

Five Contract Issues A Doctor Needs to Negotiate Before Joining an ACO

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Doctors today are being barraged with information about Accountable Care Organizations (ACOs). Journal articles and seminar speakers tout ACOs as the latest way physicians and hospitals can earn financial rewards by working together.

But with reward comes risk. Doctors need to be careful about signing ACO contracts. While some ACOs might earn large rewards for their providers, other ACOs will be losers, costing their doctors money.

Careful contract negotiation is key. Your potential rewards and your personal exposure to ACO risk depend directly on what your ACO contract says. The new proposed ACO regulations specify almost no standard terms that need to be included in a physician's (or group's) ACO contract. Those contracts are wide open for negotiation.

To help you understand both the rewards and the risks embedded in an ACO contract, here are five examples of issues every doctor should understand before signing.

1. Personal Investment: It costs money to create an ACO. Further, an ACO will incur operating costs for at least a year before it can receive any money under Medicare's shared savings program. The Center for Medicare & Medicaid Services (CMS) estimates that that, on average, those start-up and first-year costs will be about \$1.76 million. For the most part, that upfront money will probably need to come from the ACO's providers, in the form of a cash investment.

Your ACO contract must specify how much cash you need to contribute, and when. Further, if the ACO intends to borrow money from a bank, your contract should say whether you will have a duty to personally guarantee that bank debt, and what the limits of your guarantee will be. You do not want to be jointly and severally liable for the ACO's entire debt.

2. Ongoing Risk: The new proposed ACO regulations require an ACO to establish adequate security allowing CMS to collect any money it is owed if the ACO fails to hit its performance targets. For example, the ACO's providers might place cash in an escrow account to protect CMS, or they might offer CMS bank letters of credit.

Your ACO contract must specify how much money (beside the initial investment) you must leave in an escrow account for CMS. Alternatively, if you need to provide a personal guarantee in support of a bank letter of credit, your contract should specify what the limit of the guarantee will be.

3. Allocating ACO Profits and Losses: After the end of each contract year, CMS will either pay the ACO a portion of earned Medicare savings or CMS will determine that the ACO owes money to Medicare. In either event, the ACO will then

allocate those profits or losses to its providers. (There is a possible two-year exception for losses, but electing that exception comes at its own cost.)

How will the ACO allocate profits and losses among its providers? Perhaps surprisingly, an ACO probably will not distribute profits or losses proportionally to the providers' initial investment in the ACO. Instead, in most cases an ACO will distribute profits and losses based on a formula that incentivizes providers to meet the ACO's overall objectives. The specifics of that formula are open for negotiation.

Your ACO contract is critical in determining your potential reward and your personal level of risk under the ACO's formula. Suppose your own personal performance within the ACO is stellar. Are there contractual caps on the amount of reward you can earn from the ACO? Conversely, if you run into unforeseen problems with the ACO, are there contractual limits on the amount of money you might be forced to pay in to the ACO to cover losses?

4. Monitoring: The ACO will have a system of monitoring your financial and clinical performance. Your ACO contract should specify who will be monitoring your practice, and what criteria will be evaluated. What information will you need to turn over to the ACO? What information will the ACO have the right to glean directly from your medical charts or billing records?

5. Disciplinary Process: Your ACO contract will specify a disciplinary process for physicians who do not help the ACO achieve its financial and clinical goals. That process will include provisions for a corrective action plan. The corrective action plan might ultimately lead to a physician being expelled from the ACO.

While no physician wants to be the object of such discipline, it is important to understand in advance how the disciplinary process would work. As with a hospital medical staff discipline situation, your contract should specify what your rights would be to access the information that is leading to the proposed corrective action. You should have a right of a hearing and appeal. Also, while one hopes the issue never arises, if you are expelled from the ACO, do you get your initial investment back? Will the ACO assure that you are released from any ACO bank guarantees?

Your personal ACO contract is critical in determining your ACO rights and your risks. The issues mentioned above are examples of the issues buried in an ACO agreement. You need to negotiate carefully, and you need to understand what you are signing.

If we can assist you or if you would like further information, please contact Richard Bouma (rbouma@wnj.com or 616.752.2159) or another member of the Health Law Practice Group at Warner Norcross & Judd LLP.