Patient Right to Request
A Restriction of Uses and Disclosures:
What MGMA Members are Asking
Revised September 2014

The HIPAA/HITECH Final Omnibus Final Rule was issued on January 25, 2013 and included a number of new rights for individuals. Under the new rule, individuals now have a right to obtain restrictions on the disclosure of health information (protected health information or “PHI”) in electronic or any other form to a health plan for payment or healthcare operations with respect to specific items and services for which the individual has paid the covered entity out of pocket in full. Such requests for restrictions must be granted by the practice unless disclosure is “required by law.” Practices must also include this right in their notices of privacy practices. This Final Rule became effective March 26, 2013 and practices must have been in compliance by no later than September 23, 2013.

The following are the most common questions MGMA government affairs have received from members regarding this new privacy provision. Wherever applicable, the answers are drawn specifically from the Omnibus Final Rule. Please feel free to contact MGMA government affairs at GOVAFF@mgma.org with any questions or issues. We hope you find this resource helpful.

Find answers to the following frequently asked questions:

- **New!** Do practices need to update their notice of privacy practices to reflect this new patient right to request a restriction of uses and disclosures?
- **New!** Does the HIPAA Omnibus Rule require a patient who requests a restriction on disclosure to fill out a form?
- If a patient requests a restriction and pays out of pocket, what are the best practices for separating this information from the patient’s unrestricted medical record?
- Does the restriction requirement only apply to PHI in an electronic format?
- Is there a requirement that EHRs have the ability to “segment” restricted PHI to help ensure that this restricted information is not disclosed to a health plan requesting the medical record for purposes of an audit?
- Is there a legal requirement for our practice to notify any ‘downstream” provider of the patient’s wish to restrict disclosure of their information to a health plan?
- Can a family member pay (in full) on behalf of the patient?
- Is the practice required to abide by the restriction should the payment by the patient be dishonored (such as in the case of returned check or refused credit card payment)?
What is a practice required to do in terms of restrictions in the case of follow-up care to the patient?

When a patient pays with a Flexible Spending Account (FSA) or Health Savings Account (HSA) is it considered a payment by a person on behalf of the individual?

Can a practice disclose restricted PHI to a health plan’s business associate or a business associate of the practice?

Does the PHI restriction apply to Medicare?

What should be done in those instances where with an individual requesting a restriction with respect to only one of several health care items or services provided in a single patient encounter?

What is the liability for a practice who discloses restricted protected health information to a health plan?

Additional Resources

Do practices need to update their notice of privacy practices to reflect this new patient right to request a restriction of uses and disclosures?

Yes. Under the HIPAA Omnibus Rule, providers must ensure that patients are notified of this new right in their notice of privacy practices. While practices are not required to give this updated notice to existing patients who have already signed an acknowledgement form, the notice must be given to all new patients and any patients who request it. Practices are reminded, however, that the updated notice must be placed in a prominent and accessible location (e.g., an office waiting room) and posted to the practice’s website if they have one. MGMA has developed a member-benefit sample notice of privacy practices in consultation with its Washington Counsel, Powers Pyles Sutter & Verville, PC.

Does the HIPAA Omnibus Rule require a patient who requests a restriction on disclosure to fill out a form?

No. However, practices may want to consider developing a self-pay patient form, which will inform patients of their rights and responsibilities and remind practice staff of this restriction. Among other things, this form would typically notify the patient that the medical group will ensure that the information is not inadvertently disclosed to a health plan for payment or other health care operations purposes, such as audits by the health plan, unless the disclosure is required by law. Practices may also consider including clear notice that this restriction is voided in the event that payment for the services is not received in full or if the payment is dishonored due to an invalid credit card or check. Although not required, the government encourages practices in these cases to reach out to the patient directly to seek payment before disclosing the information. Nonetheless, if payment in full is not received, a practice is not required to abide by this disclosure restriction request and may file a claim with the patient’s health plan.
If a patient requests a restriction and pays out of pocket, what are the best practices for separating this information from the patient’s unrestricted medical record?

Practices should consider various methods for segmenting restricted PHI such as “flags,” subfolders within the chart, special notations in the record, or other ways to ensure the restricted PHI is not inadvertently disclosed to the health plan in the event of an audit.

Does the restriction requirement only apply to PHI in an electronic format?

No. This provision applies also to PHI stored in a paper format as well.

Is there a requirement that EHRs have the ability to “segment” restricted PHI to help ensure that this restricted information is not disclosed to a health plan requesting the medical record for purposes of an audit?

No. Currently this feature is not included in the list of certified functions as part of the EHR Incentive Program. However, practices are strongly encouraged to discuss this issue with their current and prospective EHR vendors and determine how the technology can assist in segmenting restricted PHI.

Is there a legal requirement for our practice to notify any “downstream” provider of the patient’s wish to restrict disclosure of their information to a health plan?

HHS states in the final rule that it would be “…unworkable at this point, given the lack of automated technologies to support such a requirement, to require health care providers to notify downstream providers of the fact that an individual has requested a restriction to a health plan. However, we do encourage providers to counsel patients that they would need to request a restriction and pay out of pocket with other providers for the restriction to apply to the disclosures by such providers. In the case of an individual who wants to restrict disclosures to a health plan concerning a prescribed medication, the prescribing provider can provide the patient with a paper prescription to allow the individual an opportunity to request a restriction and pay for the prescription with the pharmacy before the pharmacy has submitted a bill to the health plan. However, while we do not require it, providers are permitted and encouraged to assist individuals as feasible in alerting downstream providers of the individual’s desire to request a restriction and pay out of pocket for a particular health care item or service.

For example, consider an individual who is meeting with her primary physician and requests a restriction on tests that are being administered to determine if she has a heart condition. If, after conducting the tests, the patient’s primary physician refers the patient to a cardiologist, it is the patient’s obligation to request a restriction from the subsequent provider, the cardiologist, if she wishes to pay out of pocket rather than have her health plan billed for the visit. Although the primary physician in this example would not be required to alert the cardiologist of the patient’s potential desire to request a restriction, we encourage providers to do so if feasible or in the very least, to engage in a dialogue with the patient to ensure that he or she is aware that it is the patient’s obligation to request restrictions from subsequent providers.”
Can a family member pay (in-full, and at the time of service) on behalf of the patient requesting the restriction?

Yes. Under the final rule, a practice must apply a restriction not only where an individual pays in full for the healthcare item or service, but also where a family member or other person pays for the item or service on behalf of the individual.

Is the practice required to abide by the restriction should the payment by the patient be dishonored (such as in the case of returned check or refused credit card payment)?

No, however, in the final rule, HHS states that if an individual’s payment is dishonored “…we continue to expect that providers will make a reasonable effort to contact the individual and obtain payment prior to billing a health plan. We do not prescribe the efforts a health care provider must make but leave that up to the provider’s policies and individual circumstances.” In the Final Rule, HHS also requires that the practice makes “a reasonable effort to secure payment from the individual” but states that this requirement is not intended to place an additional burden on the practice but rather is intended to align with the practice’s current policies for contacting individuals to obtain an alternative form of payment to one that was dishonored. The Final Rule does not require that the individual’s debt be placed in collection before a provider is permitted to bill a health plan for the health care services. Further, practices may choose to require payment in full at the time of the request for a restriction to avoid payment issues altogether. Similarly, where precertification is required for a health plan to pay for services, a practice may require the individual to settle payments for the care prior to providing the service and implementing a restriction to avoid the situation where the provider is unable to be reimbursed by either the individual or the health plan.

What is a practice required to do in terms of restrictions in the case of follow-up care to the patient?

In the final rule, HHS states that “With respect to restrictions and follow-up care…If an individual has a restriction in place with respect to a health care service but does not pay out of pocket and request a restriction with regard to follow-up treatment, and the provider needs to include information that was previously restricted in the bill to the health plan in order to have the service deemed medically necessary or appropriate, then the provider is permitted to disclose such information so long as doing so is consistent with the provider’s minimum necessary policies and procedures. We also clarify that such a disclosure would continue to be permitted for payment purposes and thus, would not require the individual’s written authorization. However…we highly encourage covered entities to engage in open dialogue with individuals to ensure that they are aware that previously restricted protected health information may be disclosed to the health plan unless they request an additional restriction and pay out of pocket for the follow-up care.”

When a patient pays with a Flexible Spending Account (FSA) or Health Savings Account (HSA) is it considered a payment by a person on behalf of the individual?

Yes. An individual may use an FSA or HSA to pay for the health care items or services that the individual wishes to have restricted from another plan; however, in doing so the individual may not restrict a disclosure to the FSA or HAS necessary to carry out that payment.
Can a practice disclose restricted PHI to a health plan’s business associate or a business associate of the practice?

A practice that is prohibited from disclosing protected health information to a health plan may not disclose such information to the health plan’s business associate. However, the final rule does not include a requirement that this business associate inform the provider that they are acting as a business associate of the health plan, as it is the practice’s responsibility to know to whom and for what purposes it is making a disclosure. The final rule also clarified that a practice is not prohibited from disclosing protected health information restricted from a health plan to its own business associates for the practice’s own purposes.

Does the PHI restriction apply to Medicare?

Yes. Under Medicare rules, practices are required to produce the medical record if audited and a condition for participation in Medicare is that practices are subject to the mandatory claim submission provisions of the Social Security Act (which requires that if a physician or supplier charges or attempts to charge a beneficiary any remuneration for a service that is covered by Medicare then the physician or supplier must submit a claim to Medicare). However, the Final Rule states that there exists an exception to the requirement that a claim be submitted to Medicare “…when the beneficiary (or the beneficiary’s legal representative) refuses, of his/her own free will, to authorize the submission of a bill to Medicare. In such cases, a Medicare provider is not required to submit a claim to Medicare for the covered service and may accept an out of pocket payment for the service from the beneficiary. The limits on what the provider may collect from the beneficiary continue to apply to charges for the covered service, notwithstanding the absence of a claim to Medicare.

Therefore, if a Medicare beneficiary requests a restriction on the disclosure of protected health information to Medicare for a covered service and pays out of pocket for the service (i.e., refuses to authorize the submission of a bill to Medicare for the service), the provider must restrict the disclosure of protected health information regarding the service to Medicare…”

What should be done in those instances where with an individual requesting a restriction with respect to only one of several health care items or services provided in a single patient encounter?

On the issue of bundled services, the Final Rule states that “…we expect providers to counsel patients on the ability of the provider to unbundle the items or services and the impact of doing so (e.g., the health plan still may be able to determine that the restricted item or service was performed based on the context). If a provider is able to unbundle the items or services and accommodate the individual’s wishes after counseling the individual on the impact of unbundling, it should do so. If a provider is not able to unbundle a group of items or services, the provider should inform the individual and give the individual the opportunity to restrict and pay out of pocket for the entire bundle of items or services.”

The Final Rule also states that “…we would expect a provider to accommodate an individual’s request for a restriction for separable and unbundled health care items or services, even if part of the same treatment encounter, such as in the prior example with respect to the patient receiving both treatment for asthma and diabetes. Thus, we decline to provide as a general rule that an individual may only
restrict either all or none of the health care items or services that are part of one treatment encounter."

What is the liability for a practice who discloses restricted protected health information to a health plan?

A practice who discloses restricted protected health information to the health plan is making a disclosure in violation of the Privacy Rule and the HITECH Act, which, as with other impermissible disclosures is subject to the imposition of possible criminal penalties, civil money penalties, or corrective action.

Additional Resources:

MGMA Resources:
- HIPAA Security Risk Analysis Toolkit
- Sample Notice of Privacy Practices
- Sample Business Associate Agreement
- MGMA Webinar: HIPAA Omnibus Rule: A practical approach for physician practices
- MGMA on-demand webinar: Laptops, Tablets, Smartphones and HIPAA: An Action Plan to Protect your Practice

HHS Resources:
- Omnibus Final Rule
- HHS and OCR model notice of privacy practices
- Integrating Privacy and Security into your Practice
- ONC Guide to Privacy and Security of Health Information
- ONC Security Risk Analysis Myths and Facts Factsheet
- CMS Stage 1 Meaningful Use Core Measure 15 – Conduct a security risk analysis.
- Breach Guidance