

March 23, 2022

Poll Questions for March 23 CHCANYS “Ask the Expert” Sessions

Provider Session

1. Your health center as a matter of policy and practice can delay the release of lab results to the patient portal for a specified period of time to allow the ordering clinician to review the results.
 - A. True
 - B. False**
 - C. I don't know

Discussion

The ONC states in its FAQs it would likely be considered an interference for purposes of information blocking if a health care provider established an organizational policy that imposes delays on the release of lab results for any period of time to allow an ordering clinician to review the results or to personally inform the patient of the results before a patient can electronically access the results.

ONC did clarify in a recent FAQ that it would likely *not* be an interference when a provider follows an individual patient's or patient's representative's request to

delay release of the patient's electronic health information (EHI) to the patient or to the patient's representative.

In the preamble to the 21st Century Cures Act final rule, ONC recognized "some delays may be legitimate" and not be an interference. However, the OIG would need to evaluate the unique facts and circumstances of each situation if someone files a complaint. A delay should be for no longer than necessary to fulfill each patient's request.

When assessing whether a delay may be information blocking, facts indicating that a provider created extended or unnecessary delays may be evidence of a provider's intent to interfere with access, exchange, or use of EHI. For example, when a provider delays the release of EHI in response to a patient's request, relevant considerations for assessing whether the delay may be information blocking could include whether the patient and provider agree on the timeframe or conditions for the delay, such as after 3 days or upon their clinician's review, respectively; whether the timeframe or conditions are met; and whether there were no extended or unnecessary delays in meeting the timeframe or conditions.

2. Hospitals are required to send me an electronic event notification if one of my patients is admitted, discharged, or transferred (ADT) even if I have not requested access, exchange, or use of this Electronic Health Information (EHI).

A. True

B. False

C. I don't know

Discussion

In the Centers for Medicare & Medicaid Services Interoperability and Patient Access Final Rule, CMS modified the Conditions of Participation to require hospitals, psychiatric hospitals, and critical access hospitals to send electronic patient event notifications of a patient's admission, discharge, and transfer (ADT) to another health care facility or to another provider or practitioner. The CMS regulations do not require hospitals to first receive a request for access, exchange, or use of EHI to trigger their obligation to send the ADT notification. Thus, if a hospital does not comply with the regulatory requirement to send the ADT notification, its noncompliance with the CMS regulation could be an interference with the access, exchange, or use of EHI under the information blocking regulation too.

3. The Preventing Harm Exception under the Information Blocking regulation relies on the same types of harm as apply for a covered entity to deny access to protected health information under the HIPAA Privacy Rule.

A. True

B. False

C. I don't know

Discussion

The Preventing Harm Exception's *type of harm* condition relies on the same types of harm that serve as grounds for reviewable denial of an individual's right of access under the Privacy Rule.

ONC discussed in the Cures Act Final Rule, a clinician generally orders tests in the context of a clinician-patient relationship. In the context of that relationship, the clinician ordering a particular test would know the range of results that could be returned and could prospectively formulate, in the exercise of his or her professional judgment, an individualized determination for the specific patient that:

- withholding the results of the particular test(s) from the patient would substantially reduce a risk to the patient's or another person's life or physical safety - **or – (note this does not include emotional harm)**
- that withholding the results of the particular test(s) from a representative of the patient would substantially reduce a risk of substantial harm to the patient or another person. (*"Substantial harm" includes "substantial physical, emotional, or psychological harm"* under the HIPAA Privacy Rule)

Such individualized determinations made in good faith by an ordering clinician, in the exercise of their professional judgment and in the context of the treatment relationship within which they order the test, would satisfy the *type of risk* and *type of harm* conditions of the Preventing Harm exception.

ONC recently published a new FAQ on the preventing harm exception to provide additional clarity. We will provide a copy of the new FAQs published in February.

4. Which of the following clinical notes are not included in the definition of Electronic Health Information that must be provided electronically without delay if you receive a legally permissible request for access, exchange, or use and are technically able?
- A. Consultation and progress notes
 - B. Discharge summary notes
 - C. History & Physical
 - D. Laboratory, imaging, and pathology report narratives
 - E. Procedure notes
 - F. Psychotherapy notes

Discussion

Any electronic chart notes for a behavioral health visit that do not meet the definition of psychotherapy notes are included in the definition of EHI and must be shared unless not legally permissible or you can meet an exception. HIPAA defines psychotherapy notes as “notes recorded by a health care provider who is a mental health professional documenting or analyzing the contents of a conversation during a private counseling session or a group, joint or family counseling session, and that are separate from the rest of the patient’s medical record.” These notes do not include information about medication management, session start and stop times, test results, summaries of the patient’s diagnosis or symptoms, or information about the patient’s progress.

If your EHR has the technical capability to release the notes in A through E, then your health center should as a matter of practice do so to fulfill patient requests for EHI inclusive of clinical note.

5. If a payer or health plan requests direct access to the health center's EHR for its covered patients, providers should fulfill this request to avoid a claim of information blocking by the payer or health plan.

A. True

B. False

C. I don't know

Discussion

For Payers and Health Plans you usually work with, I had noted at last week's webinar the advice from the AMA when fulfilling payer or health plans requests for EHI access, exchange, or use, especially if they are requesting direct access to your EHR.

The AMA stated the following in one of its publications on complying with the information blocking requirements: "You can expect the information blocking regulation to be "weaponized" by those seeking data access. We expect entities such as payers and health plans to leverage the info blocking rules to gain increased access to you EHR and patient records. While this may be communicated to you or your organization as a way to reduce administrative burden, (e.g., reduce the burden around prior authorizations), there is increasing

concern that payers could threaten physician practices with ‘info blocking action’ if their requests for direct access into your EHR [are] denied. Payers having unfettered access to all your patients’ records may impact patient coverage, access to care, narrowing of networks, or your autonomy to practice medicine. We strongly urge all physicians to seek counsel from an attorney prior to responding to any payer or health plan requests for direct access into their EHR.”

Remember that under the Manner condition of the Content and Manner exception, you and the requester must come to terms on the technical manner and costs for requests to provide access to EHI in “any manner” and can decline. Instead, suggest one of the alternative manner to the requestor as provided in the exception, assuming you are technically capable of fulfilling requests in one or more of the three alternative manners. Be clear in your communications with payers about how your organization will fulfill payer/health plan requests for EHI access, exchange, or use in accordance with the Content and Manner exception and other exceptions as they may apply, such as the Privacy exception.

Compliance, HIM, IT Session

1. Your health center should assign the information blocking compliance readiness checklist to your compliance officer to complete.
 - A. True
 - B. False**
 - C. I don't know

Discussion

Your health center should not assign the checklist and self-assessment to a single individual to complete. Instead, identify a project lead and a team of subject matter experts and assign portions of the checklist to the appropriate SME(s) to complete. Then compile the results and discuss as a team. Your team will then be able to develop a workplan and make assignments to close the gaps they identify in the assessment. The project lead would start with the first section of the checklist, "Compliance Program / Team," before making assessment assignments.

2. If a precondition is not met to fulfill an EHI request, such as a state law requiring patient consent, your health center can decline to fill the request and use which of the following information blocking exceptions:
 - A. Infeasibility
 - B. Preventing Harm

C. Privacy**D. Content and Manner****E. None of the above****Discussion**

For example, if HIPAA allows a certain disclosure of ePHI without patient consent and the New York State Mental Hygiene Law does not allow that disclosure unless you obtain patient consent, you cannot make the disclosure unless the patient gives permission. If the patient does not give permission, then this precondition is not met, and you would qualify for the Privacy exception under the information blocking regulations.

The NYS Mental Hygiene Law confidentiality requirements apply to clinical records that are created or maintained by a provider that is operated, licensed, or funded by the New York State Office of Mental Health (OMH). “Clinical records” include any information concerning or related to the examination or treatment of a person who is receiving services from a provider under the jurisdiction of OMH. These provisions would not apply to a private social worker, psychologist, or psychiatrist, nor would they apply to a provider that is licensed by the New York State Department of Health. Also, these requirements do not apply if you are not a provider operated, licensed, or funded by OMH.

The fact that the HIPAA regulations were modified to remove the consent requirement for treatment, payment, and operations (TPO) activities does not preempt New York state law consent requirements. If it is not legally permissible

in New York to share EHI without consent, then you must meet this consent precondition before you fulfil an EHI request from someone other than the patient. If the precondition is not met, you would not be information blocking if you made reasonable efforts within your control to provide the individual with a consent or authorization form to complete, when the form is required. If you receive a consent or authorization form that requires your assistance to satisfy missing elements that the law does not require and you do not provide the assistance, the ONC states that this may be information blocking.

Examples illustrating this privacy sub-exception and would justify you not providing access, exchange, or use of an individual's EHI include:

- Not being able to obtain consent of the individual that certain federal and state laws require for his or her EHI to be accessed, exchanged, or used for specific purposes, such as state laws requiring an individual's consent for uses and disclosure of EHI regarding sensitive health conditions, (i.e., HIV/AIDS, mental health, or genetic testing).
- An individual refusing to provide a HIPAA authorization the law requires prior to providing access, exchange, or use of EHI.
- Being unable to verify the identity or authority of a person requesting access to EHI, and the law requires this verification before providing access, exchange, or use of EHI.
- Another health care provider is requesting EHI from you for a quality improvement project that requires you to verify the provider has a relationship

with the person whose information is being requested and you are unable to establish if the relationship exists.

3. Which of the following technical manners, if technically able, is not permissible for electronically fulfilling an EHI request if requested by a patient?
- A. Patient portal using certified health IT
 - B. Direct secure messaging
 - C. Unsecure email
 - D. 3rd-party consumer application of patient's choice
 - E. One of the NY regional health information networks
 - F. All of the above are permissible if technically able [and complies with the law]

Discussion

If the EHR you are using is 2015 edition certified technology, then it will have a view/download/transmit function and a patient portal, which enables patients to remotely obtain certain information without having to contact your staff. The EHR should also allow for secure "Direct Messaging" and creation of a PDF, which you can print or send using encryption technology. It may also have the capability to save documents in the CDA format, which is a format specifically created for health information. As a part of the compliance readiness assessment checklist, your health center should consult with the EHR vendor to find out all their capabilities to provide access, exchange, and use of EHI to your patients or to other providers caring for your patients outside your health center.

If your health center has conducted a security risk assessment and determined that you should only send encrypted email, but a patient requests you send her medical record through unencrypted email, then you should notify the patient there is some risk that unauthorized individuals may view the information while transmitted across the internet. If the patient is fine with the risk, then you must accommodate the patient's request and send the information via unencrypted email. You should document in your records that you informed the patient of the risk and the patient accepted.

[The next two questions go together]

4. Which of the following is/are included in the Cures Act updates to your certified EHR technology to support interoperability?
- A. Standardized FHIR API for patient and population health services (uses USCDI standard)
 - B. Replacement of Clinical Common Data Set (CCDS) with the USCDI standard in several certification criteria
 - C. Both A and B**
 - D. None of the above

Discussion

ONC's Cures Act rule requires developers of certified health IT (i.e., your EHR vendor) to make these updates available by December 31, 2022. Many of the vendors have already completed the updates and made them available to their

customers. This is something you will need to discuss with your vendor if you don't currently have the updates. Once you have these updates, the technology should be able to make the data elements in the USCDI (including clinical notes) available to your patient in the patient portal or via the FHIR API for Patient and Population Health Services.

5. Until what date is the definition of EHI confined to the data elements in the USCDI V1 July 2020 Errata standard under the Content and Manner Exception?
- A. December 31, 2022
 - B. October 5, 2022**
 - C. October 6, 2022
 - D. December 31, 2023, when health IT developers must make an EHI export capability available to providers

Discussion

Until October 5, 2022, the definition of EHI confined to the data elements in the USCDI V1 July 2020 Errata standard under the Content and Manner Exception. Beginning on October 6, the definition includes all EHI in your systems; however, ONC's rule is not requiring the health IT vendors to provide an EHI export capability until the end of 2023. Some of the vendors are already working on this and may already have this capability available yet this year.

6. If our health center can provide "electronic access" (as defined in the Information Blocking regulation) to fulfill a patient's request for a 3rd-party app

designated by the patient to receive her EHI, we can charge fees under the Fees exception.

A. True

B. False

Discussion

The Fees exception specifically defines the term “*electronic access.*” It means an internet-based method that makes the EHI available at the time of the request, and it requires no manual intervention by the requestor or you to fulfill the request. The excluded fees condition prohibits you from charging patients, their personal representatives, or other individual or entity designated by the patient to receive his or her EHI via electronic access, such as a 3rd-party app. You can charge fees to provide an individual access to his or her EHI through other forms of physical media, such as when you print paper copies of the EHI or collate and copy the EHI to a CD or flash drive. This would not implicate the information blocking provision, if the fees you charge for that access comply with the HIPAA Privacy Rule and any NY state laws. Prior to October 6, 2022, the Fees conditions in this exception apply to just the limited EHI identified by the data elements represented in the USCDI standard.