

Department of Health Establishes  
Amnesty Period for **Illegal EHR**  

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**Arrangements**

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On February 11, 2011, the New York State Department of Health granted clinical laboratories and health practitioners 90 days in which to correct illegal electronic health record (EHR) arrangements. Many of these arrangements were donations of software which would enable practitioners to implement EHRs for their daily practices.

The federal anti-kickback law includes a safe harbor and the federal "Stark" law contains an exception under which a clinical laboratory may pay up to 85% of the cost of EHR technology, software and training, for a practitioner or group practice, if specific requirements are met. However, in September 2010, the Department issued an advisory that NYS rules do NOT allow cost sharing; therefore, the provision of EHR, software and training that otherwise may be permitted under federal law is prohibited in connection with a laboratory operating in New York. And since the EHR arrangement would constitute a "financial relationship" with the laboratory it would violate the physician self-referral prohibitions of the New York Stark-type law. In the opinion of the Department, the federal rules do not preempt more restrictive state laws.

The September advisory would allow the provision of EHR technology to practitioners at less than fair market value if the items are used exclusively to enable the physician to participate in specifically defined laboratory-related activities. But the donation to physicians of any computer system or functionality that exceeds laboratory-related interactions would be prohibited.

For example, the NYS rules would allow laboratories to interface their laboratory information systems to the client's existing EHR to enable seamless laboratory test ordering and laboratory test reporting, and facilitate other laboratory-related functions and may assume, as a cost of doing business, the cost of such limited interface. They could also provide physicians with computer hardware, software and information technology training and supplies

that are restricted to laboratory-related functions that enable the physician to order tests from the lab, and receive and store test results. It would also be acceptable if the software and hardware contained functionality that would allow the physician to make referrals to other labs and/or provide access to other lab internet portals.

Laboratories must retrieve all computer equipment placed with the physician's office and related unused supplies, and discontinue paying for an interface upon termination of the laboratory services agreement with the practice, or arrange a one-time purchase at fair market value that transfers ownership of the hardware and software to the physician. A violation of these rules could constitute professional misconduct and lead to an OPMC action against the offending physician.

In its FAQ's issued on February 11, 2011, the Department stated that it wanted to minimize disruption of on-going arrangements and therefore set an amnesty period of 90 days (which started January 15, 2011!) during which laboratories that have donated costs of EHR may take back the software and discontinue prohibited services (i.e., unwind contracts), arrange for the one-time sale of donated software and EHR components to the referral source at fair market value or leave donated software or EHR components in place, and continue to pay for connectivity for the non-laboratory components of the EHR, and discontinue accepting specimens for testing from the referral source.

The Department warned that after April 15, 2011, laboratories found to be in violation of the NYS rules as communicated in the September 2010 advisory can be referred for civil or criminal penalties and/or administrative action against the lab owner.

Although the New York Stark law is implicated in these arrangements and there has been little or no state enforcement of self-referral prohibitions, physicians should be advised to consider unwinding transactions that do not comport with the Department's guidance.

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