

Accountable Care Organizations: Preparing for New Payment Methodologies

Introduction

One of the features of the new Patient Protection and Affordable Care Act (Healthcare Reform Law) is the emphasis on developing Accountable Care Organizations or ACOs. Healthcare reform's key goals are to improve quality and lower costs by encouraging providers and suppliers to develop new integrated delivery models that utilize new reimbursement methodologies. One of the reforms being pushed is the Shared Savings Program, which allows qualified groups of providers and suppliers to work together to manage and coordinate care for Medicare beneficiaries through ACOs. An ACO may receive payments for shared savings if it meets certain requirements established by the Secretary of Health and Human Services. In addition, the Secretary is authorized to test whether ACOs are appropriate vehicles to improve the quality of care for Medicare beneficiaries and reduce unnecessary costs for the Medicare program. Commercial payors are also quickly jumping on board with the ACO concept.

The Healthcare Reform Law does not provide many details on the requirements applicable to ACOs but it does include guidance on the types of entities that can form ACOs and the conditions under which they receive shared savings payments. Further, the Secretary is required to promulgate regulations for ACOs and establish the Shared Savings Program no later than January 12, 2012. In an effort to address these legal concerns, the Federal Trade Commission, the Office of Inspector General of the Department of Health and Human Services, and the Centers for Medicare and Medicaid Services are conducting a workshop on October 5, 2010 at which some of the regulatory obstacles are expected to be discussed. At the conclusion of the

open forum, we will provide additional information on upcoming regulatory changes concerning ACOs on our Healthcare Reform Resource Center. Information about the upcoming workshop can be found at <http://www.cms.gov/center/physician.asp> and at 75 Federal Register 57039-57042 (September 17, 2010).

What is an ACO?

An ACO is an organization of health care providers and suppliers that agrees to be “accountable” for the quality, cost, and overall care of Medicare fee-for-service beneficiaries assigned to the ACO. There is no guidance at this point on exactly how ACOs are to be legally or operationally structured and many different models are being considered.

Beneficiaries will be “assigned” to an ACO based on the healthcare providers that are members of the ACO from which the beneficiaries receive the bulk of their primary care services. ACO assignments will not affect the beneficiary’s benefits or choice of physician. A beneficiary may continue to seek services from their physician or other providers of their choice, whether or not the physician or provider is part of an ACO.

Each ACO must:

enter into a three-year agreement to participate;

have a formal legal structure to receive and distribute shared savings payments;

maintain a sufficient number of primary care professionals;

establish a leadership and management structure that includes clinical and administrative systems;

and

adopt defined processes to

promote evidence-based medicine and patient engagement,

report on quality and cost measures, and

demonstrate that the ACO meets patient-centeredness criteria specified by the Secretary.

The Secretary must establish quality performance standards and gradually raise those standards and/or introduce new measures to improve quality of care. The Secretary is also required to establish a method to assign fee-for-service beneficiaries to ACOs.

Participants in ACOs will receive standard Medicare Part A and Part B payments and will be eligible to receive additional payments in the form of shared savings. To be eligible for shared savings, the ACO’s estimated average per capital Medicare expenditure for Medicare fee-for-service beneficiaries

must equal a specified percentage of a benchmark established by the Secretary based upon per beneficiary expenditures over the most recently available three years (the Secretary also has authority to develop alternative payment models, such as partial capitation models).

Regulatory Issues for ACOs

ACOs raise numerous legal and regulatory issues. The collaboration necessary for hospitals, physicians and other providers to integrate in a meaningful manner to achieve cost savings and facilitate progress toward consistent quality initiatives triggers numerous issues with existing laws such as the Anti-kickback Statute, Stark Law, antitrust laws, and the Civil Monetary Penalty Law. For example, the ACO structure would likely involve gainsharing arrangements, require competitors to share pricing and other competitive information, and could result in financial incentives to reduce or limit services – all of which would currently be subject to intense legal scrutiny.

Unfortunately, the Healthcare Reform Law does not create safe harbors or exceptions to address how ACOs will comply with these laws, although it does permit the Secretary to waive certain requirements to allow ACOs to operate. The process to obtain these waivers and other regulatory issues are expected to be addressed in the HHS regulations that establish the Shared Savings Programs.

What This Means to You

ACOs present a new opportunity for hospitals, physicians, and other providers and suppliers to work together to improve quality and reduce costs. They are a high priority and represent a lynchpin of the Healthcare Reform Law. However, before ACOs can be successful, HHS must address the current regulatory restrictions that will otherwise impede their successful implementation. While we may have to wait for HHS regulations governing Medicare ACOs until early 2011, many providers are not waiting and are diligently moving forward with developing the networks needed for ACO integration and are also working with commercial payors to establish ACO-type products in the commercial market.

Contact Info

If you have questions about this or any other healthcare legal matter, please contact your Husch Blackwell attorney or Curt Chase at 816.983.8254.

Husch Blackwell LLP regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please contact us if you would like to receive updates and newsletters, or request a printed copy.

HUSCH BLACKWELL

Husch Blackwell encourages you to reprint this material. Please include the statement, "Reprinted with permission from Husch Blackwell, copyright 2010, www.huschblackwell.com." at the end of any reprints. Please also email info@huschblackwell.com to tell us of your reprint.

This information is intended only to provide general information in summary form on legal and business topics of the day. The contents hereof do not constitute legal advice and should not be relied on as such. Specific legal advice should be sought in particular matters.