

Tips for entering into ‘meaningful’ EHR contracts with vendors

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With the February 17, 2009 American Recovery and Reinvestment Act (ARRA), the federal government announced its intention to spend roughly \$17 billion to encourage the nationwide adoption of electronic health records (EHRs). Now the hard work begins. According to 1 source, only 14% of all health care professionals in the United States are currently using EHRs.¹ Although some have expressed doubt that ARRA’s goal of creating EHRs for every person by 2014 will significantly improve US healthcare costs and quality, the harsh reality is that physicians who opt out of the funding assistance under ARRA will miss out on financial incentives and may eventually face financial penalties if they do not implement an EHR system by 2015.

Financial incentives for eligible physicians start in 2011 and have the potential to total \$44,000 over 5 years under Medicare and \$63,750 under Medicaid (the earlier a physician starts the adoption process, the more money possible). Even if a physician starts the EHR adoption process now, it may take a couple of years before the physician qualifies as a “meaningful EHR user.” Physicians are the only individual users who can qualify for the financial incentives. (Note: Hospitals also qualify for incentives that can

be in excess of \$2 million per hospital system.) Under ARRA, meaningful EHR users will use “certified EHR technology” in a “meaningful manner” that shall include the use of electronic prescribing. Meaningful EHR use also includes:

- The ability to connect the EHR in a manner that provides for the electronic exchange of health information to improve the quality of care, such as promoting care coordination.
- The ability to submit clinical quality and other measures as determined by the federal Department of Health and Human Services (HHS).

Because of these financial incentives, health information technology vendors are clamoring for health care professional business. It is essential for physicians to know their obligations under ARRA so they may negotiate useful contracts with vendors.

The definition of meaningful EHR user should serve as a helpful guide when meeting and contracting with health information technology vendors. So, based on that definition, following are some tips physicians can use when negotiating with vendors:

1. Make sure the EHR technology is “certified.” ARRA requires HHS, through the Office of the National Coordinator (ONC), to develop a certification program in consultation with the National Institute of Standards and Technology

(NIST). ARRA does not mention the Certification Commission for Healthcare Information Technology (CCHIT) or its EHR standards, which for the past several years has served as the premier certifying organization for health information technology vendors. It is unclear whether ONC and NIST will endorse CCHIT standards and certification. The deadline for initial standards, implementation specifications, and certification criteria is December 31, 2009. Moreover, these standards will likely become more stringent over time. *Therefore, until it is clear whether CCHIT certification will meet ARRA requirements, EHR vendor contracts should use language that guarantees timely compliance of the vendor’s software with any regulations regarding certification to meet the definition of meaningful EHR user as used in ARRA and as amended from time to time.*

2. Make sure the EHR technology continues to be certified. Because the certification standards may change over time, the vendor agreement should address how the vendor will monitor and incorporate these changes into its software. Optimally, the vendor should guarantee that its product will remain “certified EHR technology,” so that the physician does not become ineligible for financial incentives or subject to financial penalties. To obtain this assurance, for example, the vendor contract may specify that

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the vendor submit an annual report to the physician about its certification compliance efforts. In addition, the contract should specify whether incorporating new certification requirements is included in the original cost, or will be an extra cost to the physician.

3. Make sure the vendor includes training services in the contract. One of the biggest barriers to EHR implementation so far has been an inability to use the technology. The EHR vendor should include sufficient training resources so the physician can use the technology effectively. The contract should also spell out the costs of initial and ongoing training.

4. The EHR vendor should be able to automate required reporting. As part of establishing meaningful use, ARRA requires physicians to submit reports on clinical quality and other measures, as selected by HHS. Ideally, the EHR technology should facilitate that required reporting by allowing the physician to electronically submit those measures to the appropriate entity. The agreement should reflect and guarantee this functionality.

5. The EHR product must be part of an interoperable network. The

whole point of ARRA's goal of having an EHR for every person by 2014 is so that healthcare professionals can access essential information nationwide. Therefore, EHR products must be part of a larger data exchange initiative or else the physician will not be able to establish meaningful use. The vendor contract should specify how the EHR product will be able to exchange health information with other professionals and entities to improve the quality of healthcare. For example, will the product have consistent architecture, consistent messaging standards, consistent functionalities, and identical vocabularies with most other health information databases? Is the EHR vendor cooperating with other vendors and government entities to ensure this interoperability? The agreement should state how the EHR vendor intends to comply with interoperability expectations and standards.

6. The EHR product and technology must be secure. Along with financial incentives for EHR adoption, ARRA imposes stiffer penalties for HIPAA violations. Thus, as physicians move toward electronically storing health information, maintaining privacy and security of

that information is a must. The EHR vendor agreement should spell out exactly how the vendor will ensure the security of the health information stored on the EHR, both in the physician's office and any external storage space. Under ARRA, the vendor itself must comply with the HIPAA security rules, so the vendor agreement should state that the vendor agrees to such compliance and that it will have policies and procedures that meet the requirements of the HIPAA security rules. The EHR vendor should work with the physician as a partner to ensure that patient data is not compromised in any way.

These are just a few general contracting tips that physicians should consider when negotiating with EHR vendors. For more tailored guidance, physicians are encouraged to contact a knowledgeable health lawyer familiar with technology contracting to assist them in the contract development or negotiation process.

Reference

1. Halamka JD. A Healthcare IT Primer. Life as a Healthcare CIO. <http://geekdoctor.blogspot.com/2009/03/healthcare-it-primer.html>. Accessed June 22, 2009.

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