

## **When Purchasing Electronic Health Records: Buyer Beware**

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Recent legislation, including the stimulus bill and health care reform legislation, have created strong incentives for physicians to purchase electronic health record (EHR) systems. While the timing of such purchases is important to maximize incentives, physicians must also make informed decisions and proceed cautiously.

Beginning in 2011, physicians will be able to receive incentive payments from either the Medicare or Medicaid programs for demonstrating “meaningful use” of a “certified” EHR. The Medicare program is based on 75% of allowable Medicare charges and can include incentives of up to \$44,000 over a five year period. Physicians who have not demonstrated meaningful use by 2015 will not only be ineligible to receive the incentive payments, but will also face reductions in Medicare payments as a penalty. Medicaid incentives are generally available to physicians whose patient volume are comprised of at least 30% Medicaid patients and can result in incentives of up to \$63,750 over six years.

In addition to the “carrot and stick” incentives and penalties, the use of EHRs will be essential for physicians wishing to take advantage of the many pilot and demonstration programs being implemented as a result of health care reform. While physicians will generally see a decrease in Medicare fee for service payments over time, there are also opportunities to increase reimbursement through various programs, such as the shared savings program. The shared savings program requires participation in an Accountable Care Organization (ACO), which, in general, is a group of health care providers across the health care spectrum sharing responsibility for a specified population. Participation in such programs will require physicians to be able to coordinate care and share outcomes and other data electronically.

Despite the many incentives to implement EHRs, physicians should exercise caution when choosing an EHR product and entering into contracts with vendors. Some of the considerations when choosing an EHR system should include:

### 1. Cost and financing

It is important to note that incentive payments will not be provided to physicians at the time of purchase. Rather, payments will be made retrospectively and only if the government is satisfied that the physician meets the criteria for “meaningful use” of a “certified” EHR. Physicians must, therefore, be prepared to finance the EHR system prior to receiving incentive payments. Physicians also face the risk that the government will determine that the physician failed to meet the criteria, especially for subsequent years, for which objectives have not yet been defined. Initially, providers will receive payments through attestations, but CMS could demand return of the money if an audit shows that the physician did not actually meet the requirements.

### 2. Certification and Meaningful Use

In order to be eligible for incentive payments, physicians must demonstrate “meaningful use” of EHR technology that is “certified” by a certifying body approved by the Office of the

National Coordinator (ONC) for Health Information Technology. In August 2010, the ONC approved two certifying bodies and certified products are expected to be available in Fall of 2010. To the extent that physicians purchase products that are not yet certified, they must be careful to obtain contractual assurances addressing the contingency of the vendor's inability to obtain certification. Physicians should be aware that certifying bodies can certify complete EHRs or "modules" and must understand whether they are purchasing a complete system that is certified or merely a module that would need additional components to achieve meaningful use. In addition to purchasing a certified EHR, physicians must actually use the system in a manner that meets the meaningful use objectives. Final rules on meaningful use were published on July 28, 2010 and include a "staged" implementation process, which increases objectives over time. The requirements for meeting stage one are set forth in the final rule, but stages two and three requirements will be set forth in future rulemaking.

### 3. User Friendliness and Ability to Customize

Another obvious but important element of successful EHR adoption is the ability of physicians to actually use the system without impacting the normal flow of patient care. All physicians in a practice should be involved in the selection process and participate in hands-on demonstrations. Additionally, the system should be customizable to include templates that allow specialty specific documentation. Vendor contracts should address training and other measures that will be taken to assist physicians with the transition to EHRs.

### 4. HIPAA Compliance

An EHR system must also contain elements that are required for compliance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy and Security Rules. For example, the system should have appropriate user level password protection and be capable of producing audit trails and tracking all uses and disclosures. Additionally, the system should be capable of producing an electronic version of a patient's medical record that can be shared with the patient upon request.

### 5. Additional Contractual Issues

When entering into contracts with vendors, physicians should be aware of the following important contractual provisions:

- The length of the term of the license to use the software and the respective rights of the parties to terminate the license during or following the initial term;
- The number of users that are licensed to use the software;
- Whether or not there are restrictions on the ability to transfer the license;
- The representations and warranties made by the vendor as to the ownership of the software and its future performance;
- Vendor indemnification for breach of representations and warranties;
- Whether or not source code escrow protection will be provided;
- Payment amounts and terms;
- Acknowledgements of customer's exclusive rights to its own data;

- Software acceptance procedures;
- Vendor training and support;
- The listing of hardware requirements;
- Software maintenance and bug fixing obligations;
- Transition services support following termination; and
- Arbitration, choice of law and venue provisions;

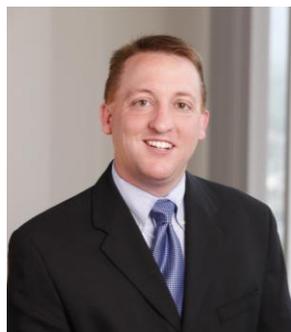
Physicians should strongly consider having contracts reviewed by an attorney experienced with the review of information technology contracts and the meaningful use incentives.



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