

Joint Negotiations Model Law Suggested Provisions

Findings, declarations relative to joint negotiations by dentists with carriers

(ADA note: the ‘Findings’ include verbiage relative to physicians. This can be edited appropriately depending upon the scope of the proposed law. The points below are copied directly from the New Jersey law version on 3/11/2016 [52:17B-196 thru 52:17B-209] and are similar to the Alaska law version on 3/11/2016 [23.50.010 thru 23.50.099])

- Active, robust and fully competitive markets for health care and dental services provide the best opportunity for the residents of this State to receive high-quality health care and dental services at an appropriate cost;
- A substantial amount of health care and dental services in this State is purchased for the benefit of patients by health and dental insurance carriers engaged in the financing of health care and dental services or is otherwise delivered subject to the terms of agreements between carriers and physicians and dentists;
- Carriers are able to control the flow of patients to physicians and dentists through compelling financial incentives for patients in their health and dental benefits plans to utilize only the services of physicians and dentists with whom the carriers have contracted;
- Carriers also control the health care and dental services rendered to patients through utilization management and other managed care tools and associated coverage and payment policies;
- Carriers are often able to virtually dictate the terms of the contracts that they offer physicians and dentists and commonly offer these contracts on a take-it-or-leave-it basis;
- The power of carriers to unilaterally impose provider contract terms jeopardizes the ability of physicians and dentists to deliver the superior quality health care and dental services traditionally available in this State;
- Physicians and dentists do not have sufficient market power to reject unfair provider contract terms offered by carriers that impede their ability to deliver medically appropriate care without undue delay or difficulties;
- Inadequate reimbursement and other unfair payment terms offered by carriers adversely affect the quality of patient care and access to care by reducing the resources that physicians and dentists can devote to patient care and decreasing the time that physicians and dentists are able to spend with their patients;
- Inequitable reimbursement and other unfair payment terms also endanger the health care infrastructure and medical progress by diverting capital needed for reinvestment in the health care delivery system, curtailing the purchase of state-of-the-art technology, the pursuit of medical research, and expansion of medical services, all to the detriment of the residents of this State;
- The inevitable collateral reduction and migration of the health care work force will also have negative consequences for the economy of this State;
- Empowering independent physicians and dentists to jointly negotiate with carriers as provided in this act will help restore the competitive balance and improve competition in the markets for health care and dental services in this State, thereby providing benefits for consumers, physicians and dentists and less dominant carriers;
- This act is necessary and proper, and constitutes an appropriate exercise of the authority of this State to regulate the business of insurance and the delivery of health care and dental services;
- The pro-competitive and other benefits of the joint negotiations and related joint activity authorized by this act, including, but not limited to, restoring the competitive balance in the market for health care services, protecting access to quality patient care, promoting the health care infrastructure and medical progress, and improving communications, outweigh any potential anti-competitive effects of this act; and
- It is the intention of the Legislature to authorize independent physicians and dentists to jointly negotiate with carriers and to qualify such joint negotiations and related joint activities for the State-action exemption to the federal antitrust laws through the articulated State policy and active supervision provided under this act.

Summary of Pertinent Sections

§ ONE: Definitions relative to joint negotiations

- Most states will wish to publish definitions that relate to their statutory construct.
 - Drawn from the New Jersey law are the following examples:
 1. "Joint negotiation representative" means a representative selected by two or more independent physicians or dentists to engage in joint negotiations with a carrier on their behalf.
 2. "Carrier" (enter common state definition)
 3. "Covered person" (enter common state definition)
 4. "Covered service" means a health care or dental service provided to a covered person under a health benefits or dental plan for which the carrier is obligated to pay benefits or provide services.
 5. "Dental plan" means a benefits plan, which pays or provides dental expense benefits for covered services and is delivered or issued for delivery in this State by or through a dental carrier.
 6. "Health benefits plan" (enter common state definition-be certain to include dental care coverage only plans)
 7. Otherwise common definitions.

§ TWO: Joint negotiations regarding non-fee related matters

- Two or more independent physicians or dentists who are practicing in the service area of a carrier may jointly negotiate with a carrier and engage in related joint activity regarding non-fee-related matters which may affect patient care, including, but not limited to, any of the following
 - Provisions of existing New Jersey law include items below that may be considered:
 1. The definition of medical necessity and other conditions of coverage;
 2. Utilization management criteria and procedures;
 3. Clinical practice guidelines;
 4. Preventive care and other medical management policies;
 5. Patient referral standards and procedures, including, but not limited to, those applicable to out-of-network referrals;
 6. Drug formularies and standards and procedures for prescribing off-formulary drugs;
 7. Quality assurance programs;
 8. Respective physician or dentist and carrier liability for the treatment or lack of treatment of covered persons;
 9. The methods and timing of payments;
 10. Other administrative procedures, including, but not limited to, eligibility verification systems and claim documentation requirements for covered persons;
 11. Credentialing standards and procedures for the selection, retention and termination of participating physicians or dentists;
 12. Mechanisms for resolving disputes between the carrier and physicians or dentists, including, but not limited to, the appeals process for utilization management and credentialing determinations;
 13. The health benefits or dental plans sold or administered by the carrier in which the physicians or dentists are required to participate;
 14. The formulation and application of reimbursement methodology;
 15. The terms and conditions of physician or dentist contracts, including, but not limited to, all products clauses, and the duration and renewal provisions of the contract; and
 16. The inclusion or alteration of a contractual term or condition, except when the inclusion or alteration is required by a federal or State regulation concerning that term or condition; however, the restriction shall not limit a physician's or dentist's rights to jointly petition the federal or State government, as applicable, to change the regulation.

§ THREE: Joint negotiations regarding fees and fee related matters

- Allow for a finding that a carrier has substantial market power in its service area, and that any of the terms or conditions of the contract with the carrier pose an actual or potential threat to the quality and availability of patient care among covered persons;
- Upon that finding, allow two or more independent physicians or dentists who are practicing in the service area of a carrier to jointly negotiate with the carrier and engage in related joint activity, as provided in the law regarding fees and fee-related matters, including, but not limited to, any of the following: (i.e. amount of payment, amount of discount and procedure code or other description of dental service covered by a payment and the appropriate grouping of the procedure codes, etc.)
- The (*proper agencies of the state involved in banking and insurance interests*), shall have the authority to collect and investigate such information as it reasonably believes is necessary to determine, on an annual basis:
 1. The average number of covered lives and geographical distribution of covered lives per quarter per county for every carrier in the State; and
 2. The impact of the provisions of this section on average physician or dentist fees in the State.

§ FOUR: Details on exercising joint negotiation rights

- The providers may communicate with each other concerning any contractual term or condition to be negotiated with the carrier;
- The providers may communicate with the joint negotiation representative authorized to negotiate on their behalf with the carrier concerning any contractual term or condition;
- The joint negotiation representative shall be the sole party authorized to negotiate with the carrier on behalf of the providers as a group;
- The providers may, at the option of each physician or dentist, agree to be bound by the terms and conditions negotiated by the joint negotiation representative; and
- When communicating or negotiating with a joint negotiation representative, a carrier may offer different contractual terms or conditions to, or may contract with, individual independent providers.

§ FIVE: Inapplicability of act

- This law does not apply to health benefits or dental plans providing covered services exclusively or primarily to persons who are eligible for Medicaid or SCHIP.

§SIX: Requirements to act as joint negotiation representative

- Set out procedures (and fee) a person or entity proposing to act as a joint negotiation representative must complete before engaging in negotiations. Must submit to the Attorney General a petition which identifies specified information including subject matter of the negotiations and the anticipated effect the negotiations may have on the quality and availability of health or dental care.
- Once a negotiated agreement on the contractual terms is reached, the joint negotiation representative must submit a copy of the proposed contract and any plan of action for implementing the contract terms to the Attorney General for approval.
- Provide for timelines on communications to decline or terminate negotiations.

§ SEVEN: Powers, duties of Attorney General

- Set up Attorney General participation parameters.
 - Examples of existing laws:
- 1. The Attorney General has up to 30 days to act on the petition or proposed contract, as applicable. Failure to do so provides avenue of relief via a court of competent jurisdiction. If the Attorney General disapproves the petition or the proposed contract, law requires the Attorney General to communicate to the negotiator any deficiencies and specific remedial measures for the deficiencies.

2. Negotiations cannot be launched without written Attorney General approval. A proposed contract between two or more independent physicians or dentists and a carrier cannot be implemented unless the Attorney General has approved the contract.
3. The Attorney General shall approve a petition to negotiate or a proposed contract if it is found that the benefits, which are likely to result from the joint negotiations, outweigh the disadvantages.
4. Require the Attorney General to consider physician or dentist distribution by specialty and its effect on competition in the geographic service area of the carrier.
5. Attorney General approval is effective for all subsequent negotiations between the joint negotiation representative and the identified carrier.
6. The Attorney General must notify the carrier of the petition to negotiate and provide the carrier with the opportunity to reply.

§ EIGHT: Application for hearing

- Model bill allows that within 30 days after Attorney General notice of disapproval of a petition to negotiate by joint negotiation representative, the petitioners may make a written application to the Attorney General for a hearing.
- Hearing must be granted.
- Model law provides for how the hearing is to transpire, referencing standard procedures under the state law for hearing processes.

§ NINE: Confidentiality of information

- All information is treated confidentially and is deemed proprietary. Require written consent of the petitioners to whom the information pertains before any publication by the Attorney General or any other person.

§ TEN: Good faith negotiation required

- Require both parties to negotiate in good faith regarding the terms and conditions of physician or dentist contracts.
- (CT H6431-2013) No managed care organization shall refuse to negotiate in good faith with parties to a joint negotiation authorized by the Attorney General. Any managed care organization that violates this section shall be subject to a civil penalty of not more than twenty-five thousand dollars per day for each violation. The Attorney General may institute proceedings to enforce the provisions of this section.

§ ELEVEN: Construction of act

- Model provides thoughts on what bill/law cannot be construed to do or achieve.
- As an example:
 - The bill/law:
 1. Does not permit a coordinated cessation reduction or limitation of the health care or dental services.
 2. Does not permit two or more physicians or dentists to meet or communicate in order to jointly negotiate a requirement that at least one of the physicians or dentists, as a condition of participation with a carrier, be allowed to participate in all of the products offered by the carrier.
 3. Does not permit two or more physicians or dentists to jointly negotiate with a carrier to exclude, limit or otherwise restrict a non-physician or non-dentist health care provider from participating in the carrier's health benefits or dental plan based substantially on the fact that the health care provider is not a physician or dentist, unless that exclusion, limitation or restriction is otherwise permitted by law.
 4. May not be construed to affect governmental approval of, or otherwise restrict activity by, physicians or dentists that is not prohibited under federal antitrust law; or require approval of physician or dentist contract terms to the extent that the terms are exempt from state regulation under section 514(a) of the "Employee Retirement Income Security Act of 1974," Pub.L.93-406 (29 U.S.C. §1144(a)).

- The law requires the joint negotiation representative for providers to notify the physicians or dentists of the provisions of this law and advise them as to their potential for legal action against physicians or dentists who violate federal antitrust law.

§ TWELVE: Optional Sunset Related Language

- The Attorney General, in consultation with pertinent state offices, must report to the Governor and the Legislature no later than four years after the effective date of this act on its implementation.
- The report shall include an assessment of the effect the joint negotiations have had in restoring the competitive balance in the market for health care or dental services and in protecting access to quality patient care, an assessment of the impact this act has had on health insurance premiums in the state.