

Report on Medicare Compliance Volume 30, Number 18. May 10, 2021 Hospitals Adapt to New World of Information Blocking Rule; No Delays Without an Exception

By Nina Youngstrom

When physicians at Nemours Children’s Health System were informed about the information blocking rule,^[1] which took effect April 5, there was some grumbling. They worried about a potential minefield, with patients seeing their test results on the portal before speaking to the physician, jumping to conclusions about the implications and flooding physicians with calls.

It’s a recurring theme with the information blocking rule, as hospitals have braced for the fallout of patients having unfettered, real-time access to their medical information.

“What’s been interesting is I’m not getting feedback that that has happened,” said Chief Compliance Officer Anna Small. She’s hoping it’s because “we’ve done a good job of educating patients.” There’s also a banner at the top of the results page in the portal that tells patients they may be seeing results before or at the same time as the ordering physician and to follow up if they have questions.

So far, so good on that score, because patients have yet to hit the panic button, hospital officials and attorneys said. But there have been other challenges and unintended consequences with the information blocking rule, which interprets a provision of the 21st Century Cures Act that prohibits practices likely to interfere with the access, exchange or use of electronic health information (EHI) unless they fall into one of eight exceptions (e.g., the release would cause patient harm). The rule on information blocking and interoperability, which was published by the HHS Office of the National Coordinator for Health Information Technology (ONC) in the May 1, 2020, *Federal Register*,^[2] requires providers to embrace a new way of thinking about access to information, said attorney Gina Bertolini, with K&L Gates in North Carolina. “It is much less paternalistic or protective of the patient,” she said. “While they still need to comply with HIPAA, they don’t need to protect patients from themselves.” A primary focus of the rule is ensuring providers and other “actors”—including developers of health information technology—“aren’t impeding the free flow of information to innovative formats of the patient’s choice, like mobile apps and personal health records,” Bertolini said.

One thing that’s crystal clear, despite a lot of discussion and some resistance: As soon as test results or other clinical information is finalized in the electronic health records, providers must make them available to patients at their request—even if the information is sensitive and the physician hasn’t had a chance to speak to the patient, Bertolini said. “A delay may be considered information blocking depending on the facts and circumstances” unless it’s required by state law or fits into an exception (e.g., for patient harm or privacy), she said. “With regard to the patient harm exception, ONC has made abundantly clear that a delay to the patient based on a concern that the patient will suffer emotional or psychological harm does not meet the harm threshold and would not justify a delay.” The anticipation that patients might panic when they see test results on the portal is not a reason to delay putting them there, until the physician can get them on the phone first, Bertolini said, unless state law requires physician communication before releasing the results or the patient has asked for a delay.

This document is only available to subscribers. Please log in or purchase access.

Purchase Login