

Insights

HHS Finalizes Enforcement Stick For Health Care Providers Committing Information Blocking

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Effective July 31, 2024, health care providers will be subject to "disincentives" for committing information blocking. As codified under the 21st Century Cures Act, information blocking is when an "actor" (e.g. health care provider) interferes with the access, exchange, or use of electronic health information (EHI), except when required by law or an exception applies. In June 2023, the Office of Inspector General (OIG) published its final rule implementing information blocking penalties for actors other than health care providers (e.g. health information technology (IT) developers of certified health IT), which was effective September 1, 2023.

The Department of Health and Human Services (HHS), including the Office of the National Coordinator for Health Information Technology (ONC), the Centers for Medicare & Medicaid (CMS), OIG, and other agencies worked together to create a final rule for health care providers that violate the information blocking rules: "Establishment of Disincentives for Health Care Providers That Have Committed Information Blocking" (Disincentives Final Rule).

The objective of the Disincentives Final Rule is to deter information blocking and promote safer, more efficient and coordinated care for patients through EHI sharing. The Disincentives Final Rule established the following disincentives for health care providers that have violated information blocking rules as determined by OIG and are referred to CMS:

- Under the Medicare Promoting Interoperability Program, an eligible hospital or critical access hospital (CAH) that commits information blocking will not be a meaningful electronic health record (EHR) user in an applicable EHR reporting period. As a result, the eligible hospital will not be able to earn three quarters of the annual market basket increase they would have been able to earn; for CAHs, payment will be reduced to 100% of reasonable costs instead of 101%.
- Under the Promoting Interoperability performance category of the Merit-based Incentive Payment System (MIPS), a MIPS eligible clinician that commits information blocking will not be a meaningful user of certified EHR technology in a performance period and will therefore receive a zero score in the Promoting Interoperability

performance category of MIPS, if required to report on that category. If a MIPS eligible clinician participating in group reporting is found to have committed information blocking, only the individual will be subject to a disincentive, not the group. The Promoting Interoperability performance category score typically can be a quarter of a clinician or group's total MIPS score in a year.

- Under the Medicare Shared Savings Program, an Accountable Care Organization (ACO), ACO participant, or ACO provider or supplier may be deemed ineligible to participate in the program for a period of at least one year. As a result, a health care provider may be removed from an ACO or prevented from joining an ACO; and where a health care provider is an ACO, this may prevent the ACO's participation in the Shared Savings Program.
- Preventing a health care provider to participate in the Shared Savings Program for at least one year may result in a health care provider not receiving revenue that they might otherwise have earned if they had participated in the Shared Savings Program. Prior to implementing a disincentive under the Shared Savings Program, CMS will consider an OIG information blocking determination in light of the relevant facts and circumstances.

The Disincentives Final Rule is specific to healthcare providers and are connected to payment adjustments under the CMS promoting interoperability programs. Currently, the Disincentives Final Rule does not apply to healthcare providers that are not Medicare-enrolled providers or suppliers. Finally, investigation of claims of information blocking or imposing disincentives on healthcare providers begins July 31, 2024.

If you have any questions regarding information in this alert, please contact Stacy Walton Long or Christopher J. Kulik.

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