

Healthcare Contracts: Obligations and Responsibilities

Addressing likely areas of conflict up front can benefit both textile service companies and healthcare providers

By Steven John Fellman

In recent years, the market for textile services in the healthcare industry has grown dramatically. TRSA members have expanded their healthcare services, and whether you are providing NOG or rental services, this market is one that forecasters predict will continue to expand. More acute-care hospitals and nursing homes are converting in-house laundries to commercial laundry services. The explosion in the number of outpatient clinics has created further demand for textile services.

Textile services companies that enter this market must recognize that a good contract is required in order to protect their investment. When preparing a contract for a client in the healthcare industry, here are some basic points to consider.

1. MEETING OF THE MINDS

Every contract is an agreement between two parties, wherein each side agrees to accept certain responsibilities and in turn obtain certain benefits. Basic contract law describes a contract as a “meeting of the minds.” The document that sets forth this meeting of the minds is the contract. The contract explains what each party agrees to do and what benefits each party will provide to the other. Contracts used to be simple one-page documents. Today a contract with a large acute-care hospital may be many pages in length. However, regardless of the number of pages, the complexity of the

terminology, the amount of dollars or volume of business involved, unless both parties have the same understanding of what the contract means, there will be a problem for both parties.

At one time, there was a philosophy that by using confusing language, misleading terminology and other deceptive means, a party could get an advantage by getting a customer to sign a contract that was one-sided. The perpetrator of such a scheme then thought that he could

profit from this situation. However, marketplace realities have shown that such a strategy won't work. Eventually, the other party learns that he has been deceived and will do everything in his power not to perform his obligations. Litigation may result. The end is a lose-lose proposition.

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Your best contract is one where there is a true meeting of the minds. Both you and your customer have the same understanding of the contract terms and what obligations and responsibilities each of you have accepted. With that in mind, let's look at specific contract clauses.

2. PRICE

There are many ways to price textile services. You can price by the piece, or you can price by the pound. If you price by the pound, you can price by clean, or soiled weight. You can count pieces, or you can price by piece based



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on an agreed-upon understanding of how the number of pieces processed will be computed. Whatever method you use, make sure that your customer understands exactly how the price of the services is going to be computed before you start billing the account.

3. EVERGREEN PROVISIONS

Some states permit “Evergreen” clauses contracts. Under an Evergreen clause, at the end of the contract term, whether it’s one, three, five years, or more, the contract automatically renews unless either party gives notice of intent not to renew within a time period specified in the contract. For example, if the customer doesn’t provide the service provider with written notice that the customer doesn’t intend to renew within 60 or 90 days from the anniversary date of the contract, the contract is automatically renewed for another term that may be the same length as the original

term. This type of contract provision is called an Evergreen clause. In some states, such as New York, the use of Evergreen clauses has been held to be against public policy. That means such clauses aren’t enforceable. In other states, they are enforceable. Many acute-care hospitals won’t accept Evergreen clauses, but many smaller accounts will accept them. You should evaluate whether or not you want Evergreen clauses in your contracts.

4. LOST OR DAMAGED GOODS

Your contract should address the question of who’s responsible for lost or damaged goods. If the customer is responsible, exactly what responsibility does the customer have? If the customer gets 100 sheets and returns 95 sheets, how much does the customer owe the textile service company for the missing sheets? What’s the formula for setting the value of lost goods? If the textile services company is going

to hold the customer responsible for paying for lost merchandise, the contract should establish the terms by which the parties can compute the actual amount owed. The same holds true for damaged merchandise. Who’s responsible for damaged merchandise and what exactly is that responsibility? If the customer returns a sheet with a small tear, can the textile services company repair the tear and keep the sheet in service? What about a sheet that is torn almost in half? Who is responsible and what is each party’s responsibility? The contract should address these issues.

5. BUY BACK CLAUSES

Some contracts include provisions that require customers canceling a contract to buy back the textiles provided by the textile services company based on a buy back schedule provided in the contract. As an example, the contract might provide that if for

any reason the customer decides to cancel the contract prior to the expiration date, the customer is obligated to purchase all the textiles purchased by the textile services company for use in the contract based on a price schedule. The price schedule might include X% of the actual cost of the goods during the first year of the contract, Y% of the actual cost of the goods during the second year of the contract and Z% of the actual cost of the goods during the third year of the contract. The buy back provision should also take into account the time the goods were actually in service. As an example, if goods were placed in service in the first year of the contract and the contract was canceled during the third year, the goods would have a certain value. If the goods had been placed in service during the second year of the contract and the contract was canceled during the third year, the goods would have a greater value. Some customers will object to the use of buy back clauses; others will accept them. Whether your contract ends up with a buy back clause is a matter for you to determine as a business decision. Remember, when you set up a major hospital account, you need to make a huge investment in linens. Have you protected that investment?

6. LIQUIDATED DAMAGES

Most states will permit the use of a liquidated damages clause in a contract. Under a liquidated damages clause, the parties agree that in the event that the customer breaches the contract, the customer will be liable to pay the textile services supplier \$X in the form of liquidated damages and not a penalty. Liquidated damages must be computed with some significant tie-in to an estimate of the

economic loss that will be incurred. Obviously, a textile services company has an investment in inventory when it sets up an account. If that inventory cannot be used elsewhere, when a contract is breached, the inventory investment is lost. In the same way, the company has other expenses incurred in establishing an account, including marketing, training route people and service representatives, and providing a certain amount of plant capacity (in the case of large contracts), that will not be filled with other business. All of these issues can be factored into determining liquidated damages. Courts are not fond of liquidated-damages clauses and many

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courts won't enforce such clauses, if they believe they are unreasonable. A liquidated damages clause that provides that the textile services company damages are equal to the full revenue that would have been generated during the full term of the contract probably won't be enforced if the customer terminates the contract after six months of a 5-year contract. The court could find the amount of damages unreasonable. Liquidated damage clauses are enforced based on a judge's interpretations of state law. Each textile services company should examine the law in each of the states in which it operates in order to determine an effective liquidated damages clause formula, if the company elects to include such a clause in its contract.

7. SERVICE PROBLEMS

When a customer wants to get out of a contract, the common complaint is that there are service problems. Either deliveries are not made on time or deliveries are incomplete. Textiles are not properly washed. The textile service company does not provide adequate inventory. The list is endless. In many instances, the real reason is simple. The customer believes that it can obtain a lower price elsewhere and is using the "service problem" as an excuse to claim that the textile services company has breached the contract. Many textile service contracts have a provision that require in the event that the customer believes that the textile services company has breached the contract or is providing inadequate service, the customer is required to notify the textile services company of the problem and give the textile services company 30 days to respond and/or fix the problem. If your contract has such a provision, your customer will normally be required to provide you with an opportunity to address any problems before claiming breach and switching to another supplier. If the customer fails to follow such a provision, the customer may have been in breach regardless of the quality or service problem that exists. These clauses can help prevent a customer from going to another upplier without cause.

8. OSHA COMPLIANCE

Healthcare workers in hospitals, nursing homes, outpatient clinics and other healthcare facilities who deal with certain types of situations where they may be exposed to blood-borne pathogens must meet OSHA's bloodborne pathogen regulations. Your contract should specify that it's the healthcare institution's responsibil-

ity to establish a program for ensuring that the healthcare institution's employees meet the requirements of the OSHA bloodborne pathogen standards. The contract should state that unless specifically provided, the textile services company does not directly or indirectly warrant that any of the uniforms, or other textiles provided by the company, will meet any government requirements under the bloodborne pathogen standards.

9. SUCCESSORS AND ASSIGNS

The contract should have a provision that the parties agree that the contract will be binding not only on the parties themselves, but also on their successors and assigns. This means that if the customer is sold, in many cases, the entity buying the customer will have the obligation of accepting service under the contract. Similarly, if the textile services company decides to assign the contract to another textile services company, the customer will be obligated to accept service from the other textile services company. Such a provision is of great benefit to the textile services company.

10. ARBITRATION

There are pros and cons to arbitration clauses. Arbitrations are often informal, and a party can usually represent itself in arbitration. By contrast, if your customer is a corporation, many states require that corporations be represented in court by an attorney. Arbitrations generally are quicker than court proceedings. However, arbitrators usually split the baby down the middle, whereas judges are more likely to decide for one party or another. Some companies like arbitrations as the value of a quick resolution is greater than the value of a longer

proceeding with a "yes/no" type answer. Other companies argue that going to court often scares customers into complying with the terms of a contract. These companies claim that if they have a reputation for enforcing their contracts, customers are not inclined to breach. Every textile services company should consider an arbitration clause and discuss it with their counsel. Whatever decision you make should be an informed decision.

CONCLUSION

There are many other issues to consider with healthcare contracts. Processing red bag linens, dealing with sharps, special processing for certain soiled linen, all must be considered. Certain types of accounts, such as acute-care hospitals, and outpatient

surgical centers cannot operate without sufficient textiles. When you sign up to service such an account, you must recognize that if you don't produce the services required, these accounts can't stay open. You're often providing a critical service. When you accept this responsibility, you must recognize the need to meet your obligations and service the account properly. However, you also must recognize that the account may try to take advantage of you. Your protection is an enforceable contract with specific terms that sets forth your responsibilities and the customer's obligations. TS

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