

# Electronic Health Record (EHR) Systems: Is Certification Ever Certain?

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The 2009 Health Information Technology for Economic and Clinical Health (“HITECH”) Act provides the Department of Health & Human Services (“HHS”) with the authority to establish programs to improve health care quality, safety, and efficiency through the implementation of health IT, including electronic health record technology (“EHR Technology”). Under HITECH, eligible health care providers can qualify for Medicare and Medicaid incentive payments when they adopt certified EHR technology and use it to achieve specifically outlined objectives, known as “meaningful use” requirements.

To be eligible for meaningful use incentives, health care providers must use “certified” EHR Technology. The Office of the National Coordinator for Health Information Technology (“ONC”) is responsible for issuing the rules that establish the standards that EHR Technology must meet to be certified and therefore eligible for meaningful use incentives. ONC also appoints technology review bodies authorized to test and certify EHR Technology for compliance with ONC standards.

Many health care providers have found that implementing EHR Technology can be an expensive and time-consuming process. In addition to purchasing costly certified EHR Technology that will qualify for meaningful use incentives, providers also find that the day-to-day implementation comes with its share of headaches as staff and providers learn to use a new system effectively. Now, health care providers must confront an additional concern, ensuring that their EHR Technology *remains* certified under evolving ONC standards.

On April 25, 2013, ONC issued a press release announcing the decertification of two EHR Technology systems. This announcement sent a shockwave through the industry as it was the first time that ONC decertified EHR Technology that initially met ONC standards. The two decertified EHR Technology systems were developed by a company based in Santa Fe Springs, California. After complaints were allegedly made to ONC about the products, ONC investigated and the products were retested for certification by InfoGard Laboratories, one of ONC’s authorized certification bodies. Based on the results of the retest, the EHR Technology was decertified and is no longer eligible for meaningful use incentives.

What happens to a health care provider’s substantial EHR Technology investment and meaningful use incentives when previously certified EHR Technology does not continue to meet ONC

standards? It seems that, at least for now, the answer to this is unknown. There is an array of questions that arise in the wake of ONC's recent action, such as:

- Are providers entitled to keep meaningful use payments received based upon the previous certification?
- Do providers have any legal rights against an EHR vendor whose product loses its certification?
- What rights do vendors have once their product becomes decertified? Is there an appeal process? If so, what effect will it have on providers who are left in limbo with the product?

We will have to wait and see how this situation develops in the coming months. In the meantime, check back on Thursday and I'll offer some tips on what a provider should look for when they purchase EHR Technology and how to protect their organizations from the effects of an ONC decertification.

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