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New Rules For an Old Game: Structuring Winning Electronic Health Record Contracts

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Conflict of Interest Disclosure

Diana J.P. McKenzie, JD, MBA

Has no real or apparent
conflicts of interest to report.

Regulatory Issues

- ARRA and HITECH statutes and corresponding regulations
 - Provide funding for the purchase of EHR technology and financial incentives for becoming “meaningful users” of EHR technology
 - Stark and Anti-Kickback exceptions allow donation of EHR technology to physicians and other referral sources if the software, services and training donated are necessary and used predominately to create, maintain, transmit, and receive EHRs

EHR Incentive Plans

- Medicare:
 - Incentive payments to eligible professionals (EPs) for up to 5 years and eligible hospitals for up to 4 years
 - Reductions in reimbursement rates after 2015 to Medicare providers who do not use certified EHR technology
- Medicaid:
 - Incentive payments to EPs and hospitals in the first year EHR technology is adopted, and incentive payments for the following 5 years if meaningful use is met
 - No penalty for failure to adopt EHR technology
- EPs may participate in either Medicare or Medicaid incentive plan, but not both
- Eligible hospitals may participate in both plans

Meaningful Use Regulations

- Interim final rule released December 30, 2009
- Stage I “meaningful use” criteria focus on:
 - Capturing information in coded, electronic format
 - Using electronically stored information to track key clinical conditions
 - Communicating electronically stored information to coordinate care
 - Reporting clinical quality measures and public health information

Regulatory Issues

- Contract Solutions – In any EHR contract, vendor should commit to:
 - CCHIT Certification
 - Product will allow and not impair client's ability to meet meaningful use criteria
 - Cooperation with certification and attestation

Example 42 CFR Compliance Language

- Vendor warrants and covenants that the EHR Technology meets, and will meet, all of the conditions specified in 42 CFR § 1001.952(y) and 42 CFR § 411.357(w), including:
 - The Technology is necessary and used predominantly to create, maintain, transmit, or receive electronic health records
 - The Technology will be interoperable as required by 42 CFR § 1001.952(y)(2) and 42 CFR § 411.357(w)(2)
 - Vendor will not take any action to limit interoperability of the EHR Technology with other electronic prescribing or electronic health records systems

Example 42 CFR Compliance Language (Continued)

- In determining whether to provide EHR Technology to a Practice, Vendor will not take into account the volume or value of referrals or other business generated between Client and any Practice as required by 42 CFR § 1001.952(y)(5) and 42 CFR § 411.357(w)(6);

Example 42 CFR Compliance Language (Continued)

- Vendor will immediately notify Client in writing of any Practice that, to Vendor's knowledge, has already obtained items or services equivalent to the EHR Technology
- Vendor will not restrict, or take any action to limit, a Practice's right or ability to use the EHR Technology for any patient regardless of payor status
- The services provided by Vendor will not include staffing of any Practice's office

Example 42 CFR Compliance Language (Continued)

- The EHR Technology will contain electronic prescribing capability that meets certification standards for SureScripts, CCHIT, and all federal regulatory or statutory requirements for certification of electronic health record systems
- Vendor warrants that neither the EHR agreement nor the transactions contemplated by it violate any federal or state law or regulation governing billing or claims submission

Assisting Physician Adoption

- Physician Adoption is critical to meeting meaningful use
- Some vendors are supplying a full-time MD on-site to help train and push adoption by other MDs
- Often this service is added gratis near the end of negotiations
- This type of service is also available from third-party consultants

Data Concerns

- Data Rights and Use
 - Vendor will likely have access to your organization's EHR data and may "mine" it to further vendor's business objectives
 - Departing physicians will want to migrate their patients' EHR data
- Contract Solutions
 - Vendor's Ongoing Use of Data; Specify what permissions vendor will have to use EHR data
 - Termination of Physician Practice; Set up fee schedule and procedure for vendor assistance with data migration for departing physicians

Data Concerns (Continued)

- No Data Loss Warranty
 - Vendor warrants and covenants that use of the Licensed Software will not result in the direct or indirect loss, destruction, deletion, or alteration of any of Client's data
 - To the extent that Client has met reasonable backup requirements and Vendor has been the cause of the loss, Vendor shall either promptly restore all of Client's lost data or reimburse Client for the cost of restoration performed by a third party (Client's choice)

Data Concerns (Continued)

– Compatibility Warranty

- Vendor warrants and covenants that all portions and components of the Licensed Software, and all deliverables provided by Vendor, will be fully compatible with each other and with Client's other equipment and licensed software, and will operate as an integrated system

Getting a “Fair” Price

- Discounts – How much is enough?
- Payment Terms – Revenue Recognition versus Customer Needs
- Optional Items – Lock in Prices for Future Purchases
- Other Rate Protections – The Old Debate: CPI versus fixed increases

Getting a “Fair” Price (continued)

- All Fees Clause
 - Fees stated in the contract represent all fees due from client to vendor to purchase, install, and implement the EHR technology

Getting a “Fair” Price (continued)

- Ancillary Services Clause
 - If the parties have accidentally omitted a product or service that is ancillary and required to operate the EHR system, risk of that omission falls on vendor
 - Vendor is the expert in specifying and supplying the EHR system, so risk of omission should be borne by vendor

Other Warranties

- Response Time
 - System must provide a meaningful response within a minimum time – even at full user load
 - Meaningful response is not an hourglass or interstitial screen
- System Availability
 - 99.999% Uptime
 - Uptime can be measured not just as a monthly average, but also on a daily or even hourly basis

Other Warranties (Continued)

- No sunset of Product
 - Vendor will not cease to actively market the product
- 80% Similar Product
 - If within 5 years vendor discontinues the purchased product and launches a product with 80% of the functionality of the purchased product, client is entitled to be upgraded at no cost

Other Warranties (Continued)

- Scalability
 - Equipment specified by vendor is sufficient to support client's anticipated growth over the next 5 years

Other Helpful Provisions

- Cooperation Clause
 - Vendor will cooperate with other vendors to integrate system and resolve issues
- Dispute Resolution
 - As issue is escalated, higher-level executives within vendor's organization must be involved
 - At highest escalation level, a senior executive (COO) is required to travel to client's site

Latest Trends

- Clients and vendors taking less time to close deals
- Standard form contract always favors the vendor
- Longer negotiations favor the client
- Price and terms become more favorable to client in each successive negotiation round

Before You Close

- Business Intelligence on Vendors
 - Pending litigation searches
 - Dunn & Bradstreet reports
 - Merger and acquisition activity

Questions?

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