Accountable Care NEWS

The CMS Next Generation ACO Model – Will It Increase Medical Malpractice Risk?

By Susan Huntington

The Patient Protection and Affordable Care Act of 2010 ("ACA") provides for the formation of accountable care organizations ("ACOs") to encourage physicians, hospitals, and other health care providers to come together and deliver better coordinated, high-quality care to Medicare patients and the chronically ill.

The ACA also instituted the Medicare Shared Savings Program ("MSSSP") under which ACOs are eligible to receive shared savings from Medicare from the calculated reduction in Medicare spending. After the ACA was enacted, many physicians and other providers moved quickly to form ACOs that would allow them to take advantage of the MSSP payment model.

Since its original enactment, the Centers for Medicare and Medicaid ("CMS") has made numerous revisions to the MSSP model. Most recently, the CMS Center for Innovation announced the application process for its newest MSSP option called the "Next Generation ACO" which goes into effect January 1, 2016. This Next Generation ACO allows ACOs to assume a higher level of financial risk and reward than is currently available in Medicare ACO initiatives, including full capitation. Other new features of the model include provisions to increase the Medicare beneficiary's engagement and alignment with the ACO.

While such improvements may increase the attractiveness of participating in an MSSP ACO for health care providers, will these enhancements create additional medical malpractice exposure for such ACOs, similar to the risks encountered by capitated HMOs in the 1990s?

Financial Incentive Concerns

In theory, ACOs may decrease medical malpractice exposure for several reasons. First, the goal of clinical integration required by ACOs is to lower overall health care costs by increasing quality and creating an integrated set of resources to manage care through the current fragmented health care system. Second, the clinical integration of providers in an ACO requires the use of evidence-based treatment options which should lead to better outcomes. Third, the implementation of sophisticated information technology required in ACOs should increase communication between providers and the availability of information necessary for effective patient care management.

However, whenever cost-saving efforts play a role in the delivery of health care services, there is the inevitable risk of a claim that financial considerations adversely impacted the patient's care. Under prior MSSP models, ACOs could choose between an upside-risk-only payment contract (sharing in savings; no risk for losses) or an upside/downside-risk contract (sharing in savings while being at risk for losses associated with medical costs).

The Next Generation Model includes more options for payment mechanisms, including full capitation, but requires both upside/downside risk. This requirement for the ACO to be responsible for financial losses as well as savings from the care provided to patients will create more incentive for providers to control costs and avoid procedures that are considered non-critical. This can include decisions related to diagnostic tests, such as costly MRIs, which may lead to higher exposure for failure to diagnosis allegations. Similarly, financial considerations or contractual requirements related to risk assumption between the ACO MSSP participating providers may impact referrals for specialty care or hospitalization creating patient concerns about denied care.

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Beneficiary Alignment and Expectation Concerns

In the Next Generation ACO model, Medicare beneficiaries are still allowed to go to the provider of their choice which creates challenges for the ACO managing their care. To help improve beneficiary engagement with the ACO, the Next Generation ACO Model includes specific benefit enhancement tools, including (i) the opportunity for beneficiaries to receive reward payments for receiving the majority of their care from ACO providers, and (ii) a process for beneficiaries to confirm their care relationship with ACO providers. Thus, more than ever before, beneficiaries will be better informed and aware that the ACO is responsible for coordinating and providing their care. They will also know that the goal of an ACO is to improve efficiency and the quality of care using national standards and reporting on defined quality metrics. This transparency can lead to higher expectations from the patient regarding the standard of care they are supposed to receive from their ACO providers.

Risk Management Considerations

Many of the HMO liability cases in the 1990s were decided under federal ERISA pre-emption law which limited the HMO's liability. However, ERISA does not apply to the Medicare Shared Savings Programs so its pre-emption protection will not help MSSP ACOs. In addition, the ACA does not contain any pre-emption protection for ACOs. In fact, provisions within the ACA state that ACOs will adopt rules for the provision of patient centered medical care. Therefore it will be harder for ACOs to assert -- like HMOs did in the past - that they only provide administrative or management services and don't provide patient care.

Some ACOs employ health care providers and have vicarious liability for the medical malpractice of such employees in its capacity as the employer. The majority of ACOs contract with health care providers through participation agreements which generally contain the usual language on independent contractor relationship and the responsibility of the provider to determine the course of care for the patient. However, the ACA contains language stating that an ACO is "accountable" for the "quality, cost and overall care" of the Medicare beneficiaries and such language may create direct liability for the ACO, even if there is express language to the contrary in the provider participation agreement.

While CMS's new financial risk methodology and beneficiary alignment provisions may increase risk for ACOs that sign up for the Next Generation model, every ACO should consider the following to mitigate their legal and regulatory risks:

- A consequence of outcome-based payment and the quality reporting required of MSSP ACOs is that publicly reported quality and outcomes data is now readily available. It is yet to be fully determined how this data will be used to support malpractice allegations against an ACO or a provider. Thus, it is important for each ACO to do internal utilization and quality reviews of providers, especially physicians, and document any actions taken by the ACO to remediate the situation.
- Since the ACO will be seen as "accountable" for the "quality, cost and overall care" of patients, it is important for the ACO to secure traditional medical malpractice coverage either in addition to or as part of its managed care professional liability coverage.
- The ACO must require adequate malpractice coverage (and obtain documentation of such coverage) for all participating providers (physicians, hospitals, laboratories, skilled nursing facilities, etc.) to avoid having the ACO becoming the "deep pocket" in the event of a claim.
- Any ACO guidelines will likely be discoverable in a law suit. Consequently, it is prudent to use nationally recognized standard clinical guidelines for the delivery of clinical services, rather than adopt customized guidelines to avoid unintentionally creating a different or higher standard of care.
- Create and actively maintain a process for any beneficiary (or their family member or friend) to report complaints about any perceived denied or delayed care.
- Avoid tying provider payments solely or directly to their demonstrated ability to decrease medical costs.
- Ensure that the ACO has received appropriate state regulatory approvals and/or licenses that govern the assumption of insurance risk by providers including, in some cases, the need to demonstrate the availability of adequate reserves to cover potential losses, and/or a licensure as a third party administrator, utilization management reviewer or insurance company.
- In the event of a malpractice claim, hire defense counsel who not only understands medical malpractice but also the applicable ACO regulations and how ACOs operate.

ACOs have the potential to address many of the problems in the current fragmented U.S. health care system effectively. However, it is important for ACO managers to remember the liability experience of past cost-containment experiments, such as capitated HMOs, and to avoid or mitigate potential unintended consequences of increased liability risk.

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