

Overpayments (and underpayments)

If a payor mistakenly overpays a claim, for example accidentally key-stroking \$1000 when the fee schedule says \$100, then it is entitled to recoup the overpayment. If we expect them to play fair with us then we have to play fair with them.

The Issue: The above recovery being obvious, many payors will take it a step further with language putting the physician or facility at financial risk by requiring refunding of **any** monies the payor deems were mistakenly paid. And typically you'll also agree that offsetting monies can be withheld from future amounts owed. Here is an example from an actual agreement.

Overpayments. *Provider shall refund to <name of payor> any excess payment made by a Payor to Provider if Provider is for any reason overpaid for health care services or supplies. <Name of payor> may, at its option, deduct the excess payment from other amounts payable, and Provider will be notified of any such deduction as specified in the Administrative Guidelines.*

I worry that the words “...any excess payment made by a Payor...” and “...for any reason...” or similar are open-ended and create a potential financial trap. For example, a payor could use this provision to take back monies or offset against future payments when making retroactive eligibility denials (**See on page 83: Retroactivity**), or for any other reason the payor unilaterally decides a payment was “excess.”

Though typically a payor must provide a reason for any deduction there may be little or no due process. Beyond announcing that money is being taken back per some specified paragraph in the agreement there may be nothing that requires the payor to **justify** a claim of overpayment. And unless stipulated in the agreement or by law there may be no time limit as to how far back in claims payment history the payor can go to recover monies it declares have been overpaid. Rather, the payor declares and the practice or facility pays.

Possible Solutions: Medicare and Medicaid aside, payors should not have an essentially unrestrained ability to take back/offset **alleged** overpayments. Here is some equitable language that, with attorney review and considering your state's laws or regulations, might be used as a model for presentation to a payor. The idea is to allow both sides a means to assert improper payment and to then to have protocols to decide if an allegation holds water. This is a fair and balanced way to resolve assertions of over- or underpayment.

OVERPAYMENTS AND UNDERPAYMENTS

- a) Request for Adjustment of Payment.** *Either party shall be entitled to request a payment adjustment if, within <insert number> days from the date of payment, it notifies the other party in writing of the overpayment or underpayment and provides documentation substantiating such claim.*
- b) Payment Disputes.** *The parties shall work cooperatively and in good faith to resolve payment issues on an informal basis within <insert number> days of the first notification of a request for an adjustment of payment, pursuant to paragraph (a) above. If this is unsuccessful, then any disputes concerning claims of overpayment or underpayment shall be resolved in accordance with <name of plan>'s Grievance and Appeal Process referenced in the <name of plan> Administrative Guidelines.*
- c) Payments Final.** *Except for those payments that have been submitted to the Grievance and Appeals Process in accordance with the foregoing, all payments shall be final.*
- d) Paying Adjustments.** *If the parties determine that <name of plan> or another payor has underpaid physician, <name of plan> or another payor shall pay the underpaid amount to physician within <insert number> calendar days of said determination. If the parties determine that <name of plan> or another payor has overpaid physician, physician shall reimburse <name of plan> or another payor for overpayment within <insert same number> calendar days of said determination.*
- e) No Offsets or Deduction Without Permission.** *In no event shall <name of plan> or another payor offset overpayments against, or deduct overpayments from, any other payments it owes physician unless physician expressly permits <name of plan> or another payor to do so.*

I suggest keeping the time frame referenced in paragraph (a) as short as possible, preferably 30-60 days, and certainly not more than 120 days.

Are payors likely to say “No” to such language and give all sorts of reasons why they reserve the right to take back the money you worked so hard to earn? Yes, of course. And if you question the one-sidedness of the recoupment language and ask why a payor feels it is entitled to take back monies on an allegation of “excess” payment (perhaps without any requirement to substantiate), you’re probably in for a hypocritical tap-dance.



Simply put, it just seems unreasonable that any payor should be entitled to take back money on nothing more than a statement that it's going to do so. A payor should be entitled to recovery **only** if it can substantiate the claim of overpayment, and **only** if done within a

reasonable amount of time after the payment. A payor should not have unrestrained rights to take money going back to the start date of your agreement.

From a purely business perspective the sample language I offer on the previous page is fair and balanced for both sides. If a payor will not agree to something substantially similar then it is saying in so many words, *"We reserve the right to mess with your financial well-being anytime we want, and you just have to take it."*

Caveat! Under conditions stated in applicable law or regulations a payor could be entitled to recover certain payments made in error. But likely it is not entitled to unrestrained recoveries. An attorney can explain how your state law may come into play here.