

## **CONTRACTING ISSUES RELATED TO MANAGED CARE ORGANIZATIONS**

### **What general issues should a physician consider before signing a managed care contract?**

Before signing, a physician should carefully review all provisions of any managed care contract to be sure that he or she fully understands and accepts the rights, obligations, and liabilities under the contract, as well as the compensation, termination, and other provisions of the contract. Often, terminology in managed care contracts is unclear or undefined, and documents referenced in the contract are not attached. Because a physician who signs a managed care contract is presumed to have understood and to have agreed to be bound by both the contract and the documents referenced in the contract, a physician should make sure before signing the contract that any unclear or undefined terms are clarified in writing and that all documents referenced in the contract are attached and made available for the physician's review.<sup>1</sup>

It is also worthwhile for a physician to investigate the financial solvency or strength of the managed care organization (MCO) and/or the payor or payors under a managed care contract. Such an investigation reduces the chances that the physician will not be fully compensated for the services the physician will provide under the contract.

As a practical matter, physicians should consult with experienced legal counsel before signing any contract.

### **What types of entities fall within the rubric of an “MCO” as that terminology is used in this Guide?**

As used in this Guide, “MCO” is meant to include any health care organization, health carrier, or health plan—such as a health insurer, disability insurer, health care service contractor, health maintenance organization, preferred provider organization, and even a governmental agency—that enters into managed care contracts with physicians to provide health services to its enrollees.

### **What is a “liability assumed by contract”?**

A “liability assumed by contract” is a liability that a person has agreed in a contract to accept. For example, a physician may be deemed to have assumed a liability by contract when the physician enters into a managed care contract that contains a provision requiring the physician to indemnify or hold harmless the MCO for any losses the MCO sustains as a result of the physician's services rendered under the contract.

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<sup>1</sup> See WAC 284-43-320(4).

**Is a “liability assumed by contract” something that a physician’s insurance policies generally cover?**

No. Many professional liability insurance policies—and other types of policies as well—exclude coverage for liabilities assumed by contract. Thus, a physician who signs a managed care contract containing a “hold harmless” or “indemnification” provision may financially responsible personally for such liability.

When faced with a request to sign any type of contract that includes a “hold harmless” or “indemnification” clause, a physician should seek legal advice and discuss the issue with his or her professional liability insurance carrier.

**May an MCO refuse to allow a physician to be on its list of providers?**

Generally, yes. Refusing to allow a physician the opportunity to be on an MCO’s list of providers does not generally, by itself, constitute a violation of Washington law.<sup>2</sup> Although health carriers are required to maintain sufficient numbers and types of physicians to assure that all health plan services to covered persons will be accessible without unreasonable delay,<sup>3</sup> health carriers are not prohibited from using restricted networks and may select the individual providers with whom they will contract or whom they will reimburse.<sup>4</sup> Depending on the circumstances, however, antitrust considerations may force an MCO to allow a physician to be a participating provider. An MCO may also be precluded from excluding a physician for discriminatory reasons.<sup>5</sup> See DISCRIMINATION.

Health carriers are required to develop selection standards for participating providers and facilities. Those selection standards must not be established in a manner that would exclude providers or facilities because they are located in geographic areas that contain populations presenting a risk of higher-than-average claims, losses, or health care utilization; or because they treat or specialize in treating persons with such higher-than-average risks; or because they treat or specialize in treating minority or special populations.<sup>6</sup>

**When may an MCO or a physician terminate a managed care contract?**

The circumstances under which an MCO or a physician may terminate a managed care contract depend on the terms of the managed care contract. The contract will usually set forth the bases for termination by the MCO or the physician, the amount of notice required for such termination,<sup>7</sup> and the rights and obligations of the parties upon delivery and receipt of a termination notice.

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<sup>2</sup> WAC 284-43-310(2)–(3).

<sup>3</sup> WAC 284-43-200.

<sup>4</sup> WAC 284-43-205(4).

<sup>5</sup> WAC 284-43-310(2).

<sup>6</sup> WAC 284-43-310(1).

<sup>7</sup> WAC 284-43-320(7) (requiring sixty days written notice before terminating the contract without cause).

**What should a physician do when an MCO refuses to approve or pay for treatment the physician has recommended to a patient?**

To minimize a physician's risk of malpractice liability when confronted with an MCO's managed care decision that conflicts with the physician's treatment recommendations, the physician should:

- Make his or her objection to the MCO's decision known to the MCO, preferably in writing.
- Exhaust all available appeal opportunities for the patient.
- Advise the patient of the MCO's adverse decision, the physician's recommendation notwithstanding the adverse decision, the options available to the patient, and the risks inherent in each of those options, including the option of non-treatment.
- Document in the patient's chart what steps were taken to change the MCO's adverse decision, what advice was given to the patient, and what decision the patient made.<sup>8</sup>

**May an MCO preclude a physician from advocating on behalf of a patient with the MCO?**

No. Under Washington law, no health carrier may prohibit or discourage a physician from advocating on behalf of a patient with a health carrier, nor may the health carrier penalize the physician for doing so. Moreover, no health carrier may in any way preclude or discourage a physician from informing patients of the care they require, which includes informing them of various treatment options and whether in the physician's view such care is medically necessary, medically appropriate, or otherwise covered by the patient's service agreement with the health carrier.<sup>9</sup>

**May an MCO preclude a physician from discussing the comparative merits of different health carriers with their patients?**

No. Under Washington law, no health carrier may preclude or discourage patients from discussing the comparative merits of different health carriers with their physicians, nor may any health carrier prohibit physicians from or limit them in participating in those discussions even if critical of a carrier.<sup>10</sup>

**May a health carrier penalize a physician who reports the carrier for an action or practice that the physician feels may jeopardize the patient's health?**

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<sup>8</sup> See generally RCW 48.43.055 (procedures for health care provider complaints); RCW 48.43.530 (procedures for complaints on patient's behalf).

<sup>9</sup> WAC 284-43-320(5)(a). See also RCW 48.43.510(6).

<sup>10</sup> WAC 284-43-320(5)(b). See also RCW 48.43.510(7).

No. A health carrier cannot penalize a provider because the provider, in good faith, reports to state or federal authorities any act or practice by the health carrier that jeopardizes patient health or welfare or that may violate state or federal law.<sup>11</sup>

**May a managed care contract between a physician and a certified health plan contain a “most favored nations” clause?**

No. “‘Most favored nation’ provisions in managed care contracts require physicians to give the payer the benefit of the lowest rate the physician negotiates with any other payer.”<sup>12</sup> Under Washington law, the use of “most favored nations” clauses in contracts between a health care provider or facility and a certified health plan is prohibited.<sup>13</sup>

**When may a managed care contract between a physician and a certified health plan or health care network contain an exclusive dealing clause?**

A contract between a certified health plan or a health care network and a health care provider or health care facility may contain an exclusive dealing clause if the certified health plan or health care network holds 20% or less of the relevant market.<sup>14</sup>

But a contract between a certified health plan or health care network and a health care provider or health care facility may not contain an exclusive dealing clause if the certified health plan or health care network holds more than 40% of the relevant market.<sup>15</sup>

When the certified health plan or health care network holds between 20% and 40% of the relevant market, then a contract between the plan or network and a health care provider or health care facility may contain an exclusive dealing clause only if the Department of Health has explicitly permitted such a clause to be used. There is some ambiguity in the law, so it is recommended that to obtain such approval, the plan or network should request an informal opinion as to the use of the clause in the particular circumstances or must seek approval by written petition.<sup>16</sup>

**What resources does the WSMA have available that provide additional information on managed care contracting issues?**

The WSMA has available a Model Health Insurance Physician Contract, a contract evaluation service,<sup>17</sup> and a scoring guide<sup>18</sup> that provide additional information on managed care contracting issues. Visit the WSMA web site at [www.wsma.org](http://www.wsma.org).

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<sup>11</sup> WAC 284-43-320(9).

<sup>12</sup> American Medical Association, Advocacy Resource Center, *Managed Care Campaign: Fair Contracting and Transparency in the Private Health Care Market* (2008), at 20, available at: [http://www.ama-assn.org/resources/doc/arc/x-ama/fc\\_legs\\_template\\_106.pdf](http://www.ama-assn.org/resources/doc/arc/x-ama/fc_legs_template_106.pdf).

<sup>13</sup> WAC 246-25-045.

<sup>14</sup> WAC 246-25-050(3), (6).

<sup>15</sup> WAC 246-25-050(2), (5).

<sup>16</sup> WAC 246-25-050(4), (7). See also RCW 43.72.310.

<sup>17</sup> [http://www.wsma.org/Media/Legal-pdfs/Contracting\\_Rsrc\\_Model\\_Ins\\_Phy\\_Contract.pdf](http://www.wsma.org/Media/Legal-pdfs/Contracting_Rsrc_Model_Ins_Phy_Contract.pdf).

<sup>18</sup> [http://www.wsma.org/Media/Legal-pdfs/Contracting\\_Rsrc\\_Payer\\_Matrix\\_Guide.pdf](http://www.wsma.org/Media/Legal-pdfs/Contracting_Rsrc_Payer_Matrix_Guide.pdf).