



The Office of the National Coordinator for
Health Information Technology

EHR Contracts Untangled

Selecting Wisely, Negotiating Terms, and Understanding the Fine Print

Karson Mahler, JD
Senior Policy Advisor, ONC

October 2016



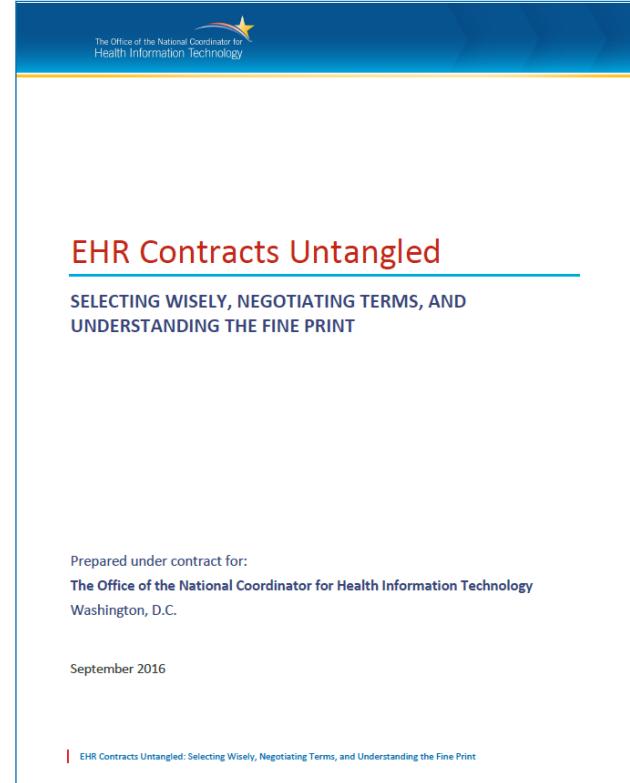
EHR Contract Guide

EHR Contracts Untangled: Selecting Wisely, Negotiating Terms, and Understanding the Fine Print

- Updates a guide released by ONC in 2013
- Prepared for ONC by private sector attorneys who have extensive experience negotiating EHR contracts
- A resource for diverse audiences

Available at:

https://www.healthit.gov/sites/default/files/EHR_Contracts_Untangled.pdf



The cover of the EHR Contracts Untangled guide features a blue header with the ONC logo and the title. Below the title, there is a red section with the subtitle, followed by a small paragraph about the contract preparation and a date. At the bottom, there is a note about the legal nature of the guide.

The Office of the National Coordinator for Health Information Technology

EHR Contracts Untangled

SELECTING WISELY, NEGOTIATING TERMS, AND
UNDERSTANDING THE FINE PRINT

Prepared under contract for:
The Office of the National Coordinator for Health Information Technology
Washington, D.C.

September 2016

| EHR Contracts Untangled: Selecting Wisely, Negotiating Terms, and Understanding the Fine Print

The EHR Contract Guide should not be construed as legal advice and does not address all possible legal and other issues that may arise with the acquisition of an electronic health record or other health information technology product or service. Each health care provider organization is unique and will need to consider its particular circumstances and requirements, which cannot be contemplated or addressed in this guide. A health care provider organization should obtain the advice of an experienced attorney whenever it proposes to enter into a legally binding contract.

EHR Contract Guide

Helps Health IT Purchasers:

- Understand the “fine print”
- Consider contract provisions that impact whether the technology they are contracting for will meet their needs and expectations
- Ask the right questions when selecting an EHR and better communicate their requirements to potential vendors
- Consider and manage expectations and offer a framework for negotiating reasonable contract terms that reflect best practice contracting principles

EHR Contract Guide

The guide is divided into two parts.

Part A: The Importance of Planning: Putting Your Best Foot Forward

- Highlights the critical planning steps that providers should take to properly understand and communicate their requirements to potential vendors.
Areas addressed include:
 - » Types of EHR products and service models
 - » Researching and comparing EHR products and vendors
 - » Identifying and prioritizing technical and operational requirements
 - » Understanding certification and regulatory requirements
 - » Procurement strategy, planning and resourcing

EHR Contract Guide

Part B: Negotiating EHR Contracts: Key Terms and Considerations for Providers

- Focuses on the negotiation and contracting phase of acquiring an EHR
- Contains strategies and recommendations for negotiating best practice EHR contract terms
- Addresses the practical issues important to providers
- Illustrates how legal issues might be addressed in a contract by providing example contract language

The diagram shows two examples of EHR contract language side-by-side, each enclosed in a blue-bordered box. A blue arrow points from the first example to the second.

Example Contract Term 11

refund for any prepaid services. Example language to address these points is set forth below.

Neither party will be liable for any failure or delay in its performance under this Agreement due to causes beyond its reasonable control, including but not limited to, labor disputes, strikes, lockouts, shortages of or inability to obtain labor, energy, raw materials or supplies, war, terrorism, acts of God, or government ("Force Majeure Event"); provided, however, that EHR Vendor may not rely on this provision if it has not maintained or implemented the disaster recovery plan and procedures as required by this Agreement. Customer shall not be obligated to pay any fees or other amounts for periods during which EHR Vendor's performance is adversely affected by such a Force Majeure Event in any material respect. Customer may also, in its sole discretion, elect to terminate this Agreement and not be obligated to pay any amount otherwise due hereunder for future services if a Force Majeure Event affects EHR Vendor's performance hereunder in a material respect for more than [redacted] days. EHR Vendor shall also refund any amounts which were paid in advance for services that were not provided due to the Force Majeure Event and for any services that will not be performed in the event of a Force Majeure Event.

Another important protection is an "uptime" warranty or service level agreement by which the vendor of a cloud-based EHR promises to make the EHR services available at a specific level (for example, 99.9% of the time). This protection is discussed in Section 3 – System Performance: Ensuring Your EHR Meets Your Expectations.

Example Contract Term 12

The Software, Services (and any portions thereof), do not and shall not in the future contain any timer, clock, counter, keylock, or other mechanism that causes or could cause the Software, data, or Services (or any portion thereof) to become erased, inoperable, impaired, or otherwise incapable of being copied or used in the full manner for which it was designed or required to be provided hereunder (collectively, "Disabling Technology"). In the event of a breach of this provision, the EHR Vendor shall not use or permit any of the Disabling Technology to be used and shall, at the EHR Vendor's sole expense, promptly remove the Disabling Technology and take all other action necessary to comply with this provision.

You may also want to propose language requiring both parties to continue to perform their obligations in the event of a dispute as discussed in Section 8 – Dispute Resolution: Resolving Disagreements With Your EHR Vendor.

¹³ See ONC Report to Congress on Health Information Blocking (April 2015), available at http://www.onsc.gov/sites/default/files/reports/info_blocking_0405_3.pdf. In particular, Scenario 3 in Appendix A – Information Blocking Scenarios, is an example of circumstances under which the operation of a "kill switch" was deemed to constitute information blocking.

| EHR Contracts Untangled: Selecting Wisely, Negotiating Terms, and Understanding the Fine Print

Areas covered in Part B of the guide:

- EHR Safety and Security: A Shared Responsibility (B.2)
 - » An EHR contract should assign appropriate roles and responsibilities to both the provider and the vendor, and should ensure that providers are not unreasonably prevented from reporting and discussing patient safety, security, and other issues.

Safety

- Ongoing maintenance, upgrades, performance monitoring and optimization.
- Internal controls and processes for software and upgrades.
- Investigation and collaboration in response to EHR technology-related deaths, serious injuries, or unsafe conditions.
- Transparency about problems.
- Training and education of users.

Security

- Security assessment questionnaire.
- Independent security audit.
- Provider's information security program and industry standards (e.g., NIST Common Framework) are baseline.
- Encryption methodology and secure data destruction.
- Compliance with all applicable state and federal data security regulations.

Areas covered in Part B of the guide:

- System Performance: Ensuring Your EHR Meets Your Expectations (B.3)
 - » The contract should reflect the promises that the vendor makes, including during negotiations, by expressly describing all core service and performance obligations.
 - Acceptance criteria
 - Uptime and system response time
 - Quality and timeliness of service
 - Post implementation support
 - » Providers can explore performance management strategies – e.g., SLAs for unscheduled system downtime

Areas covered in Part B of the guide:

- Data Rights: Managing and Safeguarding EHR Data (B.4)
 - » The contract should reflect the principle that, as between the provider and vendor, the provider owns all EHR data and has timely and reliable access to it.
 - » An EHR contract should not impede a provider from extracting maximum analytical value out of its data, and from fulfilling its role as custodian of its patients' health information.
 - Acknowledge the importance of data in patient care
 - Control the scope of commercialization by vendor
 - Respond to emergencies
 - Facilitate patient access
 - Prevent data access being blocked

Areas covered in Part B of the guide:

- Fostering Interoperability and Integration (B.5)
 - » An EHR contract should not unduly restrict a provider's ability to integrate third party technologies and services that are important to the provider's ability to leverage data to deliver better and more efficient care, or to take advantage of emerging technologies .
 - Interface strategy – point-to-point, data feed or batch export capabilities, APIs.
 - Integrating third party products.

Areas covered in Part B of the guide:

- Intellectual Property Issues (B.6)
 - » An EHR contract should recognize the investments that a health care provider makes in customizing or improving their EHR by granting the provider appropriate rights in those customizations and improvements.
 - Limited license v. perpetual license v. ownership. (CONSIDER THE SCOPE OF THE LICENSE FROM THE VENDOR)
 - » An EHR contract should provide the provider with sufficient rights to use all of the vendor's IP that is necessary to support the provider's obligations under HIPAA and impending Meaningful Use and other federal or state requirements.
 - » Contract terms that address the consequences of IP claims made by third parties should be carefully considered. (necessary to provide the software or service without "infringing" or violating the IP rights of others, you could be sued.)

Areas covered in Part B of the guide:

- Managing Risks and Liability (B.7)
 - » One party to an EHR contract should not bear all of the risk for the performance of the EHR—risk and liability should be allocated fairly between a provider and vendor so that risks are born by whichever party has most control over and ability to mitigate the risk.
 - Indemnities should reflect the principle of comparative negligence (each party is responsible for its own negligent acts or omissions).
 - Dollar amount limitations should be based upon the true maximum amount of financial risk exposure.
 - Carve outs for limitation of liability provisions are appropriate (e.g., personal injury, breach of HIPAA, willful misconduct).

Areas covered in Part B of the guide:

- Dispute Resolution: Resolving Disagreements With Your EHR Vendor (B.8)
 - » Well drafted dispute resolution provisions can help ensure continuity of patient care and the provider's business operations.
 - Continuity of service
 - Litigation v. arbitration

Areas covered in Part B of the guide:

- Transition Issues: Switching EHRs (B.9)
 - » An EHR contract should facilitate the transition—with minimum cost and disruption—if a provider chooses to switch EHRs (e.g., at the end of their contract).
 - Getting the contract structure right – length of support commitment
 - Transition assistance – data transfer and conversion
 - Accessing previous versions of EHR software

Download the Guide:

- *EHR Contracts Untangled: Selecting Wisely, Negotiating Terms, and Understanding the Fine Print* (Sept 2016), available at:
https://www.healthit.gov/sites/default/files/EHR_Contracts_Untangled.pdf
- *Health IT Playbook*, available at: <https://www.healthit.gov/playbook/>

The EHR Contract Guide should not be construed as legal advice and does not address all possible legal and other issues that may arise with the acquisition of an electronic health record or other health information technology product or service. Each health care provider organization is unique and will need to consider its particular circumstances and requirements, which cannot be contemplated or addressed in this guide. A health care provider organization should obtain the advice of an experienced attorney whenever it proposes to enter into a legally binding contract.