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Contracts: Practices and Provisions to Manage Liability Risks

All healthcare organizations – including allied healthcare settings, physician practices, hospitals, nursing homes and assisted living centers – enter into contractual arrangements with outside entities, either as contractors (i.e., providing services to others) or as contractees (i.e., receiving services from vendors or providers). These agreements tend to have certain provisions in common, relating to such key elements as rights and responsibilities, payment, indemnification, intellectual property, insurance coverage, conflict resolution and termination.

Carefully written and reviewed contracts can help prevent misunderstandings in business agreements, strengthen partnerships and enhance legal defensibility in the event of litigation. However, ambiguous contracts laced with legalese and healthcare jargon can increase the organization's exposure to both direct and vicarious liability.

The following case history illustrates the costly ramifications of a poorly drafted healthcare contract.

> A rehabilitation/physical therapy (PT) company contracted with a nursing home to provide PT services to residents under physicians' orders. The contract, under which the PT company served as the PT department for the nursing home, did not stipulate that the contracting facility (i.e., the nursing home) must carry professional liability insurance. A nursing home resident was injured while receiving treatment from a company-employed PT. The resident's injury was further mishandled by the nursing home, causing additional injury and leading the resident to file a claim against both the PT provider company and the facility. A jury found both the PT company and the nursing home liable. However, because the nursing home lacked professional liability coverage, the court determined that the assessed damages were to be paid entirely by the contracted PT provider company. If the nursing home had been properly insured, and the court had apportioned responsibility for the occurrence, the PT company would likely have been required to pay only part of the total damages (depending upon the state's joint and several laws).

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This scenario demonstrates the critical importance from a risk management standpoint of executing properly written service agreements and contracts, which can help mitigate exposure in case of patient injury. Sound contractual provisions can also help prevent costly countersuits and minimize vicarious liability if employees or contractors of a healthcare business are sued for negligence while providing services on behalf of a contracting entity.

This edition of *inBrief*® is designed to help protect healthcare organizations by focusing leadership attention on key contract terms and provisions that define mutual responsibilities and limit liability. The checklist below has two sections: the first lists essential provisions to include in contracts in which healthcare entities provide services, while the second section addresses risk considerations when healthcare entities contract to receive services.

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Drafting Sound Contracts: A Self-assessment Checklist

I. CONTRACTS IN WHICH ONE HEALTHCARE ENTITY IS PROVIDING SERVICES TO ANOTHER	STATUS (CHECK IF PRESENT)	COMMENTS
BASIC CONSIDERATIONS		
1. **Each party's rights and responsibilities are clearly articulated** and organized into sections with conspicuous headings for quick reference.		
2. **Basic terms are defined within the body of the contract,** especially if the agreement involves new technology or legal standards of care.		
3. **A compliance provision is included,** with contracted providers agreeing to adhere to the contracting organization's policies and procedures.		
4. **Reporting procedures and time frames are specified,** with contracted providers obligated to convey all accidents, adverse events and incidents to the contracting organization in a timely manner.		
5. **Full disclosure is made of any financial links between contracted physicians and healthcare organizations,** in order to prevent potential violations of the federal Stark Law, which prohibits self-referral.		
6. **An antitrust clause is contained within the contract,** requiring the parties to abide by relevant federal and state laws and regulations.		
7. **New clinical service contracts are limited to one year or less,** permitting a relatively swift ending of the relationship if serious issues emerge.		
8. **Contracts are executed only when fully complete** – i.e., after all changes have been reviewed and approved by both parties.		
INSURANCE REQUIREMENTS		
1. **Professional liability coverage requirements are specified for both parties,** including minimum policy limits and carrier ratings.		
2. **A hold harmless provision is included to minimize vicarious liability** – i.e., to ensure that any damages arising from direct patient care are assigned to the responsible party.		
3. **Contractual indemnification is limited to the scope of insurance coverage,** especially with respect to physicians and licensed independent practitioners, shared service agreements and temporary staff arrangements.		
4. **The right of subrogation is expressly stated,** whereby, in the event of a claim, the insurer can enforce the insured's rights against a third party that directly caused the loss.		
5. **A provision is included stating that any changes in insurance coverage by either party must be conveyed in writing to the other signatory in a timely manner** and found acceptable by the non-originating party.		

I. CONTRACTS IN WHICH ONE HEALTHCARE ENTITY IS PROVIDING SERVICES TO ANOTHER (continued)	STATUS (CHECK IF PRESENT)	COMMENTS
PROVIDER-RELATED TERMS		
1. **The contractor's duties are expressly delineated,** including direct patient care, diagnostic test interpretation, utilization management reviews and participation in quality/risk/safety activities.		
2. **Patient healthcare information issues – including access, confidentiality and authorized disclosure – are addressed in the agreement** in a manner consistent with HIPAA and other applicable state and federal laws.		
3. **The contractee is obligated to evaluate services received,** utilizing established quality metrics for performance review purposes.		
4. **Peer review terms are clearly stated,** agreed to by the contracted provider, and utilized in the re-credentialing and re-privileging process.		
5. **Restrictive covenants, if included in the contract, are reviewed by legal counsel** to ensure they are fair, reasonable and enforceable.		
ADVANCED HEALTHCARE PRACTITIONERS		
1. **The scope of professional acts is defined** within the contract.		
2. **The organization's written policies and procedures are formally agreed to by contract signatories,** including requirements relating to scope of care, supervision, patient confidentiality and documentation of patient care.		
3. **Professional liability insurance coverage requirements are detailed in the agreement,** including minimal policy limits for both practitioners and their supervising physicians, if applicable.		
4. **Due process protections are delineated** in the event of contract termination or other disciplinary actions taken against the practitioner.		
CONSULTING SERVICES		
1. **The consulting services to be rendered are listed in the contract** and reflect a mutual, negotiated understanding.		
2. **Performance expectations are delineated,** with evaluation based upon widely recognized standards, measures and criteria.		
3. **Documentation and reporting requirements are specified,** in order to ensure that consultants' clinical findings are accurately and swiftly conveyed to the contracting organization.		
4. **The organization is formally granted the power to accept consultant providers' recommendations** or to decline them in writing.		

Ambiguous contracts laced with legalese and healthcare jargon can increase organizational exposure to both direct and vicarious liability.

II: CONTRACTS IN WHICH ONE HEALTHCARE ENTITY IS RECEIVING SERVICES FROM ANOTHER ENTITY	STATUS (CHECK IF PRESENT)	COMMENTS
BASIC CONSIDERATIONS		
1. **Contract wording is simple, clear and unambiguous,** permitting later written amendment and revision, if necessary. If highly technical language must be used, definitions should be provided in an appendix.		
2. **Mutual obligations are explicitly stated in the contract** and are clearly described, reasonable and legally enforceable.		
3. **All necessary documents and references are cited in the contract** and/or appended thereto, e.g., quality standards, technical support requirements, HIPAA privacy protections, HITECH Act data breach response requirements, etc.		
4. **"Proprietary information" is clearly defined in the contract,** i.e., as any information about the contracting organization that is furnished to or obtained by the vendor in connection with the performance of its duties.		
5. **Patient healthcare information is deemed confidential** and protected by relevant state and federal laws and regulations.		
6. **The vendor is prohibited from disclosing patient-identifiable information** to any third party without proper authorization.		
7. **Access is granted to patient records in the event of a claim** or other legal situation in which patient healthcare information serves as evidence.		
8. **Dispute resolution processes – such as mediation and arbitration – are negotiated by the parties** and included in the contract language.		
INSURANCE REQUIREMENTS		
1. **Minimum insurance policy limits and breadth of coverage are specified for both parties,** including professional, general and cyber liability policies.		
2. **Insurance limits are consistent with applicable medical staff bylaws** and/or other legal agreements, professional standards and organizational policies.		
3. **Contractual risk allocation arrangements are reviewed and approved by legal counsel,** including indemnification and hold harmless clauses, additional insureds status and claim subrogation language.		
ADMINISTRATIVE SERVICES		
1. **Responsibility is assigned for exposures associated with ethical and procedural lapses,** including questionable billing practices, regulatory noncompliance and substandard medical record maintenance.		
2. **Contained within the contract are clearly stated protections against the potential consequences of any criminal actions committed by the vendor,** such as Medicare fraud or abuse.		
3. **An "interruption of business interest" clause is included in the agreement,** as well as a stipulation that the party responsible for any business interruption will be given the opportunity to resolve the disruption and/or reimburse the other party for lost earnings.		

II: CONTRACTS IN WHICH ONE HEALTHCARE ENTITY IS RECEIVING SERVICES FROM ANOTHER ENTITY (continued)	STATUS (CHECK IF PRESENT)	COMMENTS
EQUIPMENT PURCHASE OR LEASE		
1. **Payment terms and warranties are clearly stated** for all purchased equipment.		
2. **Vendor responsibilities are delineated in the contract,** especially in terms of training staff to operate the equipment in a safe, effective manner.		
3. **Preventive maintenance issues are addressed in the agreement,** as well as associated repair or replacement costs.		
4. **Refunds or other payment modifications are specified,** in the event that purchased equipment fails to produce promised results.		
5. **Responsibility is assigned for any medical costs associated with patient injuries** caused by malfunctioning equipment.		
HAZARDOUS WASTE REMOVAL		
1. **Hazardous waste-related issues are addressed in the contract,** with responsibility for handling and disposing of medical and hazardous waste material assigned to the producer of the waste.		
2. **Contracted waste disposal vendors are made responsible for on-site training of staff** in how to safely handle and dispose of medical and hazardous waste material.		
3. **All contracted workers who handle and dispose of hazardous waste are required to have workers' compensation insurance coverage,** in compliance with state law.		
4. **Coverage limits for exposures related to waste handling and disposal are specified,** and do not exceed the limits of the healthcare organization's employee health insurance policies and workers' compensation plans.		
TEMPORARY STAFFING		
1. **The staffing agency is assigned responsibility for checking and documenting licensure and credentials** of temporary staff.		
2. **Consistent hiring and credentialing requirements are maintained** – e.g., if the contracting allied health setting conducts pre-employment drug screens, then the staffing agency is also expected to do so.		
3. **Criminal background checks of temporary staff are performed by the agency** in accordance with state and federal law, and past felony convictions are reported to the contracting organization.		
4. **Temporary staff are given an orientation period** by the contracting healthcare facility.		
5. **The healthcare organization is contractually responsible for supervising and monitoring temporary staff** when they are engaged in patient care activities.		
6. **Liability for any claims that may arise from the services of the staffing agency is clarified in the contract,** including allegations asserted against temporary staff.		
7. **Liability insurance coverage limits are specified** for negligent acts committed by temporary staff.		

II: CONTRACTS IN WHICH ONE HEALTHCARE ENTITY IS RECEIVING SERVICES FROM ANOTHER ENTITY (continued)	STATUS (CHECK IF PRESENT)	COMMENTS
ELECTRONIC HEALTH RECORDS (EHR)		
1. **Key questions regarding patient data are addressed in the EHR vendor contract,** which should state that patient data are owned by the healthcare organization that created them, and that all parties are responsible for complying with pertinent HIPAA privacy requirements.		
2. **Responsibility for interface maintenance, troubleshooting and upgrades is set forth in the contract,** which also specifies the functions (e.g., laboratory, billing, scheduling) with which the EHR will interface.		
3. **System implementation specifications are stated,** including vendor services and resources to be provided and expected number of hours required.		
4. **Vendor-provided training hours are specified,** as well as the cost for any additional hours needed after the initial training period has ended.		
5. **All support hours are to be documented by the vendor,** who is also responsible for itemizing associated costs.		
6. **Cyber insurance coverage is stipulated** to reduce loss exposure in the event of improper disclosure of protected information or other errors involving electronic transmission of patient data.		
7. **Bilateral and hold harmless termination clauses are included,** as well as the required notice period.		

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