
MEMORANDUM

DATE: December 1, 2022
TO: Texas Society of Pathologists
FROM: Duane Morris
RE: Provider Participation Agreement Provisions

I. Unilateral Amendment of Contract

Provider participation agreements often include terms that allow payors to unilaterally amend underlying terms of the agreement. By agreeing to these terms, the provider agrees in advance to unilateral contract changes made by a payor. Such changes may result in material, and frequently detrimental, changes to the overall financial arrangement initially agreed to by the parties. Set forth below are several frequently encountered provisions found in provider participation agreements, an explanation of why these provisions may be problematic, and ways in which a provider may minimize these concerns.

A. Examples of Objectionable Contract Language

“Unilateral amendment” provisions can take different forms, but typically require the payor to provide advanced written notice of the amendment, and allow the provider the option of terminating the contract if it rejects the amendment. Such provisions may also, however, be silent on the provider’s option to terminate the agreement. Rarely does the language allow the provider to reject the amendment without any consequences. The following are typical examples of these provisions:

- Payor shall have the right to amend this Agreement by providing ninety (90) days advance written notice to Provider. If Provider objects to the amendment and notifies Payor of its intent to terminate within thirty (30) days of the date of the notice of amendment, the termination will be effective at the end of the ninety (90) day notice period, unless Payor agrees to retract the amendment, in which case the Agreement will remain in full force and effect without the proposed amendment.
- Payor may amend this Agreement upon ninety (90) days written notice by sending Provider a copy of the amendment.

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Note: Texas law specifically requires HMOs to provide at least 90-calendar-days written notice to the provider identifying with specificity any amendment, revision, or substitution of the claims payment procedures or fee schedule; and any such amendment, revision, or substitution will have no effect where this requirement is not met. *See* 28 TAC § 11.901(c)(4).

B. Potential Solutions

The issue of how a contract is amended can be addressed through a range of options, including, for example, the following:

- **Terms that allow amendment only by the signed, written agreement of both parties.** Amendment only by mutual assent is the most preferred way of addressing some of the concerns associated with a payor’s unilateral right to amend the underlying agreement. Although this language addresses how an amendment can be implemented, it is also necessary to consider if failing to agree to the amendment has any other consequences. For example, does a provider’s refusal to agree to a proposed amendment constitute the provider’s notice to terminate the agreement? At a minimum, it is reasonable for a provider to insist that the contract require the payor to provide advance notice of an amendment, and to expressly state that the provider can terminate the agreement if the amendment is implemented.
- **Terms that allow the agreement to be amended by the payor upon a period of written notice, unless the provider raises an objection to the amendment. If the provider fails to object during that period, the amendment will be deemed to have been accepted by the provider.** If the contract does not already provide for sufficient notice or termination rights, terms that allow a provider to object and “opt out” of an amendment are better than being bound to amendments without any recourse. It is important to ensure that the terms clearly express the parties’ intention that an “opt out” may occur. Such terms also make it imperative that providers monitor announced amendments and make timely objections. Finally, as noted above, the provider must also be cognizant of any implications from expressing its desire to reject or opt out of a proposed amendment (e.g., does such action constitute the provider’s intent to terminate the agreement).
- **Terms that allow an agreement to be amended by the payor with advance notice, but any amendment that results in a material, adverse change to the terms may be objected to by the provider.** If a payor insists upon a right to implement unilateral amendments, an alternative option is to seek the right to object to just those changes that are material and adverse to the provider. Using this approach, a payor is free to make unilateral amendments so long as they do not result in a material change to the terms of the agreement. Careful attention must be given to how “material” is defined in the agreement, and also whether the provider is responsible for proving that materiality, how disputes regarding the amendment

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are resolved, and whether (as noted in the above examples) objecting to the amendment represents the provider’s intent to terminate the underlying agreement.

- **Terms that allow an agreement to be amended by the payor with advance notice, except for the reimbursement methodology or rate.** As an alternative to the above, the provider can seek to exclude just the fee schedule and manner of reimbursement from the payor’s right to unilateral amendment. Careful attention must be given to how the exclusions are defined, but this option provides a “middle of the road” compromise, whereby the payor remains free to implement non-impactful changes, and also allows the provider to preserve the integrity of the underlying financial arrangement.
- **Terms that allow an agreement to be amended by the payor with advance notice, but if the provider raises an objection, the parties must meet and confer over the objection.** In the event a payor will not agree to the above objection rights or exemptions, requiring a “meet and confer” process may provide an opportunity for the parties to come to an agreement regarding an objectionable amendment. Such terms would require the payor to provide notice of an amendment, allow a provider to raise objections within a set time period, and then require the parties to meet and confer regarding the terms for a certain amount of time before the amendment could go into effect. Such a clause should also allow a provider to terminate the agreement if their objections are not resolved.

II. Requiring Compliance with Policies and Amendment of Policies

Participation agreements also generally require providers to comply with payor “policies,” a term that is frequently defined broadly. Policies imposed by a payor have the potential of adversely affecting the parties’ overall financial arrangement. A broad definition of “policies” that encompasses those of the other payor’s (e.g., through a network rental arrangement) may also result in providers being bound to comply with policies they are not only unaware of, but do not have access to. Payors typically reserve the right to amend their “policies” unilaterally. Because policies have the potential to affect the rate or method of reimbursement, terms that permit a payor to unilaterally change their policies can result in material changes to the terms of the agreement.

A. Examples of Objectionable Contract Language Defining Policies

Outlined below are examples of the kinds of unfavorable contract terms that may be used to define policies and changes thereto, and that allow payors to, for example, implement a new claims bundling policy or a policy that denies reimbursement based upon the payor “mirroring Medicare”:

- Policies means the rules, policies, and procedures adopted by Payor.
 - This kind of broad, all-encompassing language has the effect of subjecting the provider to every policy that is unilaterally adopted by the payor, including those that may affect the rate of reimbursement. In addition, a definition that encompasses policies of the plans requires the provider’s

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compliance with policies of the both payor and the payor's self-funded or fully insured clients.

- Policies means the rules, policies, and procedures adopted by Payor, including, but not limited to provider manuals, reimbursement policies, utilization management policies and clinical policies.
 - Payors' payment or reimbursement policies in particular may be used to reduce reimbursement rates under the contract.
- Policies means the rules, policies and procedures adopted by Payor to be followed by Provider in providing services under the Agreement.
 - This broad language may be used by a payor to encompass things such as its reimbursement or payment policies even when those categories are not specifically listed in the definition of policies.
- Policies may change from time to time / Payor may implement changes in its Policies without Provider's consent.
 - Such terms grant payors wide latitude in making unilateral changes to their policies, which can in turn result in unilateral changes to reimbursement rates or burdensome administrative processes.

B. Potential Solutions

Payors may be particularly resistant to altering contract terms relating to their "policies" and the ability to alter them freely. There are, however, minor modifications that can make the agreement terms less onerous and more advantageous to providers:

- **Limit the definition of "policies" to only those that were disclosed to the provider at the time the contract was formed.** Terms that include these limitations allow a provider to know the policies it is agreeing to follow, and limit the universe of policies to those that have been disclosed at the time of the agreement.
- **Require that any policy amendment that results in an adverse change to the provider's reimbursement under the agreement be subject to special notice requirements and the opportunity for a provider to object and opt-out.** Terms that single-out policy changes that result in adverse changes to the provider's reimbursement and allow providers to object and "opt out" of those policy changes limit the adverse impact that can result from unilateral policy changes. Using this approach, a payor is free to make changes to their policies so long as they do not adversely affect provider reimbursement. A payor may limit such terms to "material" adverse changes; careful attention must be given to how those terms are defined, and also to who must prove materiality, and how disputes regarding the changes may be resolved.

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- **Require that any policy amendment that results in an adverse change to the provider’s reimbursement under the agreement be subject to special notice requirements, the opportunity for a provider to object and a requirement that the parties meet and confer over the objection, and be resolved by binding mediation if necessary.** If a payor will not agree to allow a provider to “opt out” of policy changes that have a material, adverse impact on the provider’s reimbursement, then allowing for objections and a “meet and confer” process may provide an opportunity for the parties to come to an agreement regarding an objectionable policy. Such terms would require the payor to provide special notice of the policy change, allow a provider to raise objections within a set time period, and then require the parties to meet and confer regarding the terms for a certain amount of time before the policy could go into effect. Finally, if the parties are unable to informally resolve their dispute, the matter should be allowed to be resolved through binding mediation.