Contract terms: Direct-to-Employer arrangements

Direct-to-Employer arrangements come in such a wide variety of forms that there are few contract terms that are applicable to all, or even most, forms. Still, there are certain concepts that physicians should consider in almost every contract for Direct-to-Employer services.

Disclaimers about insurance

The regulatory requirements that apply to entities offering insurance products, such as licensure and financial reserve requirements, can be onerous. The majority of Direct-to-Employer arrangements are not intended to trigger these regulatory requirements.

Some Direct-to-Employer arrangements can, however, include elements that can “look like” insurance. For example, some models involve full capitation where physicians receive up-front payments at regular intervals to cover a specified scope of care, regardless of the actual cost of care. If appropriate, it may be important to establish business expectations for the employer by including a disclaimer making clear that the arrangement is not actual insurance. Despite establishing clear expectations for the employer, physicians should always consider whether an arrangement actually triggers insurance licensure or other regulatory requirements as a legal matter.

Sample contract language: The parties acknowledge and agree that the services described in this Agreement do not constitute health insurance and will not cover hospital services, specialist services, or any other services not directly provided by the [Provider] under this Agreement. The Services provided by Provider hereunder are not a substitute for health insurance or other health plan coverage and are not intended to replace any existing or future health insurance plan coverage.

Limitation of liability

As the service provider, practices should include a provision limiting the physicians’ legal liability to the extent possible. The use and scope of these types of provisions may be restrained by state law, so it
is always best to consult with an attorney.

**Sample contract language:** [Employer] specifically agrees that [Provider] shall not be liable for any consequential, incidental, indirect, special or punitive damages or failure to realize expected savings arising from or relating to any breach of this Agreement or the relationship covered by this Agreement, regardless of any notice of the possibility of such damages, and hereby waives its rights thereto.

**Independent medical judgment**

Provisions stating that physicians are free to maintain and exercise their independent medical judgment are common in managed care contracts. But most employers are not managed care organizations. A contract provision such as the one provided below is necessary to clarify for the employer that it may exert control over the plan, but it cannot exert control over the physician’s practice of medicine.

**Sample contract language:** The standards of medical practice and professional duties of [Provider] shall be in compliance with applicable law. [Employer] will not act or assert authority in any manner that would constitute the unlawful practice of medicine. [Employer] shall not have or exercise control or direction over the methods by which any Physician or Licensed Non-Physician Provider performs professional services pursuant to this Agreement or with respect to medical decision-making and [Provider] and its health care providers shall have sole authority regarding such clinical decisions.

**Compensation–Shared savings**

Contract provisions governing compensation vary widely depending on the type of Direct-to-Employer arrangement and on other negotiations between the parties. One common type of compensation model entitles physicians to a portion of any annual health care cost savings realized by the employer on an annual basis.

These payments for shared savings are in addition to fee-for-service payments under physicians’ other arrangements with an employer’s third-party administrator. In addition, it is not uncommon for shared savings payments to also be conditioned on achievement by the physician of specified quality metrics during the applicable year.
Sample contract language: The parties will develop and manage an integrated system of comprehensive health care services and will operate a financial payment model that will promote accountability for high quality care in the most appropriate setting, and high levels of patient satisfaction and experience, while ensuring value and cost effectiveness as further described in this Agreement. Pursuant to the terms and conditions of the participating provider agreement, physician providers shall provide the Covered Services to designated and attributed member employees of Employer. Physician providers will receive fee-for-service compensation as set forth in the participating provider agreement. Additionally, Physician providers shall have an opportunity to share in a portion of net savings as set forth herein. Net savings payments to the physician providers are subject to achievement of quality measures as set forth herein.

Quality/performance metrics

One aspect of Direct-to-Employer arrangements that employers find attractive is the ability to customize the health plan design to the specific needs and desires of their employees. An employer with high prescription drug costs, for example, may be interested in new strategies to reduce those costs in ways that its third-party administrator cannot accommodate. One common method of employing these strategies in Direct-to-Employer arrangements is through the use of quality or performance metrics.

Sample contract language: Physician providers shall participate in and comply with the terms and conditions of the programs and activities described herein and updated from time to time. Physician providers shall use best efforts to cooperate with and improve applicable delivery of care quality metrics and data. [Examples of quality metrics may include (not exhaustive) goals for minimum percentage of instances in which patients are able to schedule same day appointments or within one day of initial call, how quickly referrals can be made for specialists and ancillary services, meeting goals for use of care coordinators related to assistance with medication adherence and facilitation of follow-up care and specified reductions in rates of preventable readmissions]. Each quality metric described herein shall be assigned a weight signifying the portion of any quality payment for which the quality metric is responsible. At the end of each performance year, Employer shall pay to each physician provider that portion of the quality payment to which the physician provider is entitled based on achievement of each quality metric and its associated weight.
Data sharing and reporting obligations

Successful administration of Direct-to-Employer arrangements often depends on access to accurate and timely data. Cost, practice management, patient encounter and other types of data are often necessary for the physician practice to be successful and to enable the employer to make objective assessments of physician performance.

Direct-to-Employer arrangements that rely on such data should have contractual provisions specifying the type of data to be tracked, which party is responsible for tracking it, the content, timing and format of any reports that the employer and physician rightfully expect from each other, and ownership of such data.

Sample contract language: Physician providers shall submit the required quality measures data and other required information pertaining to Covered Services provided to Employer’s employees (and dependents) that are designated or attributed to the network. The parties will mutually agree to an acceptable format for the required reports and data extracts, subject to the constraints of the providing parties’ operational requirements, administrative policy requirements, and information technology systems. Physician provider shall comply with the data privacy and security and related obligations set forth herein.

Employer (on behalf of itself and its sponsored health plan (herein referred to as “Plan”)) has reserved all right, title and interest in and to: (i) all data owned, generated, collected, processed, or otherwise held by Employer, the claims administrator, the network administrator, or their agents, service providers regardless of whether such information is confidential including participating providers’ PHI, other information created, maintained, or communicated by the Plan, its business associates and its business associates’ subcontractors, but excluding PHI created by physician providers and other participating provider as set forth below (ii) information concerning physician provider compensation created, maintained, or communicated by the Plan, or its agents; and (iii) information and data reported by physician providers or other providers as part of the quality achievement program and related functions, regardless of where the data or information is stored.

Notwithstanding the foregoing, as between the parties, all PHI created, generated, collected, maintained, processed, or otherwise held by physician providers and other providers as part of treatment, payment and health care operations of the provider or its agents and subcontractors will not be considered Employer-owned information or data.
More articles on Direct-to-Employer arrangements

The AMA has developed these additional materials to help physicians navigate available opportunities and negotiate terms that reflect the practices' goals and preferences.

- Case studies, custom networks and contract terms (overview)
- Snapshot: Physician-employer engagement: Direct-to-Employer arrangements
- Model checklist: Physician-employer engagement: Direct-to-Employer arrangements