

Top 10 Questions to Ask When Looking at an EHR License Agreement

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Electronic health records (EHRs) offer medical practices the potential for increased efficiency and profits. The license agreement controls the practice's relationship with the vendor. Understanding the implications of the license agreement will help a practice to evaluate an EHR that the practice may adopt. This article will focus on 10 specific questions to ask while evaluating the EHR license and which portions of the license answer the questions.

Key words: Electronic health record; EHR; contracting; license agreement.

Although in existence since the early 1990s, electronic health records (EHRs) are part of a growing fascination with technology in the healthcare industry. Interest in EHRs has increased partially due to the federal government advocating widespread implementation. Implementation is more practical because of the development and proliferation of computers and broadband technology. EHRs offer practical benefits to medical practices, such as increased efficiency in the office, the opportunity for increased profits, and better communication between the office and other facilities.

EHRs, however, require substantial investment of time and money: thousands of dollars for the software alone, and productivity costs during installation, which involves technical hurdles in installing hardware and software, and the time spent training personnel to use the EHR. Despite these obstacles, physician practice use of EHRs is inevitable. The question becomes simply “when,” rather than “if” a practice should buy. Your practice's use of an EHR system is controlled by a license agreement—the foundation of the vendor-practice relationship. As with any contract, some terms are negotiable, and some are not.

This article focuses on 10 essential questions to ask yourself about the license before signing. In considering

these questions keep in mind three essential overarching issues relevant to all contracts: (1) How do you get into the agreement? (2) What do the parties have to do during the agreement? and (3) How do you get out of the agreement? (To understand basic principles of contracting, see Gosfield A. Understanding contracts: the glue of modern business relationships. *Anesthesia Business Consultants: The Communiqué*. Summer 2005:6–15.) Each of the 10 following questions are grouped into one of these three general areas.

GETTING IN

1. What Am I Getting for My Money? (Scope of License)

The scope of the license controls how many machines you can install the software on, how many people may use the software, and/or how many physical locations may house the software, all of which may be a basis for the license price. When reviewing the scope of the license, consider your practice's infrastructure and determine whether the scope best suits your practice's needs.

Licenses may be priced on a per-computer or per-user basis, or for a specific facility, building, or office suite (“site license”). Per-computer licenses will benefit a practice with fewer computers, but many users. By contrast, a practice with only a few users but a larger number of computers will benefit more from a per-user license.

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Finally, a site license is better suited for a practice with many computers and users in a single building, because the site license will cover the entire physical space of the practice without regard to the number of individual users or computers. A site license, however, may be more expensive than other licenses. If a license's scope does not meet your practice's needs, consider asking for alternative language and pricing as well as shopping around with multiple vendors.

2. How Will I Actually Get the EHR System? (Delivery/Installation/Timeframe)

How and when a practice physically implements the EHR system is determined by delivery and/or installation clauses. These clauses typically disclaim liability for the vendor's failure to deliver on time and may require the practice to prepare the site for installation by having all necessary hardware in place when the vendor arrives to install the software. If the vendor is selling hardware with the EHR, it should also install the hardware.

EHR licenses vary in the flexibility of delivery dates and whether they impose costs on either or both parties relating to delivery. For example, the vendor may require lodging and transportation for its employees providing on-site customer training, or you may have to pay costs for delays you cause, even if the vendor has no such penalty. Here you should ask for language stating that the vendor will deliver by a specific date. If the vendor imposes financial penalties for delay on you, ask for these to be mutual.

ONCE YOU'RE IN

3. Who Will Work with Me When Things Go Wrong, and What Will They Do? (Support)

Who helps you when the software crashes and what kind of help you can expect are controlled by the support clause—a crucial section relating to the vendor's duties. If your practice completely abandons paper records, a robust support clause will be critical to maintaining productivity. Support can include training for your users, technical support either in person or by telephone, and software updates and/or patches. Your practice may have to pay monthly fees, or support may be included in the cost of the license. Support clauses may also place additional performance requirements on your practice.

For example, the support clause may require you to designate a specific contact person to act as a go-between with the vendor for support issues. There may also be operational and maintenance requirements, such as requiring installation of the software on a computer in a room kept at a certain temperature, or requiring installation of all updates and/or patches that the vendor provides.

While these requirements may not seem burdensome at face value, they may include hidden practical costs such as investing in additional hardware to meet environmental requirements or installing updates that make the software less efficient for your practice.

4. Is the Vendor the Same Person Who Will Work with Me? (Sublicensing)

The party delivering the software may not be the party that created the software. In some cases, vendors may sublicense software from a separate developer. This can create issues in terms of who provides you with ongoing support. If the vendor has sublicensed the EHR system solely to sell to others, you may have to interact with the original developer for support. While this is not necessarily problematic, it will mean you have to read the support clause that much closer to see what kind of obligations the vendor is under, and whether the developer is bound to you at all.

When dealing with a sublicensing vendor, you will also want to determine if and how the EHR software has been modified. The vendor may simply have "rebranded" the software by replacing the developer's logos with its own, or it may have modified the functionality of the software. In some cases, this may be a selling point; but in others, you may want the software to function exactly as the developer originally intended.

As a separate issue, at the time of this writing, the Office of Inspector General has proposed an exception to the Stark law for hospital donations of EHRs to practices. Once this rule is finalized, it will impose additional considerations on practices seeking sublicensed software from hospitals.

5. Will the Same Person Work with Me Forever, and Can I Keep the Software If My Practice Merges? (Assignment)

The assignment clause controls whether one or both of the parties may have a third party step in and take over their position in the contract. If the vendor is able to assign, this means it can turn over all its rights and duties to another company. Likewise if a practice can assign, it means that it can sell to or enter into a merger with another practice without the new entity having to pay additional license fees. Think about your future plans when you read what may look like meaningless boilerplate language. Problems can occur here.

6. Can I Change the Software? (Modifications)

You may want to alter the software, such as adding new document templates or modifying the software's functionality. Depending on the language of the license,

these actions may constitute modifications. Modifications may be expressly permitted or prohibited, or may not be addressed at all. Ideally you should see a demonstration of how the software functions before purchasing. If there are any features you want to change or forms you want to adjust, find out whether doing so is permitted by the license. If the license is silent on this point, ask to add language permitting modification.

7. Who Owns the Data Anyway? (Data Ownership)

Because vendors often place commercial value on data, pay close attention to how the license addresses data ownership and use. Make certain that the license clearly states that any data you create is your property. Any vendor use of practice-created data should be compensated to the practice, either directly, through discounts in the EHR costs, or by providing additional services not otherwise offered. Also, pay close attention to what happens to your practice's data upon termination. You may have to return the software. Then what? You should address transition as a point of termination. If your data are stored off-site, make sure the vendor will return your data. If the data can be read only by the software, determine whether the vendor will convert your data to nonproprietary format upon termination.

GETTING OUT

8. How Do I Get Out of the License? (Termination)

The termination clause is of critical importance. A termination clause may permit either or both parties to terminate for any reason on written notice, or may allow termination only for breach (with or without a cure period). Grounds for termination may also be spread throughout the document in the clauses governing the parties' duties.

Remember to try to negotiate for the most favorable terms you can. The license is not written in stone.

You should always seek to have the right to terminate for more than a vendor's breach. If you are dissatisfied with the service you receive, but not to the point where it would breach the license terms, you should still be able to terminate. If for some reason the license does not include any means by which you can terminate, ask to have the license changed to allow you to terminate both for breach and for no reason at all, a "without cause"

termination clause. Remember, when reading the termination clause, you are planning ahead for the worst, even if you currently assume the best.

9. What Can I Sue Them For If Things Go Wrong? (Warranty and Liability Disclaimers)

Disclaimers of warranties and liabilities limit what a practice may sue a vendor for and/or limit recovery or damages when the vendor otherwise fails to fulfill contract requirements or the software fails to meet expectations. Disclaimers exist exclusively to protect the vendor and appear in all EHR system licenses. If the vendor disclaims a warranty or liability, and a patient is harmed due to a glitch in the software, the practice will not recover punitive or other specific damages from the vendor in the event the practice itself is sued. If the software fails to meet your practice's specific specialty needs, you cannot sue for breach of the warranty of fitness for a particular purpose. Disclaimers appear in all capital letters, boldface, or other conspicuous typeface, as required by law. Although disclaimers are non-negotiable, a practice should understand the impact of the language before signing.

10. What Happens If There's a Dispute? (Arbitration, Choice of Law, and Venue)

How disputes are handled is typically controlled by three clauses: choice of law, venue, and arbitration. Choice of law determines which state's laws will govern the dispute, while venue will determine in what physical location the dispute will be resolved. For example, if a contract is signed by a practice in Missouri and the vendor is from California, the contract will specify which of those two states' laws will govern the dispute in its choice of law section, with similar language stating where disputes will be resolved. In some contracts, arbitration will be the method of dispute resolution instead of litigation. Arbitration can be less expensive and time consuming than litigation, but may be conducted by an impartial lawyer rather than a judge.

CONCLUSION

To analyze a proposed EHR system license, first you have to read it. Even if you use a lawyer to be sure the significant expenditure to get the software is protected, it is important to understand the purpose and significance of the document's language. Remember to try to negotiate for the most favorable terms you can. The license is not written in stone. However, even if the terms are non-negotiable at a minimum, you can know ahead of time what you are getting into, and plan accordingly. ■