

Federal Incentives for Electronic Health Record Adoption HITECH Act - How Physicians Can Benefit

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act (the “ARRA”), which provides, among other things, incentive payments for the adoption of Electronic Health Records (EHR) by certain eligible physicians and hospitals. The ARRA allocated approximately \$20 billion towards the promotion of electronic health records. Title XIII of the ARRA, known as the Health Information Technology for Economic and Clinical Health Act (the “HITECH Act”) details the goals and procedures to increase the use of Health Information Technology as well as the revised HIPAA privacy and security provisions.¹

Eligible physicians may be entitled to Medicare or Medicaid incentive payments under the ARRA.

Medicare Incentive Payments

Who qualifies for Medicare incentive payments? Physicians who receive Medicare reimbursement payments are eligible for this incentive program. The law excludes from the definition of eligible professionals physicians that are hospital based such as anesthesiologists, pathologists, and emergency room physicians. HHS will determine who is a hospital based physician based on whether a physician furnishes substantially all of his/her services in the hospital setting using hospital facilities and equipment. These determinations will not be based on employment or billing agreements.

How much are the incentive payments? The incentive payments are equal to 75% of the Medicare allowed charges per physician capped as follows:

1. First payment year is 2011 or 2012 = \$18,000
2. First payment year is 2013 or 2014 = \$15,000
3. Second payment year = \$12,000
4. Third payment year = \$8,000
5. Fourth payment year = \$4,000
6. Fifth payment year = \$2,000
7. For any succeeding payment year = \$0

¹ A separate update will discuss the revisions to the HIPAA privacy and security provisions.

These incentive payments may start as early as 2011. This means that for physicians to qualify for the most amount of incentive payments (the initial \$18,000), full operation and adoption of an EHR system must be in place by October 2010. Those physicians who adopt EHRs by 2012 will be eligible for up to \$44,000. The amounts of payments are phased down if a physician implements the use of EHRs after 2013, however no incentive payments will be made after 2016. Physicians first adopting the EHRs after 2014 will not receive any incentive payments.

For physicians practicing in designated health professional shortage areas, the incentive payment is increased by 10% per year.

When do penalties begin? For Medicare covered services that are provided during 2015 or thereafter by a physician that has not demonstrated meaningful usage of EHR technology, the Medicare physician fee schedule shall be reduced as follows: 1% for 2015, 2% for 2016 and 3% for 2017. Physicians that can demonstrate that there is a significant hardship can apply for a hardship exception, but that exception will only apply for a maximum of five years.

Medicaid Incentive Payments

Medicare incentive payments only reimburse physicians that have EHR systems already in place. In contrast, Medicaid incentive payments are given to eligible professionals (including non-physician providers) who are acquiring EHR systems or updating existing systems.

Who qualifies for Medicaid incentive payments? The Medicaid incentive payments apply to a broader group of professionals as compared to the Medicare incentives. Eligible professionals include: physicians, dentists, certified nurse mid-wife, nurse practitioner, and physician assistants employed by a rural health clinic or federally qualified health center (FQHC) that is led by a physician assistant. In order to qualify, these eligible professionals must meet one of the following eligibility requirements:

1. Non-hospital based eligible professionals who attribute at least 30% of their patient volume to Medicaid patients.
2. Pediatricians who are not hospital based and who attribute at least 20% of their patient volume to Medicaid patients.
3. Eligible professionals who practice predominantly in a FQHC or rural health clinic and who attribute at least 30% of their patient volume to “needy individuals.” Needy individuals include individuals who: 1) receive assistance under Medicaid; 2) receive assistance under the State Children’s Health Insurance Program (“SCHIP”); 3) receive uncompensated care from the provider; or 4) receive reduced charges by the provider on a sliding scale basis based on the patient’s ability to pay.

How much are the incentive payments? Medicaid incentive payments may be up to \$63,750. Providers who qualify for both Medicaid and Medicare incentive payments will not receive a duplication in incentive payments. HHS will determine the “average allowable costs” which consist of the average first year costs associated with the purchase or upgrade of EHR technology and in subsequent years costs associated with the maintenance, operation and use of the EHR technology. Any payments received by the provider from other sources (i.e. state or federal grants) are then subtracted from the average allowable cost, creating the “net average allowable costs.” A provider may collect up to 85% of the “net average allowable costs.” The net average allowable costs cannot exceed \$25,000 in the first year, or \$10,000 in the subsequent years. Incentive payments for the first year, which is intended to cover the purchase or upgrade of the EHR system, cannot be distributed after 2016. The incentive payments for each subsequent year may not be distributed after 2021 and may only be distributed for a total of five years. Pediatricians may only collect 2/3rds of the dollar amounts of other qualifying eligible professionals, unless their practice exceeds over 30% of Medicaid patient volume.

Example 1: A physician who is not otherwise eligible for the Medicare incentive payment, who has a practice with a 30% Medicaid patient volume, and who implements an EHR system in 2011 would be eligible for \$63,750.

$$2011 = 85\% \times \$25,000 \text{ (cap)} = \$21,500$$

$$2012-2016 = 85\% \times \$50,000 \text{ (cap of } \$10,000 \text{ for 5 years)} = \$42,500$$

$$\text{Total Medicaid Incentive Payment} = \$63,750$$

Example 2: A pediatrician who has a practice with a 23% Medicaid patient volume and who implements an EHR system in 2013 would be eligible for \$42,500.

$$2013 = 85\% \times \$25,000 \text{ (cap)} \times 2/3\text{rds} = \$14,167$$

$$2014-2018 = 85\% \times \$50,000 \text{ (cap of } \$10,000 \text{ for 5 years)} \times 2/3\text{rds} = \$28,333$$

$$\text{Total Medicaid Incentive Payment} = \$42,250$$

Are there penalties for failing to adopt EHRs? There are currently no penalties for providers who fail to adopt an EHR system except for those penalties associated with Medicare payments.

Medicare and Medicaid Incentive Payments require that the Eligible Professional is a Meaningful User of Electronic Health Records

What are certified Electronic Health Records? EHRs contain health information about an individual that:

1. includes demographic and clinical health information (i.e. medical history) of that patient;
2. has the capacity to provide clinical decision support;
3. has the capacity to support clinical physician order entry (CPOE);
4. has the capacity to capture and query information relevant to health care quality; and

5. has the capacity to exchange electronic health information with, and integrate such information from other sources.

Who is a meaningful user? A meaningful user is a physician that can demonstrate to HHS that the practice uses certified EHR technology in a meaningful manner, which includes the use of electronic prescribing as further described by HHS. Additionally, the physician must demonstrate that the certified EHR technology has the ability to provide for the electronic exchange of health information in order to improve the quality of health care, including the promotion of care coordination.

How does an eligible professional demonstrate that his/her practice is a meaningful user? HHS shall specify how a physician practice shall demonstrate that it is a meaningful user. Options may include an attestation, the submission of claims with specific coding indicating that the patient encounter was documented using an EHR, a survey response, or through a reporting mechanism. HHS will also post on the Centers for Medicare and Medicaid Services website a list of the names, addresses and phone numbers of those physicians that are meaningful EHR users.

Both HHS and the States will be providing further clarification regarding the distribution and any further requirements related to these incentive payments. If you have any questions regarding these incentive payments or any other provision of the HITECH Act please contact Dave Schoolcraft, dschoolcraft@omwlaw.com or Elana Zana, ezana@omwlaw.com, or call (206) 447-7000.