

# VBP CONTRACTING WEBINAR SERIES

## Webinar 2 VBP Contract Terms and Legal Protections

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- For legal advice, you should consult a qualified attorney.

# Agenda

- Contract Terms and Protections
  - Access to Claims and other Data
  - Confidentiality Laws
  - Performance Measures
  - Incentive Payments
  - Attributed Population
  - Regulatory Penalties
  - Contract Term
  - Termination
  - Amendments
  
- Your Questions and Comments!



for People with Serious Mental Illness

# Contract Terms and Legal Protections

VALUE-BASED PAYMENT ARRANGEMENTS



for People with Serious Mental Illness

# Access To Claims Information

- Providers need timely, accurate and usable data to be successful in VBP arrangements.
- If managing the total costs of care or performance on clinical measures for an attributed population, you may need timely receipt of patient health information related to:
  - Emergency room visits
  - Hospitalizations / discharges
  - Primary care services
  - Pharmacy services (medication fills/re-fills)
  - Outpatient addiction services
  - Inpatient/Residential addiction services

# Access To Claims Information

- **Practice Pointers.** A provider's terms of participation in VBP arrangements should contain language that requires the MCO to furnish to the provider the necessary claims information related to a patient's use of services (or provide access to integrated databases), patient risk scores, and prior authorization requests on a real-time basis.
  - Ideally, the contract would specify the type of data that the provider is entitled to receive, the timeliness of such data, and the frequency in which the MCO must provide the data to the provider.
  - If the MCO fails to meet its data sharing obligations, the provider should be held harmless from any loss of revenue arising from unearned payment withholds or downside financial risk.

# Applicability of Patient Confidentiality Laws

- A Covered Entity may disclose protected health information (“PHI”) for the treatment activities of any health care provider (including providers not covered by the Privacy Rule).
  - Covered Entities include health care providers who transmit health information in an electronic form as well as health plans (e.g., health insurers, state Medicaid programs)
  - “Treatment” generally means the provision, coordination, or management of health care and related services among health care providers or by a health care provider with a third party, consultation between health care providers regarding a patient, or the referral of a patient from one health care provider to another.
  - Note: Disclosures for treatment purposes do not need to abide by the “Minimum Necessary Standard” and can disclose all of a patient’s PHI.



# Applicability of Patient Confidentiality Laws

- Generally, 42 CFR Part 2 restricts disclosure and use of substance use disorder records which are maintained in connection with the performance of a federally-assisted Part 2 program.
  - Unlike HIPAA, patient consent is required even for disclosures for the purposes of treatment.

# Performance Measures

- To facilitate participation in multiple VBP arrangements, providers should seek performance measures that have standard definitions and methodologies for calculating scores (e.g., HEDIS measures).
  - Ideally, the Medicaid measure sets and incentives would align with those used by Medicare and commercial payers.
- Providers should be familiar with the performance measures applicable to MCOs (particularly Medicaid MCOs), understand the financial rewards available to MCOs (if any), prioritize internal operations to score high on those performance measures, and leverage those results for favorable VBP arrangements with MCOs.

# NYS Behavioral Health Clinical Measures

In 2018, NYS included the following BH measures in the Medicaid measure set:

- Adherence to mood stabilizers for individuals with bipolar disorder
- Antidepressant medication management
- Initiation and engagement of alcohol and other drug dependence treatment
- Initiation of pharmacotherapy upon new episode of opioid dependence
- Preventive care and screening for clinical depression and follow-up plan
- Use of alcohol abuse or dependence pharmacotherapy

# NYS Levels of Value Based Payments

There are different levels of risk that the providers and MCOs may choose to take on in their contracts:

Level 0 VBP*	Level 1 VBP	Level 2 VBP	Level 3 VBP (feasible after experience with Level 2; requires mature contractors)
FFS with bonus and/or withhold based on quality scores	FFS with upside-only shared savings available when outcome scores are sufficient (For PCMH/IPC, FFS may be complemented with PMPM subsidy)	FFS with risk sharing (upside available when outcome scores are sufficient)	Prospective capitation PMPM or Bundle (with outcome-based component)
FFS Payments	FFS Payments	FFS Payments	Prospective total budget payments
No Risk Sharing	↑ Upside Risk Only	↑↓ Upside & Downside Risk	↑↓ Upside & Downside Risk

Goal of ≥80-90% of total MCO-provider payments (in terms of total dollars) to be captured in Level 1 VBPs at end of DY5

Aim of ≥ 50% of total costs captured in VBPs in Level 2 VBPs or higher



# Performance Measures

- **Practice Pointers.**

- A provider's terms of participation in VBP arrangements should contain clear language regarding the population of patients subject to the performance measures, the definitions and methodology for calculating scores, and the financial rewards available.
- The MCO should not be permitted to change the performance measures (or methodology) after they have been established for any given performance year, at least without the provider's consent.

# Level 1 VBP Arrangements

- **Why not?**

- A provider is not placed at financial risk to participate in Level 1 (upside-only shared savings) VBP incentive arrangements.
- Even if the provider does not qualify for shared savings, participation in those arrangements may “kick-start” internal delivery changes and partnerships with other providers to qualify for future payments.

# Level 1 VBP Arrangements

- **Practice Pointers:**

- During negotiation of contracts (and contract amendments!) with MCOs, providers should affirmatively request participation in an MCO's VBP arrangements to maximize overall reimbursement.
- If an MCO is not willing to permit participation in VBP arrangements at the point of contracting, a provider should seek language that entitles the provider to participation at a future date, upon meeting eligibility requirements, or otherwise.

# Level 2 VBP Arrangements

- A provider has down-side financial risk if participating (directly) with an MCO in a shared risk VBP arrangement.
- Providers should generally exercise caution in entering such arrangements as they could result in significant risk to the organization's financial health.



# Level 2 VBP Arrangements

- **Practice Pointers.** When negotiating the terms of participation in any VBP arrangement that involves downside financial risk, the provider should add language that limits or mitigates any such risk.
- For example, a provider might seek contract language that:
  - Limits financial losses to a percentage of total payments or the benchmark and
  - Allows financial losses incurred in one year to be paid back to the MCO by financial gains earned in subsequent years.

# Level 1/2/3 VBP Arrangements

## Who's In? Who's Out?

- Attribution Methodology: The basis by which the MCO attributes patients to a population under a VBP arrangement. Possible attribution methods might include populations based on an enrollee's:
  - Geographic area (e.g., counties);
  - Specified behavioral health conditions;
  - Receipt of services from a behavioral health agency (e.g., clients); or
  - Receipt of primary care services.

# Level 1/2/3 VBP Arrangements

## Who's In? Who's Out?

- If attribution of patients is prospective (i.e., based on prior years' claims data), providers should recognize that the population of patients attributed to the provider may:
  - Include patients who have not visited the provider during the current performance year; and
  - Not include patients who receive services from the provider during the current performance year but who are attributed to a different provider.

# Level 1/2/3 VBP Arrangements

- **Practice Pointers.** To avoid surprises related to the attributed patient population, a provider should:
  - Request that the MCO generate a list of attributed patients based on prior year's data so that the provider can learn how many and which patients would have been attributed to the provider under a VBP arrangement.
  - The provider should negotiate a provision that requires the MCO to provide a list of the attributed patient population at least 90 days prior to the start of the performance period for the VBP arrangement.
  - The provider should negotiate a provision that requires the MCO to provide monthly or quarterly patient rosters of attributed patients for the current performance year as well as the right to confirm or reject individuals attributed to the provider against the provider's own records within 60 days of receipt of the patient rosters.

# Regulatory Penalty Provisions

- Some MCO contracts hold a provider liable for financial penalties assessed against the MCO by a regulatory agency. The financial penalties might result from the MCOs failure to meet clinical benchmarks, down-side risk arrangements, or non-compliance with VBP requirements.
- The provider can be held responsible if the financial penalty results from a provider's non-compliance with a requirement under the contract or provider manual. Under these provisions, providers will be liable even if:
  - MCO was unaware of the non-compliance, took no steps to monitor the provider or correct the provider's non-compliance.
  - Provider did not act negligently but made good faith efforts to comply.
- Providers do not have authority to appeal or dispute the regulatory agency's fines or penalties against the MCO.

# Regulatory Penalty Provisions

- **Practice Pointer.** Providers should seek to remove these provisions from participation agreements with MCOs so as to avoid incurring liability for fines or penalties assessed against an MCO!

# Contract Term

- Providers should be aware that there may be a separate contract term that applies to VBP arrangements.
- In practical terms, the contract term reflects the amount of time that the provider is committing to participate in the VBP arrangement.

# Contract Term

- **Provider Pointer.** When initially contracting with an MCO, it may be desirable for the term of the VBP arrangement to be shorter (e.g., one year)— possibly without automatic renewal-- so that the provider can re-negotiate any problematic terms of participation in VBP arrangements.
  - In any VBP arrangement, providers should seek contract language that permits them to receive payment of any earned payment incentives for completed performance periods prior to termination of the participation agreement, even if the payment incentives have not been distributed prior to termination.



# Termination

- If participation in a VBP arrangement involves financial risk, the provider may wish to include contract language that permits the provider to terminate its participation in the VBP arrangement if the provider is incurring (or is likely to incur) financial penalties under the arrangement.
- For cause. The situations that constitute cause will be listed in the contract, e.g., breaches of material terms of the contract.
  - **Practice Pointer:** The provider may want to add other circumstances that would permit participation in the VBP arrangement to be terminated for cause, e.g., the MCO modifies the performance measures or methodologies.

# Termination

- Without cause. In some contracts, a party may also terminate without cause after providing written notice to the other party.
  - **Practice Pointer:** Contracts that contain termination without cause provisions mean that, from a practical perspective, the term of the contract is the notice period. This may be a desirable mechanism to exit the VBP arrangement if necessary.

# Amendments

- Amendment provisions are particularly crucial in VBP arrangements because the clinical, operational, and financial environments in which the parties operate are subject to constant change.
- Types of amendment provisions include:
  - Immediate amendment: The provider has notice but no right to opt-out or consent. (Typically used only for regulatory or statutory changes)
  - Auto-Amendment: Notice and “Passive” Consent. (Typically used for non-regulatory amendments)
  - Written Amendment: Notice and Consent (signed by both parties).

# Amendments

- **Practice Pointer.** Determine whether there is a specific amendments clause that applies to participation in VBP arrangements.
  - Any amendments clause to VBP arrangements should offer the right to the provider to opt-out but if the amendments clause permits the MCO to amend unilaterally the terms of participation in a VBP arrangement, then the provider should negotiate language that permits the provider to terminate its participation in the VBP arrangement.

# Questions and Comments

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# Additional Webinars in this Series

All Webinars Scheduled for 1:00-2:00pm ET

**Webinar 3:** [Key Terms in Participation Agreements](#); Wednesday, June 27

**Webinar 4:** [Forming Community Partnerships to Participate in VBP Arrangements](#); Wednesday, July 11

**Webinar 5:** [Forming Community Partnerships to Participate in VBP Arrangements](#); Wednesday, July 18

**Webinar 6:** [Data Sharing and Confidentiality Part 1](#); Wednesday, August 1

**Webinar 7:** [Data Sharing and Confidentiality Part 2](#); Wednesday, August 15

**Webinar 8:** [Employment & Professional Services Agreements](#); Wednesday, August 29

**Webinar 9:** [Forming Provider Networks to Participate in VBP Arrangements](#); Wednesday, September 12

**Webinar 10:** [TBD](#); Wednesday, September 26

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