

Electronic Health Records: What Physicians Should Know Beyond Meaningful Use and Incentive Payments

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The benefits to adopting a certified electronic health records (“EHR”) system are numerous, including a continuous medical record, incorporating notes from *all* physicians and practitioners treating a patient (assuming they utilize an EHR system), and increased efficiency in documenting care, to name a few. Lately, physicians have been flooded with information from the Centers for Medicare and Medicaid Services and others regarding the opportunity to receive incentive payments for meaningfully using EHR. This financial push is working as the National Center for Health Statistics issued a Data Brief in November 2011 indicating 57% of office-based physicians used an EHR system in 2011, a 38.8% increase since 2001.

Importantly, however, many providers may know little beyond the fact that if certain requirements are met, they could earn up to \$42,500 in Medicare incentive payments over six years. While this number is enticing and has been a catalyst to increased EHR adoption, prior to purchasing and implementing an EHR program, physicians must conduct their due diligence to avoid exposure to certain legal risks and liabilities uniquely associated with EHR systems.

Emergence of a New Kind of Medical Error

While the adoption of EHR is aimed at increasing timely access to complete patient information among providers and decreasing confusion and mistakes associated with the record, increased dependence on computerizing the process gives rise to a new set of errors that would likely not appear in the hand-written, paper records. These new types of errors may lead to greater exposure for providers in the face of increased scrutiny in the submission of claims and with respect to professional malpractice actions.

For example, many EHR have built in “time savers,” such as self-populating fields that insert a patient’s medical or procedural history into each record. These time-saving devices ultimately may hurt a provider if not used correctly. Auditors and claim reviewers may deny claims for medical necessity if it appears that the documentation is not tailored to the service performed, but is merely a template. Additionally, claims may be denied if it is determined that the medical records associated with the service or procedure are internally inconsistent. For example, claims have been denied because the medical record states in one area: “patient has no complaints of pain,” but in another area states: “patient presents with severe pain.”

In some cases, EHR systems may automatically generate a prescription, including strength and form, based on the notes in the record. In such instances, the provider must take care on two levels. Firstly, the provider must ensure that the prescription generated by the EHR system is appropriate for the patient. Though the system is convenient in generating the prescription, nothing can substitute for the professional judgment of the provider. Secondly, if

the provider does, in fact, change the EHR-system-generated-prescription, the provider must ensure that such alterations are also reflected in the exam note itself. Other providers will rely on that exam note to make future decisions on refilling the prescription or prescribing another medication.

Liability can also arise by missing simple spelling errors, despite spell check (*e.g.*, writing care instead of case). The ease with which certain tasks can be completed has resulted in increased carelessness on all of our parts. In the EHR world, however, those careless mistakes could have much greater implications, including risks of patient safety, medical malpractice claims or audit activity.

Above All: Know Your EHR System

In order to decrease potential liability, providers using EHR must ensure that they understand the capabilities of the software, have knowledge regarding which fields self-populate, and tailor each record to the patient's condition at the time of assessment. In order to accomplish these goals, providers must perform significant due diligence during the search for, and after implementation of, an EHR system.

First, the provider must make certain that he/she has found the right system, tailored to his/her particular practice. Next, knowing the system and how to use the system correctly is essential. Providers and their staffs must take the time to learn the system and be properly and thoroughly trained and re-trained when program updates occur. Providers and their staff should know, for instance, whether their EHR system has an auto-populating function and whether it can be disabled, whether the prescription-generating function can be customized and whether the entire EHR system can be custom-made to fit within the provider's current practice.

Negotiate with the EHR System Provider

Before EHR adoption, when contracting with an EHR system provider, the key to remember is: negotiate, *negotiate*, ***negotiate***. In addition to negotiating the obvious provisions regarding price and warranties, one of the most important points of negotiation will be liability. Specifically, the EHR system provider may include in the agreement that it will be absolved from all liability for issues arising from its EHR system. In other words, according to the contract, the provider will be liable for *all* errors that occur from using the EHR system, even if the provider was properly utilizing the EHR system.

Merely accepting the status quo and limited liability of the EHR system provider could be problematic for the healthcare provider should issues arise from a faulty EHR system. While true that EHR failure can be the result of human vs. computer or software-related error, what is certain is that electronic documentation can enhance the evidence available to assess claims and the resulting liability by a Court or other trier of fact. A provider with a faulty EHR system can thus be placed at greater risk.

At this early stage of EHR use and implementation, it is not clear how the law will evolve to allocate liability among providers and EHR developers. As such, healthcare providers should try to insulate themselves, as best as possible, from liability resulting from faulty EHR systems in areas including breach of confidentiality and privacy; medical malpractice and compliance issues.

Conclusion

The benefits associated with adopting an EHR system can be great both clinically and financially. However, a provider's failure to properly understand the EHR system and his/her liabilities under the agreement could result in a greater headache than anticipated. Proper education on the EHR system and engaging well-qualified legal counsel is crucial in realizing the maximum benefit of EHRs.