

# New Rules for Charging Patients for Their Medical Records



Just when you thought you understood how to charge for medical records!

New clarifications have just been released that give specific direction to medical practices and other healthcare providers on charging patients for medical records. I have extracted the most salient pieces for you below, followed by FAQs from the published clarifications.

1. Covered entities must inform the individual in advance of the approximate/exact fee that may be charged for the copy.
2. A covered entity can develop a schedule of costs for labor based on average labor costs to fulfill standard types of access requests (e.g. paper records, electronic records, mailed records, etc.)
3. **A covered entity may charge individuals a flat fee for all standard 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. While the Privacy Rule permits the limited fee as described, covered entities should provide individuals who request access to their information with copies of their PHI free of charge.
4. The fee limits apply when an individual directs a covered entity to send the PHI to a third party (and it doesn't matter who the third party is) HOWEVER, where

the third party is initiating a request for PHI on its own behalf, with the individual's HIPAA authorization (or pursuant to another permissible disclosure provision in the Privacy Rule), the access fee limitations do not apply.

5. Administrative and other costs associated with outsourcing the function of responding to individual requests for access cannot be the basis for any fees charged to individuals for providing that access.
6. A covered health care provider cannot charge an individual a fee when it fulfills an individual's HIPAA access request using the View, Download, and Transmit functionality of the provider's CEHRT.
7. HIPAA does not override those State laws that provide individuals with greater rights of access to their health information than the HIPAA Privacy Rule does
8. A covered entity may not charge an individual who, while inspecting her PHI, takes notes, uses a smart phone or other device to take pictures of the PHI, or uses other personal resources to capture the information, however, a covered entity is not required to allow the individual to connect a personal device to the covered entity's systems.
9. A covered entity may not withhold or deny an individual access to his PHI on the grounds that the individual has not paid the bill for health care services.

## **May a covered entity charge individuals a fee for providing the individuals with a copy of their PHI?**

Yes, but only within specific limits. The Privacy Rule permits a covered entity to impose a reasonable, cost-based fee to provide the individual (or the individual's personal representative) with a copy of the individual's PHI, or to direct the copy to a designated third party. The fee may include only the cost of certain labor, supplies, and postage:

1. **Labor for copying the PHI requested by the individual, whether in paper or electronic form.** Labor for copying includes only labor for creating and delivering the electronic or paper copy in the form and format requested or agreed upon by the individual, once the PHI that is responsive to the request has been identified, retrieved or collected, compiled and/or collated, and is ready to be copied. Labor for copying does not include costs associated with reviewing the request for access; or searching for and retrieving the PHI, which includes locating and reviewing the PHI in the medical or other record, and segregating or otherwise preparing the PHI that is responsive to the request for copying. While it has always been prohibited to pass on to an individual labor costs related to search and retrieval, our experience in administering and enforcing the HIPAA Privacy Rule has shown there is confusion about what constitutes a prohibited search and retrieval cost and this guidance further clarifies this issue. This clarification is important to ensure that the fees charged reflect only what the Department considers “copying” for purposes of applying 45 CFR 164.524(c)(4)(i) and do not impede individuals’ ability to receive a copy of their records.
2. **Supplies for creating the paper copy (e.g., paper, toner) or electronic media (e.g., CD or USB drive) if the individual requests that the electronic copy be provided on portable media.** However, a covered entity may not require an individual to purchase portable media; individuals have the right to have their PHI e-mailed or mailed to them upon request.
3. Labor to prepare an explanation or summary of the PHI, if the individual in advance both chooses to receive an explanation or summary and agrees to the fee that may be charged.
4. **Postage**, when the individual requests that the copy, or the summary or explanation, be mailed.

Thus, costs associated with updates to or maintenance of systems and data, capital for data storage and maintenance, labor associated with ensuring compliance with HIPAA (and other applicable law) in fulfilling the access request (e.g., verification, ensuring only information about the correct individual is included, etc.) and other costs not included above, even if authorized by State law, are not permitted for purposes of calculating the fees that can be charged to individuals. See 45 CFR 164.524(c)(4).

Further, while the Privacy Rule permits the limited fee described above, covered entities should provide individuals who request access to their information with copies of their PHI free of charge. While covered entities should forgo fees for all individuals, not charging fees for access is particularly vital in cases where the financial situation of an individual requesting access would make it difficult or impossible for the individual to afford the fee. Providing individuals with access to their health information is a necessary component of delivering and paying for health care. We will continue to monitor whether the fees that are being charged to individuals are creating barriers to this access, will take enforcement action where necessary, and will reassess as necessary the provisions in the Privacy Rule that permit these fees to be charged.

### **What labor costs may a covered entity include in the fee that may be charged to individuals to provide them with a copy of their PHI?**

A covered entity may include reasonable labor costs associated only with the: (1) labor for copying the PHI requested by the individual, whether in paper or electronic form; and (2) labor to prepare an explanation or summary of the PHI, if the individual in advance both chooses to receive an explanation or summary and agrees to the fee that may be charged.

Labor for copying includes only labor for creating and

delivering the electronic or paper copy in the form and format requested or agreed upon by the individual, once the PHI that is responsive to the request has been identified, retrieved or collected, compiled and/or collated, and is ready to be copied. For example, labor for copying may include labor associated with the following, as necessary to copy and deliver the PHI in the form and format and manner requested or agreed to by the individual:

- Photocopying paper PHI.
- Scanning paper PHI into an electronic format.
- Converting electronic information in one format to the format requested by or agreed to by the individual.
- Transferring (e.g., uploading, downloading, attaching, burning) electronic PHI from a covered entity's system to a web-based portal (where the PHI is not already maintained in or accessible through the portal), portable media, e-mail, app, personal health record, or other manner of delivery of the PHI.
- Creating and executing a mailing or e-mail with the responsive PHI.

While we allow labor costs for these limited activities, we note that as technology evolves and processes for converting and transferring files and formats become more automated, we expect labor costs to disappear or at least diminish in many cases.

In contrast, labor for copying does not include labor costs associated with:

- Reviewing the request for access.
- Searching for, retrieving, and otherwise preparing the responsive information for copying. This includes labor to locate the appropriate designated record sets about the individual, to review the records to identify the PHI that is responsive to the request and to ensure the information relates to the correct individual, and to

segregate, collect, compile, and otherwise prepare the responsive information for copying.

**May a covered health care provider charge a fee under HIPAA for individuals to access the PHI that is available through the provider's EHR technology that has been certified as being capable of making the PHI accessible?**

No. The HIPAA Privacy Rule at 45 CFR 164.524(c)(4) permits a covered entity to charge a reasonable, cost-based fee that covers only certain limited labor, supply, and postage costs that may apply in providing an individual with a copy of PHI in the form and format requested or agreed to by the individual. Where an individual requests or agrees to access her PHI available through the View, Download, and Transmit functionality of the CEHRT, we believe there are no labor costs and no costs for supplies to enable such access. Thus, a covered health care provider cannot charge an individual a fee when it fulfills an individual's HIPAA access request using the View, Download, and Transmit functionality of the provider's CEHRT.

**May a covered entity that uses a business associate to act on individual requests for access pass on the costs of outsourcing this function to individuals when they request copies of their PHI?**

No. A covered entity may charge individuals a reasonable, cost-based fee that includes only labor for copying the PHI, costs for supplies, labor for creating a summary or explanation of the PHI if the individual requests a summary or explanation, and postage, if the PHI is to be mailed. See 45 CFR 164.524(c)(4). Administrative and other costs associated with outsourcing the function of responding to individual requests for access cannot be the basis for any fees charged to individuals for providing that access.

## **Must a covered entity inform individuals in advance of any fees that may be charged when the individuals request a copy of their PHI?**

Yes. When an individual requests access to her PHI and the covered entity intends to charge the individual the limited fee permitted by the HIPAA Privacy Rule for providing the individual with a copy of her PHI, the covered entity must inform the individual in advance of the approximate fee that may be charged for the copy. An individual has a right to receive a copy of her PHI in the form and format and manner requested, if readily producible in that way, or as otherwise agreed to by the individual. Since the fee a covered entity is permitted to charge will vary based on the form and format and manner of access requested or agreed to by the individual, covered entities must, at the time such details are being negotiated or arranged, inform the individual of any associated fees that may impact the form and format and manner in which the individual requests or agrees to receive a copy of her PHI. The failure to provide advance notice is an unreasonable measure that may serve as a barrier to the right of access. Thus, this requirement is necessary for the right of access to operate consistent with the HIPAA Privacy Rule. Further, covered entities should post on their web sites or otherwise make available to individuals an approximate fee schedule for regular types of access requests. In addition, if an individual requests, covered entities should provide the individual with a breakdown of the charges for labor, supplies, and postage, if applicable, that make up the total fee charged. We note that this information would likely be requested in any action taken by OCR in enforcing the individual right of access, so entities will benefit from having this information readily available.

## **How can covered entities calculate the limited fee**

## **that can be charged to individuals to provide them with a copy of their PHI?**

The HIPAA Privacy Rule permits a covered entity to charge a reasonable, cost-based fee for individuals (or their personal representatives) to receive (or direct to a third party) a copy of the individuals' PHI. In addition to being reasonable, the fee may include only certain labor, supply, and postage costs that may apply in providing the individual with the copy in the form and format and manner requested or agreed to by the individual. A covered entity may calculate this fee in three ways.

- Actual costs. A covered entity may calculate 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. The covered entity may add to the actual labor costs any applicable supply (e.g., paper, or CD or USB drive) or postage costs. Covered entities that charge individuals actual costs based on each individual access request still 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 for the workforce member of the covered entity (or business associate) 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).

- 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. OCR is aware that per page fees in many cases have become a proxy for fees charged for all types of access requests – whether electronic or paper – and that many states with authorized fee structures have not updated their laws to account for efficiencies that exist when generating copies of information maintained electronically. This practice has resulted in fees being charged to individuals for copies of their PHI that do not appropriately reflect the permitted labor costs associated with generating copies from information maintained in electronic form. Therefore, OCR does not consider per page fees for copies of PHI maintained electronically to be reasonable for purposes of 45 CFR 164.524(c)(4).

- Flat fee for electronic copies of PHI maintained electronically. A covered entity may charge individuals a flat fee for all standard 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.

## **Are costs authorized by State fee schedules permitted to be charged to individuals when providing them with a copy of their PHI under the HIPAA Privacy Rule?**

No, except in cases where the State authorized costs are the same types of costs permitted under 45 CFR 164.524(c)(4) of the HIPAA Privacy Rule, and are reasonable. **The bottom line is that the costs authorized by the State must be those that are permitted by the HIPAA Privacy Rule and must be reasonable.** The HIPAA Privacy Rule at 45 CFR 164.524(c)(4) permits a covered entity to charge a reasonable, cost-based fee that covers only certain limited labor, supply, and postage costs that may apply in providing an individual with a copy of PHI in the form and format requested or agreed to by the individual. Thus, labor (e.g., for search and retrieval) or other costs not permitted by the Privacy Rule may not be charged to individuals even if authorized by State law. Further, a covered entity's fee for providing an individual with a copy of her PHI must be reasonable in addition to cost-based, and there may be circumstances where a State authorized fee is not reasonable, even if the State authorized fee covers only permitted labor, supply, and postage costs. For example, a State-authorized fee may be higher than the covered entity's cost to provide the copy of PHI. In addition, many States with authorized fee structures have not updated their laws to account for efficiencies that exist when generating copies of information maintained electronically. Therefore, these State authorized fees for copies of PHI maintained electronically may not be reasonable for purposes of 45 CFR 164.524(c)(4).

**A State law requires that a health care provider give individuals one free copy of their medical records but HIPAA permits the provider to charge a fee. Does HIPAA override the State law?**

No, so the health care provider must comply with the State law and provide the one free copy. In contrast to State laws that authorize higher or different fees than are permitted under HIPAA, HIPAA does not override those State laws that provide individuals with greater rights of access to their health information than the HIPAA Privacy Rule does. See 45 CFR 160.202 and 160.203. This includes State laws that: (1) prohibit fees to be charged to provide individuals with copies of their PHI; or (2) allow only lesser fees than what the Privacy Rule would allow to be charged for copies.

**When do the HIPAA Privacy Rule limitations on fees that can be charged for individuals to access copies of their PHI apply to disclosures of the individual's PHI to a third party?**

The fee limits apply when an individual directs a covered entity to send the PHI to the third party. Under the HIPAA Privacy Rule, a covered entity is prohibited from charging an individual who has requested a copy of her PHI more than a reasonable, cost-based fee for the copy that covers only certain labor, supply, and postage costs that may apply in fulfilling the request. See 45 CFR 164.524(c)(4). This limitation applies regardless of whether the individual has requested that the copy of PHI be sent to herself, or has directed that the covered entity send the copy directly to a third party designated by the individual (and it doesn't matter who the third party is). 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). Thus, written access requests by

individuals to have a copy of their PHI sent to a third party that include these minimal elements are subject to the same fee limitations in the Privacy Rule that apply to requests by individuals to have a copy of their PHI sent to themselves. This is true 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 (such as by an app being used by the individual). Further, these same limitations apply when the individual's personal representative, rather than the individual herself, has made the request to send a copy of the individual's PHI to a third party.

In contrast, third parties often will directly request PHI from a covered entity and submit a written HIPAA authorization from the individual (or rely on another permission in the Privacy Rule) for that disclosure. Where the third party is initiating a request for PHI on its own behalf, with the individual's HIPAA authorization (or pursuant to another permissible disclosure provision in the Privacy Rule), the access fee limitations do not apply. However, as described above, 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, the fee limitations apply.

We note that a covered entity (or a business associate) may not circumvent the access fee limitations by treating individual requests for access like other HIPAA disclosures – such as by having an individual fill out a HIPAA authorization when the individual requests access to her PHI (including to direct a copy of the PHI to a third party). As explained elsewhere in the guidance, a HIPAA authorization is not required for individuals to request access to their PHI, including to direct a copy to a third party – and because a HIPAA authorization requests more information than is

necessary or that may not be relevant for individuals to exercise their access rights, requiring execution of a HIPAA authorization may create impermissible obstacles to the exercise of this right. Where it is unclear to a covered entity, based on the form of a request sent by a third party, whether the request is an access request initiated by the individual or merely a HIPAA authorization by the individual to disclose PHI to the third party, the entity may clarify with the individual whether the request was a direction from the individual or a request from the third party. OCR is open to engaging with the community on ways that technology could easily convey this information.

Finally, we note that disclosures to a third party made outside of the right of access under other provisions of the Privacy Rule still may be subject to the prohibition against sales of PHI (i.e., the prohibition against receiving remuneration for a disclosure of PHI at 45 CFR 164.502(a)(5)(ii)). Where the prohibition applies, a covered entity may charge only a reasonable, cost-based fee to cover the cost to prepare and transmit the PHI or a fee otherwise expressly permitted by other law or must have received a HIPAA authorization from the individual that states that the disclosure will involve remuneration to the covered entity.

**May a health care provider withhold a copy of an individual's PHI from the individual who requested it because the covered entity used the individual's payment of the allowable fee for the copy to instead pay an outstanding bill for health care services provided to the individual?**

No. Just as a covered entity may not withhold or deny an individual access to his PHI on the grounds that the individual has not paid the bill for health care services the covered entity provided to the individual, a covered entity may not withhold or deny access on the grounds that the

covered entity used the individual's payment of the fee for a copy of his PHI to offset or pay the individual's outstanding bill for health care services.

**Can an individual be charged a fee if the individual requests only to inspect her PHI at the covered entity (i.e., does not request that the covered entity produce a copy of the PHI)?**

No. The fees that can be charged to individuals exercising their right of access to their PHI apply only in cases where the individual is to receive a copy of the PHI, versus merely being provided the opportunity to view and inspect the PHI. The HIPAA Privacy Rule provides individuals with the right to inspect their PHI held in a designated record set, either in addition to obtaining copies or in lieu thereof, and requires covered entities to arrange with the individual for a convenient time and place to inspect the PHI. See 45 CFR 164.524(c)(1) and (c)(2). Consequently, covered entities should have in place reasonable procedures to enable individuals to inspect their PHI, and requests for inspection should trigger minimal additional effort by the entity, particularly where the PHI requested is of the type easily accessed onsite by the entity itself in the ordinary course of business. For example, covered entities could use the capabilities of Certified EHR Technology (CEHRT) to enable individuals to inspect their PHI, if the individuals agree to the use of this functionality.

Further, a covered entity may not charge an individual who, while inspecting her PHI, takes notes, uses a smart phone or other device to take pictures of the PHI, or uses other personal resources to capture the information. If the individual is making the copies of PHI using her own resources, the covered entity may not charge a fee for those copies, as the copying is being done by the individual and not the entity. A covered entity may establish reasonable

policies and safeguards regarding an individual's use of her own camera or other device for copying PHI to assure that equipment or technology used by the individual is not disruptive to the entity's operations and is used in a way that enables the individual to copy or otherwise memorialize only the records to which she is entitled. Further, a covered entity is not required to allow the individual to connect a personal device to the covered entity's systems.

More information is available **here**.