



# New payment models: Withholds

## I. Introduction

Payment withholds are a long-standing type of risk arrangement. Under a withhold arrangement, the health plan retains or withholds a portion of the payments that are contractually due you and other participants. These withhold amounts are then placed in one or more risk pool funds held by the health plan. The health plan may also contribute funds to the risk pool. For example, a withhold arrangement might involve the health plan withholding 20% of fee-for-service, capitation, or other risk-based payments due you and other physician risk pool participants. These withheld payments will fund 50% of a risk pool that will be used to pay for certain specialty services. The health plan will contribute the other 50%.

Whether or not you or any other physicians participating in the withhold arrangement will receive all, or a portion of, the withheld monies will depend on the extent to which you and those physicians perform with respect to a predetermined utilization budget set by the health plan. The utilization budget will generally be based on past claims data concerning the enrollee population that will be subject to the risk pool arrangement. If at the end of the contract term the cost of the specialty services utilized by the enrollee population is less than the budgeted amount, a risk pool surplus is created. This surplus will then be allocated between the health plan and the physicians, e.g., 50% to the health plan and 50% to the risk pool physicians as a whole. Withheld amounts remitted to you will be paid out of this latter 50%, and whether or not you receive your entire withhold will depend on the size of the surplus. However, if the cost of the specialist services exceeds the health plan's cost budget, this creates a risk pool deficit for which the health plan and physicians are responsible, e.g., on a 50%-50% basis. Your withhold payments will be used to help offset that part of the risk pool deficit that is allocated to the participating physicians.

Although the preceding example only references use of a cost-of-care budget, physician performance with respect to quality benchmarks or targets can also be used to determine the extent to which withheld payments will ultimately be remitted to you.

Withholds were used extensively during the heyday of managed care risk contracting. Although withhold arrangements have not been as prevalent in recent years as they were in the 1990s, payers and employers are now revisiting the use of withholds as a means of slowing the growth of health care costs. If, as expected, risk-based reimbursement methodologies will replace conventional fee-for-service as the predominant means of physician compensation, it is very likely that health plans will be offering you withhold contracts. This is because withholds and risk pools can be used in conjunction with any reimbursement methodology.

Because withholds may be used in conjunction with a broad range of reimbursement methodologies, you should look for withhold provisions in every managed care contract offered to you. Past physician experience suggests that you should carefully analyze any proposed withhold arrangements. In the 1990s, few physicians who entered into withhold contracts ever received withheld amounts, regardless of how well those physicians performed. Until contemporary physician experience proves otherwise, your analysis should take into account the possible effect that failure to receive withheld amounts will have on the financial viability of your practice.

## II. Possible advantages of withhold arrangements

Although you should approach withhold arrangements with caution, there are at least a couple reasons why you may find participation in such arrangements attractive. First, participation in withhold arrangements may help

improve your market position. Health plans, employers and other purchasers of health care services are increasingly basing their purchasing decisions on physicians' ability provide high quality health care services in a cost-effective manner. Withhold arrangements are perhaps currently the most readily-available type of risk arrangement through which physicians may demonstrate a commitment to responding to purchasers' priorities.

Second, participating in physician networks engaged in withhold contracting may be attractive because of potential protections available under state and antitrust laws. Federal and state antitrust laws dictate the extent to which independent, competing physicians may collectively negotiate contract price terms or refuse to deal (engage in group boycotts). The antitrust laws that prohibit independent competing physicians from engaging in collective price negotiations or group boycotts typically do not preclude those activities when undertaken by physicians who have financially integrated their practices according to guidance issued by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC). In their 1996 Statements of Antitrust Enforcement Policy in Health Care ("Statements"),<sup>1</sup> the DOJ and FTC described the kinds of physician financial integration that enables physicians to receive favorable antitrust review of conduct constituting collective price negotiation and/or group boycotts. Withhold arrangements are one of the types of financial integration that the Statements discuss. More specifically, under the Statements, favorable antitrust review is available to physician networks where a significant portion of fee-for-service payments are withheld and placed in risk pools. The Statements do not specify how large the withhold or risk pool must be in order for the physician network to qualify for favorable treatment. However, FTC advisory letters suggest that a 15 percent withhold may not be sufficient<sup>2</sup> to justify the joint price negotiations, while a pool within a 15 to 20 percent range may suffice.<sup>3</sup> How large the withhold will need to be to constitute financial integration sufficient to qualify for favorable antitrust review will likely depend on a case-by-case analysis and depend on factors such as how important membership in the network is to participating physicians, and how many of patients will be subject to the withhold arrangement.

**Federal and state regulations.** Your consideration of any proposed withhold's size should take into account potentially applicable federal and/or state risk-sharing requirements. For example, certain federal Medicare Advantage requirements apply when a Medicare Advantage plan's

managed care agreements transfer substantial financial risk to contracted physicians. One of the ways in which a Medicare Advantage plan can transfer substantial financial risk to you is through the use of withholds and risk pools, where the withhold exceeds a specific percentage threshold. For example, a Medicare Advantage plan transfers substantial financial risk to a physician if the plan places the physician at risk for referral services at amounts beyond a twenty-five (25%) percent threshold, that is, that more than twenty-five (25%) percent of potential payments are at risk. "Referral services" are defined as "any specialty, inpatient, outpatient, or laboratory services that a physician or physician group orders or arranges, but does not furnish directly."<sup>4</sup> Ancillary services are not considered to be "referral services" if your practice performs the ancillary services. If your practice refers patients to other providers (including contractors of your practice) to perform the ancillary services, then the services are referral services.

### III. Key considerations

#### A. General risk arrangement considerations.

Because a withhold/risk pool arrangement is a type of risk-based payment methodology, your analysis of a contract containing a withhold arrangement must take into account the core physician concerns common to all risk-based payment methodologies. These concerns include, but are not limited to:

1. identifying the specific items and services that will be subject to the arrangement, as well as those services that will be carved out;
2. identifying the utilization budgets and quality benchmarks that will be used to measure your performance;
3. determining the actuarial soundness of your utilization budgets and quality benchmarks;
4. predicting expected utilization;
5. the extent to which a reliable risk adjustment methodology will be used to establish your utilization budgets and quality benchmarks, and to evaluate your performance with respect to those budgets and benchmarks;
6. use of a Division of Financial Responsibility matrix;
7. tracking your own utilization and quality performance during the term of the arrangement so that you can compare your practice data with

<sup>1</sup> The Statements may be accessed at [www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf](http://www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf).

<sup>2</sup> Letter from FTC to Paul W. McVay, President, ACMG, Inc. (July 5, 1994), available at <http://www.ftc.gov/bc/adops/007.shtm>

<sup>3</sup> Letter from FTC to David V. Meany, Esq., on behalf of Yellowstone Physicians, L.L.C., (May 14, 1997), available at <http://www.ftc.gov/bc/adops/yelltone.shtm>

<sup>4</sup> 42 C.F.R. §422.208(9)

- utilization and quality data that you receive from the health plan;
- 8. verification of enrollee eligibility;
- 9. accrual accounting;
- 10. working with actuaries;
- 11. stop-loss insurance; and
- 12. sharing enough financial risk to qualify for favorable treatment of certain types of joint conduct under state and federal antitrust laws.

You will, of course, also have to establish your practice baseline. Further information concerning these core issues may be found in other chapters in this guidance, e.g., the chapters discussing how to establish your practice baseline costs, the differences between fee-for-service and budget-based payment systems, shared savings, capitation, risk adjustment, stop-loss insurance, working with actuaries, and joint contracting/collective bargaining.

#### **B. How much of payments otherwise due you will be withheld?**

##### **Identify the precise amount of the withhold.**

Obviously, a crucial consideration is the withhold's size. The larger the withhold, the greater your risk of loss and the more you must endeavor to obtain as much information as you can concerning the data and methodology used to structure the withhold arrangement. The best approach is for the health plan to tell you what the withhold will be in terms of a precise dollar amount. It is more likely, however, that the health plan will describe your withhold amount in terms of a specific percentage. If the health plan gives you a percentage, insist that the health plan also provides you with information sufficient to identify the specific payment amounts to which the percentage withhold will apply—otherwise you will not be able to precisely determine withheld amounts. Thus, for example, if the withhold will be applied to fee-for-service payments, you should insist that the health plan provide you with all of the information described in "Fee-for-service."

- C. Methodology and data.** You will need to obtain clear and complete information concerning the methodology and data that the health plan used to structure all aspects of the withhold arrangement in order to determine whether or not you can successfully manage the risk you will have to assume should you enter into that arrangement. You may need the assistance of an actuary to help you make this

determination. For further information, see "Working with actuaries." You will also need to be given regular reports to help you track your performance and successfully manage your risk during the term of the withhold arrangement. It will be particularly important for you to have sufficient information to determine how any risk pool surpluses and/or deficits are being allocated to you.

##### **1. Allocation of risk pool surpluses and deficits.**

You should insist that the health plan provide you with information sufficient to enable you to understand and independently verify how any risk pool surpluses and deficits were allocated to you. For example, will you share equally in all surpluses or deficits with all of physicians in your risk pool, or will your portion of any surplus or deficit obligation be contingent on how you performed compared to other risk pool physicians with respect to quality benchmarks and/or cost-effectiveness budgets? If PCPs and specialists participate in the same risk pool, will risk pool surpluses and deficits be allocated between PCPs and specialists in a manner that is mutually agreeable? What will be the health plan's share? Will you have sufficient information to verify independently the manner in which the health plan has determined its allocations?

##### **D. Verification of income and expense allocation.**

You should also be able to regularly verify how expenses and income are being allocated among the various participants in the risk pools in which you are participating. To do this, you must be able to reconcile any payments, remittances, and/or deficits received or allocated to your practice on a frequent basis *during the term of the contract*, as well as subsequent to the conclusion of each contract term. To perform this verification and reconciliation, you should insist on receiving quarterly reports from the health plan containing sufficient detail to allow verification and reconciliation, as well as a comprehensive year-end report that will enable you to verify the health plan's final allocation of income and expenses and enable you to perform a final payment/deficit reconciliation.

- E. Timing of remitted withhold amounts.** Be certain that the contract indicates when any withheld amounts will be remitted to you. The health plan may only want to make disbursements on an annual basis. However, it is much more beneficial for you to receive remittances more frequently, e.g., on a

quarterly basis, as more frequent remittances may help your practice avoid cash-flow problems.

**F. Risk pools.** Risk pools are a central component of withhold arrangements and can vary widely in complexity. The following are key issues that you will need to consider with respect to risk pools.

**1. In what type of risk pool or pools will you be involved?** Your risk pool involvement can vary widely from one withhold arrangement to another. Depending on how the health plan structures the arrangement, you may be involved in one risk pool or in multiple risk pools. Risk pools might also vary with respect to the number and types of physicians and institution health care providers involved. Risk pools may also vary in terms of the items and services that risk pool monies will fund. The following are just a few ways that risk pools may be structured in withhold arrangements that may be offered to you. This information is designed to help you assess your risk pool participation within the larger context of performing your risk analysis of the entire withhold contract.

**A. A single risk pool for your patients.** Your withheld payments might be used to fund a risk pool that applies only to the health care items and services that you provide to patients who have been assigned to, or who have selected, you. This type of withhold arrangement can place you at significant risk because risk is spread across a limited number of enrollees and you do not share risk with other physicians. This withhold arrangement can also have significant legal implications. See section IV below.

**B. Risk pools with other physicians.** It is likely that withhold arrangements offered to you will require you to participate in risk pools with other physicians. These risk pools will often be structured around physician specialties. For example, a withhold arrangement might involve two physician risk pools—one for primary care physicians (PCPs) and another for all other specialists to whom PCPs refer. But risk pools may be further divided along specialty lines. For example, rather than having one risk pool for all non-PCP specialists, there may be separate risk pools for all physicians within a

particular specialty, e.g., radiology. It is even possible that risk pools may be structured for particular sub-specialties.

**C. Types of services that risk pool monies will fund.** It is also vital for you to understand precisely the items and services that will be funded by risk pool monies. Physician risk pools will, of course, be used to help pay for services that physicians provide, e.g., specialty procedures, physical examinations, etc., which physicians provide in their practices. But your withholds might also be used to help fund other types of services. You might be asked to participate in risk pools in which you will be at risk for that will fund inpatient and/or outpatient hospital services. For example, a health plan may fund a hospital risk pool that may be used to incentivize both physicians and hospitals to reach certain targets regarding the utilization of hospital services, e.g., reduction of readmissions or hospital-acquired conditions. You may also be asked to participate in risk pools in which you will accept risk for utilization costs for pharmaceuticals, laboratory services, durable medical equipment and other ancillary services.

**D. Whose services will be funded by risk pool funds?** In addition to understanding the types of services that risk pool monies will fund, you will also need to understand the extent to which your risk pool withholds will be used to pay for particular types of providers. For example, will services from out-of-network providers be paid out of risk pool funds? If so, will you have sufficient control over out-of-network utilization? Has the health plan developed an adequate network so that it is likely that enrollees will be able to access all of the services they need in-network? If you are a PCP, will the services you refer to specialists have to be funded from your withholds?

**2. Who will be your fellow participants in your risk pool?** Once you have identified the risk pools that your withholds will help fund, you should ask the health plan to identify all the other physicians and providers that are participating in those risk pools. Since your share in any risk pool surpluses or obligations for risk



pool deficits will likely depend on how well you and your fellow participants perform with respect to quality and/or cost-efficiency targets, identifying who those other physicians and providers are may help you assess the likelihood of your sharing in such surpluses or liability for deficits. For example, if the other physicians and/or providers have a reputation for quality and cost-efficiency in your community, the more likely it is that you will have some, or all, of your withhold amounts remitted to you out of any risk pool surplus (assuming that the applicable quality and/or cost-effectiveness targets are actuarially sound). But if the other participants do not enjoy such reputations, this may signal that a cautious approach with respect to your participation is warranted. So find out as much as you can regarding whether or not your fellow risk pool participants share your commitment to achieving mutual cost-efficiency and quality goals.

3. **Over how many participants will your risk be spread?** A crucial issue in your risk analysis is the extent to which your risk will be shared by other physicians and providers. The more your risk is shared, the less likely it is that a catastrophic occurrence involving one of your patients or otherwise unexpected utilization by your patient population will, by themselves, cause risk pool deficits. But if risk is spread across a small number of participants, a single catastrophic occurrence can result in risk pool deficits for which you may be liable.
4. **How many enrollees will be included in each risk pool?** You also need to determine the number of enrollees who are included within each risk pool. The more enrollees involved in your risk pools, the more risk can be spread across that patient population, and the less likely it is that a catastrophic case or other unexpected utilization will result in risk pool deficits.
5. **What will be the payer mix of your enrollees?** You should insist that the health plan provide you with specific information concerning the payer mix of the enrollees that will be assigned to, or select, you. The health plan may combine in your risk pools patients whose health care services are paid for by a broad array of payers: Original Medicare, Medicare Advantage, Medicaid, Medicaid managed care, commercial health plans, etc. Such information will aid your evaluation of the risks and benefits associated with a withhold arrangement by helping you predict expected utilization and payment adequacy.
6. **Account information and ongoing audit capability.** Because it is your withheld money that will help fund your respective risk pools, you should insist that the health plan allows you to access risk pool account information on a continual basis until the withhold arrangement is terminated and all payment reconciliation activity has concluded. The health plan should, for example, tell you the name of the institution holding the risk pool funds, and provide you with any account numbers and other information necessary to specifically identify available risk pool fund amounts. You should also determine the extent to which you will be able to audit those risk pool accounts as a means of verifying other information that you receive from the health plan concerning the risk pool.
7. **In what type of account will the risk pool monies be held--interest considerations?** You should determine whether or not risk pool monies will be held in an account that earns a competitive rate of interest, and the extent to which that interest accrues to you or to the health plan. Since at least part of the risk pool will be funded by your withholds, you should insist that any interest on such withhold funds accrue to you.
8. **What happens if risk pool monies are insufficient to cover expense obligations?** A paramount consideration is the extent to which you may be liable for any risk pool deficits. For example, will your liability be limited to your total withheld amounts, or will the health plan be able to impose additional withholds in order to cover risk pool deficits? Will the health plan have recourse against you for previously made payments to offset liabilities that exceeded risk pool amounts? Unless you obtain specific answers to these types of questions, you cannot accurately assess your risk under any prospective withhold arrangement. Note that state regulations may limit the amount of risk of loss that you may be contractually obligated to assume.
9. **Who is funding the risk pool and how much is being funded?** The risk pool may be funded from several sources. For example, a risk pool

might be funded by contributions from a health plan, and withholds from payments due a hospital, physician network like an independent practice association, PCPs, and/or specialists. You should know who is contributing what percentage of funds to the risk pool, as this is likely to have a bearing on the parties that may exert the most influence on management of the risk pool, and how any risk pool surplus or deficit will be allocated to the different participants.

**10. Will risk pool surpluses or deficits be carried over?** You should determine whether or not any risk pool deficits or surpluses can be carried over from one contract term to the next. You should resist any attempts to carry over deficits or surpluses. Assuming that your contract is for a term of one year, subject to renewal, deficits and surpluses should be reconciled at the end of each contract term, so that you can be sure to obtain any remittances due you or discharge any obligation for risk pool deficits. This will enable you to start out each contract term with a clean slate. The possibility that deficits that can be carried over from one year to the next may significantly compromise your ability to assess your risk accurately, since it is often more difficult to estimate risk exposure over longer time periods vis-à-vis shorter periods of time.

**11. Can a surplus in one or more of your risk pools be used to offset a deficit in other risk pools?** It is also vital that you determine the extent to which the health plan can use a surplus in one risk pool to offset a deficit in another risk pool. For example, even if you and your fellow risk pool participants come in under a risk pool's medical expense target, can the health plan use the resulting surplus to offset deficits in another risk pool rather than remitting withheld amounts to you out of that surplus? If a health plan can offset risk pool deficits in this manner, it may reduce the likelihood you will receive any withhold monies.

#### **IV. State and federal requirements concerning physician financial incentives.**

States may have laws that regulate the use of financial incentives in managed care agreements. For example, California law prohibits managed care arrangements (including medical group and IPA arrangements) which include specific payments as an inducement to deny, reduce, limit or delay specific, medically necessary covered services to specific enrollees or groups of enrollees. The prohibition does not extend to capitation payments, shared risk agreements or other general payments that are not tied to specific medical decisions involving specific enrollees or groups of enrollees with similar medical conditions.<sup>5</sup> Similarly, federal Medicare Advantage regulations state that a Medicare Advantage plan is prohibited from making a specific payment, either directly or indirectly, to a physician or a physician group as an inducement to reduce or limit medically necessary services furnished to any particular enrollee.<sup>6</sup> Requirements such as these may influence how withhold agreements in your state may be structured.

#### **V. Conclusion**

Given the likelihood that withhold mechanisms may play a significant role in future contracts offered to you, developing the capacity to evaluate and negotiate withhold arrangements will be worth your time and effort. This chapter provides you with the essential factors you will have to consider in order to successfully manage your risk under the wide variety of withhold arrangements that health plans may offer you.

<sup>5</sup> See Business & Professions Code §511; Health & Safety Code §1348.6; Insurance Code §10175.5.

<sup>6</sup> 42 CFR § 422.208(c)(1)