code and any rules that may be adopted under those sections;
- (e) A patient, patient's personal representative, or authorized person if the medical record is necessary **to support a claim under Title II or Title XVI of the "Social Security Act,"** 49 Stat. 620 (1935), 42 U.S.C.A. 401 and 1381, as amended, and the request is accompanied by documentation that a claim has been filed.



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## Florida Law Example

- Florida Statutes 395.3025 (Patient and personnel records, copies, examination)

Regarding records from hospitals:

Exclusive charge for copies may include sales tax and actual postage

Non-paper records not to exceed \$2.00 per page

Paper records not to exceed \$1.00 per page

An additional \$1.00 may be charged for each year of records requested

- Rule 64B8-10.003, Florida Administrative Code (Costs of Reproducing Medical Records)

Regarding records from anyone licensed under chapter 458 (most physicians):

\$1.00 per page for the first 25 pages of written material

\$.25 for each additional page

Actual cost of reproducing nonwritten records such as x-rays. (The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs and overhead costs associated with such duplication.)



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## ONC Cures Act Final Rule

- The goal is for patients to access their electronic medical record at no additional cost and for providers to choose the IT tools that allow them to provide the best care for patients, without excessive costs or technical barriers
- Prohibits information blocking—anything that interferes with, prevents, or materially discourages access, exchange, or use of electronic health information



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## What CAN providers do?

- Consistent with HIPAA, a provider can charge a reasonable, cost-based fee for records
- Exceptions that involve *not fulfilling requests* to access, exchange, or use EHI: not considered information blocking if..
  1. **Preventing harm exception:** a provider engages in practices that are reasonable and necessary to prevent harm to a patient or another person, provided certain conditions are met.
  2. **Privacy exception:** a provider does not fulfill a request in order to protect an individual's privacy, provided certain conditions are met.
  3. **Security exception:** a provider interferes with the access, exchange, or use of EHI in order to protect the security of EHI, provided certain conditions are met.
  4. **Infeasibility exception:** a provider does not fulfill a request due to the infeasibility of the request, provided certain conditions are met.
  5. **Health IT performance exception:** a provider takes reasonable and necessary measures to make health IT temporarily unavailable or to degrade the health IT's performance for the benefit of the overall performance of the health IT, provided certain conditions are met.
- Exceptions that involve *procedures for fulfilling requests* to access, exchange, or use EHI: not considered information blocking if..
  6. **Content and manner exception:** a provider limits the content of its response to a request to access, exchange, or use EHI or the manner in which it fulfills a request to access, exchange, or use EHI, provided certain conditions are met.
  7. **Fees exception:** a provider charges fees, including fees that result in a reasonable profit margin, for accessing, exchanging, or using EHI, provided certain conditions are met.
  8. **Licensing exception:** a provider licenses interoperability elements for EHI to be accessed, exchanged, or used, provided certain conditions are met.



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## Why is this important?

- Hospitals and providers must attest they are not information blocking and using good faith when implementing and using their EHR to exchange data.
- Potential liability for funds received through the Promoting Interoperability Program and liability for penalties under the False Claims Act.
- Enforcement discretion until the end of the year



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## Questions?

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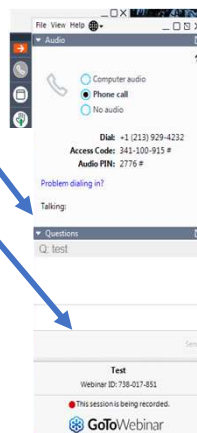
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