

Track III: Legal Considerations for Employers, TPAs, and Providers

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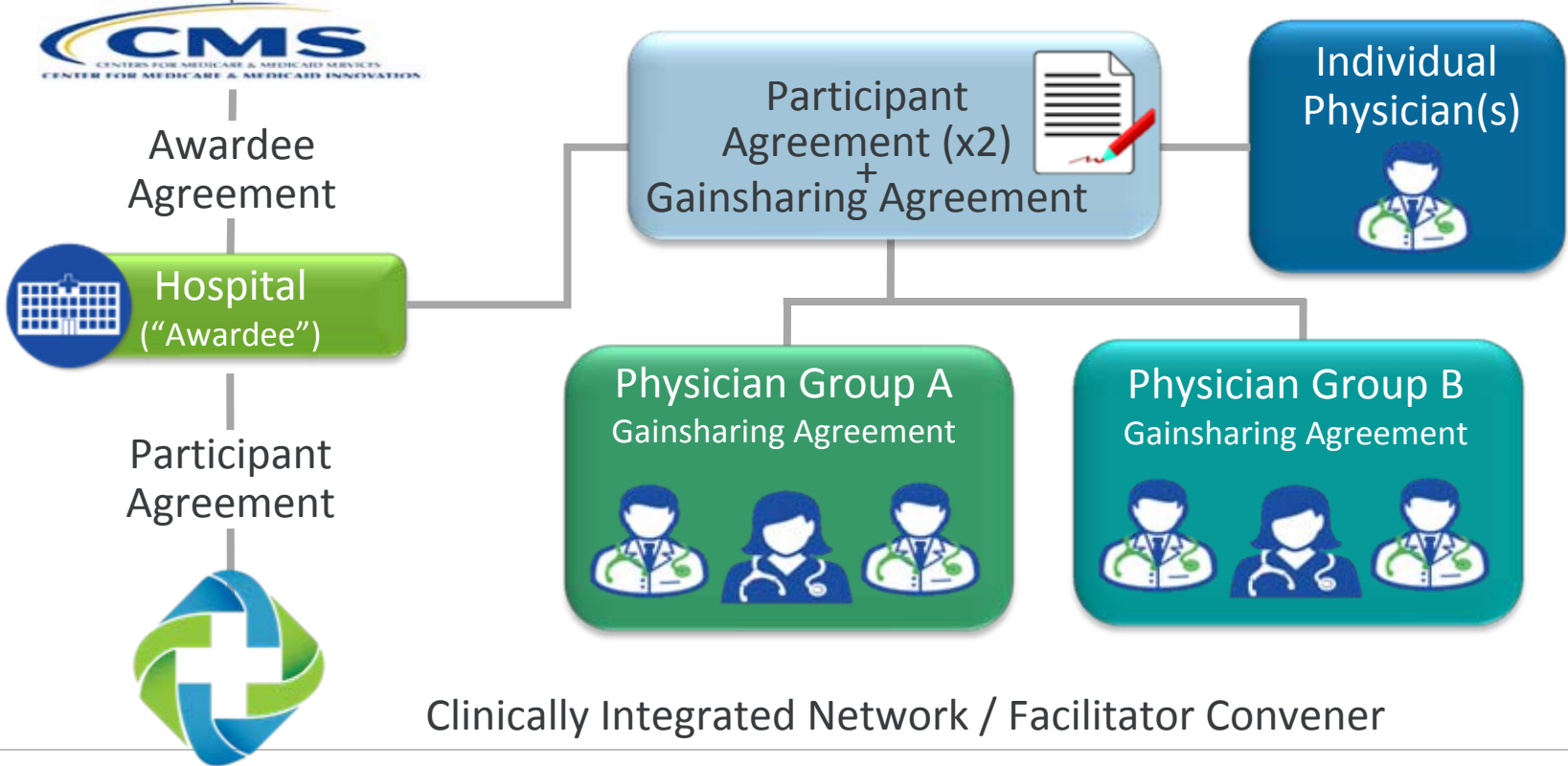


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Goals and Agenda

-  Goal: Provide an Overview of Legal Issues and Options for Bundled Payment Arrangements
-  Present Illustrative Case Studies
-  Offer an organization-neutral checklist for bundled payment arrangements -- checklist can be used both to identify Legal Considerations and as an guide in Contract Drafting

Environmental Scan: CMS/CMMI BPCI Case Study

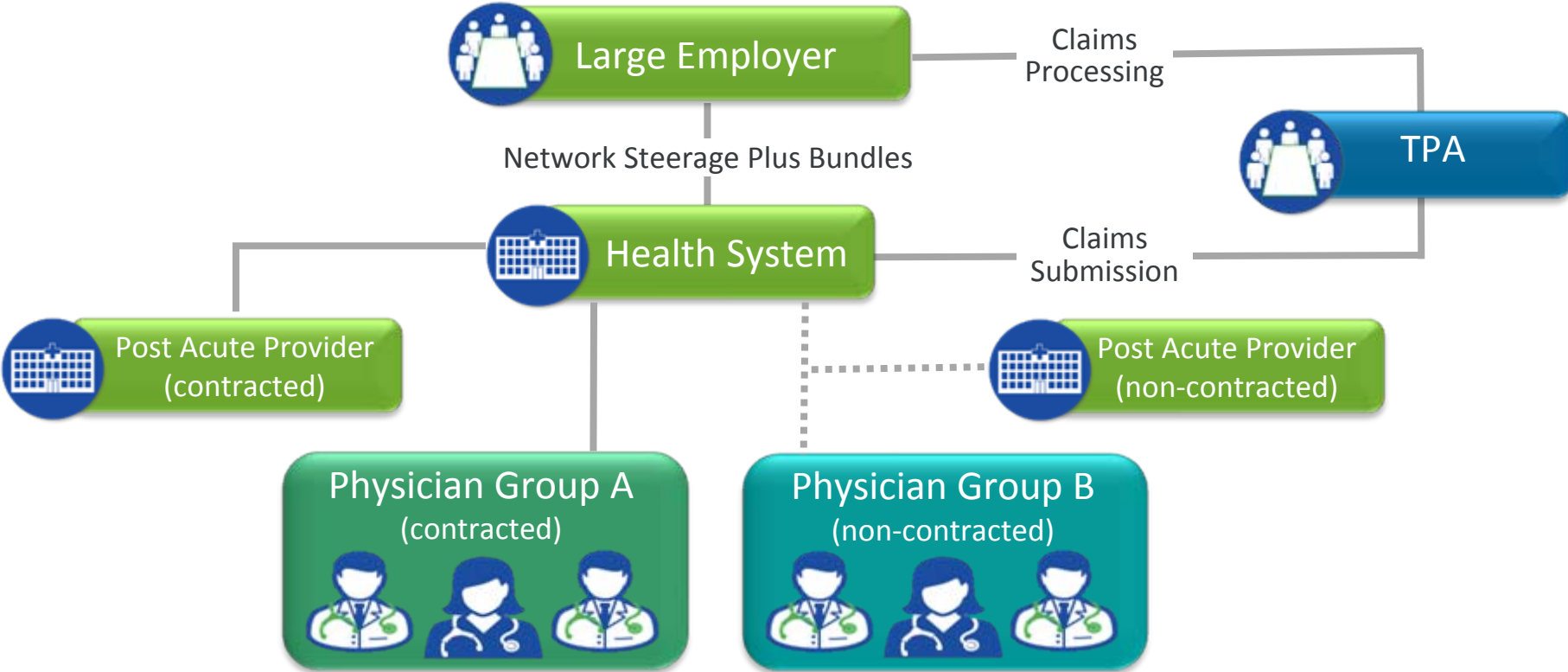


Exponential Legal Complexity: CMS/CMMI Case Study

Add to the arrangements in the previous slide:

- Multiple disease focus
 - Providers entering and leaving the arrangement
 - Multiple existing compensation relationships beyond bundled payments
 - The other payment models-- beyond the bundled payment arrangement-- even within Medicare (FFS, MSSP, Medicare Advantage).
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Environmental Scan: CMS/CMMI BPCI Case Study



Exponential Legal Complexity: Employer/Commercial Case Study

Add to the arrangements in the previous slide:

- Some of the Providers also participate in BPCI
 - TPA legacy IT systems have not been used for bundled payment arrangements
 - State Department of Insurance has not taken a position as to whether a bundled payment is “insurance risk”
 - Health System shares a TPA with the Employer
 - Providers participating in Bundled Payment arrangement want all of the claims data for the Employer’s entire population not just the data relating to the providers’ own claims
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Bundled Payment Planning Checklist: Legal Issues to Consider

- Scope
 - Team
 - Pricing and FMV
 - Risk and Risk Type
 - Billing and Funds Flow
 - Regulatory
 - Multiple Initiative Logistics
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Legal Issues to Consider: Scope

- What services are included in the bundle?
 - Specify the level of Disease/Procedure Included (e.g., DRG/CPTs, Groups of DRGs/CPTs, Custom)
 - Identify excluded services
- What is the anchor or trigger event? (e.g., admission, discharge)
- What is the temporal scope?
 - Specify the episode time period



Legal Issues to Consider: Team

- Which providers are contracted participants versus non contracted?
 - Consider limitation of provider panel
- What is included in the contracted provider/vendor relationship?
 - Identify who shares upside risk/downside risk
 - Identify performance and quality metrics
 - Outline adoption and/or adherence to clinical protocols standards
 - Identify referral restrictions
 - Address patient management/care coordination processes



Legal Issues to Consider: Team

- What resources are provided by the payer?
 - Explore shared technology resources
 - Discuss care management staffing
 - Address whether and what claims data is provided
- What happens when a provider leaves the arrangement?



Legal Issues to Consider: Pricing and FMV

- How is the bundled “price” set?
 - BPCI: Government process
 - Commercial: Negotiation process
 - Price fixing? Probably not ...



Legal Issues to Consider: Pricing and FMV

- How are Bundled Payments allocated?
 - Discounted FFS base payment to all providers
 - Excess funds/deficits?
 - Upside “risk sharing” providers entitled to some share of excess funds
 - Full “risk sharing” providers potentially liable for deficits
 - Role of Quality Metrics?
 - FMV of payments? Commercial Reasonableness?
 - Some arrangements only the institutional providers accept downside risk
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Legal Issues to Consider: Risk and Risk Type

Who takes risk?

- Is it one or more providers, the employer, the insurer or shared risk?

What type of risk?

- Distinguish between “insurance” risk or business risk
- Understand state insurance licensure or filing requirements
- Determine if there are licensed insurers in the contracting chain

Legal Issues to Consider: Risk and Risk Type

- What is the state Department of Insurance definition of 'risk' and/or 'insurance'?
 - Consider whether it is wise/necessary to seek clarification from DOI
 - Is there any applicable guidance from other states?



Legal Issues to Consider: Billing and Funds Flow

- When is payment made?
 - Prospective Upfront payment of \$ per episode of care
 - Retrospective Target bundled price set up front, providers paid FFS and total spend reconciled after episode of care is completed
- How will the payer/TPA process claims?
 - Investigate whether legacy payer/TPA claims systems can process up front bundled payments
 - Research whether fee splitting laws are implicated



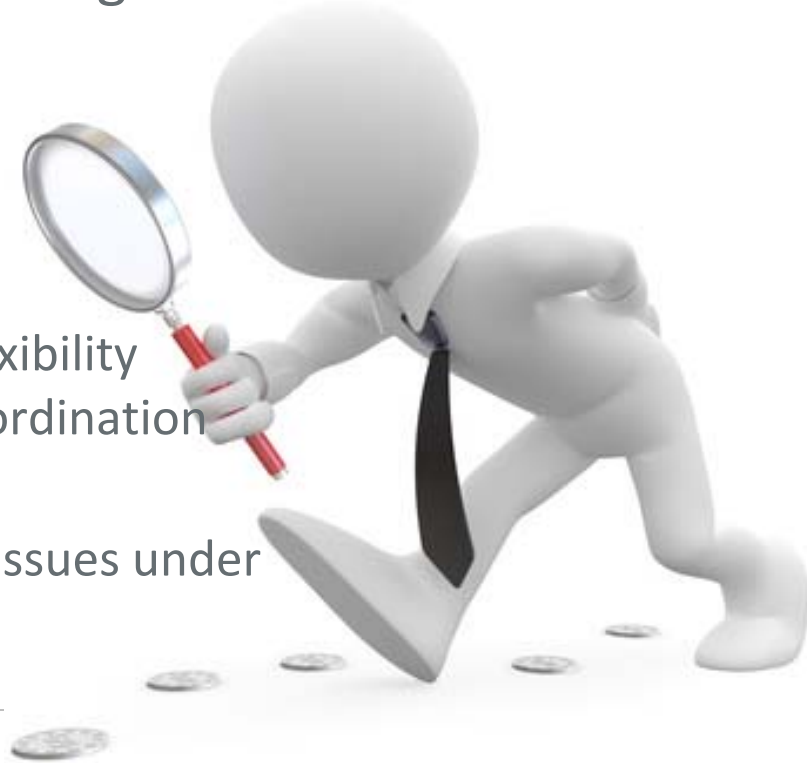
Legal Issues to Consider: Billing and Funds Flow

- Is a technology investment contemplated?
 - Determine licenses and sub-licenses of technology/IP and who pays for it
 - Address who owns any analytics or data output
 - Address data privacy issues
- What happens to bundled dollars or shared savings if a provider does not achieve quality metrics?



Legal Issues to Consider: Regulatory

- If a Federal Program (e.g., BPCI), investigates waivers of Federal Fraud & Abuse laws
 - Scope of waivers not same as for ACOs in Medicare Shared Savings Program
 - Waivers different for each model
 - Nonetheless, waivers provide some flexibility for gainsharing arrangements, care coordination fees, etc.
 - Consider whether arrangement raises issues under the CMP Beneficiary Inducement Law



Legal Issues to Consider: Regulatory

- Waivers do not apply to State Fraud & Abuse Laws
 - Fee Splitting?
 - All payor kickback or anti-rebate laws?
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Legal Issues to Consider: Regulatory

If outside of BPCI, no Federal waivers

- Stark

- Risk Sharing exception may apply

- Anti-Kickback Statute

- Limited to Medicare/Medicaid
- Beware spill over effect
- FMV?

- CMP laws

- Limited to Medicare/Medicaid Patients
- Beware spill over effect

- State laws—fee splitting, anti-rebate, etc.

Legal Issues to Consider: Regulatory

- Are multiple payments being received for the same services?
 - Inventory other relevant agreements with physicians (e.g., co-management, professional service arrangements, medical directorships)
 - Determine Fair Market Value of total or “stacked” compensation



Issues to Consider: Multiple Initiative Logistics

Are the providers or payers involved in multiple new payment models?

- Identify potential financial conflicts (e.g., Bundled Payment v. Shared Savings; inconsistent incentives)
 - Identify potential operational conflicts (e.g., too many metrics, too little infrastructure; burden of customized metrics on IT systems)
 - Identify potential regulatory conflicts (e.g., when are waivers applicable)
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Questions?