

Jails and holding facilities: contracting for healthcare services in challenging times

By Carlene Brown

Providing for healthcare within members' jails and holding facilities is a difficult task as a significant number of incarcerated individuals suffer from addiction issues, mental health disorders and compromised health. All correctional facilities have a non-delegable duty to provide for the healthcare needs of those who are incarcerated. Failure to do so can result in significant exposure to allegations of civil rights violations and negligence claims. Recent losses experienced by WCIA members have resulted in multi-million-dollar settlements against the members along with the contracted healthcare service provider.

For those members who already contract for correctional health services or those who are considering contracting them, care should be taken to ensure the contract has certain key elements. The contract should include, but not be limited to, the following:

Term of Contract: The contract should have language that will assist the member with tracking the contract and updating the contract when necessary. For example, the language in the contract might state: *"The member will review the contract every 2 years and reserves the right to amend the insurance requirements based on the risks presented at the time the document is being revised."*

Responsibilities of Each Party: The contract needs to clearly outline the responsibilities of the parties, including but not limited to, what services the healthcare providers will provide, details of the services, responsibility for the cost of healthcare services, and responsibility for any transportation needs.

Insurance Requirements: Due to the risks associated with this service, especially in custody deaths, it is important to require the service provider to carry applicable types of coverage including sufficient insurance limits. WCIA recognizes that there is currently a limited market for services and it may be difficult to obtain adequate or high professional liability limits from available providers. Based upon a recent verdict against a non-member that was recently reported, WCIA should be recommending members ask for limits well over \$10 million per occurrence but we are cognizant that providers do not have these types of limits. WCIA is seeing providers with limits ranging from \$3 million to \$5 million per occurrence, with aggregates from \$5 million to \$10 million, often times with high self-insured retentions. Our

recommendation is that members at least attempt to secure from a healthcare service provider a minimum of \$5 million per occurrence, \$10 million aggregate in professional liability insurance, if not more. Members can ask the provider to issue a separate policy specific to the contract, essentially a project or contract specific policy similar to what you might see with a construction contract, designed to ward off the problem of an aggregate having been eroded on other claims.

Be mindful of healthcare service providers with high self-insured retention (SIR) limits. Similar to a deductible, a service provider may be self-insured for a large amount before their professional liability insurance pays out on a claim. We have seen service contractors with multi-million dollar self-insured retentions (“deductibles”) that are on financially shaky ground. In the event the service provider cannot come up with the SIR, the insurance carrier may not be obligated to pay on a loss until the SIR is exhausted. You may want to inquire as to the size of any SIR and consider the financial wherewithal of the service provider before finalizing the agreement.

There should also be a requirement for workers’ compensation coverage as mandated by the state of Washington. If the healthcare service provider will be transporting prisoners, include a requirement for the service provider to carry auto liability coverage with minimum limits of \$1 million combined single limit. Finally, the service provider should be required to add the member as an additional insured onto the liability insurance policies where possible; this can sometimes be a difficult request for professional liability policies and it may not happen; it never hurts to ask when negotiating.

Indemnification: Members need to ensure indemnification language is not one-sided, in favor of the healthcare professionals. While a non-mutual indemnification clause in favor of the member is preferred, if a member is only able to negotiate or secure a mutual indemnification clause, both parties to the contract should be required to indemnify the other party from and against any, and all claims, costs, judgments, or damages, including attorney fees, arising out of or resulting from the negligent acts or omissions of each party. The indemnification should also state that it includes a waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of the indemnification. It is also required to note that this waiver has been mutually negotiated by the parties.

In addition, members should also make sure that these healthcare providers’ insurance companies meet the current A.M. Best financial stability rating of not less than A: VII. A.M. Best ratings can be found on the A.M. Best website at www.AMBest.com.

The ADM.21 guideline, Insurance and Indemnity Requirements for Contracts, provides sample indemnification language as well as recommendations on the types of insurance and amounts of limits for a variety of contracts. The ADM. 21 guideline is located in the Liability Resource Manual on the WCIA website at www.wciapool.org. As with any contract, the members’ attorney should always review the agreement prior to it being signed. Your WCIA Risk Management Representative is also available to review the agreement from an insurance and risk management perspective.