



INCENTIVES FOR ADOPTION OF ELECTRONIC HEALTH RECORDS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT

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Under the American Recovery and Reinvestment Act of 2009 (the Act), Medicare and Medicaid professionals and hospitals are eligible for incentives for the adoption and use of electronic health records (EHR) technology. Under Medicare, eligible professionals can receive incentive payments of up to \$48,400 over a five year period to adopt EHR technology. Hospitals are also eligible to receive incentive payments for implementing EHR technology starting in 2011 until 2015. If eligible professionals and hospitals, however, fail to adopt EHR technology by 2015, then Medicare will penalize them by reducing their Medicare payments. Eligible professionals and hospitals may also receive incentive payments from Medicaid for the adoption of EHR technology.

MEDICARE INCENTIVES – ELIGIBLE PROFESSIONALS

Beginning in 2011, eligible professionals who qualify may receive incentive payments from Medicare. An eligible professional includes (1) a doctor of medicine or osteopathy, (2) a doctor of dental surgery or of dental medicine, (3) a doctor of podiatric medicine, (4) a doctor of optometry, and (5) a chiropractor. Under limited circumstances, physicians affiliated with a qualified Medicare Advantage organization may be considered as an eligible professional. Hospital-based eligible professionals are not eligible for Medicare incentive payments. A hospital-based eligible professional is defined as a physician, such as a pathologist, anesthesiologist or emergency physician, who furnishes substantially all of such services in a hospital setting (whether inpatient or outpatient) and through the use of the facilities and equipment, including qualified EHR, of the hospital.

In order to qualify for Medicare incentive payments, the eligible professional must be a meaningful EHR user of certified EHR technology. At this time, the definition of “meaningful use of certified EHR technology” is not clear. Ultimately, the Secretary of the Department of Health & Human Services will determine what it means to use a certified EHR technology in a meaningful manner. The Act also provides the Secretary with authority to require more stringent measures of meaningful use over time to improve the use of EHR and health care

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quality. Regardless of the definition of “meaningful use,” the eligible professional must (1) demonstrate that the certified EHR technology is connected in a manner that provides for electronic exchange of information to improve the quality of health care, such as promoting care coordination and (2) submit information on selected clinical quality measures and such other measures as selected by the Secretary.

An eligible professional, who is determined to be a meaningful EHR user, shall be paid an amount equal to seventy-five (75%) of the Secretary’s estimate of the allowed charges for all covered professional services furnished by the eligible professional during such year. The incentive payments available to eligible professionals shall not exceed the applicable amounts as specified in the chart below. The amounts available to the eligible professional vary depending upon the year the EHR technology is adopted by such eligible professional. If an eligible professional predominantly furnishes services in an area that is designated as a health professional shortage area (HPSA), then the amount that would otherwise be available to the eligible professional shall be increased by ten percent (10%).

Payment by Year	2011	2012	2013	2014	2015
2011	\$18,000	\$0	\$0	\$0	\$0
2012	\$12,000	\$18,000	\$0	\$0	\$0
2013	\$8,000	\$12,000	\$15,000	\$0	\$0
2014	\$4,000	\$8,000	\$12,000	\$12,000	\$0
2015	\$2,000	\$4,000	\$8,000	\$12,000	\$0
2016	\$0	\$2,000	\$4,000	\$8,000	\$0
Total	\$44,000	\$44,000	\$39,000	\$32,000	\$0
HPSA (+10%)	48,400	\$48,400	\$42,900	\$35,200	\$0

If the eligible professional is not a meaningful EHR user by 2015, then the eligible professional’s fee schedule amount will be reduced to the applicable percent amount, as shown in the chart below. If the proportion of eligible professionals who are meaningful EHR users is less than seventy-five percent (75%), the Act authorizes the Secretary to decrease the applicable percent by 1 percentage point from the applicable percent in the preceding year, but in no case shall the applicable percent be less than ninety-five percent (95%). The Act also provides a significant hardship exception, which is determined by the Secretary on a case-by-case basis.



Year	2015	2016	2017	2018+
Applicable Percent	99%	98%	97%	97% > x > 95%

MEDICARE INCENTIVES – HOSPITALS

Beginning in 2011, eligible hospitals, who are meaningful EHR users, may receive Medicare incentive payments. Eligible hospitals will also be penalized by not becoming a meaningful EHR user by 2015. An eligible hospital is a critical access hospital or a subsection (d) hospital. A subsection (d) hospital does not include: (i) a psychiatric hospital; (ii) a rehabilitation hospital; (iii) a hospital whose inpatients are predominantly individuals under 18 years of age; (iv) a hospital which has an average inpatient length of stay of greater than 25 days; (v) hospital involved extensively in treatment for or research on cancer. To qualify for an incentive payment, a hospital must be a meaningful EHR user of certified EHR technology. This includes (1) demonstrating that the certified EHR technology is connected in a manner that provides for electronic exchange of information to improve the quality of health care, such as promoting care coordination and (2) submitting information on selected clinical quality measures and such other measures as selected by the Secretary.

For eligible hospitals, the incentive payment is equal to the product (i.e., multiplied) of the Initial Amount, the Medicare Share and the Transaction Factor (“Hospital Incentive Payment Calculation”).

- The Initial Amount is the sum of \$2,000,000 plus \$200 for each discharge between the 1,150th through the 23,000th for a 12-month period selected by the Secretary.
- The Medicare Share is equal to the fraction of:
 - The numerator (e.g., 3 is the numerator of 3/4), which is the sum of:
 - The estimated number of Part A inpatient bed days; and,
 - The estimate number of Part C inpatient bed days.
 - The denominator (e.g., 4 is the denominator of 3/4), which is the sum of:
 - The estimated total number of inpatient bed days; and,
 - The estimate total amount of the eligible hospital’s charges during such period, not including any charges that are attributable to charity care, divided by the estimated total amount of the hospital’s charges during such period.



- The Transition Factor is as follows:
 - One for the first payment year;
 - 3/4 for the second payment year;
 - 1/2 for the third payment year;
 - 1/4 for the fourth payment year; and,
 - Zero for any succeeding payment year.
 - If the first payment year is after 2013, then the transaction factor is the same as the amount for an eligible hospital for which the first payment year is 2013. If the first payment year is after 2015, then the Transaction Factor shall be zero.
 - The Transition Factor, in effect, reduces the Medicare incentive payment available to a hospital each year.

Hospitals that do not demonstrate to be a meaningful EHR user by 2015 will be subject to reductions in three-quarters of their market basket adjustment as follows:

- For Fiscal Year 2015, 33 1/3% of the three-quarters of the hospital’s applicable percentage market basket adjustment will be reduced;
- For Fiscal Year 2016, 66 2/3% of the three-quarters of the hospital’s applicable percentage market basket adjustment will be reduced; and
- For Fiscal Year 2017 and each subsequent fiscal year, 100% of the three-quarters of the hospital’s applicable percentage market basket adjustment will be reduced.

MEDICARE INCENTIVES – ELIGIBLE PROFESSIONALS AND HOSPITALS

Certain Medicaid providers may receive Medicaid incentive payments for the adoption of certified EHR technology. Eligible professionals include physicians, dentists, certified nurse mid-wife, nurse practitioner, and physician assistants practicing in a Rural Health Clinic (“RHC”) that is led by a physician assistant or is practicing in a Federally Qualified Health Center (“FQHC”) that is led by a physician assistant. However, only the following eligible professionals are considered a Medicaid provider who qualify for incentive payments: (1) an eligible professional who is not hospital-based and has at least thirty percent (30%) of the professional’s patient volume attributable to individuals who are receiving medical as-

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sistance under Medicaid; (2) a pediatrician, who is not hospital-based, and who has at least twenty percent (20%) of the professional's patient volume to individuals who are receiving medical assistance under Medicaid; and, (3) an eligible professional who practices predominantly in a FQHC and RHC and has at least thirty percent (30%) of the professional's patient volume attributable to needy individuals. A Medicaid provider is also defined to include a children's hospital and an acute care hospital (other than a children's hospital) that has at least ten percent (10%) of the hospital's patient volume attributable to individuals who are receiving medical assistance under Medicaid.

The incentive payments for eligible professionals who are qualified as a Medicare provider may receive up to eighty-five percent (85%) of the net average allowable costs for certified EHR technology as Medicaid incentive payments. The term "net average allowable costs" means the average allowable costs reduced by any payment made to the Medicaid provider from any other source (other than by a State or local government) for certified EHR technology or support services. For the first year of payment, the average allowable costs are the purchase and initial implementation or upgrade of EHR technology (including support services and training) as determined by the Secretary. For the subsequent year of payment, the average allowable costs are related to the operation, maintenance, an use of such EHR technology as determined by the Secretary.

The net average allowable costs may not exceed \$25,000 for the first year of payment (which may not be later than 2016). For each subsequent year of payment, the net average allowable costs may not exceed \$10,000. These amounts are reduced by two-thirds for qualifying pediatricians. No payments may be made after 2021 or over a period of longer than five years.

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Payment by Year	2011	2012	2013	2014	2015	2016	2017+
2011	\$25,000	\$0	\$0	\$0	\$0	\$0	\$0
2012	\$10,000	\$25,000	\$0	\$0	\$0	\$0	\$0
2013	\$10,000	\$10,000	\$25,000	\$0	\$0	\$0	\$0
2014	\$10,000	\$10,000	\$10,000	\$25,000	\$0	\$0	\$0
2015	\$10,000	\$10,000	\$10,000	\$10,000	\$25,000	\$0	\$0
2016	\$0	\$10,000	\$10,000	\$10,000	\$10,000	\$25,000	\$0
2017	\$0	\$0	\$10,000	\$10,000	\$10,000	\$10,000	\$0
2018	\$0	\$0	\$0	\$10,000	\$10,000	\$10,000	\$0
2019	\$0	\$0	\$0	\$0	\$10,000	\$10,000	\$0
2020	\$0	\$0	\$0	\$0	\$0	\$10,000	\$0
Total	\$65,000	\$65,000	\$65,000	\$65,000	\$65,000	\$65,000	\$0

Eligible hospitals may receive incentive payments not to exceed the maximum amount permitted by the following payment calculation:

- The product of the overall hospital EHR amount for the provider and the Medicaid share for such provider.
 - The EHR amount for the provider is determined based upon the Hospital Incentive Payment Calculation as described above. However, the Medicare share for this calculation is one for the first four payment years. Further, the Secretary shall assume that for payment years after the first payment year that discharges increase at the average annual rate of growth of the most recent three years for which discharge date are available per year.
 - The Medicaid share shall be calculated in the same manner as the Medicare share (see Hospital Incentive Payment Calculation above) except the numerator is equal to the number of inpatient bed days which are attributable to Medicaid patients (including those individuals in Medicaid managed care plans).
- Fifty percent (50%) of the product of the overall hospital EHR amount and the Medicaid share in any year.
- Ninety percent (90%) of the product of the overall hospital EHR amount and the Medicaid share in any two-year period.

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Incentive payments may not be paid to eligible hospital for any year beginning after 2016 unless the provider has been provided payment under the above-described payment calculation for the previous year and over a period of more than six (6) years of payment.

The Act authorizes the Secretary to ensure coordination of the Medicaid incentive payment with respect to providers under the Medicare incentive payment program and to assure that no duplication of incentive payments occurs.

The enactments under the American Recovery and Reinvestment Act of 2009 are expansive and pervasive. This summary is only a thumbnail sketch of the significant enactments. As regulations interpreting the Act are published, you will need to continue to monitor the changing landscape. For any questions about the payment incentives authorized under the Act, please contact your Brunini attorney or any member of Brunini's Health Care Law Group.

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