

Selection and Negotiation of EHR Contracts for Providers

The HITECH Act of the American Recovery and Reinvestment Act of 2009 is driving new technology acquisitions unlike anything seen in the healthcare information technology (HIT) sector since Y2K. Specific terms and warranties in Electronic Health Record (EHR) agreements are absolutely essential for the protection of provider customers. Competent and experienced legal advice is extremely important.

Care must be taken by the provider customers throughout the United States that are now embarking on their own EHR adventure. Some will be investing capital based solely on the prospect of reimbursement. Protection of their interests and education of their representatives are important goals; this paper sets forth topics that attempt to provide some measure of both, and at a minimum to provide a contract baseline on some major issues for later reference.

Certification

Clearly this is at the top of the list. Providers seeking reimbursement under ARRA/HITECH must select a certified EHR product. This is the absolute perfect example of a “deal breaker” issue. No certification, no sale, it is that simple.

The best situation would be for the vendor to warrant that its EHR technology has been certified by a designated authority and is installed and live at more than XX (vendor to fill in the number) sites and that those sites are willing to act as references. The fallback position today would be a warranty that the product will be certified in the appropriate timeframe for full reimbursement eligibility.

Further, vendors must warrant that certification will be maintained throughout the reimbursement periods (note that the timelines for provider reimbursement differ for Medicare and Medicaid participants). It is technically possible for a provider to lose a year or more of reimbursement if the vendor’s EHR product was initially certified, but then misses certification during the reimbursement period. The year of ineligibility still “counts” for the provider on the eligibility timeline, but they will not receive associated funding for that year due to the missed certification of their vendor’s product.

Vendors that make sales warranting EHR certification must also be willing to offer remedies for failure to maintain certification. The providers that invest in EHR technology primarily because they are counting on reimbursement will be dramatically affected if the vendor does not maintain certification. Vendors that reap the benefits based on certification representation must be willing to also step up and fill the financial void for the provider for lost reimbursement occasioned through no fault of the provider. Note – the foregoing statement has nothing to do with achieving Meaningful Use – which is addressed later. In simple terms, certification of product plus Meaningful Use of that product by provider results in reimbursement for the provider. If the provider cannot get to Meaningful Use because the selected EHR product loses certification or is never certified despite warranties by the vendor, then the vendor absolutely must step up and make the provider whole.

Timeline - Delivery and Live Status

The delivery date and implementation timeframe for a certified EHR product must result in the EHR in use in a live environment in time to enable the provider customer to achieve Meaningful Use within the mandated time period. Keep in mind, though, that for long projects with work to be done on both sides, a vendor should not be expected to warrant that something will be live when considerable work must be done by the customer, work which is completely out of the vendor's control. That said, provider customers should certainly look for a commitment from the vendor that the timeline provided by the vendor will result in live status for the EHR within a certain time period from delivery if the provider customer has completed the tasks for which it is responsible as set out in the timeline and work plan, which again is provided by the vendor. The recurring theme here is straightforward; vendors are responsible for defining the schedule and tasks required for reaching live status with a certified EHR product and warranting their side of the effort. The timeline factor can be greatly reduced as a consideration when dealing with some EHR products provided in the SAAS model because the time from delivery to live status can be negligible. However, as a general statement, the less time required or recommended by vendors for implementation means less input by the provider, which in turn could mean less opportunity to define or adapt the system for use in the provider's operation.

What you should look for in all situations is a guaranteed timeline that, if all is accomplished on time by both vendor and customer, will allow for live use by a certain date. This is very reasonable.

Training

Just as critical as the selection of the EHR application, so too is the training the provider customer must receive in the use of that EHR product. A tool in any situation or setting will not be used, or used correctly, if the user is not properly trained and consequently comfortable with the use of that tool. What is required in the EHR contract is an express reference to a specific amount of training. The

number of guaranteed training days must then be applied to and integrated in the delivery timeline (see above). For large projects, the vendor should provide a coordinator that works throughout the project to keep things in line and on time for both the vendor and the provider customer.

Consider the many forms of training. On site is best but most expensive. Seminars at the vendor location offer face-to-face experience but take the provider's expert(s) out of the workplace. On line or packaged (CD/DVD) training that can be done at any time at the trainee's convenience is a reasonable option if proper internal oversight and structure is provided and mandated by the provider to its staff. A separate training system identical to the live (or soon to be live) EHR system should be provided within the terms of the contract and at no additional cost.

Implementation Consultants

The previous two topics, Timeline and Training, suggest the option for the provider entity to retain a consultant to assist in the implementation of the selected EHR technology. Most determinations regarding what can and cannot be done for ancillary products and services are based on cost. Experienced project management consultants are unquestionably very worthwhile investments. Unfortunately, the providers that need the support most are those with less financial resource. Consultants offering EHR selection services almost universally also offer implementation services. The good firms are wonderful at drawing from their implementation experience, coupling that with their evaluation of the provider's operation and experience, and developing a truly sound recommendation for EHR vendor. The prior experience with the selected vendor then pays huge dividends during implementation. If the provider entity can afford the investment, use a consultant for selection with the option of extending the engagement through implementation.

License Type and Term

Probably the most common situation will be the perpetual (once paid) EHR license agreement, as opposed to the strictly temporary, pay as you go, SAAS model. Pricing metrics vary and can be based on provider counts, sites, or users. If pricing is based on provider counts, make sure the contract clearly defines the individuals included. Some companies count physicians one-for-one and other professionals at two-for one. Similarly, what is a site? What if your practice moves from one office building to another but remains attached to the hospital? Relocation of the same practice should not require payment of additional fees.

With the perpetual license, one-time costs are known, finite, and relatively near term. In addition, fees are required for ongoing support on a monthly, quarterly, or annual basis, typically in the range of twelve to twenty percent of the license fees, on an annual basis. Alternatively, the SAAS model usually requires only regular ongoing payments, typically paid monthly.

What happens at the end if there is an end? For the perpetual license, in theory there is no end point. You paid for the software and you may use it forever. That said, failure to keep current on releases may leave your vendor little choice but to eventually drop you from service as soon as contractually permitted. Typically either the vendor or the customer may terminate support after a finite period of years.

If you have an SAAS model EHR, then you know ahead of time that the end is XX years away. Price reductions are usually realized in exchange for a longer contract term. Be aware of the potential increase in cost following the initial contract term. Negotiate a reasonable escalation amount so you are not stuck with an unreasonable increase should you elect to stay with the vendor (or if you do not have a good exit strategy in place and have no choice other than to stay with the vendor).

Regardless of how the end is reached, the contract must allow for data retention and conversion through clearly defined transition services. The outgoing vendor must never retain or encumber the provider's data and must enable extraction of that data from the vendor's system.

Support:

Ongoing support for a licensed EHR product is critical. In broad terms, support has two major components, first the essential "problem fixing" support whereby day-to-day issues with the software application are resolved and second the equally important long term development and enhancement of the software application. Taking the latter issue first, the vendor must provide a solid commitment to future enhancement of the product, and must make these enhancements available to the provider customer as part of the ongoing support fee (or in the SAAS model, as part of the overall fee for service). Enhancements or updates must be provided to accommodate functionality requirements mandated by Federal and State governments. As for problem resolution, vendors must provide clear detail as to the type of service provided and the applicable hours for such support. Given that the EHR is a critical piece of the HIT equation, constant availability of service support is needed. Check the proposed agreements for type of service. Is it qualified in urgent and not urgent terms? Are there different hours for different levels of service? This is perfectly acceptable provided that urgent issues are resolved at any time, day or night, with no holiday exclusions.

Provider customers, lock in the vendor for as long as possible in the non-SAAS model. Once all one-time license fees are paid, provider customers should be able to discontinue ongoing service with reasonable notice (90 days or less) to the vendor. However, provider customers must ensure a termination notice period for the vendor roughly twice the time period reasonably expected to search for and fully implement a replacement system. Ideally, require the vendor to provide support for as long as the support fees are paid.

Problem Resolution Response Time

The title is loaded and for good reason. Complete problem free operation of any system is uncommon. While some vendors and applications are better than others, in all cases preparation must be made for circumstances in which the provider customer needs assistance with the software product. Contract provisions range from the simple requirement of error correction to complex tiered support definitions and associated response time guarantees. Consideration must be given to the method of support request; telephone help desk with personal (live, human, located in the United States) attention to email problem submission followed by behind the scene attention during vendor's normal business hours. Important tip – pretend you are experiencing a total system meltdown and your anxiety level is at an all time high – then pick up the vendor's proposed contract and review the problem response time section. What you read should give you some comfort that issues will be addressed to the very best of the vendor's ability and in timeframes dependent on urgency of the situation. In contrast, if what you read leaves you with the notion that you could never defend that position to your superiors (or staff depending on perspective), then you need more from the vendor. There should be no "holes" or questions as to the procedures, severity levels and timeframes for problem resolution. This is the most important issue in the support section of your contract and it should jump out and grab your attention.

Problem Escalation

This issue is related to Problem Resolution Response Time issue above. Even with the best language detailing wonderful provisions for support service, breakdowns do occur. When things go really wrong, how does the provider customer get attention? There should be procedures in place to walk an issue up the corporate ladder, with timing of intervals dependent on the severity of the issue. A procedure that takes fifteen days to work up to an officer level on the vendor side may be fine for a minor nagging issue, but is ridiculous for a system down, all hands on deck issue. Accommodation must be made for immediate escalation to officer level if reasonably determined to be critical by the appropriate counterpart at the provider customer entity.

Patent and Copyright Protection

The vendor must warrant that its software does not infringe on any patent, copyright, trademark, trade secret, or other intellectual property right of any third party and indemnify customer from all costs associated with infringement of such third party rights. In the event of infringement and associated injunction from use of infringing products, Vendor must acquire rights to continued use, replace the products with substantially conforming non-infringing products, or failing those efforts refund all fees paid for the infringing products. With the exception of the last remedy (refund), nearly all vendors provide this protection.

Cost Escalation Limitations

License fees for additional users or locations, subsequent training fees, increases to ongoing service fees, and escalators to monthly subscription service fees are all potential cost concerns. Any time a contract refers to additional or unknown fees you must secure some limit or measuring metric so that the potential additional costs are either known or predictable with some measure of comfort in range or magnitude. This is an absolute necessity.

Third Party Products

Be aware of bundled applications, operating systems, hardware, network and other services. This can be an incredibly complex area to navigate. Be absolutely certain that the contract contains a clause where the vendor warrants that all third party products are identified and included in the pricing, in order to avoid potentially nasty surprises later. Warranties of other vendors must be passed through the selected primary vendor for the benefit of the provider customer. Connecting the dots and finding the pathway to resolution is critical. Adding players to the equation makes it more difficult. Diligence is essential at the outset of contracting in order to peel back the layers. Further, warranties of compatibility between the various component vendors must be included along with a "first point of contact" provision whereby the primary vendor is responsible for coordinating problem resolution with all vendors involved. In a perfect world, the provider customer should only make one contact in the event of a system problem.

Ownership

Always start with the position that the vendor must warrant that it is the sole owner of the technology and that it has all right, title and interest necessary to grant the license or sell the product under the contract. If this raises flags, then you are dealing with third party software and/or hardware in addition to the vendor's product. This is not bad by any means, but refer to the preceding section for issues pertaining to pass-through warranties and obligations.

Business Associate Agreement

The requirements mandated under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) were strengthened and expanded under ARRA/HITECH. Business Associates are now directly subject to certain provisions of HIPAA and are further susceptible to penalties for violations of those provisions. Business Associates that use subcontractors must bring those subcontractors under the same terms and conditions as the Business Associate itself. Note this does not mean that Covered Entities must now obtain Business Associate Agreements from subcontractors to their Business Associates. That obligation is squarely on the Business Associates. The Business Associate Agreement between Covered Entity and Business Associate must reflect the new legislation (capitalized terms in this section refer to terms defined in HIPAA).

Meaningful Use

Astute readers have no doubt by now noticed the absence of any detailed reference to Meaningful Use. The items recited above are tailored toward protection of the customer provider, while hopefully allowing for fairness to the vendor. Meaningful Use is another situation entirely.

O'Toole Law Group maintains the position that vendors cannot guarantee or warrant that any customer will achieve Meaningful Use. Vendors only provide the tools needed for that process. Ultimately it is the provider customers that are responsible for the work on their side, using the certified EHR tool acquired from the vendor in their operations necessary to achieve Meaningful Use. That said, the vendor should warrant that the certified product, delivered in the appropriate timeframe, will enable the provider customer to achieve Meaningful Use through its efforts and implementation. The vendor cannot warrant that the provider will or shall achieve that goal. Achieving that goal is the responsibility of the providers that will receive the reimbursement if all goes well.

Certification and Meaningful Use Guarantees

Some vendors are drawing customers with splashy campaigns tied around guarantees. One guarantee in particular is outstanding. It clearly and simply states that if a customer loses reimbursement due to the non-certification of the product, the vendor will compensate the provider for the lost reimbursement throughout the entire period of non-certification. Others throw the words around but mix in qualifiers like deductions for vendor costs, which is infuriating. Unless the provider is able to add costs to its baseline, the vendor should not be entitled to deduct costs. This will no doubt have some vendor folks writhing on the floor with much wailing and gnashing of teeth, but fair is fair. Lost reimbursement is easy to measure. Any guarantee should be just as easy to calculate. That said, the simplest, most straightforward and most valuable guarantee should probably be tied only to certification of the product.

Incentives

Unfortunately the importance to a vendor of a provider customer's opinions and issues can be scalable much like price of the product. Ten physician groups of ten or more physicians certainly attract more attention than a single ten-physician practice. Use this to your advantage. Combined sales and demonstration efforts are welcomed and recognized by smart vendors. The physician groups need not be legally related; association in selection and time for contracting should be sufficient. Often times associated physician groups select the same EHR vendor, and at this point most of them should be on the same general "we need to get this done" timeframe. Use the combined approach for software, hardware, network, implementation assistance, and legal review.

Final Thoughts

Please search for similar papers; find ones with concise teaching points. Overlay other writings with this one. All will be slightly different and none will cover all possible issues. Compile your own list of what is truly important to your organization in the EHR acquisition process. Some practices want someone to come in and do 100% of the work, train everyone, sign off that it is all done and “hand over the keys” to a fully functional system. In contrast, others may have experienced staff that can enthusiastically take on the challenge and workload of implementing a new system. Obviously, some land in the middle as well. The point is to understand your needs and capabilities as best you can before the selection process, because they are huge factors in vendor and implementation process selection. Some implementation decisions may eliminate certain vendors right up front, while an early stage favorite vendor might not offer your desired implementation approach.

Functionality, certification, price, implementation support, ongoing service support, and legal terms and conditions are all important criteria in system selection. Once the finalists are chosen, compare the terms and conditions the best you can. You may be surprised at how much you learn when comparing certain terms like payment terms or support hours. The differences can be glaring at times, and recognizing that can assist you in learning what you want and what is best for your situation. Tally those observations. The real legal issues are best left for your attorney to review, but take a shot at them. Compile your own list of good and bad points on the major terms for each finalist and then ask your attorney for a similar (brief) review of the major legal issues. Armed with those lists you may eliminate a vendor and another may rise to the top. The point here is that the terms and conditions of the agreement under which you must operate for many years are incredibly important and absolutely must be considered in the selection process, which is precisely why this article is titled “*Selection and Negotiation of EHR Contracts for Providers.*”

Hopefully this overview will be helpful to the many entities looking toward EHR acquisition. However, it must be understood that this is a general overview and does not serve as, and should not be taken as, specific legal advice. Also please recognize that this is by no means an exhaustive checklist and cannot be relied upon exclusively for your legal review processes.

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