

# Legal Considerations in Joining an HIE

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By Chris Dimick

The legal issues healthcare organizations must consider when joining a health information exchange (HIE) go far beyond the standard HIPAA-related concerns.

HIEs are rapidly gaining prominence in healthcare, bolstered by federal initiatives like the meaningful use program, which requires participants engage in HIE activities. The prospect of improved healthcare delivery through improved access to health information is also driving organizations to sign up with HIEs.

Legal issues should be addressed from the start of any partnership between an HIE and a healthcare organization, according to Claudia Egan, JD, and John Orth, CDIA+. Egan is an attorney with von Briesen & Roper based in Milwaukee, WI, and Orth is principal consultant for EHRs at IMERGE Consulting. They discussed the legal and compliance issues that affect interoperable electronic record exchange during a presentation at AHIMA's Legal EHR Summit in August in Chicago. They have firsthand HIE experience-both volunteer with Wisconsin's state HIE, the WISHIN.

The legal issues one must address with an HIE are many and can differ from typical legal issues within a healthcare organization, Orth says.

## Trust Required

Healthcare facilities must ensure the contract they enter into with an HIE addresses both how to exchange information as well as what to do when things go wrong, Egan says.

Local and regional HIEs have been developing across the country without using a standard participant contract, or trust agreement. Legal problems have come up when one state HIE tries to exchange information with a different state HIE and their contract agreements do not align.

Some HIEs also find problems in their cooperative when their exchange contract with participants is weak and does not explicitly list how to handle the various operational and legal issues that can arise during health data exchange.

Healthcare organizations looking to sign up with an HIE should ensure the following points are addressed in their exchange contracts, Orth and Egan say:

- Each partner must know and comply with an exchange code of conduct.
- Each partner must know it is always exchanging health information with another trusted entity that can unambiguously identify the patient.
- The contract must include an oversight process to ensure compliance with all trust agreement components.
- The consequences for failing to uphold the trust agreement must be explicit and enforced.
- Each exchange partner must know and comply with the HIE's technical requirements to participate.

"People haven't worked out what to do or how to fix it when things go wrong," Egan says. "That is why it is important to have a contract in place, which would be a DURSA or some other agreement about how you are going to fix everything. The contract should have a process, not just a remedy.

"That is the most overlooked (step)."

The data use and reciprocal support agreement, or DURSA, is a trust agreement contract developed by the federal government for the Nationwide Health Information Network, a still developing HIE network with the goal of connecting the separate state HIEs.

DURSAAs contain most of the essential legal and compliance specifications needed for a successful health information exchange, Orth says. But conflicting state laws and other contractual issues have caused many HIEs to not implement a DURSA-based contract.

Some HIEs are organized solely by vendors, who create EHRs that can exchange information with other products by that vendor. These exchange systems also have avoided DURSAAs. Vendor Epic's HIE function, for example, contains some "rules of the road" for HIE, but it doesn't specifically follow a DURSA-type trust agreement.

Even if a facility's local HIE hasn't implemented a DURSA, the facility should ensure that the trust agreement in place meets at least all of the above listed criteria. These trust contracts are not just for a healthcare facility's legal peace of mind, they are essential in assuring patients that their health information will be safe and secure during HIE transport.

## State Law versus HIPAA

Another legal HIE issue comes when state law is more strict than HIPAA when it comes to exchanging and releasing medical records. This especially comes into play with state laws centered on protecting specially protected records like substance abuse and HIV/AIDS data.

Typically the trained HIM professional is responsible for dissecting a record request by a neighboring state and reconciling the two state laws. But when requests come from unfamiliar states, HIM professionals need to carefully consider the two states' laws and decide what is legal to send through the HIE.

EHR systems complicate matters as currently most cannot truly segregate all parts of a person's record that fall into a certain protective category. An HIM professional can pull complete protected records, but usually hints to things like mental health and disease are viewable in other sections of the record, like medication history. HIV treatment records could be blocked, but an HIV drug cocktail on the medication list might get sent unnoticed.

"When I transmit the medication history for a patient, I probably have not weeded out those medications that are only related to the individual's treatment for their mental health illness," Egan says. "That is the sort of crossover that folks really have to sit down and figure out how they are going to do that."

There are two current solutions to this legal risk. An organization can over-block records, excluding everything with a diagnosis code related to the specially protected information. Or an organization can stretch their patient consent document to cover multiple years and include consent for exchanging specially protected information in an HIE.

"That is harder on the lawyer side because you are really stretching the knowing consent into 'I agree that you can release this for anything that might come up in the next couple of years,'" Egan says. "That is a little bit of a harder case."

## Intellectual Property Rights

Sometimes more than just a patient's record gets exchanged during health information exchange, like intellectual property. Business processes, database details, facility-developed patient data, and software details can all be revealed when an organization exchanges data through an HIE.

Facility management and staff lawyers need to be aware that there are times that legal rights to this intellectual property can be negated through health information exchange.

For example, a hospital purchases software that conducts data mining and finds indicators for a patient's risk of certain diseases or a need for preventive treatment. The software determines a person needs to have diabetes sugar testing every four months because of certain warning signs, even though the patient does not yet have a diagnosis of diabetes. This information is then entered into the patient's record, which could then be distributed to competing hospitals in the local HIE.

"The hospital paid good money to create that sort of special knowledge that they are using for treatment purposes," Egan says. "Clinicians will tell you 'I will happily share that information to whoever asks me because my goal is to improve patient care.' But the business people might think, 'Oh my gosh though, think how much money we have spent, hundreds of thousands of dollars, in helping come up with those indicators that we are now maybe propagating.'"

While clinicians typically win these types of arguments, Egan says there is tremendous pressure on the business side to make money or at least recoup the cost on this type of software.

Software companies have concerns about their proprietary information as well, Orth says. EHR vendors have software built into their systems that is proprietary and valuable to competing vendors, software details that can be sent out with health information in an exchange.

Many vendors make their provider clients sign contracts that state they will not release these proprietary details. Should a provider unknowingly send out vendor proprietary information during a routine health information exchange, that provider could be held legally accountable for breaking the contract. Product licenses could be revoked and financial penalties or lawsuits could result.

## Malpractice

The use of an HIE, or lack thereof, could lead to lawsuits in the future. While no cases have been filed yet, Egan and Orth see the potential for malpractice lawsuits being filed if a provider had access to vital information through an HIE but failed to review the information.

In the past record transfers have not been immediate enough to constitute a lawsuit stemming from a provider not accessing an exchanged record. But as HIEs improve their processes and speed up their delivery, malpractice suits could appear. Facilities would need to modify their practice procedures to ensure staff has checked whether there is further relevant information about each patient by way of an HIE.

"That is the biggest new legal fear," Egan says. "In this world where now the record is going to be available and available fairly instantaneously, the failure to [access records] resulting in harm is really looming and something that folks should start to think about."

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