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A Road Map To The Electronic Health Records Program

Law360, New York (May 10, 2010) -- Despite the efforts of the federal government to increase the use of electronic health records (EHR) through an incentive program created in the Health Information Technology for Economic and Clinical Health (HITECH) Act in 2009, many eligible providers — from large hospital systems to small physician practices — remain confused about how they can qualify for incentives and how much money is actually available.

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In order to qualify for incentive payments, a provider must implement an electronic health record that meets the certification requirements published in draft form by the Office of the National Coordinator for Health Information Technology (ONC) on March 10, 2010. This certification is designed to ensure that EHR systems purchased by health care providers will meet the act's requirements for meaningful use.

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Making sure your system meets ONC certification requirements is just the first step, however, in becoming a "Meaningful User" of an electronic health record. In its Jan. 13, 2010, proposed rule, the Centers for Medicare and Medicaid Services (CMS) described three phases of meaningful use. In phase one, the provider must have e-prescribing capability, capture information in a coded format that will allow the system to use the captured information to track key clinical conditions and to coordinate care, implement clinical decision-support tools, and make reports to CMS. The e-prescribing capability makes the practice immediately eligible for an additional reimbursement.

In later phases, there is more focus on improving the quality and efficiency of care on a larger scale. The provider must be able to use the EHR for continuous

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quality management at the point of care. Orders must be entered electronically (computerized provider order entry, or CPOE); and reports of tests, such as lab tests, must be electronically transmitted. One key requirement that has not been as clearly outlined is engaging patients and their families in medical care that is delivered. Such uncertainties, which have remained outstanding for some time, are one of several reasons providers and provider organizations are cautious about wholly committing to a direction at this time.

These requirements are daunting for many providers, regardless of their size. The vast majority of providers are facing Medicare and/or Medicaid cuts this year that make them wary of spending money they may not have. Indeed, many smaller providers are actually calculating whether or not they can afford to keep their businesses open. Added to this concern is a fair degree of skepticism about whether the promised funding will actually come through. Another prevalent concern is the ongoing cost of maintaining an EHR system, which is not part of the HITECH funding and is potentially very costly.

There are three basic approaches to electronic health records systems: in-house systems, cloud-based systems and partnerships with local hospitals and health systems. Some are new options and others have been "freshened" to make them more attractive to the market.

· In-house systems exist where the relevant hardware and software are located in or near the facility using the system. In this approach, hardware and software maintenance and monitoring requirements are the responsibility of the provider. This potentially means additional staffing and reliance on a variety of outside services. Many small providers do not feel comfortable entering the computer-management arena and can't afford the additional staffing this option might entail.

· Cloud-based systems are remote and may be housed in a data center, which might be thousands of miles away. System maintenance and monitoring requirements are handled by the vendor's personnel, which reduces the need for a system manager at the practice. This model provides a lower cost of entry for smaller practices. However, significant issues can arise in the event that the cloud cannot be accessed.

· Partnerships with local hospitals and health systems have been the most successful approach so far. In this model, the larger entity provides the implementation, monitoring and maintenance to the individual practice. The practice benefits from lower maintenance costs and, in some cases, additional monies from the institution. The outcome is a stronger relationship between local physicians and the local hospital or health system. One upside of this model is that the practice can rely on an already-established and operational system. However, the hospital or health system may only offer selected systems, limiting the practice's options. Likewise, a practice may wish to create a customized system that suits its individual needs. In many cases, working with a system wherein numerous practices report to one central source limits the ability to customize.

Contracts — The Devil Is in the Details

Once you've carefully reviewed your options and decided to proceed with an EHR system that best suits your needs, the process of negotiating the agreements and vendor contracts begins.

This process has many potential pitfalls, and the practice will feel its effects for years to come. For example, at one practice, an issue arose with the vendor-support clause in a contract. Most vendors will have an automatic monthly payment for support. On the surface, this fee may appear to be reasonable. The practice was paying that fee, which amounted to about $1,100 a year.

However, once the practice reviewed the contract with a consultant, it discovered that it had only made two support calls during the previous year. It renegotiated the support contract to an hourly basis, which saved the practice nearly $800. Most vendors have multiple support options available, but will usually offer only the option that is most beneficial to them. Approaching the negotiation process with an eye for these pitfalls can benefit the practice immensely.

Nonetheless, health care providers of all sizes have been "caught" by bad contracts. Examination of a contract is crucial to ensuring that implementation and services run smoothly throughout the course of the relationship. The legal issues

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are the same for the small provider that contracts with a large health care organization or health system. A formal legal review of every vendor contract is strongly advised. Although vendors may present their contracts as boilerplate, it is important to negotiate the major issues and hidden fees, including:

· Timing of payments

· Auto renewal

· Software support

· Requirements to upgrade

· Access to client data by the vendor

· Regulatory compliance

· Data conversions

· Reselling scrubbed information

· Requirement for upgrades within versions

· Gag rules

· System uptime requirements

· Sunset clauses

Conclusion

Contracting for electronic health records is complex and full of potential problems that can be avoided with proper preparation. When a provider decides to use one of the three approaches — in-house, cloud-based or partnership with existing systems offered by larger institutions — representation by a knowledgeable attorney and a health information technology expert can save the provider a lot of time and money down the road.

--By Kathleen Carver Cheney (pictured), Duane Morris LLP, and Sandra Holtzman

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