

Legal Considerations for Employers in Value-Based Contracting

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Frustrated with the high cost of health care, year-over-year trend increases, lack of transparency in pricing, and lack of control over data, employers are increasingly looking to value-based payment models as an alternative health care strategy to traditional narrow networks and fee-for-service pricing. Employers are leading the way in innovation by harnessing control of data and health care delivery to drive quality and outcomes. Value-based design options available to employers include on-site clinics, virtual care, direct primary care arrangements, purchasing coalitions, direct contracts with providers, and centers of excellence for bundled pricing and accountable care organizations (ACOs).

As employers engage in value-based contracting, attention must be paid to challenging legal issues, some of which include:

- 1. Data Privacy Issues** – The roles of the parties to the contract should be carefully evaluated in light of applicable data privacy and security laws. Health Insurance Portability and Accountability Act (HIPAA) business associate agreements and three-way data sharing agreements may be necessary to coordinate the exchange of data between contracting parties and the employer's existing service providers, such as third party administrators, pharmacy benefit managers, wellness vendors, and data warehousing and cloud storage vendors. Care should also be taken to address rights of ownership, use, access, and storage of data, data breaches, and security requirements. HIPAA notices may also need to be updated regarding use and disclosure of participant protected health information (PHI).
- 2. State Insurance and Licensing Laws** – While providers usually do not take on full risk under value-based contracts, care must be taken to ensure that shared savings, ACOs, or capitated arrangements comply with state laws regulating risk bearing organizations. Many states also regulate and require licensing and/or credentialing of providers, direct primary care arrangements, third-party administrators, and other types of health plan vendors.
- 3. Employee Retirement Income Security Act (ERISA) Fiduciary Considerations** – Employers should pay careful attention to who has responsibility for claims adjudication under the value-based arrangement, whether it complies with ERISA's claim and appeal procedures and whether the contract properly addresses delegations of fiduciary authority and reasonableness of fees.

4. **Coordination with Existing Plan Design** – Care should be taken to ensure that the employer’s adoption of a value-based arrangement, such as an on-site clinic or direct primary care arrangement, does not disqualify an employee from participation in other benefit programs offered by the employer, such as health savings accounts. The value-based design must also be incorporated into plan documents, summary plan descriptions, and other employee communications.
5. **Design Incentives and Employee Communication Strategy** – An important component of value-based contracting is the adoption of employer incentives to facilitate use of the value-based arrangement in order to drive volume and savings. Employers should verify that any incentives and other design features of the value-based design comply with applicable federal laws, such as the HIPAA nondiscrimination rules, the Affordable Care Act, the American’s with Disabilities Act, Genetic Information Nondiscrimination Act, ERISA, the Internal Revenue Code, and Consolidated Omnibus Budget Reconciliation Act.

Direct contracting is expected to grow in the coming years as employers continue to play an important role in the delivery of health care in the U.S. with an eye towards increasing employee productivity and enhancing well-being while eliminating wasteful spending. It will be important for employers to navigate the legal issues as new technologies and payment models disrupt and improve the health care delivery system.

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