



The Office of the National Coordinator for
Health Information Technology

EHR Contracts Untangled

Selecting Wisely, Negotiating Terms, and Understanding the Fine Print

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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



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

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

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 screenshot displays two sections of contract language. The left section, titled "Example Contract Term 11", discusses the vendor's obligation to pay any fees or other amounts for periods during which the vendor's performance is adversely affected by a Force Majeure Event. The right section, titled "Example Contract Term 12", discusses the vendor's obligation to provide a replacement or other technology that causes or could cause the software, data, or services for any portion thereof to become erased, corrupted, damaged, or otherwise unavailable. Two blue arrows point from the text in the main list to these two example contract terms. Below the terms, there is a section titled "4.3 Avoiding Data Access Being Blocked" which discusses the importance of an "uptime" warranty or service level agreement. At the bottom of the page, there is a footer that reads "EHR Contracts Unraveled: Selecting Wisely, Negotiating Terms, and Understanding the Fine Print" and the number "25".

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