Revenue Cycle Advisor

HIPAA audit report highlights the need to improve patient access

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In the months before a transition to a new administration, the Office for Civil Rights (OCR) released the long-awaited 2016-2017 HIPAA Audits Industry Report, offering a look at the successes and shortcomings of select covered entities (CE) and business associates (BA).

Among the major takeaways: Eighty-nine percent of the audited CEs failed to show they were correctly implementing the individual right of access.

To provide an extra layer of analysis, OCR created a rating system to show varying degrees of compliance, with a 1 rating representing the highest level of compliance and a 5 rating representing the lowest. Only one audited CE received a 1 rating for its access implementation. The majority of CEs (78%) received either a 4 or 5 rating.

The results from the audit report closely align with OCR's recent enforcement actions. Since announcing the Right of Access as an enforcement initiative in 2019, OCR has settled 14 cases with various healthcare organizations. Clearly, patient access was a top priority for former OCR Director Roger Severino, who held the position for the past four years.

The Notice of Proposed Rulemaking (NPR) that would make significant changes to the HIPAA Privacy Rule also places a strong emphasis on patient right of access. Like the audit report, the NPR was pushed out in December as the Trump administration was preparing for its departure.

"All of this is connected," says **Abner Weintraub**, principal consultant at Expert HIPAA in Spokane, Washington. "The results of the audit are really backing up exactly what the proposed rules are proposing to do and change. And good, I applaud that. It's one way to begin to address some of the deficiencies that the audit revealed."

Let's take a closer look at the patient access issues highlighted in the audit report and review some critical changes that can be made by healthcare organizations.

Report findings

In addition to reporting that 89% of audited CEs failed to show they were correctly implementing the individual right of access, OCR provided examples of the shortcomings in its report.

They included the following:

Inadequate documentation of access requests. Many audited CEs stated that they had never received an access request, according to the OCR report. Some CEs did not maintain adequate records of how and when they responded to requests.

Under HIPAA, a CE must document and retain documentation on the following: designated record sets that are subject to access by individuals, and the titles of the persons or offices responsible for receiving and processing requests for access by individuals. This information can be found at 45 CFR 164.524(e).

"Unless an organization has taken the time to learn what its specific obligations are concerning this requirement, they likely would not have the documentation required," says **Helen Oscislawski, Esq.**, founder and managing partner of Oscislawski LLC in Princeton, New Jersey. "These can be addressed in a comprehensive policy governing right of access."

Insufficient evidence of policies for individuals to request and obtain access to protected health information (PHI). As an example, OCR pointed out that one CE provided a form used by patients to name an authorized representative as its access policy.

Inadequate or incorrect policies and procedures for providing access. The missteps here indicate CEs are misunderstanding the requirements.

"The biggest takeaway with patient access is that so many organizations are still requiring a patient to fill out a complete authorization," says **Rita Bowen, MA, RHIA, CHPS, CHPC, SSGB**, vice president of privacy, compliance, and HIM policy at MRO Corp. in Norristown, Pennsylvania. "They're failing to realize that a patient can write it on a napkin. They can just come in and say, 'I want this.'"

Bowen points out that the NPR further emphasizes this point, calling for patients to be able to make verbal requests for their records. Though more changes may be coming, by now organizations should be aware that signed authorization forms exceed what is required for a right of access request.

As Oscislawski notes, 45 CFR 164.524(b) states that the CE may require individuals to make requests for access in writing, provided that it informs individuals of such a requirement. If there is a requirement to submit requests in writing, OCR has elaborated in its guidance and FAQs that such a requirement cannot be a barrier to allowing individuals to gain access to their information.

"For example, an organization cannot demand that the person submit a signed HIPAA authorization before their PHI is released to them," says Oscislawski. "For those organizations choosing to implement a written request requirement, these parameters must be adhered to carefully."

Other inadequate or incorrect policies and procedures revealed in the audit report included:

- Policies that incorrectly state that the CE could deny access to PHI in a designated record set, such as lab test results or prescription medication history.
- Lack of policies for honoring requests for information to be provided to a designated third party.
- No provision to enable an individual to state a desired form and format for receiving the PHI, such as a particular electronic form. For example, a request form that limited the choices to fax, mail, or in-office pickup.
- Policies that did not address situations where a patient requests access to records not maintained by the CE.

Lack of a clear reasonable, cost-based fee policy, or application of blanket fees in violation of the standard. This is another area that is misunderstood, Oscislawski says.

"The issue of being permitted to charge individuals a reasonable, cost-based fee has been further complicated by lawsuits stemming from whether such HIPAA-capped charges would apply to third parties, such as personal injury attorneys, who are requesting such records for their clients pursuant to signed HIPAA authorizations," says Oscislawski.

There have been other lawsuits capping what an electronic medical record vendor can charge by simply retrieving and producing the records. Therefore, if an organization charges a cost-based fee for releasing PHI, it should carefully review HHS guidance on this topic and develop its policies and procedures accordingly.

Notice of Privacy Practices (NPP) did not identify or incorrectly identified the patient's right to timely access (i.e., within 30 days of request unless an extension is provided). Many CEs stated incorrectly that the entity had 60 days, instead of 30 days, to respond to requests. In Weintraub's estimation, many organizations today view the NPP as a boilerplate requirement—knock it out, post it on the website, and the process is over.

But it's far more important than that. "To patients, the NPP is the face of HIPAA," Weintraub says.

Organizations need to return to the NPP and make sure it clearly describes what patients are and are not permitted to do, as well as what the organization is prepared to do.

The NPP should be viewed as a living document that is a communication channel between healthcare organizations and patients, according to Weintraub.

Smaller organizations at risk

The OCR audit report does not indicate the size of the audited organizations, but experts surmise that small- to mid-sized organizations are struggling with patient access issues more than larger organizations.

As Bowen sorted through the information regarding the 14 settlements in OCR's Right of Access initiative, she realized that most of the affected practices were smaller organizations or individuals who were trying to do release of information by themselves.

"Now it's a highly specialized process, and it's probably something that needs to be either centralized in an organization or outsourced," Bowen says.

Jay Hodes, president and founder of Colington Consulting in Burke, Virginia, sees the job of a privacy officer as a collateral duty in smaller organizations. Such organizations do not have dedicated custodians of records. Instead, record retrieval falls to employees who are already juggling other responsibilities. In the end, requests can slip through the cracks and patients can miss out on the information they are seeking.

Hodes believes many of the issues in the audit report stem from organizations failing to meet the 30-day timeline to provide records. For larger organizations with resources, it's an easy fix: find a dedicated record custodian to stay on top of requests. For smaller organizations that cannot afford to staff this position, the easiest way to stay in tune with requirements is to follow the guidance within the NPP, says Hodes.

"If you follow the guidance in there in terms of what the patient right to access is, then this should eliminate a lot of these problems," he says.

Keep an eye on…

The NPR proposes to make changes to several aspects of the HIPAA Privacy Rule, including patient access standards. Most notably, the NPR seeks to move the 30-day deadline for responding to patient requests to 15 days. The NPR is not yet posted in the Federal Register.

There is a long way to go before the changes get finalized (not to mention a new administration that may make adjustments), but organizations should at least be aware of the proposed changes that may affect their patient access process down the line.

In the meantime, organizations should take several steps to rectify any struggles with patient access.

They should start by carefully reviewing OCR's website, which contains detailed information and FAQs on the topic. If organizations do not have comprehensive policies and procedures in place, they need to carefully craft these policies and make sure they aren't simply using an "off-the-shelf" piece of paper, says Oscislawski. Policies should explicitly state exactly how the requests come in, how they are escalated, who is responsible for responding to them, and when a request can be properly denied under the law.

It's imperative for organizations to return to the language that is actually in the regulations, according to Weintraub.

"We've kind of always assumed and operated under the idea that the regulations are unapproachable—that's for lawyers, that business management isn't equipped to read the regs and take away the important points and do something with them," Weintraub says. "And I think to some degree that's true—on finer points, perhaps—but I think folks need to return to the regulations to get a sense of what's required."

Finding an online copy of the regulations that allows employees to search by keyword is a great step to take. This way, any confusion about what is required by the CE can quickly be cleared up.

Finally, OCR and the Office of the National Coordinator for Health Information Technology have developed tools for CEs seeking to improve their patient records request process. These tools include ONC's Improving the Health Records Request Process for Patients, a research report released in 2017. Another is the audit protocol itself, which provides detailed audit inquiry language that sets forth OCR's expectations of entity performance in complying with the standard. OCR provides links to helpful tools in the appendix of its audit report.

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