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Negotiating Accountable Care Organization Participation Agreements on Behalf of Long Term Care Facilities

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Accountable Care Organizations (ACOs), as defined in Section 3022 of the Affordable Care Act (ACA) and implemented by the Medicare Shared Savings Program regulations,¹ are organizations of hospitals or other health care organizations that have registered with the Centers for Medicare & Medicaid Services (CMS) to be held accountable for costs and quality care for certain patients. The provider organizations join the ACO for the opportunity to benefit from shared savings. Each ACO member is required to sign a participation agreement. Most of the negotiations regarding the participation agreements focus on the business terms of the percentage of the shared savings; however, this article focuses on the salient legal points of the participation agreement.

Although ACOs have existed for several years, the concept still is relatively new, and long term care organizations have been slow to join ACOs



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—from a declaration of the American Bar Association

for a number of reasons. A substantial reason for the delay in joining an ACO is the difference between the post-acute care market and the true long term care market for elderly patients. Therefore, there is a lack of definitive or market legal terms for long term care facility participation agreements. Because this still is an emerging concept for long term care facilities, incorporating some of the concepts below could help to set an industry standard for more-favorable terms in comparison with other health care providers.²

Governance

An ACO must maintain an identifiable governing body with authority to execute the functions of an ACO.³ The governing body has responsibility for the ACO's oversight and strategic direction, including clinical and administrative standards. ACO participants must hold at least 75% control of the ACO's governing body.⁴ It is critical that the Skilled Nursing Facility (SNF) obtain a role in the ACO's governance.

Compliance with Laws

CMS has specified certain mandatory provisions required to be in the participation agreement.⁵ These provisions will be non-negotiable:

- a. All contracts or arrangements between or among the ACO and participants must require compliance with the requirements and conditions of the regulations, including, but not limited to, those specified in the agreement between the ACO and CMS; and
- b. Each participant must agree to comply with all applicable laws, including, but not limited to:
 1. federal criminal law;
 2. the False Claims Act;⁶
 3. the Anti-Kickback Statute;⁷
 4. the Civil Monetary Penalties Law;⁸ and
 5. the Physician Self-Referral Law.⁹

Although the participant cannot do anything regarding the aforementioned standards, the participant can require the ACO to comply with these same standards. The participant should include the sample language below in the participation agreement:

Compliance with Standards. *In connection with participation in ACO, ACO will comply with all terms and conditions of the ACO Participation Agreement, the ACO Requirements, and all rules and regulations, and any policies, processes, and procedures of ACO and such decisions interpreting this Agreement as currently are in effect or as ACO may adopt or modify from time to time. ACO will, at all times, act in accordance with ACO's compliance program.*

Compliance with Laws. *ACO must comply with all applicable laws, including, but not limited to, the following: (1) federal criminal law; (2) the False Claims Act (31 U.S.C. § 3729 et seq.); (3) the Anti-Kickback Statute (42 U.S.C. § 1320a-7b(b)); (4) the Civil Monetary Penalties Law (42 U.S.C. § 1320a-7a); (5) the Physician Self-Referral Law (42 U.S.C. § 1395nn); and any other federal or state law, statute, rule, or regulation applicable to ACO, or the performance of functions or services related to ACO's activities.*

The inclusion of ACO representations and covenants brings about an interesting point regarding the participation agreement. The ACO often is a newly formed entity that may or may not have any assets. Typically, a hospital system or large physician group is the organizer of the ACO but is not a party to the agreement between the ACO and the participant. Although governing body members have a fiduciary duty to the ACO and must act consistent with that fiduciary duty,¹⁰ there is no direct contractual remedy against the organizer of the ACO. The only possible way to achieve a remedy for breach of contract is to add the organizing entity as a party to the participation agreement. This is something that the hospital system will resist but could potentially obtain if the SNF has attractive reimbursement rates.

Exclusivity

The participation agreement should have a clause similar to the following which requires that the participant should not participate in any other ACO:

Exclusivity. *Participant may not participate in, or contract with, any accountable care organization, except ACO.*

Conversely, the ACO will reserve itself the right to enter into agreements with other providers:

ACO's Right to Hire Other Providers/Suppliers. *ACO shall have the right at any time to enter into agreements with any other provider/supplier with whom ACO wishes to include in ACO.*

In the post-ACA environment with a shrinking number of independent hospital providers, a long term care organization could be forced to "pick a team" and join a major hospital system's ACO, but the ACO can bring in as many long term care organizations as it desires. If the long term care provider is a significant system with great outcome numbers, it potentially could have the negotiating power to be the exclusive provider for skilled nursing in the ACO. If the long term care provider cannot be the exclusive provider, it could attempt to include language in the participation agreement that limits the number of SNFs that can be in the ACO or require a right to reasonably object to the inclusion of a competing SNF.

Audits

ACOs are required to include the right for the ACO and CMS to audit the participant.¹¹ Typical ACO participation agreements include the language below:

Audits and Record Retention. *ACO may, at any time during the Term, audit, inspect, investigate, and evaluate any books, contracts, records, documents, and other evidence of Participant. Participants must maintain and give ACO access to all books, contracts, records, documents, and other evidence (including data related to Medicare utilization and costs, quality performance measures, shared savings distributions, and other financial arrangements related to ACO activities) sufficient to enable the audit, evaluation, investigation, and inspection of Participant's compliance with the ACO Requirements, quality of services performed, right to any shared savings payment, or obligation to repay losses, ability to bear the risk of potential losses, and ability to repay any losses to CMS.*

Participants should attempt to negotiate prior notice requirements before the ACO conducts an audit. Moreover, the participant should include language that the ACO should not interfere with the participant's business. Given the regulatory requirements, the notice requirement could be extremely short, but that does not necessarily mean that the participant must give the ACO unfettered and immediate access to the participant's books and records. Needless to say, the participant cannot do anything to restrict CMS' right to audit the participant.

Termination

During the term of the participation agreement, an ACO may add or remove ACO participants or ACO providers/suppliers, but obviously, this could be detrimental to the long term care facility and could cost the participant shared savings or other benefits. As such, it is critical that the termination provision of the participation agreement provide for a definitive term and that the participant have the right to cure any breach or alleged breach. Below is sample language of a termination provision that provides for the participant to cure the breach. Bear in mind that under the regulations certain breaches cannot be cured and that the ACO will have to immediately terminate the participant to maintain its accreditation.

Termination by ACO for Cause. *Participant may be terminated, subject to Participant's right to cure as provided below, by ACO for cause upon Participant's receipt of thirty (30) days prior written notice stating the breach by Participant that is the reason for the termination. Participant shall have the right to request a review of such a termination decision pursuant to reasonable procedures adopted by ACO from time to time. In cases where ACO shall reasonably determine that Participant must be terminated to comply with ACO Requirements (42 C.F.R. § 425), any termination*

effected pursuant to this Section, shall be effective within thirty (30) days after receipt of the notice of termination or as required by the ACO Requirements, whichever is earlier. In the event that ACO reasonably determines that Participant may continue to render services under the ACO Requirements, Participant shall have the right to cure such breach within thirty (30) days; provided, however, that in the event that the breach is incapable of being cured within such thirty- (30-) day period, ACO shall not be terminated by ACO provided that Participant begins to cure the breach within such thirty- (30-) day period and diligently pursues such cure till completion.

Notice

As provided above, as participants in an ACO, SNFs have made a substantial investment in the ACO. The participant will be prejudiced if CMS terminates the ACO. Consequently, it is prudent for the participant to receive all CMS notifications regarding a breach or termination of the underlying participation agreement between CMS and the ACO.

Notice of Breach. *ACO shall immediately deliver to Participant copies of all notices or other correspondence (including notices of default) received by ACO related to the ACO Participation Agreement. ACO shall comply with all of the terms, covenants, and conditions of the ACO Participation Agreement. In the event of an occurrence of an event of default, Participant shall have all rights and remedies given by the laws and statutes of Ohio, and the right (but not the obligation) of Participant to expend whatever sums of money as should be reasonable to perform any obligation of ACO which ACO has failed to perform, and to collect from ACO all sums of money so expended, together with interest thereon, compounded monthly at the prime interest rate as provided in the Wall Street Journal.*

Conclusion

ACOs have the potential to greatly benefit health care organizations, but careful attention must be paid when crafting the participation agreement. Although the participation agreement inevitably will favor the ACO, SNFs should push to negotiate better terms.

1 See 42 C.F.R. Part 425.

2 Although this article focuses on CMS/Medicaid ACOs, many of the concepts can be applied to commercial or other ACOs.

3 42 C.F.R. § 425.106.

4 *Id.* § 425.106(c)(3).

5 *Id.* § 425.208.

6 31 U.S.C. § 3729 *et seq.*

7 42 U.S.C. § 1320a-7b(b).

8 42 U.S.C. § 1320a-7a.

9 42 U.S.C. § 1395nn.

10 See 42 C.F.R. § 425.106.

11 *Id.* § 425.314.