

## Nursing Homes Need to Play by the Same Rules

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Some nursing homes are taking the position that they do not have to comply with the “patient rate” under HIPAA, and in fact are exempt from it. The position of the nursing homes is incorrect. They have to comply with HIPAA and the rates set forth for providing patients their medical records.

An analysis of the issue begins with 45 CFR §164.524 of the Health Insurance Portability and Accountability Act (hereinafter “HIPAA”) which provides in depth an individual’s right to access their protected health information. We specifically are dealing with patients who want to copies of their health records electronically on a CD. Requesting records on this format is provided by §164.524(c)(2)(i) & (ii) which reads:

(2) Form of access requested.

(i) **The covered entity** must provide the individual with access to the protected health information in the form and format requested by the individual, if it is readily producible in such form and format; or, if not, in a readable hard copy form or such other form and format as agreed to by the covered entity and the individual.

(ii) Notwithstanding paragraph (c)(2)(i) of this section, if the protected health information that is the subject of a request for access is maintained in one or more designated record sets electronically and if the individual requests and electronic copy of such information, the covered entity must provide the individual with access to the protected health information in the electronic form and format requested by the individual, if it is readily producible in such form and format; or, if not, in a readable electronic form and format as agreed to by the covered entity and the individual.

45 CFR §164.524(c)(2)(i) & (ii) (emphasis added).

The preferred format today is to receive records electronically on a CD to prevent from having to exchange thousands of pages of documents. The next question to ask is what kind of fees are involved in requesting the production of these document. 45 CFR §164.524(c)(4) sets forth what fees a **covered entity** can charge a patient. This section reads:

(4) Fees. If the individual requests a copy of the protected health information or agrees to a summary or explanation of such information, **the covered entity** may impose a reasonable, cost-based fee, provided that the fee includes only the cost of:

- (i) Labor for copying the protected health information requested by the individual, whether in paper or electronic form;
- (ii) Supplies for creating the paper copy or electronic media if the individual requests that the electronic copy be provided on portable media;
- (iii) Postage, when the individual has requested the copy, or the summary or explanation, be mailed; and
- (iv) Preparing an explanation or summary of the protected health information, if agreed to by the individual as required by paragraph (c)(2)(iii) of this section.

45 CFR §164.524(c)(4) (emphasis added).

As is shown above, the covered entity may only impose a reasonable, cost-based fee when an individual requests his or her medical records. This reasonable fee is what is often referred to as the “patient rate.”

We have bolded and underlined **covered entity** above because the law specifically sets forth which healthcare providers fall under this definition and are bound by the sections at issue. Is a nursing home covered under the definitions section? The answer is “yes”, they are.

There are three separate definitions that must be looked at when coming to the conclusion that a nursing home is a covered entity. They occur in the following order: **(1) covered entity; (2) health care provider; and (3) provider of services.**

The first is 45 CFR §160.103. This section defines a covered entity as:

**Covered entity:**

- (1) A health plan.
- (2) A health care clearinghouse.
- (3) A **health care provider** who transmits any health information in electronic form in connection with a transaction covered by this subchapter.

45 CFR §160.103 (emphasis added).

After reading the above definition, it is clear that subsection (3) is the most applicable definition. Is a nursing home a health care provider? We must again turn to the definitions of §160.103 and the definition of a health care provider. This reads in full:

**Health care provider:**

Health care provider means a provider of services (as defined in section 1861(u) of the Act, 42 U.S.C. 1395x(u)), a provider of medical or health services (as defined in section 1861(s) of the Act, 42 U.S.C. 1395x(s)), and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.

45 CFR §160.103 (emphasis added).

Nursing homes furnish, bill, and are paid for their health care provided to the elderly in the normal course of business. Applying the above definitions, it is clear that a nursing home is a health care provider, of the status that is a covered entity who is subjected to HIPAA and its rules regarding a patient request for their medical records.

To further this conclusion, one can look to the definition of a health care provider which states, among other definitions, that a health care provider is a provider of services as defined in 42 U.S.C. §1395x(u). This section defines a **provider of services** as:

(u) Provider of services. The term “provider of services” means a hospital, critical access hospital, **skilled nursing facility**, comprehensive outpatient rehabilitation facility, home health agency, hospice program, or, for purposes of section 1814(g) [42 USCS §1395f(g)] and section 1835e [42 USCS §1395n(e)] a fund.

42 USCS §1395x(u)(emphasis added).

A nursing home is a skilled nursing facility so as to bring them into the purview of the definition of a provider of services.

The definitions set forth demonstrate that a nursing home must follow the HIPAA requirements when it comes to patient costs of requesting their medical records. A nursing home is a health care provider who provides skilled nursing services, which in turn makes them a covered entity under 45 CFR §160.103.

42 Pa.C.S. §6155 specifically provides sets forth a patients’ right to their records generally in Pennsylvania. This pertinent portion reads:

§6155. Rights of patients.

(b) Rights to records generally.

(1) A patient or his designee, including his attorney, shall have the right of access to his medical charts and records to obtain photocopies of the same, without the use of a subpoena duces tecum, for his own use. A health care provider or facility shall not charge a patient or his designee, including his attorney, a fee in excess of the amounts set forth in section 6152(a)(2)(i) (relating to subpoena of records).

42 Pa.C.S. §6152(a)(2)(i).

The specific “patient rates” in Pennsylvania under 42 Pa.C.S. §6152(a)(2)(i) read:

(2)

(i) Except as provided in subparagraph (ii), the health care provider or facility or a designated agent shall be entitled to receive payment of the amounts under this subsection before producing the charts or records pursuant to a subpoena. The payment shall be \$20.62 for searching for and retrieving the records, \$1.39 per page for the first 20 pages, \$1.03 per page for pages 21 through 60 and 34 cents per page for pages 61 and thereafter for paper copies or reproductions on electronic media whether the records are stored on paper or in electronic format; \$2.04 per page for copies from microfilm; plus the actual cost of postage, shipping or delivery. No other charges for the retrieval, copying and shipping or delivery of medical records other than those set forth in this paragraph shall be permitted without prior approval of the party requesting the copying of the medical records.

42 Pa.C.S. §6152(a)(2)(i).

The rates are the patient rates that are to be afforded either to an individual requesting their records or an attorney requesting the records on their behalf. We do not believe that nursing homes have a basis to charge “non-patient rates” when requests for records have been made. Nursing homes are not exempt. Nursing homes are health care providers in the same manner as a hospital and they must live by the same rules for document production. The courts in Pennsylvania, in an argument that it may be related, has made clear that corporate claims may be brought against nursing homes who, after all, frequently provide encompassing hospital-like care.

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