

# Restrictions and Obligations Post-Termination

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## **Why do certain aspects of a managed care agreement continue even after termination?**

Restrictions and obligations that survive termination serve various purposes. Many protect the business interests of the managed care organization (MCO). Such clauses may provide for confidentiality of proprietary information or the nonsolicitation of MCO enrollees treated by the contracting physician. Other restrictions and obligations are designed to protect the best interests of patients or enrollees of managed care plans. These clauses may contain provisions governing the confidentiality of medical records or may ensure some continuity of care despite termination of a particular physician from a managed care plan. Some of these restrictions are commercially reasonable. Others are not.

## **Why are continuing obligations to managed care enrollees included?**

Physicians should keep a careful eye out for provisions obligating them to continue to provide care to managed care plan enrollees post-termination of the contract. Medical ethics and state laws prohibit physicians from abandoning patients in the middle of a course of treatment. However, that has little to do with the managed care contract. Using that ethical and legal obligation as the basis for their continuing restrictions, some contracts include clauses such as: “this Agreement will continue in effect with respect to enrollees existing prior to the MCO’s receipt of notice of termination by the physician until the anniversary date of the MCO’s contract with the enrollee’s subscriber group or for

one (1) year, whichever is earlier, unless otherwise agreed to by the MCO.” With this type of provision, physicians are potentially obligated to provide care for up to an entire year, whether or not the enrollees are currently under a course of treatment. Moreover, such managed care contracts often do not address how, or if, the physician will be compensated for such services.

This obligation is even more problematic where the MCO’s financial condition is unstable or where the MCO has filed bankruptcy. Although the physician may be obligated to continue to provide care to enrollees of the insolvent MCO for a certain amount of time, payment to the physician for services rendered is uncertain at best.

## **Do some of these restrictions restrict physicians from communicating with patients?**

Many contracts provide for the MCO (often alone and sometimes in conjunction with the physician) to notify enrollees when their physician is no longer a participating physician under a plan. Moreover, nonsolicitation clauses often restrict physicians from advising patients of their options to switch plans in order to remain with their current physician. Such restrictions function as a “gag” clause, effectively prohibiting a physician from communicating on one of the most fundamental components of the patient/physician relationship—its possible termination.

Some contracts require the physician to give immediate notice to patients/enrollees that the

physician is no longer a participating MCO physician. Contracts may include financial penalties if the patient is not informed and he or she incurs costs for seeing the physician out-of-network. Some also require physicians to refer patients/enrollees to another participating MCO physician.

### **What are the common restrictions on confidentiality?**

Most managed care contracts contain provisions that provide for confidentiality of proprietary information that typically survives termination. Proprietary information of the MCO or payer, such as mailing lists, enrollee lists, employer lists, payment rates and procedures, utilization review procedures, physician contract terms, and other documents concerning the MCO's systems and operations, is deemed the exclusive property of the MCO or payer. The physician must maintain the confidentiality of this information and not improperly disclose it to third parties. The physician may even be required to return any copies of proprietary information in the physician's possession at termination.

Similarly, most managed care contracts contain provisions addressing the confidentiality of medical records that survive termination. Typically, these records are to be maintained and treated as confidential as required by state and federal laws. The MCO is given the authority to access or obtain copies of these records from the physician with a written release from the patient. The physician is required to make records available to the MCO for legitimate purposes such as audits, medical necessity determinations, and utilization review. Many contracts provide that the provision requiring access to data and

information survives the termination of the contract either indefinitely or for a period of years specified in the contract.

### **How does the AMA Model Managed Care Contract address restrictions or obligations that continue after termination?**

Section 8.6 of the AMA Model Managed Care Contract outlines clearly the effect of termination. It provides that as of the effective date of termination, the Agreement is no longer in force and that each party is discharged from all rights, duties, and obligations under the Agreement. However, Section 8.6 also explicitly states that the obligations of the parties under the sections governing Compensation, Confidentiality and Records, and Dispute Resolution survive the termination of the Agreement.

For example, the MCO remains liable for covered services and retains the obligation to pay the physician for any covered services rendered by the physician to enrollees who the physician is obligated to continue treating by law until the treatment for an episode of illness is completed. The payment for such services rendered after termination must be made according to the fee schedule for that plan attached to the contract, or if no schedule is attached, according to the billed charges of the physician. Under the AMA Model Managed Care Contract, the MCO also must maintain confidentiality of medical records after the termination of the contract, and the physician must maintain the confidentiality of any financial, utilization, or compensation information obtained during the life of the contract.