Negotiating Managed Care Contracts

NYSHFA Audio Conference
Friday, December 13, 2013

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Outline

- Threshold Issues
- MCO Diligence
- We Don’t Negotiate or We Can’t Negotiate
- Contracting Basics
- Specific Contract Terms
Threshold Issues

- Rate Setting – How and Who
- Payment – How, Who and When (and How Fast)
- Eligibility and Coverage – Who, How and What Process
- Covered Services – Who Decides
- Take It or Leave It Contract?
MCO Diligence

- Facilities should investigate an payor’s history, creditworthiness, financial resources, and reputation
- Issues to look for:
  - Failure to pay claims in a timely manner
  - Failure to produce accurate financial statements in a timely manner
  - Loss of personnel / high employee turnover
  - Unjustified claim denials
  - High complaint volume
We Don’t Negotiate or We Can’t Negotiate

- Many provider contract provisions may be “set in stone” by legal requirements
  - Federal statutes
  - CMS regulations on managed care
  - Federal provider regulations
  - State Medicaid Statutes
  - State MCO Statutes
- Not all terms, however, are required by law – MCO negotiating ploy
We Don’t Negotiate or We Can’t Negotiate

• The “Balance” of Power
  • MCOs typically act as though they have all the leverage because they believe they can selectively contract
  • Facility can draw its strength from the value it can deliver to the MCO and its ability to deliver solutions to problems efficiently
  • MCO network access may be helpful if there is a geographic “hole” or hurtful if there is a “glut”
  • MCOs have strong incentive to contract with long term care facilities because such facilities can reduce cost by replacing hospitalization and other forms of expensive care
Contracting Basics

- Don’t assume you can’t negotiate and don’t allow the contracting administrator to prevent you from talking to MCO counsel
- Facilities should try to enter into a specially negotiated contract rather than relying on the form contract provided by the MCO
- Clarity is important:
  - Make sure the contractual language is clear
  - Define important terms
- Facilities should make sure they have the complete contract, including all documents the contract makes reference to
Specific Terms - Definitions

- The definition section of a contract is very important as it sets out what specific terms will mean.
- Pay special attention to how the following terms are defined:
  - Clean Claim
  - Medical necessity
  - Covered services
  - Covered person/Member/Enrollee
  - Eligible (and any eligibility or service related terms)
Specific Terms - Services/Admission

• Covered Services
  • Facilities should avoid contracts that allow for covered services to simply reflect services provided in the member’s contract.
  • Facilities should specifically list and define each service

• Admission of Covered Services and Obligation to Provide Services
  • Facilities should contract for provisions that allow for service contingent upon availability and authorized admission

• Pre-Admission Authorization
  • Contract should state what approvals and authorizations are needed prior to admission
  • Facilities should only be required to use “best efforts” to obtain authorization
Specific Terms - Billing/Payment

- **Billing Format and Claims Submission** - The contract should specify a billing format to be used by both parties, or at least state that the parties will mutually agree upon a billing format.
- **Copayments and Collections** - Who is responsible for collection of co-payments or member cost sharing?
- **Denial of Payment** - Try to limit retroactively denials based on lack of authorization or utilization review.
- **Prompt Pay** - How fast does the MCO pay and what happens when they don’t comply?
- **Overpayment** - What is Facility required to do?
Specific Terms - Billing/Payment

• **Payment Methodology and Source**
  - There are various payment methods and structures
  - Negotiates for ones that are reasonable and consistent
  - If fixed, there should be an affirmative statement that payment is according to the agreed upon rate schedule

• **Coordination of Benefits**
  - The facility should pay attention to an MCO’s attempts to offset negotiated rates
  - This is especially important if the plan combines payment sources
Specific Terms - Billing/Payment

• Most favored nation clause - BEWARE
  • MCO always gets your lowest rates
  • Lowest common denominator on your facilities controls

• Overpayments
  • The MCO will want to retain the right to demand return in the event of overpayment
  • The contract should require the MCO to provide notice of alleged overpayment and set a time limitation on demands for past overpayments
Specific Terms - QA/Utilization Review

• Delineate the facility’s responsibility and control of utilization reviews
  • What are the data collection and transfer requirements?
  • Be sure to examine this section for reasonableness and evaluate your facility’s ability to apply
  • How does QA/UR enhance or conflict with the facility’s operations and federal compliance requirements
  • How much control does plan have over patient care (DM, care protocols, etc.)
• Confidentiality
Specific Terms - Term and Termination

- Review the term and termination section closely
- Mutuality for each side’s needs is the key
- What triggers involuntary termination
  - Breach for non-payment, slow payment
  - Regulatory or quality considerations
- Consider the length of term and choose what makes sense for the facility’s needs, but understand the needs of the MCO to have and keep a viable network
- Ideally the facility should try to negotiate w/o cause termination upon reasonable notice
Specific Terms - Amendment/Modification

• Avoid provisions which allow the MCO to unilaterally modify the contract
  • Provider Manuals
• Be wary of “re-opener” clauses which allow a facility to reject MCO proposed changes but then trigger termination of contract
Specific Terms - Notification

- The contract will likely incorporate various appendices and exhibits
  - Ensure there is a provision so that facility gets these new versions
- The MCO will want to be apprised of any changes in conditions or situations, especially any legal problems that may arise
  - The facility should negotiate for a notification limitation that only requires notification based on statutory requirements or documents as a matter of public law
Specific Terms - Other Issues

- **Provider Denials & Enrollee Grievances**
  - What does the contract provide for stating grievances and appeals of MCO decisions?

- **Insurance and Indemnification**
  - Look for mutual provisions relative to both the MCO and the SNF’s insurance coverage against general and professional liability.
  - Negotiate for mutual indemnification provisions (especially for utilization review process).
Specific Terms - Other Issues

• Hold-Harmless Clauses
  • Most contracts have clauses which prevent the provider from charging the enrollee for services not covered under the enrollee’s plan

• Maintenance and Release of Records; Confidentiality
  • Do you need a provision relative to HIPPA rules
  • Data collection and transfer
Questions?
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Ari J. Markenson, J.D., M.P.H. is a partner with the Health Care Practice Group of Benesch Friedlander Coplan & Aronoff LLP in its New York Office. He is experienced in counseling various health care industry clients, including providers and payers, and has specific expertise in the representation of continuing care providers. Mr. Markenson assists health care clients on legal and regulatory compliance issues, including requirements and conditions for participation, fraud and abuse, HIPAA and survey, certification and enforcement issues, administrative proceedings, acquisitions, due diligence, obtaining certificate of need approval and state licensure, health care decision making and refusal of treatment issues. Mr. Markenson also counsels clients regarding mergers and acquisitions, general corporate and business matters, such as the negotiation of A/R financing agreements and health care facility leases.

Mr. Markenson also serves as an Adjunct Associate Professor at the University of Maryland University College, Graduate School of Management and Technology, where he teaches courses in Long-Term Care Administration and Legal Aspects of Health Care Administration. In addition, he is a Lecturer at the School of Health Sciences and Practice at New York Medical College, where he teaches Health Care in the U.S., Law and Health and Management of Long Term Care Facilities. He is also an Adjunct Associate Professor of Law at Brooklyn Law School where he teaches a health law practice workshop. Mr. Markenson is a past-chair of the New York State Bar Association Health Law Section and a member of its executive committee. He is listed in Best Lawyers in America (2012-2014) and as a NY-Metro Superlawyer in October 2011 and 2013. He is also a member of several non-profit boards - Providence Rest, The Foundation for Quality Care and Youth Soccer of New Rochelle.

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