

ALERT

Contracting With PBMs: Critical High-Value Issues to Consider

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Crafting a new pharmacy benefit manager (PBM) agreement may feel like an uphill battle when you do not have the time and resources to develop a highly customized contract. While it is often more beneficial to a health plan to curate its own PBM agreement, you might find it necessary to start from the selected PBM's template contract as your base, particularly if you are changing PBMs (as your existing PBM agreement might be proprietary/confidential and/or may be operationally/technologically incompatible with your new PBM).

This sometimes less-than-ideal contracting approach can nonetheless prove to be an effective and efficient starting point. But it can also leave health plans at a disadvantage if they do not appreciate what the PBM's template contract terms do – and, more importantly, do not – fully address. The PBM's template contract is designed to shape the PBM's contractual and financial obligations in a manner that best serves the PBM. As a result, you are likely to discover that many issues of "high value" to a health plan (both operationally and financially) are either not addressed in the PBM's template contract, or are addressed in a manner that fails to adequately serve the health plan's functional, regulatory, or competitive needs.

Gaining leverage over these high-value issues is entirely possible, but it requires sufficient industry knowledge (secured from your PBM legal counsel and consultant) to ensure that these issues are well captured in your new PBM agreement. We detail below several high-value issues to consider when "reconstructing" a PBM agreement from your PBM's template contract.

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Practice Areas

Health Care
Pharmacy Benefit Manager (PBM)
Contracting

1. Your PBM as Your Competitor

It is not uncommon for the PBM selected for your commercial pharmacy program to also show up in your market as your competitor. Your PBM could, for example:

- Be contracted with a coalition;
- Bid in conjunction with its (health plan) affiliate; or
- Bid independently for an account's/prospect's stand-alone pharmacy program.

In whatever manner your PBM might be showing up in your market, there is a strong likelihood the PBM's template contract does not address any concerns you might have when your PBM becomes your direct competitor (e.g., ensuring that your pricing terms and strategic business direction are not shared with/used by the PBM's sales team). If the PBM's template contract addresses this issue at all, it likely will be a full-throated declaration that the PBM is not precluded from serving as a PBM to other entities. While limiting contracting opportunities for your PBM can be legally tricky (particularly if you are the market leader in your jurisdiction), there are effective tools you might want to consider. Seeking guidance from experienced PBM legal counsel to effectively address this issue on the front end will save you from innumerable issues on the back end should your PBM become your competitor.

2. Segmenting Your Pharmacy Program (Modular Contracting)

Many health plans are moving toward a new way of structuring their pharmacy programs, by segmenting or subdividing them into various operational components. This segmentation (or modular approach) can take many forms, including for example:

- Having different PBM contractors for each functional component of your pharmacy program (e.g., claims, retail, mail/specialty, rebates);
- Having the same PBM for most of the traditional pharmacy functions, but separate PBMs for claims payment and benefit administration or rebate contracting, for example; or
- Having different PBM contractors for each line of business (e.g., retail, mail, and specialty).

Choosing to segment your pharmacy program is a critical determination that is best made at the outset of your contracting journey, so that all pricing and functional requirements reflect the intended segmentation throughout the procurement to the final contract. However, it might be that this novel and intricate contracting approach is still under consideration by your health plan, or is not the best structure for your pharmacy program at the beginning of the new contract term. If there is uncertainty about whether to segment your pharmacy program, you still might want to seek guidance on how to establish and protect your contractual right to incrementally move to a modular approach (either through further outsourcing with another vendor, or insourcing certain services). Experienced PBM legal counsel can assist with tightly detailing and incorporating specific contract terms to ensure your pharmacy program can evolve during the contract term, and to set parameters on the impact to pricing should this incremental segmentation occur.

3. Defined Terms

Defined terms, as underrated as they may be, are one of the most important and costly issues to consider when contracting with your PBM, because defined terms are what drive important operational and financial aspects of your contract. It is imperative that you and your PBM appreciate the import of defined terms as they are used throughout the PBM agreement, particularly if certain negotiated definitions have meanings fundamentally different from those in the PBM's template contract. Any substantive definitional difference can profoundly change (positively or negatively) existing contract language. Thus, it is imperative that you and your PBM are on the same page in terms of what each defined term means in the PBM template contract, and any changes to these terms that will appear in the new PBM agreement.

Before making any changes to the PBM template contract, you should first read the contract from beginning to end, and make sure each defined term as used aligns with your understanding and your definitional goals. For example:

- How is "rebate" defined? Does the PBM's definition of rebates include all channels of revenue flowing from the manufacturer based on the health plan's book of business (e.g., manufacturer administrative fees, pharmacy fees, clinical fees, data fees, etc.)?
- How is "subcontractor" defined? Does the PBM's definition of subcontractor include its affiliate (including an affiliate that is serving as a rebate aggregator/GPO)?
- How does the contract define/distinguish between your data versus the PBM's data? Does the definition make it clear what data the PBM owns under the PBM's template contract? If the contract with this PBM were to end, does the definition make it clear what data the health plan would be able to retain and transfer to a new PBM?

Having a different understanding than your PBM of high-value defined terms (i.e., those that can have a financial or significant operational impact) can be a costly misunderstanding. Experienced PBM legal counsel can identify the high-value terms and ensure their definitions and usage are consistent with your goals.

4. Financial Terms

While financial terms will certainly be included in the PBM's template contract, there is a strong likelihood that these financial terms will not be isolated in one location in the contract but will cascade throughout the PBM's template contract, often not in plain sight. It is not uncommon for terms with financial implications to appear in seemingly innocuous places such as the "governing law" section, the listing of required reports, or even within technology or security requirements. Thus, it is imperative that you scour the PBM's template contract to identify all terms that have financial implications. Consider, for example:

- What does the PBM's template contract say about your administrative costs? What services are included in your base administrative fees versus any optional/additional fees? Are there services that are priced as optional that were intended to be core, base administrative services?

- What components of your pricing must be subject to financial guarantees? Does the invoicing process align with how your health plan operates?
- What type of events allow the PBM to change its pricing (i.e., exception events, reservation of rights, or equitable adjustments)? Is there a process for how these events are addressed in the PBM's template contract? Is there a requirement for the PBM to demonstrate a minimal financial impact (materiality standard) before a price adjustment will be permitted?

The high-value issues identified above are only some of the opportunities you will have to leverage your knowledge and contracting position when reconstructing a PBM's template contract. Combining a health plan's program/operational skills and subject matter expertise with seasoned PBM legal counsel can provide a potent team that can position a health plan for contracting success, even when starting with a PBM's template contract.

For more strategic opportunities in developing a PBM agreement, Wiley's PBM Contracting team of experienced attorneys and advisors is available to assist.