

Teach Your Attorney Healthcare Contracting

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by Huan N. Le, Esq.

Medicare regulations, HIPAA compliance, and the threat of litigation have made it impossible to draft a one-page healthcare contract. Standard language alone now extends to up to four pages. It's a good idea to hire an attorney for contract negotiations and drafting, but even then, you might find that you know more about healthcare law than your attorney. How can you teach your attorney the basics of healthcare contracting?

While much attention has been paid lately to HIPAA business associate agreements, HIM professionals also need to know about contract issues such as assignment of Medicare and Medicaid benefits, \$10,000 per year clauses, independent contractor clauses, and termination clauses. This article will focus on what to look for in a healthcare contract with regard to these issues.

No Assignments of Medicare and Medicaid Benefits

Medicare makes it illegal to assign Medicare benefits.¹ This law affects coding and billing companies because coding companies cannot receive compensation based on a percentage of the money received by their clients. The government reasons that if coding companies receive a percentage of the money received by the provider, the coding company will have incentive to overbill. Thus, contracts between coding companies and providers should not be based on a percentage of the provider's revenue, nor should there be a bonus tied to the provider's revenue.

On the other hand, billing companies that do not provide coding services can receive a percentage of the recovery made by the billing company for the provider. When viewed from the government's perspective, the different rules for billing versus coding companies make sense. While coding companies can overbill to receive more compensation, billing companies have no such ability, therefore there is less likelihood for fraud or abuse. When the coding and billing company are one and the same or are owned by the same individuals, providers should be cautious and not allow the coding or billing company to receive compensation based on the amount of money recovered.

The Medicare \$10,000 Language

One of the more obscure Medicare laws relates to a requirement that the parties in all contracts that cost more than \$10,000 during 12-month periods must allow their secretary of the Department of Health and Human Services (HHS) or the comptroller general of the US to inspect their books, documents, and records. Such language must also be included in contracts that include subcontractors to the contractor. This requirement was designed to help the government verify costs. As a general practice, all contracts with vendors that have the potential to exceed \$10,000 per year should contain the required language. The following is an example of such language:

For the purpose of implementing § 1861(v)(1)(I), also known as 42 USC § 1395x(v)(1)(I) (2001) as amended, or any written regulations thereof, the parties agree to comply with the following statutory requirements governing the maintenance of documentation to verify the cost of services rendered under this contract. Until the expiration of four years after the furnishing of such services pursuant to this agreement, the parties shall make available, upon request, to the secretary of HHS or the comptroller general of the US, or any of their duly authorized representatives, this agreement, and books, documents, and records of the provider that are necessary to certify the nature and extent of such costs; and if either party carries out any of the duties of the agreement through a subcontract, with a value or cost of \$10,000 or more over a 12-month period, with a related organization, such subcontract shall contain a clause to the effect that until the expiration of four years after the furnishing of such services pursuant to such contract, the related organization shall make available, upon written request, to the secretary, or, upon request, to the comptroller general, or any of their duly authorized representatives, the subcontract books, documents, and records of such organization that are necessary to verify the nature and extent of such cost.

Independent Contractor

Many healthcare contracts involve contracting with specialists who perform designated functions for a provider. To protect the provider from liability, contracts involving outside parties should include a clause that defines the relationship between parties. A sample independent contractor clause is included below for use in a situation in which a provider hires a consultant or consulting firm:

The parties acknowledge that consultant is an independent contractor. No employee or agent provided by consultant is an employee of the provider. The provider shall not have the right to control the specific details in which the consultant performs the necessary provisions under this contract.

Termination Language

Besides normal considerations about when a contract should terminate, healthcare contracts should include clauses that automatically terminate the agreement when any regulatory body determines that the arrangement is unlawful or when laws change.

A provision that automatically changes the contract to comply with regulatory changes should be considered. A sample provision is included below:

The parties recognize that this agreement, at all times, is subject to applicable state, local, and federal law, including, but not limited to, the Social Security act and the rules, regulations, and policies of the state wherein this contract is performed. The parties further recognize that this agreement shall be subject to amendments of such laws and regulations and to new legislation. Any provisions of law that invalidate, or otherwise are inconsistent with the terms of this agreement, or that would cause any of the parties to be in violation of the law, shall be deemed to supercede the terms of this agreement; provided, however, that the parties shall use their best efforts to accommodate the terms and intent of this agreement to the greatest extent possible, consistent with the requirements of applicable laws and regulations. If no such accommodations can be made to comply with laws or regulations, this agreement will automatically terminate.

Healthcare contracts have become more and more specialized as the government has increased its scrutiny over the medical profession. Hire the right attorney and then check the attorney's work—you may find that the expert you hired to write your contract is not as knowledgeable about healthcare law as you are.

Note

1. "Conditions for Medicare Payment." Code of Federal Regulations, 2001. 42 CFR, Part 424, Section 73. Available online at www.gpo.gov/nara/cfr/index.html.

Reference

"Standards for Privacy of Individually Identifiable Health Information; Final Rule." 45 CFR Parts 160 and 164. *Federal Register* 67, no. 157 (August 14, 2002). Available online at www.hss.gov/ocr/hipaa/finalreg.html.

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