



MSMS
*Leadership for Physicians,
Advocacy for Patients*

HIT/EHR Vendor Contracting Checklist



Dear Members:

You are likely coming to the end of an intense process of vetting one or more electronic health record (EHR) products and related vendor proposals. As you evaluated those proposals, hopefully you weighed the value and risks of the complete offering that was presented to you including costs, training hours, support services, upgrades, product certification, etc. Now it's time to read the fine print, seek legal review, and sign a contract.

The Michigan State Medical Society, with the help of our general counsel, Kerr, Russell and Weber, PLC, has created the HIT/EHR Vendor Contracting Checklist. This checklist identifies key areas that physicians should ensure are addressed prior to signing an agreement including:

- Contract Terms and Parties
- License
- General Expectations
- Functionality and Features
- Warranty
- Term and Termination
- Assignment
- Privacy and Security
- Applicability of State Law

This checklist is intended to be used by physicians as a starting point in evaluating HIT/EHR vendor contracts. This checklist should not be used as a substitute for engaging competent legal counsel. Physicians are strongly encouraged to contact legal counsel for a review of any HIT/EHR vendor contract prior to its execution.

We hope you find this checklist helpful. If you would like additional copies of this checklist, contact the MSMS Health Care Delivery Department at (517) 336-5723 or at cburkitt@msms.org.

MSMS is committed to providing physicians with up-to-date knowledge and information to assist its physician members in remaining competitive in an ever-changing health care environment.

I. CONTRACT TERMS AND PARTIES

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| 1. Does the contract clearly state the beginning or effective date? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Is the ending or expiration date clearly identified? | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Does the contract list the full name, address, legal status, and contact person for the vendor you have been dealing with? | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Does the contract state the purchase price and/or payment method including any required down payment, payment schedule, the manner for payment (i.e., EFT, mailing to specified location)? | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. If payments are conditioned upon the vendor meeting certain milestones, are such conditions outlined in the contract?..... | <input type="checkbox"/> | <input type="checkbox"/> |

II. LICENSE

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Physicians should understand that they are only buying the right to use the software not ownership of it.

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| 1. Does the contract clearly state what software is being licensed and what type of license is being purchased? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Is the license term identified? | <input type="checkbox"/> | <input type="checkbox"/> |
| <i>Ideally, this would be a perpetual term, not for a fixed term. If it is a fixed term, the physician may want to clarify the types of fees that he or she will have in order to renew the software. See termination section below.</i> | | |
| 3. Is it clear whether the license is transferable?..... | <input type="checkbox"/> | <input type="checkbox"/> |
| a) If the license is transferable, are the relevant conditions outlined (i.e., what happens if the physician sells his or her practice)? | | |
| 4. Does the contract state whether sub-licenses are permitted? | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. Does the contract permit the physician to modify the software?..... | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. Does the contract address who are the "Authorized" or "Permitted" users?..... | <input type="checkbox"/> | <input type="checkbox"/> |
| <i>All employees of the practice need to be included. Additionally, physicians will want to know whether independent contractors are included.</i> | | |
| 7. Does the contract identify who is providing the equipment?..... | <input type="checkbox"/> | <input type="checkbox"/> |
| 8. Is it clear in the contract how many computers on which the software may be installed?..... | <input type="checkbox"/> | <input type="checkbox"/> |
| <i>If the physician has more than one practice site, he or she needs to know whether the software can be installed and utilized at more than one practice location.</i> | | |

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| 9. | Does the contract clearly identify the physician as the owner of the data?.....
<i>It should be clear that the physician is the owner of all patient data.</i> | <input type="checkbox"/> <input type="checkbox"/> |
| 10. | Does the contract spell out the ability to access data should the contract be terminated, should the physician select new EHR technology, or should the vendor cease business operations (i.e., bankruptcy, acquisition by another EHR company)?..... | <input type="checkbox"/> <input type="checkbox"/> |
| 11. | Does the contract express the remedies available to the physician should the vendor be acquired by another vendor or cease business operations (i.e., will the physician be able to continue to use the software, will the software or source code be escrowed)? | <input type="checkbox"/> <input type="checkbox"/> |

III. GENERAL EXPECTATIONS

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| 1. | Does the contract identify all duties and obligations of the physician and his/her practice? | <input type="checkbox"/> <input type="checkbox"/> |
| 2. | Does the contract identify all duties and obligations of the vendor? | <input type="checkbox"/> <input type="checkbox"/> |
| 3. | Does the contract specify the training, implementation and support services that the vendor has promised to provide? | <input type="checkbox"/> <input type="checkbox"/> |
| a) | Is it clear what training, implementation and support services are included? | <input type="checkbox"/> <input type="checkbox"/> |
| b) | Are the estimated number of hours that will be provided included in the contract?..... | <input type="checkbox"/> <input type="checkbox"/> |
| c) | Are the training materials that will be provided identified in the contract?..... | <input type="checkbox"/> <input type="checkbox"/> |
| d) | Is vendor support available 24/7, during regular business hours only, weekends, holidays? | <input type="checkbox"/> <input type="checkbox"/> |
| e) | Does the vendor offer the support directly or via a contracted entity? | <input type="checkbox"/> <input type="checkbox"/> |
| f) | Is support provided remotely? | <input type="checkbox"/> <input type="checkbox"/> |
| g) | Is support provided on-site? | <input type="checkbox"/> <input type="checkbox"/> |
| h) | Is it clear which services and supports are included in the contract price and whether there are additional fees? | <input type="checkbox"/> <input type="checkbox"/> |
| i) | If there are additional fees, are they listed (i.e., supplemental training, travel costs for on-site training, etc.)? | <input type="checkbox"/> <input type="checkbox"/> |
| j) | Is the contact information and process for placing a request for assistance listed? | <input type="checkbox"/> <input type="checkbox"/> |
| k) | Are there any restrictions placed on the availability of these services?..... | <input type="checkbox"/> <input type="checkbox"/> |
| l) | If there are restrictions, are they clearly identified? | <input type="checkbox"/> <input type="checkbox"/> |
| m) | Are ongoing education and training programs specified, including any costs associated with such programs? | <input type="checkbox"/> <input type="checkbox"/> |

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| 4. | Does the contract specify the support that will be provided on the scheduled “go live” date? | <input type="checkbox"/> | <input type="checkbox"/> |
| a) | Will vendor staff or a contracted entity be on-site? | <input type="checkbox"/> | <input type="checkbox"/> |
| b) | If staff will be on-site, does the physician have input or final okay as to who that staff will be? | <input type="checkbox"/> | <input type="checkbox"/> |
| c) | Is this support included? | <input type="checkbox"/> | <input type="checkbox"/> |
| d) | If not, are the costs outlined? | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. | If there are installation tasks necessary to bring the product online, does the contract specify who is responsible for completing those tasks – the physician and his/her practice staff or the vendor? | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. | Does the contract outline a process to test the product to ensure that it is compatible and functioning properly before going “live?” | <input type="checkbox"/> | <input type="checkbox"/> |
| 7. | Does the contract specify critical milestones that the EHR product or system must meet? | <input type="checkbox"/> | <input type="checkbox"/> |
| 8. | Does the contract state who is responsible for performing backups of data, how often backups are to be performed, where backups are stored, how to access backups, and at what cost? | <input type="checkbox"/> | <input type="checkbox"/> |
| 9. | Should there be a system crash, is the procedure for handling such a crash detailed in the contract? | <input type="checkbox"/> | <input type="checkbox"/> |

IV. FUNCTIONALITY AND FEATURES

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| 1. | Does the contract identify the functions that the software is expected to perform (i.e., practice management functions, electronic prescribing, registry functions, interoperability, etc.)? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. | Are updates/upgrades included in the purchase price? | <input type="checkbox"/> | <input type="checkbox"/> |
| a) | Is it clear who is responsible for installing future updates/upgrades? | <input type="checkbox"/> | <input type="checkbox"/> |
| b) | If updates are necessary to maintain certification of the product, does the contract address who will pay for those updates? | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. | Does the contract specify the party responsible for data loading and validation? | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. | Does the contract address debugging, interface, and related services? | <input type="checkbox"/> | <input type="checkbox"/> |
| a) | Is the vendor obligated to provide these services? | <input type="checkbox"/> | <input type="checkbox"/> |
| | <i>These services should be free if they enable performance as intended.</i> | | |
| 5. | Does the contract indicate that the vendor will implement sufficient security measures to protect data from breaches? | <input type="checkbox"/> | <input type="checkbox"/> |

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| 6. If the physician expects to register for and attest to meaningful use under either the Medicare or Medicaid EHR Incentive Programs, does the contract guarantee the product is ONC-ATCB certified for this purpose? | <input type="checkbox"/> <input type="checkbox"/> |
| 7. If the product is not ONC-ATCB certified at the time of purchase but the vendor is promising such certification, does the contract spell out the remedies available to the physician if the vendor fails to achieve such certification (i.e., refund of costs, financial "hold-harmless," grounds to terminate contract, etc.)? | <input type="checkbox"/> <input type="checkbox"/> |

V. WARRANTY	Y N
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| 1. Does the contract specify for how long the software is warranted to function as intended? | <input type="checkbox"/> <input type="checkbox"/> |
| 2. Does the contract warrant the performance of the vendor's services and supports as outlined in the contract? | <input type="checkbox"/> <input type="checkbox"/> |
| 3. If a defect is covered under the warranty, what is the vendor's obligation pursuant to the contract? | <input type="checkbox"/> <input type="checkbox"/> |
| a) Are repairs, replacement, etc. the vendor's obligation? | <input type="checkbox"/> <input type="checkbox"/> |
| b) Is the required response time addressed? | <input type="checkbox"/> <input type="checkbox"/> |
| c) If the physician is damaged financially, will he or she be reimbursed? | <input type="checkbox"/> <input type="checkbox"/> |
| d) Are there financial and other limits on the warranty obligation? | <input type="checkbox"/> <input type="checkbox"/> |
| 4. Are different levels of maintenance services clearly identified, including costs? | <input type="checkbox"/> <input type="checkbox"/> |
| 5. Does the contract identify who will be providing maintenance services? | <input type="checkbox"/> <input type="checkbox"/> |
| a) Vendor or their contracted value added re-sellers (VARs)? | <input type="checkbox"/> <input type="checkbox"/> |
| b) Does the contract differentiate between maintenance services provided by the vendor and those provided by the vendor's VARs? | <input type="checkbox"/> <input type="checkbox"/> |
| 6. Does the vendor warranty compatibility with other data files and HIT currently utilized by the physician? | <input type="checkbox"/> <input type="checkbox"/> |
| 7. Does the Warranty represent the functionality of the software in the contract? | <input type="checkbox"/> <input type="checkbox"/> |
| a) To function as represented? | <input type="checkbox"/> <input type="checkbox"/> |
| b) To be error free? | <input type="checkbox"/> <input type="checkbox"/> |
| c) To be free of "material defects"? | <input type="checkbox"/> <input type="checkbox"/> |
| 8. Does the contract address the vendor's liability in the event of damages directly attributable to the product's malfunction or failure to protect the integrity of stored data? | <input type="checkbox"/> <input type="checkbox"/> |

VI. TERM AND TERMINATION

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1. Does the contract clearly state whether the term is perpetual or a fixed term (i.e., that it will continue for a specified period of time such as January 1, 201_)
2. Does the contract contain a termination clause specifying when the contract may be terminated during its stated term?.....
Physicians should attempt to list specific examples of events such as the vendor's continued failure to perform contract functions (i.e., promised support or response time), failure to maintain required certification, or failure to maintain system performance.
3. Are the events which will result in a termination or a right to terminate listed in the contract?
 a) Is it specified what refund and/or other rights you have upon termination including the return of the physician's data?
4. Under what circumstances can the vendor terminate?.....
The circumstances should be limited to the physician's breach of the agreement. The physician should be given reasonable written notice of breach and an opportunity to cure the breach.
5. Are the termination events defined with sufficient clarity?
Phrases such as "a material breach of this contract by either party" should generally be avoided in favor of more specific breaches of the contract which will result in the ability of a party to terminate the contract.
6. Does either the physician or the vendor have the right pursuant to the contract to cure a breach of the contract which would otherwise result in its termination?
A 10 day time period following written notice for a monetary breach of the contract and a 30 day period following written notice for a non-monetary breach of the contract are usually considered reasonable.
7. Does the contract specify what happens to data stored by licensor on its servers if the contract is terminated by either the physician or vendor?.....
It is important for the physician to know whether he or she will continue to have access to patient data, whether the vendor must maintain the patient data or if the vendor may delete the data, and whether there are time constraints that apply.
8. Does the contract contain an arbitration clause?

VII. ASSIGNMENT

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| 1. Does the contract specify whether you can assign the license? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. If so, does it specify under what circumstances you can assign the license? | <input type="checkbox"/> | <input type="checkbox"/> |
| a) Sale or other transfer of the practice? | <input type="checkbox"/> | <input type="checkbox"/> |
| b) Are other conditions placed on assignment other than the vendor's consent? | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Can the vendor assign the license? | <input type="checkbox"/> | <input type="checkbox"/> |
| a) With or without your consent? | <input type="checkbox"/> | <input type="checkbox"/> |
| b) Does an assignment by the vendor give you the right to terminate?..... | <input type="checkbox"/> | <input type="checkbox"/> |

VIII. PRIVACY AND SECURITY

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| 1. Does the contract state that the vendor shall have appropriate privacy and security protocols in place including a guarantee that the vendor will comply with HIPAA, HITECH, and applicable regulations pertaining to the security and confidentiality of patient data? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Does the contract specify disclosure policies and remedies should the vendor be responsible for a breach of patient data? | <input type="checkbox"/> | <input type="checkbox"/> |

IX. APPLICABILITY OF STATE LAW

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| 1. Does the contract specify which State's law applies to the license agreement? | <input type="checkbox"/> | <input type="checkbox"/> |
| <i>Should be Michigan law (another state's law could affect your ability to enforce warranty and other obligations of the vendor).</i> | | |

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