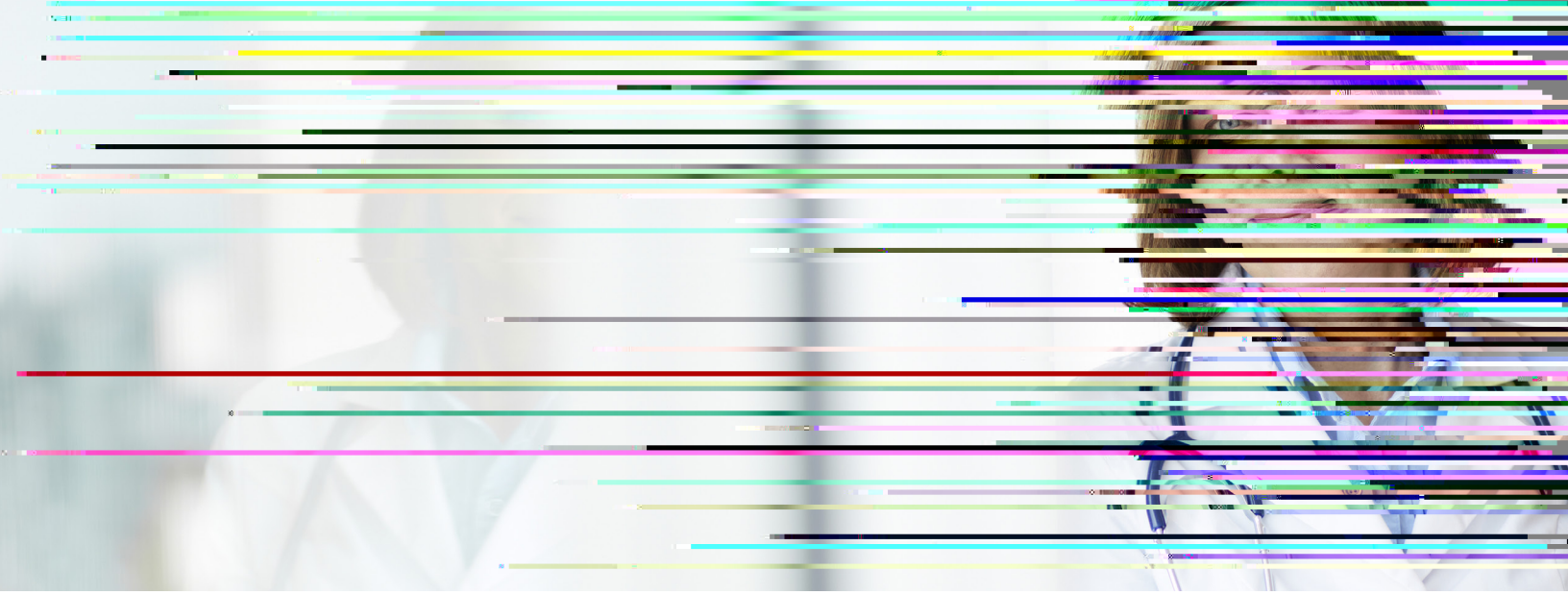

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Objectives

Introduction

With the rise in health care expenditures and an emphasis on quality improvement, federal and private payers are increasingly turning to alternative payment models that seek to shift all, or a portion of, the risk of providing health care from the payer to physicians and others who provide health care services. In these new models physicians have the opportunity to maximize the reward by increasing the quality of care while decreasing unnecessary cost. To ensure that you are prepared to successfully and sustainably adopt these new models, this contracting resource w7ysicia4urtreasing uadop1(y)10 (er83 >Hd he (tr)5 (ac)mmon /us6 (1

Contractual issues in alternative payment model agreements

Recitals

Recitals present an opportunity to set the stage for the agreement by clearly stating the intent of the parties to improve care quality and lower the cost of care, and may also include de nitions of terms used throughout the agreement within the recitals. However, depending on the jurisdiction in which the agreement is entered, the recitals themselves may not be contractually binding on the parties and, thus, key substantive provisions related to the obligations and duties of the parties should be set forth in the body of the agreement and not the recitals.

Key questions: Recitals

There are substantive provisions related to the obligations and duties of the parties set forth in the recitals rather than the body of the agreement. Does that seem right? Why or why not? That could be problematic, depending on what jurisdiction you are in. It is recommended that the agreement be revised so that any substantive provisions are incorporated into the body of the agreement, rather than the recitals, to ensure that they will be binding upon both parties.

Model language: Recitals

Whereas, _____ is a _____ [insert specialty] physician practice ("Physician") that provides high quality medical care to its patients and seeks to establish programs and protocols to ensure that it delivers the most optimal care to its patients at a low cost.

Whereas, _____ is a health insurer ("Payer") that provides health insurance bene ts to its Members and seeks to establish programs and protocols to ensure that it provides coverage for the most optimal care for its Members at a low cost.

Whereas, Physician and Payer seek, through their mutual agreement forthwith and as described herein, to provide high quality care to those Member patients who may best bene t from the program and protocol as set forth in this Agreement.

Term of agreement

Many pay-for-performance agreements require a three year term, although some use a ve year term. This extended term recognizes that it takes time for patient engagement in healthy behaviors to have an impact on quality outcome measures. Often payers develop models with a speci c term in mind based on their resource allocation for the model, and may not be exible in contract negotiations on alterations to the length of the term. Ultimately the particular length of the term of the agreement may not necessarily be as important as the other contractual provisions governing termination of the agreement and post-termination obligations, which will have a greater impact for the physician because those provisions will dictate whether the physician can exit an agreement if the arrangement is not working well. The term of the agreement, therefore, should be viewed as a guidepost for the physician in terms of what the expectations of the payer are, rather than an absolute start and end-point of the agreement.

Key questions: Term of agreement

What are the bene ts and risks of a longer agreement term (e.g., ve years vs. three years)? Answers may vary. A longer agreement term may allow more ramp-up time for physicians to make changes to their practice to meet the requirements of the model, thereby increasing the likelihood of success. For pay-for-performance models, phys may earn signi cant bonuses for tackling the low-hanging fruit in the rst years of the model, and savings may b more di cult to achieve in the later years.

Key questions: Term of agreement (continued)

My agreement has an "automatic renewal" clause—what is this? Automatic renewal clauses are common in agreements and not a cause for alarm if structured properly. Automatic renewal clauses can allow successfu arrangements to continue without additional negotiations. Often, from a contract administration perspective, neither the payer nor the physician want to spend time and resources re-executing an agreement that is otherw working for both parties. It is important, though, to make sure that the agreement has adequate termination language to allow the physician to exit the agreement if it is not working.

Model language: Term of agreement

Term

Key questions: Performance period and phase-in (continued)

There is language in my agreement about the beginning and end dates of the performance period.

Model language: Claim submission

Claim Submission. Physician shall submit claims for Covered Services in the same manner as Physician submits claims for covered services under Physician's fee-for-service participation with Payer. Upon request and subject to the mutual written consent of both Parties, Payer may require additional modi ers, documentation, and/or processes for the submission of claims to be paid under the Agreement. Payer's request to add such modi ers, documentation, and/or processes for the submission of claims to be paid under the Agreement shall be provided to Physician at leas sixty (60) days prior to required implementation of the same, and shall only be implemented with the express written consent of Physician. Payer shall make every e ort to minimize the administrative burden associated with Physician's participation in the Agreement. Physician shall make every reasonable e ort to accommodate the reasonable requests of Payer to consider new processes for the submission of claims for Covered Services under this Agreeme Under no circumstances shall the Physician's compensation under this Agreement be decreased or otherwise a ecte by the Parties failure to come to an agreement about additional modi ers, documentation, and/or processes for the submission of claims to be paid under this Agreement.

Data

Accurate performance data is essential to a physician's success in a pay-for-performance model. There should be clear provisions outlining the obligations for both payers and physicians in regard to data reporting. With respect to the data produced by the payer, physicians should have timely access to data relating to those patients within the model, as well as resources for data management. Physicians should negotiate for contract terms that obtain the best feedback loop available for data that can be readily understood and employed in the practice setting.

Key questions: Data

Some of my colleagues who are participating in pay-for-performance agreements have data dashboards to help them keep track of how they're performing, but my agreement doesn't include that. Is this a deal-breaker?Not necessarily. A payer is unlikely to create a data dashboard for a single agreement if they do not alr have one in place, so there are alternative mechanisms for access to data that you can ask for, such as individu weekly performance reports. While real-time access to an online portal is ideal, the important thing is that there some system in place to help you manage and understand the data upon which the payer is measuring performa Ask the payer for a copy of a typical performance report to see if it is something that is workable for you. Keep in that raw claims or cost data alone is unlikely to be su cient for purposes of tracking your performance in the mod

There are some provisions in my contract about me submitting data, but the format is not speci ed. Is that typical?Pay-for-performance agreements can rely, in part, on physician-submitted data, including patient satisfac data. The contract should clearly outline what the physician's obligations are and, ideally, the payer should o er s infrastructure or technical support to facilitate this data transfer.

There is a reference in the contract to executing a HIPAA-compliant agreement with the payer and/or another provider. Does this sound right?Depending on the type and intended use and/or disclosure of the data, physicians may be required to execute business associate agreements under the Health Insurance Portal and Accountability Act (HIPAA) and its implementing regulations. These agreements may be necessary to ensu the proper use and disclosure of patient health information. The agreement may also include requirements for t destruction of patient or performance data upon termination of the agreement and/or end of term.

Model language: Data

Data Payer shall maintain a twenty-four (24) hour accessible, secure online portal and/or dashboard to allow Physician to view and download patient data and metrics with respect to quality achievement, any reports or tables, and itemized billing, patient encou9 (o qu6r 0 19.023 c -5.245 19.023 -9.512 1hsm an.1tda BT 10.5 0 0 10.5

Key questions: Payment and reconciliation (continued)

I am participating in a shared savings program. Is there anything more that I should expect to see in the agreement related to distribution of the savings? The agreement should include specifics about the distribution of savings. For example, the language should be clear about how savings will be divided and whether some sa will be set aside for program administration or infrastructure reinvestment.

Our group practice is participating in a pay-for-performance model and would like to distribute the incentives we receive to the member physicians. Should that be included in this contract? Probably not— unless the goal is for each individual physician to be individual participants in the model. Contractually, it makes more sense for the group practice to execute amendments to the existing contracts among the physicians, or between the physicians and the group practice, to outline each physician's rights and obligations as participants the model. Remember, though, that you will have to consider applicable federal and state regulatory requireme here, including fraud and abuse laws.

Model language: Payment and reconciliation

Payment and Reconciliation. Payer will remit payment pursuant to the performance determination and perform any necessary reconciliation within thirty (30) days of the end of each performance period. Physician may appeal the performance determination and payment within thirty (30) days of receipt of payment. Payer must respond to such appeal within fifteen (15) days of receipt. Appeals that cannot be resolved within thirty (30) days of the date of Physician appeal shall be resolved pursuant to the dispute resolution process set forth in Section __ [dispute resolution section] of this Agreement. At the conclusion of the appeal, interest on the portion of the claim or the claim paid shall be calculated based on the date of submission of the claim and paid to the Physician.

Quality measures

Pay-for-performance agreements often skate over the specifics of measure development and the calculation and determination of measure performance, but these terms should be outlined clearly in the agreement. First, the measures to be used should be defined to ensure they are relevant to the specialty of the physician; measures that are developed with physician input are optimal, particularly same-specialty physician input. Some payers use standard measure sets such as the Healthcare Effectiveness Data and Information Set (HEDIS), while others develop their own measures.

Key questions: Quality measures

My agreement says that the payer will base my performance on measures developed by the payer. Is this common? Some payers use their own measures, but base them on nationally accepted measure sets. For exam Blue Cross Blue Shield of Massachusetts has its own measures for its Alternative Quality Contract program, bu bases them on well-known, national measures. The important thing here is that you have some familiarity with t measures and they are subject to change only upon your express written agreement.

Is it to my advantage to have the measures variable year-by-year? The payer says that, if the agreement is drafted to allow that flexibility, they can get rid of measures that are not working. It can be to your benefit to have some changes to the measures each year. As you and the payer learn what works and what doesn't work your practice, you may want to switch out the measures on which you will be judged. However, it should also be c in the agreement that measures cannot be added, deleted or significantly altered without the signed written agreement of both parties.

Key questions: Quality measures (continued)

My payer has a committee that reviews and develops metrics for quality and performance measurement. Should I try to be involved in that committee, and is it possible to get that included in the contract?

Maybe. You should ascertain the degree to which physicians participate in the payers' decisions on which meas sets to use and renew (e.g., does the payer have a physician on the committee, or do they follow national speci medical society recommendations). The volume of physicians who participate in most alternative payment model contracts likely makes it impossible to be actively involved in this way with payers, unlike similar health system or network quality committees. It is important, however, to ensure that physician input is provided whether it be from you or other physicians.

The quality measures are listed in the appendix of my agreement. Is this sufficient?

Yes, if the agreement provides that the appendix, exhibits or any attachments to the agreement are incorporated fully into the agreem There should also be contractual language incorporating the appendices by reference; the document's mere incl at the end of the agreement does not necessarily mean it has been incorporated as part of the contract and, thu anything contained therein may not necessarily be contractually binding on the parties. The agreement—wheth in the appendix or exhibit—should clearly state the measure sets or other source from which the measures will drawn, as well as state that the measures cannot be changed without your signed written agreement.

Model language: Quality measures

Quality Metrics. The pay-for-performance incentive payments shall be based upon the quality metrics set forth in Exhibit __ attached hereto and by reference incorporated herein. The quality metrics may be amended only by mutual agreement of the parties by execution of a written amendment to the agreement by the parties pursuant to Section __ [amendment provision] of the agreement. The quality metrics applicable to the Physician shall be relevant to the Physician's specialty, as applicable, and shall be based upon nationally accepted measure sets (e.g., HEDIS) related to clinical outcomes and developed clinical performance measures.

Dispute resolution

Model language: Dispute resolution

In the event of any dispute between the Parties under this Agreement, the Parties shall first negotiate the matter between themselves in good faith. If direct negotiations do not resolve the matter, either Party may demand, in writing, that the matter be submitted to mediation. After delivery of the notice of mediation, the Parties may select a mediator who will render a recommended resolution to the dispute. If the Parties cannot agree upon a mediator, the Parties shall each select a mediator and the two mediators selected by the Parties will select a third mediator. The Parties will share the expense of the mediator, if one mediator is selected and, if three mediators are selected, shall each pay the cost of the mediator they selected and will share equally the cost of the third mediator. If mediation does not resolve the dispute within ninety (90) days after the written notice of mediation is delivered or the Parties are unable to resolve the dispute through negotiation or mediation, either Party may require by written notice that the matter be submitted to arbitration, under the American Health Lawyers Association/American Arbitration Association. Arbitration will be by a single arbitrator acceptable to both parties, who is knowledgeable in health care matters. If the Parties cannot agree upon an arbitrator, the Parties shall each select an arbitrator and the two arbitrators selected by the Parties will select a third arbitrator. The Parties will share the expense of the arbitrator, if one arbitrator is selected and, if three arbitrators are selected, shall each pay the cost of the arbitrator they selected and will share equally the cost of the third arbitrator. The arbitrator's decision shall be binding, and either party may petition a court of appropriate jurisdiction for the award of the arbitrator to be enforced by the court. The arbitrator may award attorney's fees and costs to the prevailing Party, but neither Party shall be allowed punitive damages.

In the event any attorney is employed by any Party to this Agreement with regard to any legal action, arbitration, or other proceeding brought by any Party to this Agreement for the enforcement of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this Agreement, then the prevailing Party, whether at arbitration, trial or upon appeal, and in addition to any other relief to which the prevailing Party may be granted, at the judge's or arbitrator's discretion, may be entitled to recover from the losing Party all costs, expenses, and a reasonable sum for attorney fees incurred by the prevailing Party in bringing or defending such action, arbitration, or proceeding, and in enforcing any judgment granted therein, all of which costs, expenses, and attorneys' fees shall be deemed to have accrued upon the commencement of such action and shall be paid whether or not such action is prosecuted to judgment.

At the arbitrator's or judge's discretion, any judgment or order entered in such matter may contain a specific provision providing for the recovery by the prevailing Party of attorney fees, costs, and expenses incurred in enforcing such judgment. For purposes of this Section, attorneys' fees shall include, without limitation, fees incurred in the following: post judgment motions; contempt proceedings; garnishment, levy and debtor and third-party examinations; discovery and bankruptcy litigation.

_____ Physician's Initials

Termination

The agreement should clearly state under what circumstances and how the parties may terminate the agreement. There will likely be provisions detailing processes for fixing material breaches of the contract, including timeframes for resolution. Post-termination duties should be specified for both parties, including obligations for the payer to pay any outstanding compensation to the physician or true-up based on a pro rata portion of the performance year.

Key questions: Termination

What is the difference between terminating an agreement "with cause" and "without cause"? Termination of the agreement "without cause" means that you can terminate the agreement if it is not working for you, with a certain notice period for the other party. This is different from terminating a contract "with cause," where there is some specific deficiency or "material breach" on the part of the other party that leads you to terminate the agreem

My agreement appears to let me terminate the agreement whenever I decide to do so. This seems positive to me, but is there anything else I should consider here? Typically, provisions that allow termination without cause cut both ways, meaning that if you can terminate the agreement quickly and without a good reason, it is l the payer has or expects the same latitude. It is important to consider what resource investments you will be ma to participate in the pay-for-performance model, and how much risk you are willing to take on if the payer decid to terminate your agreement—or the model altogether—mid-agreement.

I have a group practice. Do individual physicians in the practice need to terminate their participation if they leave the practice? Probably not. For pay-for-performance agreements structured on the group level, it is likely that the agreement is between the group entity and the payer, not the individual physician. You should, however, notify the payer if one of the participating physicians leaves the practice, as that information will be important to maintaining accurate performance data.

Model language: Termination

Termination of Agreement. Notwithstanding any other provisions of this Agreement, this Agreement may be terminated as follows:

Termination Without Cause. Except as otherwise provided herein, either Party may terminate this Agreement by giving not less than sixty (60) days' advance written notice to the other Party. Both Parties shall have the right to terminate the Agreement for cause during any without cause notice period.

Termination For Cause. Payer may terminate this Agreement for "cause" upon thirty (30) days' written notice at any time except if the Physician materially defaults in performance hereunder, including the failure of the Physician to meet the ongoing Payer qualification criteria and comply with the Payer standards, and such Physician has failed to cure such default during such thirty (30) day period. Any Physician may terminate its participation in this Agreement for cause upon thirty (30) days' written notice at any time if Payer materially defaults in performance hereunder and Payer has failed to cure such default during such thirty (30) day period.

Termination Upon Mutual Agreement. This Agreement may be terminated at any time by mutual, written agreement of the Parties effective as of the date mutually agreed by the Parties.

Effect of Termination. Upon termination of this Agreement, as herein above provided, no terminating Party shall have any further obligation hereunder except for (i) obligations accruing prior to the date of termination, including reconciliation and payment of any monies due to the Physician from the Payer, and (ii) obligations, promises, or covenants contained herein which are expressly made to extend beyond the term of this Agreement including, without limitation, any indemnities and access to books and records.

Processes for evaluating risk and success

Make a schedule.

Appendix: Contractual provision checklist

Recitals

- Do the recitals clearly define the intent of the parties in entering the alternative payment model relationship?
- Are there substantive provisions in the recitals that should be in the body of the agreement to ensure that they are binding obligations on the parties?

Term of agreement

- What is the length of the term of the agreement?
- Is this period of time sufficient for you to achieve the goals of the program or too long of a time commitment (especially if there is no termination without cause provision)?
- Is there an automatic renewal clause in the agreement? If so, do you have a right to exit the agreement if the arrangement is not working for you?

Cooperation and collaboration

- What contractual obligations, if any, are imposed on both parties to work collaboratively (e.g., monthly meetings) for the success of the program?
- Are they obligations to which you are willing to be contractually bound (i.e., you could be in breach of the agreement for failure to meet the obligations)?

Patient assignment

- Does the agreement specify the process by which patients will be assigned and attributed to a physician in advance of each performance period?
- Does the agreement provide you with rights to object to or appeal the assignment of patients for the applicable performance period?

Covered services (bundled or episode-based model only)

- Does the agreement specify the services by CPT® codes included in an episode of care?
- Does the agreement specify that the covered services cannot be unilaterally modified by the payer?
- Does the agreement specify what types of providers may submit claims for the covered services (e.g., physicians, nurse practitioners, physician assistants)?

Performance period and phase-in

- Does the agreement specify when a performance period begins and ends?
- Do you need the initial performance period to begin after a set period of time from the commencement of the agreement, and/or the performance benchmarks modified to account for an initial ramp-up period, to ensure that the requisite administrative systems and protocols are in place for success?
- With respect to episode-based payment programs, does the agreement clearly define, by diagnoses or procedure codes, when an episode begins and ends?

Claim submission

- Is the process for claim submission clearly set forth in the agreement?
- Does the agreement allow the payer to change your submission obligations without due notice to you?
- Do you have the ability to object and/or terminate the agreement if changes are made to the claims submission obligations imposed on you?

Data

- Does the agreement provide a process by which you will be able to obtain meaningful, timely performance data?
- Does the agreement provide adequate infrastructure for you to submit requested data to the payer?

Performance determination

- Are the terms of payment and reconciliation, including the time period for reconciliation, clearly set forth in the agreement?
- Are the performance metrics and calculation included by reference in the agreement, subject to change only upon your signed written agreement, and subject to appeal?

Payment and reconciliation

- Does the agreement clearly specify the timeframe for payment, reconciliation, and any deductions for case management or administrative fees?
- Does the agreement provide you with appeal rights to contest a payer's decision with regard to performance, payment, and reconciliation?
- Do you need to amend any existing physician employment agreements or compensation policies with your group's physicians to specify the method by which savings and/or incentive payments earned will be distributed?

Quality measures

- What metrics are being measured and do you have the opportunity to provide input on them?
- Are the metrics clearly set forth in the agreement? If they are contained in an exhibit or appendix to the agreement, does the agreement state that such exhibits, appendices, and attachments are fully incorporated into the agreement?
- Are the measures relevant to your particular specialty and/or practice?
- Does the agreement allow the payer to change the measures without your agreement?

Unforeseen events (bundled or episode-based model only)

- Does the agreement include provisions to mitigate the risk of unforeseen events such as a substantial increase in the cost of a drug or services provided as part of an episode of care?

Dispute resolution

- Does the agreement include dispute resolute provisions (e.g., mediation and arbitration) so that the parties can avoid costly litigation and resolve disputes?

Termination

- Does the agreement include a right for you to terminate the agreement without cause?
- Does the agreement address the parties' right to terminate the agreement for material breach? And, if so, does the breaching party have an opportunity to cure the breach within a speci□ed period of time—e.g., within thirty (30) days?
- Does the agreement include provisions that ensure that any incentive payments earned, but not yet paid as of the termination date, are paid to you?