

# PHYSICIANS NEWS

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Digest



By Martha Swartz, M.S.S., J.D.

## PREFERRED PROVIDER CONTRACTING: Beware Of Rental Networks And Third Party Guarantors

What is a PPO? As a health care institution or individual provider, it is difficult to provide services in Pennsylvania and New Jersey without participating in at least one preferred provider network (PPO). PPOs are a form of managed care in which: an intermediary (PPO) forms a network of health care providers and connects the health care providers to third party payers such as insurance companies, employers, and third party administrators (Payers). The providers offer their services to the PPO at a discounted rate because they expect Payers to steer patients to them as a result and thus, to increase their patient volume. The health care providers that are on the PPO's panel of providers are "in-network" and, because of the negotiated discounts, patients who go to them for services pay less than they pay for similar services offered by health care providers who are not on the PPO panel, or are "out of network". A PPO can be a "win-win" for patients and health care providers in that individual patients who seek services from in-network providers save money and in-network providers potentially receive increased revenues as the result of increased patient volume which results from the PPO's marketing of their serv-

ices as being "in-network" and thus less expensive.

**What is a Rental Network?** The above arrangement falls apart if the PPO fails to market the health care provider's services as "in network" or if the PPO makes the discounts available to Payers that are not part of the health care



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provider's marketing plan, that is, if the PPO "rents out" the provider's discount without the provider's knowledge or consent. When this happens, health care providers find themselves providing services to individuals for which they expect to receive a certain reimbursement amount, only to find out at time of payment that the individual's

Payer has accessed a discount to which it is not entitled. The PPO may even have made your discount available or "rented out" your discounts to Payers with which you already have a negotiated an agreement at a higher rate. Providers thereby end up with the "short end" of the bargain, that is, they give discounts, but don't receive a higher volume of patients in return.

Back in 2005, a number of commentators began to warn physicians of "silent PPOs", that is, arrangements in which a PPO with which a physician contracts to be on a PPO panel makes the discounts the physician negotiated with that PPO available to other Payers, without the Physician's consent. *However, many times a physician unwittingly agrees to make her negotiated discounts available to other Payers in a PPO's "rental network" because the physician fails to read the fine print in the contract proposed by the PPO.*

**Are Rental Networks "legal"?** In 2008, to avoid the regulation and possible banning of "silent PPO"s, the American Medical Association and the American Association of Preferred Provider Organizations lobbied the National Conference of Insurance Legislators (NCOIL) to adopt a Model Act to Regulate the Secondary Market in Physician Discounts. Under the model law, an intermediary contracting with

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By Patricia A. Costante

## Will Hospital Employment Protect the Interests of Physicians?

Physicians across the nation are increasingly selling their practices or seeking employment directly with health-care systems. According to a report released by the policy research firm Center for Studying Health System's Change, physician employment in hospitals has grown since 2007 as part of a greater strategy for hospital-physician alignment and increased service-line profits. A recent analysis by Accenture revealed that the percentage of physicians who are in private practice and truly independent have been declining at 2 percent annually, and is projected to decline by 5 per-

cent annually by 2013.

Historically, physician employment has been a problematic model. Direct employment of physicians by hospitals was one hallmark of managed care in the 1990s, but the practice was largely dropped. However, the current trend toward hospital employment appears to be different from the 1990s.

Today, many physicians are seeking hospital employment to relieve them of the stress of administrative duties, physician recruitment, the struggle for reimbursement, high malpractice rates, and the general risks and challenges associated with managing a private practice. Physicians are increasingly looking for an improved work/life balance and a more manageable work schedule. Hospital employ-

ment may provide physicians with a safe harbor where they can ride out the anticipated changes to healthcare delivery created by the passage of healthcare reform, and may also provide greater access to leading-edge healthcare IT tools, facilities and equipment.

From the hospital's perspective, employing physicians represents a way to address the issue of physician/hospital competition that arises when physicians open their own specialty hospitals or surgery centers. Tighter alignment with physicians is viewed not only as a way to capture more specialty and hospital referrals in a fee-for-service payment system, but also as central to building the clinical and financial integration needed to succeed under potential new payment models, such as accountable care organizations (ACOs), that involve risk-sharing and reward quality and efficiency.

The trend of hospitals employing physicians has accelerated and broadened to include primary care providers, as well as a wider range of specialists. For hospitals worried about physician shortages, employing physicians can help lock in expertise and boost patient volumes and revenues in high-growth

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# MEDICINE & POLICY:

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a physician who wishes to make the terms of its contract available to other Payers must state in its contract with the physician that the intermediary contracting entity:

- is permitted to enter into an agreement with a Payer allowing the Payer to access the physician's discounted rates;
- will contractually obligate the Payer renting access to a provider network to abide by the terms of the original contract between the intermediary and the physician;
- will provide the Payer with the relevant terms of the original contract with the physician with which the Payer is obligated to comply;
- will provide the physician with a continually updated list of entities that have access to the physician's discounts, including all additions and deletions;
- will obligate all Payers to note on their Explanation of Benefit forms the source of their contractual discounts.

A number of state legislatures have adopted forms of the NCOIL Model Act, including Connecticut, Colorado, Florida, Indiana and Ohio. Other states including Arkansas, California, Ken-

tucky, Louisiana, Maryland, Minnesota, North Carolina, Oklahoma, South Carolina, Texas and Virginia, have enacted laws that limit or prohibit silent PPOs. So far, there is no similar legislation in either Pennsylvania or New Jersey.

In addition to legislature-passed laws, several state and federal courts have issued decisions rejecting a Payer's right to make discounted payments to a health care provider when the discount was "sold" to the Payer without the health care provider's knowledge. Although none of these cases arose in either New Jersey or Pennsylvania, they provide insights as to how a local court might view this issue. In at least two of the cases, *HCA Health Services of Georgia v. Employers Health Insurance Company*, 240 F. 3d 982 (11th Cir 2001) and *Mitzan v. Medview Services, Inc.*, 1999 WL 33105613 (Mass. Super, June 16, 1999), the courts based their analyses on whether the insurer that had accessed the provider's discounts had been in the position to steer patients to the provider, thus providing the physicians with the "benefits of their bargain".

**What can physicians do to gain the benefits but avoid the risks caused by rental networks?** Review your PPO

agreements carefully, preferably with the assistance of an attorney, to ascertain if the PPO intends to "rent" your negotiated discounts to Payers. If it is determined that the agreement does permit the "renting" of your discounts, make sure that your agreement with the PPO:

- makes it clear that the discount you're offering the PPO is in exchange for the PPO requiring the Payers with which it contracts to steer patients to you as an "in network" participating provider
- obligates the PPO to require all Payers to identify you in all of their written material as an "in network" provider
- makes it clear that the payment terms that you agree to in the PPO agreement are confidential and may not be disclosed without your express written consent, except to a list of Payers that you have approved
- obligates the PPO to provide you with a list of all Payers, updated throughout the term of the contract
- obligates the PPO to refrain from contracting with any entities with which you have an existing agreement that provides higher payment rates
- requires the PPO to contractually

obligate all of its Payers to comply with the terms of the PPO's agreement with you, including payment procedures, UR procedures, underpayment recoupment, etc.

- obligates Payers to note on their EOBs the source of their discounts
- clarifies which UR procedures applies to your contract, i.e. those of the intermediary or those of the Payer
- obligates the PPO to conduct financial due diligence regarding the Payers to which it makes your discounts available to you to reduce the chances that a Payer will fail to make timely and accurate payments
- obligates the PPO to advocate on your behalf if a Payer fails to make timely and accurate payments
- requires Payers to pay your full charges if they fail to pay you within the agreed upon time limit
- permits you to discontinue discounts to, and to terminate your relationship with, any Payer or any Payer's product if the Payer fails to make timely and accurate payments

**Third party Guarantors of Copayments.** Another type of arrangement  
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service lines, including cardiovascular care, orthopedics, cancer care and radiology.

## ALTERNATIVE MODELS

There are numerous physician-led alignment models that serve as alternatives to direct employment of doctors by hospitals. Examples include the physician-hospital organization (PHO) and the independent practice association (IPA). Under healthcare payment reform, a clinically integrated accountable care organization (ACO) allows collective contracting without the need for employment by a single entity. These types of models could preserve physicians' independence while still allowing them to take advantage of benefits of scale, risk sharing and the new pay-for-performance incentives.

## PROFESSIONAL LIABILITY

## CONSIDERATIONS

One advantage of being employed by a hospital or medical group may be that a physician no longer has to pay for his or her individual medical professional liability coverage out-of-pocket. However, this is not always in the best interest of the physician, who may be severely limited in his or her ability to select the best protection. As an employee, it is likely that a physician may not have input into which insurance carrier is protecting his or her greatest asset – a physician's professional reputation. Employed physicians may not even remain with a traditional carrier – in many instances they will be insured by a captive, risk retention group or self-insured situation that does not provide the same level of service and partnership that physicians may have become accustomed to while in private practice.

Another factor to consider is the

fact that when physicians share the same medical professional liability protection as the hospital that employs them, there is the potential for a conflict of interest when it comes to defending the physician against a malpractice claim. When a physician is insured through a hospital or medical group also named in the suit, he or she may be asked to waive any potential conflicts of interest to help ensure a cooperative and efficient joint defense. An attorney's representation of the hospital or medical group may materially limit the defenses and strategies the lawyer can use in the physician's defense. These joint defenses can spell trouble, especially when a physician's interests aren't the same as the hospital, medical group or other physicians in the same practice.

## FUTURE CONSIDERATIONS

How the physician employment

trend and its implications will unfold remains to be seen. But with so many changes to healthcare delivery on the horizon, New Jersey physicians need to carefully consider the best model for them, and should seek appropriate advice from their attorneys, consultants and financial advisors to make sure that all ramifications are understood in advance of a decision. When considering a potential employment situation, a physician should seek counsel from his or her broker to understand the impact to his or her professional liability protection. Ultimately, careful consideration needs to be given to the trade-offs between autonomy and employment.

*Patricia Costante is the Chairman and CEO of MDAdvantage Insurance Company of New Jersey in Lawrenceville. For more information, visit [www.MDAdvantageonline.com](http://www.MDAdvantageonline.com).*

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