

“What keeps you up at night?”

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Federal Recovery Act provides incentives for physicians to use Electronic Health Records (“EHR”); Hospitals can still provide EHR technology to physicians

By Bruce D. Armon and Karen L. Palestini

The Health Information Technology for Economic and Clinical Health Act (“HITECH Act”), signed into law by President Obama on February 17, 2009, as part of the American Recovery and Reinvestment Act of 2009 (“Recovery Act”), allocated approximately \$17 billion to the Medicare and Medicaid programs for the purpose of increasing reimbursement to hospitals and physicians that are “meaningful electronic health records (“EHR”) users.” Physicians who were not planning to transform their practices by using EHR should reconsider because they stand to gain financially as well as improve their practice’s efficiency.

Pursuant to the HITECH Act, physicians who are “meaningful EHR users” (as defined below) will be paid an amount not to exceed \$15,000 for the first payment year (except if the first payment year is 2011 or 2012, in which case the amount is \$18,000). For the second through the fifth years, the physician is eligible for \$12,000, \$8,000, \$4,000 and \$2,000 respectively. No incentive payment is available in the sixth and subsequent years.

Therefore, a physician who is a meaningful EHR user in 2011 can earn up to \$44,000 and a physician who is a meaningful EHR user for the first time in 2013 could earn an additional \$41,000.

Importantly, the HITECH Act also provides that if the first payment year for a physician who is a meaningful EHR user is after 2014, the physician is not entitled to any incentive payments.

Note that hospital-based physicians (e.g., pathologists, anesthesiologists, emergency physicians) who furnish substantially all of their professional services in a hospital setting (inpatient or outpatient) are not eligible for any incentive payments.

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A MEANINGFUL EHR USER MUST:

- demonstrate that during the period of incentive payments that it is using certified EHR technology, which shall include the use of electronic prescribing as determined appropriate by the HHS Secretary;
- demonstrate that the certified EHR technology is connected in a manner that provides for the electronic exchange of health information to improve the quality of health; and
- submit information on clinical quality measures and other measures specified by the HHS Secretary.

There are several means by which a physician can demonstrate that he or she is a meaningful EHR user: attestation; submission of claims with appropriate coding, such as a code indicating that a patient encounter was documented using certified EHR technology; survey response; or other means specified by the HHS Secretary.

The payments to a physician who works in a designated health professional shortage area and who otherwise qualifies as a meaningful EHR user are increased by 10%.

HHS will post on the CMS website a list of the physicians who are meaningful EHR users.

In addition to providing “carrots” in the form of incentive payments, the HITECH Act also provides “sticks” to physicians.

If a physician is not a meaningful EHR user during 2015 or thereafter, the physician’s Medicare reimbursements will be reduced to 99% of the Medicare fee in 2015, 98% of the Medicare fee in 2016, and 97% of the Medicare for 2017 and each subsequent year. This represents, in effect, a penalty for not becoming an EHR user by 2015.

The HITECH Act does give the HHS Secretary authority to exempt a physician from this payment reduction if becoming a meaningful EHR user would result in significant hardship, but such an exemption may not be granted for more than five years.

Like many provisions of the HITECH Act, the regulations published by HHS will be critical to evaluating how a physician can comply

and receive incentive payments or face reductions in Medicare reimbursement related to the use of EHR.

Commentary related to the HITECH Act has overlooked that entities such as hospitals and health plans are legally permitted, at the present time, to provide EHR technology to physicians in many situations. As a matter of fact, in response to a mandate set forth in the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (the “MMA”), both the Office of Inspector General (“OIG”) and the Centers for Medicare and Medicaid Services (“CMS”) created specific anti-kickback statute safe harbors and specific Stark law exceptions permitting these entities to provide/“donate” EHR technology to physicians in certain circumstances. An example of the types of assistance that can be made available to physicians in this context (using a hospital as the provider/“donor” of the items or services) is outlined below.

ITEMS THAT CAN BE PROVIDED TO PHYSICIANS AND PHYSICIAN PRACTICES BY HOSPITALS IN CONNECTION WITH EHR

Non-monetary remuneration in the form of software or information technology and training services “necessary” and “used predominantly” to create, maintain, transmit, or receive EHR can be provided by hospitals to physicians (and other individuals and entities engaged in the delivery of health care), so long as the following criteria are met:

- The software is interoperable at the time it is provided to the recipient.
- The hospital (or any person on the hospital’s behalf) does not take any action to limit or restrict the use, compatibility, or interoperability of the items or services with other electronic prescribing or electronic health records systems.
- Before receipt of the items and services, the recipient pays 15% of the hospital’s cost for the items and services. The hospital (or any related party) cannot finance the physician’s payment or loan funds to be used by the physician to pay for the items and services.
- Neither the physician nor the physician’s practice makes the receipt of items or services, or the amount

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or nature of the items or services, a condition of doing business with the hospital.

- Neither the eligibility of a recipient for the items or services, nor the amount or nature of the items or services, is determined in a manner that directly takes into account the volume or value of referrals or other business generated between the parties.
- The arrangement is set forth in a written agreement that:
 - is signed by the parties;
 - specifies items and services provided; and
 - covers all EHR items and services to be provided by the hospital (separate agreements may be cross-referenced or a master list may be kept).
- The hospital does not have actual knowledge of, and does not act in reckless disregard or deliberate ignorance of, the fact that the recipient possesses or has obtained items or services equivalent to those provided by the hospital.
- For items and services that are of the type that can be used for any patient without regard to payer status, the hospital does not restrict, or take any action to limit the recipient's right to use the items or services for any patient.
- The items or services do not include staffing of physician offices and are not used primarily to conduct personal business or business unrelated to the recipient's medical practice.
- The EHR software contains electronic prescribing capability either through an electronic prescribing component or the ability to interface with the physician's existing electronic prescribing system that meets the applicable standards under Medicare Part D at the time the items and services are provided.

ADDITIONAL HEALTH INFORMATION TECHNOLOGY ASSISTANCE PROGRAMS

In addition to the E-prescribing and EHR technology support options articulated in the anti-kickback statute safe harbors and Stark law exceptions, the HITECH Act itself provides for and funds a variety of

federal assistance programs, including EHR technology loan programs and demonstration projects for use of certified EHR technology in the clinical education of health professionals. Thus, there are a number of opportunities for physicians to subsidize the implementation of meaningful EHR use by availing themselves of the HITECH Act's reimbursement incentives. Physicians should start exploring EHR opportunities to be ready to take advantage of the incentive opportunities provided in the HITECH Act and avoid facing any reductions in its Medicare reimbursements for failure to implement EHR.

There may still be physicians who are reluctant to invest in an EHR system given that the EHR implementation expense can reach \$100,000 and incur significant time and resources. However, the financial incentives provided in the HITECH Act for EHR adoption and the reduction in Medicare fee schedule reimbursement for physicians who do not act in a timely manner to add EHR should prompt physicians to reevaluate their strategy, even in these difficult economic times.

If you have any questions about these requirements or any other provisions of the HITECH Act, please feel free to contact any of the Saul Ewing attorneys listed below.

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