



**American Hospital
Association**

Sonnenschein
Sonnenschein Nath & Rosenthal LLP

AHA CONFERENCE CALL SERIES

Medicare Advantage

Special Session

**MA for Small and Rural Providers:
Contracting Considerations**

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Introduction

- For small and rural hospitals, the Medicare Advantage (“MA”) program has brought new complexities in the form of MA Regional Preferred Provider Organizations and Private Fee-for-Service plans.
- Many small and rural hospitals have little, if any, experience in managed care contracting.
- MA program gives MA organizations (“MAOs”) and their contracted providers broad discretion in negotiating and setting the terms and conditions of their economic and operational relationship (although deemed contractors do not have the opportunity to negotiate a contract).
 - But, there remain specific contract provisions that must be included in (or excluded from) written agreements between MAOs and their providers.
 - MAOs are required to have policies and procedures which comply with MA regulations.
 - By contract, MA regulations are extended to providers.

Goals of Today's Presentation

- To assist small and rural hospitals to:
 - better understand general contracting issues between hospitals and health plans;
 - understand regulations governing the relationship between MAOs and providers;
 - distinguish between contract terms that are required by regulation and terms that are open to negotiations; and
 - identify topics worthy of negotiation/clarification in relationship with MAOs in both a contracting and deemed contracting context.

You Can't Rely on State Laws

- Remember:
 - In connection with the MA program, Congress has preempted almost all state laws and regulations that would otherwise govern private health plans.
 - State laws that won't apply include:
 - prompt payment;
 - minimum benefits;
 - marketing requirements; and
 - appeal rights and procedures.
 - Be sure these issues are addressed in your contract!

Provider Contracting – Regulatory Requirements

- While CMS will not, for the most part, involve itself in the terms and conditions of contracts between MAOs and providers, there are certain areas where federal policy dictates contract terms.
- MA regulations require contracts with providers to contain certain provisions, including the following:
 - A provision granting HHS and the Controller General the right to inspect, evaluate, and audit provider’s contracts, books, documents, and records regarding the MA contract for a period of 10 years beyond the contract.
 - Enrollee “hold harmless” provision stating the provider will not hold an enrollee liable for payment of fees that are the obligation of the MAO.

Provider Contracting – Regulatory Requirements

- Where an MAO delegates its functions or responsibilities to a third party:
 - A provision specifying the delegated functions, and stating that the provider will comply with all applicable Medicare laws, regulations and CMS instruction.
 - A provision requiring the MAO to monitor performance of the third party on an ongoing basis.
 - Provision for revocation of delegation where the third party has not performed satisfactorily.
- A provision requiring the credentialing of professionals either by the MAO or a provider credentialing process reviewed and approved by the MAO.

Provider Contracting – Regulatory Requirements

- A provision requiring providers to safeguard an enrollee's privacy and the accuracy of medical records.
- A prompt payment provision agreed upon by both parties (provision does not need to mirror original Medicare program prompt payment timelines).
- A provider certification (based on best knowledge) of the accuracy, completeness and truthfulness of data (i.e., cost for CAH's, patient diagnoses) provided to the MAO.

Provider Contracting – Regulatory Requirements

- A provision requiring provider to comply with the MAO's policies and procedures. MA policies and procedures must include the following:
 - providers may not discriminate on the basis of health status;
 - services must be available 24/7, when medically necessary;
 - services must be provided in a culturally competent manner;
 - providers must document when enrollee has executed an Advance Directive; and
 - providers must certify completeness and truthfulness of all encounter data submitted to an MAO.

Suggested Areas to Address through Provider Contracting

- **Payment terms:**
 - **Negotiate rates (factor in reimbursement for “add-ons”).**
 - **Seek additional payments if Regional PPO gets stabilization fund monies.**
 - **Leveraging of Medicare business v. commercial business.**
- **Prompt payment and penalties for slow payment.**
- **MAO audit rights (frequency, advance notice, reimbursement of hospital costs).**
- **Provider appeal procedures and rights (objective third party review of payment denials).**
- **Reimbursement for administrative costs and delegated functions.**
- **Standard contract terms (e.g., termination, indemnification).**

Suggested Areas to Address through Provider Contracting

- Hospital not required to pay for continuation benefits if MAO goes insolvent.
- What happens if MA program rules/policies and procedures change with cost implications for providers?
 - Hospital should identify a single point of contact for receipt of all communications from the MAO.
- MAO/hospital obligations in connection with beneficiary grievance and appeal process.
- MAO assistance in collecting beneficiary co-pay and deductible.
- Clarify/determine MAO expectations (and negotiate appropriate payment):
 - Medicare secondary payer requirements (if any);
 - QI related responsibilities;
 - Data reporting obligations; and
 - Marketing activities.

Suggested Areas to Address through Provider Contracting — Focus on Standard Contract Terms

- Contracts should be clear and well-organized, use easily understood language.
- Consult your legal counsel and other relevant members of Hospital administration.
- Assess the scope of your contracting leverage and negotiating flexibility:
 - The party with the most to gain will likely have the least leverage in negotiations.
 - Hospitals with flexibility on a number of issues will have more bargaining chips in negotiation.
- MAOs are likely to insist on the use of their standard form contract. The MAO form will be most favorable to the MAO.
- MAOs may insist that certain provisions in their standard form contracts are required by MA regulations. As this is not always the case, ask for specific citations to the regulations. The limits of regulatory requirements are often overstated.
- Do not skim over provisions as “boilerplate.” Boilerplate provisions have been developed over time in response to real issues and disputes.

Suggested Areas to Address through Provider Contracting — Focus on Standard Contract Terms

- Important Definitions in a Managed Care Contract
 - Member/Enrollee: Who is covered by the Agreement?
 - Covered Services, Medically Necessary: Essential to Hospital's understanding of what services are covered under the Agreement.
 - Emergency Services: MA program has its own definition, incorporating the prudent layperson standard.
 - Clean Claim: Vital to ensuring claims payment by the MAO.
 - MAO should have specified number of days to reject a claim or request additional information, or claim will be deemed "clean."

Suggested Areas to Address through Provider Contracting — Focus on Standard Contract Terms

- Prompt Payment

- As already mentioned, in the MA context, state laws on prompt payment that would otherwise govern private health plans do not apply.
- To the extent possible, assess MAO's financial health before entering into Agreement.
 - Internal monitoring of payor performance.
 - If no history with this MAO, request payment history for all claims, and look for history of slow payments (90-120+ days).
 - Stop-loss coverage/reinsurance.
- Agreement should spell out MAO's duties with respect to prompt payment.
 - Pay "clean claims" within X days.
 - Incentives for MAO to pay promptly, e.g., early payment discounts, interest on late payments, penalties, etc.
- If Agreement references MAO's policies and procedures on claims payment, be sure to get a copy.

Suggested Areas to Address through Provider Contracting — Focus on Standard Contract Terms

- Term
 - The appropriate term of the Agreement, from the Hospital’s perspective, will vary depending on the Hospital’s negotiating leverage.
 - If in a competitive environment, and the Hospital is able to obtain favorable financial terms from the MAO, then a longer term contract may be appropriate.
 - If, on the other hand, the hospital has significant negotiating leverage over the MAO, then a shorter term may be more appropriate, giving the Hospital the ability to pursue ever more favorable financial terms going forward.
 - However, plan your negotiating strategy carefully, and when negotiating with a regional PPO, consider the implications of being designated an “essential” provider.
 - Avoid “evergreen” provisions, where the term of the contract renews automatically from year to year, without the explicit ability to renegotiate financial terms each year.



Suggested Areas to Address through Provider Contracting — Focus on Standard Contract Terms

- Termination

- MA regulations require at least 60 days' advance written notice for termination of the Hospital by the MAO without cause. Consider negotiating a longer notice period.
- Consider appropriate “causes” for termination, e.g., chronic late payment of clean claims.
- Ensure that any post-termination continuing care obligations are spelled out clearly. Typically, the pre-termination payment provisions will continue to govern post-termination continuing care.
- Beware of disguised “gag clauses,” permitting MAO to terminate contract for cause based on Hospital’s alleged undermining or disparagement of MAO.
 - Note, however, that under MA regulations, providers are not permitted to steer patients to certain MAOs; just provide information.

Suggested Areas to Address through Provider Contracting — Focus on Standard Contract Terms

- Indemnification

- Indemnification provisions shift liability for a loss from one party to another party.
- If the contract has an indemnification provision, it should be mutual. Each party agrees to indemnify the other for damages it causes.
- But beware:
 - As far as the MAO is concerned, Hospitals participating in the MAO's health plan are exercising independent judgment when furnishing hospital services to MAO patients. If the MAO does not interfere with the Hospital's independent judgment, then the MAO should be indemnified for any loss suffered as a result of Hospital's negligence.
 - From the Hospital's point of view, however, the MAO may be inserting itself into the medical decision-making process through utilization review and other cost-containment measures, such as medical necessity requirements, second surgical opinion requirements, length-of-stay limitations, and provider financial risk-sharing mechanisms that may provide incentives for less care.
- Also beware of limitations on insurance coverage for contracted liabilities.



Suggested Areas to Address through Provider Contracting — Focus on Standard Contract Terms

- Force Majeure

- Contracts often include a provision called the “force majeure clause.”
- Typical provision: “No Party will be liable or in default for any delay or failure in performance under this Agreement, or for any other interruption of services, resulting directly or indirectly from acts of God, including, but not limited to, fire, flood, storm, earthquake, epidemic, war, national emergency, natural disaster, or similar or dissimilar cause beyond the reasonable control of either Party.
- Force majeure clause excuses a party from liability if an unforeseen event beyond the control of that party prevents performance of contractual obligations.
- Force majeure clause is Intended to excuse breach only if the failure to perform could not be avoided by the exercise of due care by that party.
- Most likely scenario is that Hospital will be unable to furnish services in accordance with Agreement, so in Hospital’s interest to make force majeure clause as broad as possible.

Suggested Areas to Address through Provider Contracting — Focus on Standard Contract Terms

- Assignment
 - Ensures that Agreement is not assigned by either party without the other party's consent.
 - MAO should not be permitted to assign its obligations or subcontract without the Hospital's consent. Substitute company may be hard to deal with, undependable, or financially unstable.
- Amendment
 - Limit the MAO's unilateral ability to amend the Agreement or its policies and procedures.
 - If the MAO revises its policies and procedures, Hospital should have the opportunity to review those revised policies and procedures in advance, and the opportunity to terminate the Agreement if the revisions result in a material change to the Hospital's expectations.

Suggested Areas to Address through Provider Contracting — Focus on Standard Contract Terms

- Notice
 - Sets out the addresses for each party, to which any required or other notices under the agreement shall be sent.
 - Avoid agreeing to fax transmissions (or e-mail) as an appropriate method of providing notice, as they are sometimes technically unreliable or poorly monitored.
 - Avoid agreeing to automatic receipt provisions, such as “notices sent by mail will be deemed received after three business days.” Such notices may be misdelivered, for example.

Contact info:

- AHA's Medicare WebPage: www.aha.org/aha/re/Medicare. This page will provide access to resources on many Medicare issues, including Medicare Advantage, Medicare Part D drug coverage, and Medicare Interactive.
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