

# Chicago Daily Law Bulletin®

Volume 164, No. 149

Serving Chicago's legal community for 163 years

## Medical records request should cost no more than \$6.50 under HITECH

Getting medical records can be time-consuming and expensive for everyone. But few lawyers (and fewer medical providers) know that federal law now limits how much a provider can charge for records. And, in nearly every case, it is \$6.50.

In 1996, the Health Insurance Portability and Accountability Act, commonly known as HIPAA, required that medical providers could only charge the actual cost of copying the records and responding to the request, but no other fees. Still, HIPAA left a loophole. That law allowed the medical provider to charge for paper copies even if the records were already in its system electronically.

### What is HITECH?

In 2009, HIPAA was amended when the Health Information Technology for Economic and Clinical Health (or HITECH) Act was enacted (42 U.S.C. §§300jj et seq.; §§17901 et seq.). The purpose of HITECH is to strengthen the provisions in HIPAA by tailoring them to the advancement of technology.

The HITECH Act allows individuals to access their health records in an electronic format for a low cost. Under HITECH, a health-care provider can charge a patient only for responding to the request for an electronic copy of their health records if requested in electronic form. This closed the loophole in HIPAA and disallows copying or retrieval fees.

HITECH requires medical providers to produce records in an electronic format if the patient requests them that way. If the records are not already maintained electronically, the provider must scan the records into an electronic format agreed upon between the parties. Providers have 30 days to

produce the records in electronic format.

### Is it really only \$6.50?

HITECH grants the secretary of Health and Human Services the authority to adopt the standards and data elements for HITECH. HHS authorizes providers to determine the cost of the records in one of three ways:

- The provider can calculate the actual cost of labor in producing the records.
- The provider can average the cost of labor in producing the records.
- The provider can charge a flat rate of \$6.50 (including postage and delivery).

To use one of the first two methods, the provider must supply actual data to support the cost. It also needs to know an approximate cost to show the patient up front.

Then, for example, the amount of time spent on a records request by an employee would have to be documented, presented to the requester and then approved. Even using the average cost method, the provider is required to produce evidence of how they came up with the charge.

*Under HITECH, a health-care provider can charge a patient only for responding to the request for an electronic copy of their health records if requested in electronic form.*

These extra steps are completely avoided if the provider charges the flat \$6.50 fee. The onerous documentation requirement makes it almost impossible for a provider to charge more than \$6.50 because most providers either will not have this data readily available or will not want to document these steps.



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### Who can get the records?

The HITECH Act states, "the individual shall have a right to obtain from such covered entity a copy of such information in an electronic format and, if the individual chooses, to direct the covered entity to transmit such copy directly to an entity or person designated by the individual, provided that any such choice is clear, conspicuous and specific."

This provision grants the individual the right to obtain his or her medical records in an electronic format. Federal courts have required that the records request must directly come from the patient to be subject to low costs.

HITECH requires. That means a patient can request the records and ask that they be sent to his or her lawyer.

### Components of a request

Many medical providers are hesitant to comply with HITECH or try to get around the low costs through various tactics. To avoid this, it is important to properly format a HITECH records request.

HITECH only applies if the patient asks for his or her records directly. Make sure the letter requesting the records is signed only by the patient. While not prohibited, the best practice is to put the request in a separate letter, not firm letterhead.

The request should clearly identify the person requesting the records and to whom the records are sent (Federal Register, Vol. 78, No. 17, Jan. 25, 2013, p. 5634). It is perfectly acceptable if a patient requests records to be sent to her lawyer instead of her personally.

The most important component of the request is that it must clearly state that the records are requested in an electronic format. Best practice is to add a statement that paper copies are not requested.

While the HITECH Act requires nothing more, a requesting party can add items such as the following:

- Request for the flat fee of \$6.50.
- Advise the provider they have 30 days to respond.
- An e-mail or online service where the records can be sent.

A request that includes these specifics is fully compliant with the HITECH Act.

### What about Illinois copy charges?

Illinois sets a copy charge based on paper copies of records (735 ILCS 5/8-2006). However, the HITECH Act is federal law, so it supersedes the Illinois charges.

The difference can be significant. Take, for instance, a 1,000-page medical record. Under the Illinois Copy Charge Statute, it would cost \$1.05 per page for the first 25 pages, 70 cents for pages 26-50, 35 cents per page for the remaining 950 pages, plus a \$27.91 handling fee, for a total cost of \$404.16.

Under the HITECH Act, the total charges for those same records, electronically produced would be \$6.50, a savings of \$398.66.

#### **What if they refuse?**

A provider who is reluctant to comply with the HITECH Act will cite one of four reasons. First, the provider might claim they cannot produce the records in 30 days. However, the HITECH Act is explicit, not permissive on the 30-day rule. Failure to produce records in this time subjects the provider to penalties of up to \$1.5 million (42 U.S.C. §1320d-5(a)).

Second, the provider might resist because the letter comes from the lawyer. So long as the patient is making the request (see above), the fact that the

lawyer is sending in the request or the records are going to the lawyer is not a valid objection to a HITECH records request.

Third, some providers claim they do not maintain electronic records and so they are exempt from HITECH. Almost invariably, this is untrue. By 2015, 87 percent of office-based physicians in Illinois and 96 percent of all hospitals had implemented certified technology systems in their practice.

Furthermore, to receive Medicare or Medicaid reimbursements, the provider must maintain electronic records (123 Stat. 115 Sec. 2, Div. A, Title IV). Most private insurance companies have similar requirements. Unless the provider refuses all insurance, including Medicare, they have electronic records and must comply with HITECH.

Fourth and finally, providers may also refuse to deliver the records electronically. This is an attempt to avoid the limited fees under HITECH. If the patient's request asks for electronic records, the provider must comply (45 C.F.R. 164.524(c)(2)(ii)).

The patient can demand that the records be e-mailed, and if the provider wants to deliver the records on a DVD, the patient cannot be asked to pay additional charges.

The HITECH Act is enforced by the secretary of Health and Human Services. If the provider fails to comply, the patient (or her lawyer) can file a complaint with HHS on their website.

#### **Actual, average labor costs?**

HITECH does allow a provider to charge for the actual cost or average labor costs to produce the records.

If the provider chooses to use the actual-cost method to determine the fee, it must inform the patient before production, provide the approximate fee and then follow up with its calculated fee.

The calculated fee would include the time it takes for its employee to send the copy in an electronic form, multiplied by the reasonable hourly rate of the person copying and sending it.

The hourly rate must be reasonable for that level of skill needed to create and transmit

the copy in the manner requested. If the provider has calculated reasonable actual costs for previous requests, it can charge an average cost based on those requests.

Fees above \$6.50 are presumptively unreasonable. The reality is that an administrative employee for a health-care provider clicks through a few screens on a computer and in mere minutes, records can be e-mailed or faxed to a patient, no matter the number of "pages" the document contains.

In most cases, the actual cost calculation of labor should be less than \$6.50. Make sure to push back against calculations that seem questionable.

In the electronic age, medical records are kept electronically. The HITECH Act recognizes that producing electronic records is faster and easier. The patient should not have to pay for paper copies if they want electronic records.

Following a few simple guidelines will ensure patients get the records and share in the reduced cost of records.