

## ACCOUNTABLE CARE BROADENS RISK MANAGEMENT RESPONSIBILITIES

By  
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Health care reform puts Accountable Care front and center during the next two years of expected mergers, acquisitions and contracting activities by health care organizations, absent any impediments created by the newly elected Congress. While hospitals have had risk managers, as mandated by JCAHO, there is no specific requirement within HCR mandates that an ACO has a risk manager. It is therefore likely that if the ACO is owned by the hospital, the hospital's risk manager will inherit the management of the ACO's risk as an additional duty.

### BACKGROUND

#### ACO AND MEDICARE

Originally proposed with the goal of incentivizing Medicare providers toward more efficient and cost-effective care – and not charging for hospital-acquired illness or deviation from expected outcomes – Accountable Care has become a permanent part of The Patient Protection and Affordable Care Act (PPACA), H.R. 3590 and The Health Care & Education Reconciliation Act (HCERA) of 2010.

#### WHO CAN OWN AN ACO?

According to the Act, ownership can be:

- Physicians and other professionals in group practices
- Physicians and other professionals in networks of practices
- Partnerships or joint venture arrangements between hospitals and physicians/professionals
- Hospitals employing physicians/professionals
- Other forms of ownership that the Secretary of Health and Human Services deems appropriate

Accountable Care Organizations (ACOs) can be formed as pilot programs by hospitals. Integrated with other health care providers,



#### WHAT IS AN ACCOUNTABLE CARE ORGANIZATION?

According to a recently published Glossary of Terms provided by Kaiser Family Foundation, an Accountable Care Organization (ACO) is: "A network of health care providers that band together to provide the full continuum of health care services for patients. The network would receive a payment for all care provided to a patient, and would be held accountable for the quality and cost of care. New pilot programs in Medicare and Medicaid included in the health reform law would provide financial incentives for these organizations to improve quality and reduce costs by allowing them to share in any savings achieved as a result of these efforts. Risk managers can also read more about ACOs in the Kaiser Family Foundation website and additional resources listed at the end of this paper."

ACOs enable these hospitals and other key providers, such as physician groups, to share in the government-sanctioned Medicare cost savings that they deliver (Medicare's value-based purchasing programs with hospitals involves data reporting of quality benchmarks, efficiency incentives paid to providers, "bundled" services billing and collection and, ultimately, penalties for underperformers).

## CHANGES AND CHALLENGES

- Accountable Care Organizations (ACOs) must be formed no later than 2012 if an organization is going to form one for HCR utilization.
- ACOs will change the risk profile and affect the revenue flow of hospitals.
  - Risk managers must anticipate these changes in order to have the most effective risk control and risk financing strategies for dealing with ACOs.
- Health care risk managers are often among the last in an organization to find out about recent mergers, acquisitions and divestitures of operations.
  - Creating effective communication networks by habitually reaching out to others within the health care organization can help keep risk managers up to date and avoid being the last to know about corporate change.

In order to be ready for implementation of Accountable Care by 2014, many health care organizations will have to retool and hire different types of professionals than those hired traditionally in the hospital industry. Interestingly, we know from the Act who can own an ACO as well as participate in one, but the Act does not contain detailed information on how they must operate. We do know that ACOs are supposed to achieve accountable, affordable and accessible health care. When ACOs become the point of integration for services, new revenue paths will open from insurance exchanges, as new insurance options are created at state levels with federal government funding assistance, and 32 million Americans are afforded health insurance coverage for the first time.

## CREATING A FRAMEWORK FOR NEW RISK AND NEW REVENUE FLOW

Creating an ACO is akin to a hospital merger or acquisition. According to a recent publication by McDermott Will & Emory, the top five pitfalls in health care mergers and acquisitions transactions are:

- In-depth due diligence
- Increased regulatory scrutiny

- Complexity of governmental regulation
- Licensing
- Accreditation
- Increased antitrust scrutiny

A proper due diligence checklist can help turn pitfalls into manageable challenges.

Many risk managers are beefing up their current communication networks between themselves and the "C" suite and the internal health care reform task forces created to help the organization prepare for the impact of reform and implement appropriate strategies. Both of these networks can supply information about such ACO issues as new corporate structures being created for their organization's preparedness, potential employment of physicians and physician-extender professionals, and new computer software programs being purchased for either data tracking or patient care functions.

Once new strategies to prepare for the arrival of ACOs are identified, risk managers can employ the traditional risk management framework of risk identification and risk assessment. The following categories identify risk "buckets" that will need the appropriate application of risk mitigation strategies and techniques, including risk avoidance, risk retention and risk transfer.

## PROPERTY

Risk managers should create an inventory of all property that will be owned or leased by the ACO entity going forward, including locations, replacement value, prior owning entity, age, construction and date of the most recent appraisal. Included in this inventory should be any known information on hurricane, flood and earthquake zoning, preparedness and loss history by location.



## PERSONNEL

- Staffing levels are an issue relative to patient access to primary care physicians and related physician-extender professionals, especially nurse practitioners (NPs) and physician’s assistants (PAs). As ACOs are formed, more hospitals, health care systems and physician groups will be competing to hire primary care physicians, nurse practitioners, physician’s assistants, and hospitalists. Continued shortage of these professionals will require risk managers to monitor staffing levels, training programs, competency, compliance with scope of practice, best practices and use of data management software.
  - ACO personnel strategies may include contracting from other sources with that attendant risk.
  - Peer review and credentialing initiatives will create inherent risk within an ACO.
  - Risks related to ACOs contracting with third parties include borrowed servant, injury to third parties, contingent professional liability for failure to treat, diagnose or misdiagnose.
- Workers’ compensation risk increases with an aging workforce.
- Patient lifting equipment and related prevention strategies must be in place for professionals working directly with patients who may require physical assistance.
- A tracking spreadsheet created to inventory all potential employees and contracted employees is a tool that produces protection to the bottom line of an organization through identification and mitigation of risk.
- An organization’s directors and officers will need written permission from their current board to serve on an ACO board as a function of their duties and responsibilities.

## NET INCOME

Knowing the ACO’s pro forma balance sheet, which includes expected revenues and expenses related to ACO operations, will assist the risk manager in planning for Business Interruption Insurance Coverage. Revenue sources, such as Medicare and other “pay for performance” payers, will be seeking a singular bill for the entire “episode of care” provided to the patient. The ACO may be the responsible recipient for all provider revenue and ultimately, therefore, responsible for dispersing any contracted third-party revenue based on services, performance and gain sharing stipends earned.

There are many creative ways to insure for unexpected events that could either disrupt revenue or create extra expense during ACO operations. Risk managers should look for ways to control and insure such risks as supply chain interruption, data backup protocols and off-site storage, payroll continuation during an interruption as well as consideration for emergency and temporary relocation to another site to continue operations. Putting together an ACO emergency response team early in the creation of the ACO and doing a few drills together will assist in preserving and providing critical information related to the continuity of operations.

# LIABILITIES

ACOs will have a combination of exposure to direct medical malpractice and indirect or vicarious medical malpractice liability due to contracting with other entities.

- If the ACO is involved with any research or clinical trials, there could be professional liability exposure to the organization for not following prescribed trial protocol.
- An ACO will also have Managed Care Organization E&O exposures – through both:
  - Risk bearing and insurance company business activities, notably singular billing for an “episode of care” for all providers within the contracting “medical home.” continuum, and insurance contracting on behalf of all owners with third parties
  - Care management, peer review, credentialing, network management functions as an ACO.
- Antitrust activity claims are potentially covered under both E&O policies and D&O legal liability policies. The Department of Justice has announced their close scrutiny of the anticompetitive consolidating of ACOs as a cost driver. Thus, antitrust coverage for the ACO and more generally, how the responding E&O and D&O insurance policies dovetail, should first be addressed with underwriters and then in the risk manager’s Board of Trustees education packet.
- Preventing gaps and overlaps in coverage among the owner entities will require close cooperation among the ACO risk manager and owner-entity risk managers to coordinate risk transfer to insurance policies on behalf of a multiple owner ACO.
  - Liability insurance policies to be considered for ACO operations include coverage for health care professional/general liability, environmental liability, managed care E&O, D&O legal liability, fiduciary liability, network privacy/cyber risk, clinical trials and auto liability.
  - ACO exposures should be reviewed for coverage as appropriate in captives owned by ACO owners during the start up and due diligence phases of implementation.

According to a recent survey by *HealthLeaders Media*, 74% of hospital leaders say they plan to employ more physicians in the next 12 to 36 months. For hospital risk managers, this creates an opportunity to re-evaluate risks associated with employment of physicians. For example, should all employed physicians be insured within the medical malpractice insurance program of the hospital? Or should certain “high risk” physicians (e.g., obstetricians or bariatric surgeons) be insured separately? How will the credentialing process of the ACO and its owner-entities manage this influx of new providers? What kinds of increased insurance premiums or self-insurance vehicle funding levels should be expected as a part of this ACO transformation?

# CONCLUSION

While the discussion of risks enumerated above does not include all those necessarily associated with ACO operations, it does provide the risk manager with a starting point. The risk manager needs to be kept closely apprised of all organizational changes related to the creation of an ACO so as to anticipate changes to the organization’s risk profile and thereby devise the best risk control and risk financing strategies and tactics. The following chart, by exposure type, lists the corresponding insurance policy that would normally insure key areas of responsibility for the ACO as a free-standing joint venture entity.

In order to be ready for implementation of Accountable Care by 2014, many health care organizations will have to retool and hire different types of professionals than those hired traditionally in the hospital industry. Interestingly, we know from the Act who can own an ACO as well as participate in one, but the Act does not contain detailed information on how they must operate. We do know that ACOs are supposed to achieve accountable, affordable and accessible health care.

EXPOSURE	INSURANCE COVERAGE	AVOIDING PITFALLS
Employment Practices Liability	Director & Officer Legal Liability	Officers and directors serving, as an extension of their duties, within another entity should receive written instructions from their “home” board to serve on this “outside” board, avoiding “no coverage” for the officer or director acting within the scope of duties, including serving on the ACO board
Corporate Practice of Medicine	Director & Officer Legal Liability	
Mismanagement, Poor Policies and Procedures	Director & Officer Legal Liability	
Shareholders’ Lawsuits	Director & Officer Legal Liability	
Allegations of Fraudulent Billing	Fraud and Abuse Policy	The ACO has direct exposure for billing services
Unsecured Electronic Patient Information	Cyber Liability	The ACO has direct exposure for retention and transmission of patient and employee information
Cyber Hacking	Cyber Liability	
Theft of Laptop Containing Employee or Patient Information	Managed Care, Institutional Professional or Cyber Liability	If professional liability (or MCO E&O) responds to member data breach along with cyber, dovetail the E&O as excess
Transfer of Incorrect Electronic Medical Information	Managed Care, Institutional Professional or Cyber Liability	
Peer Review & Credentialing of Physicians - Employed & Contracted	Managed Care Liability	The ACO has direct exposure for services provided to contracting third parties
Negotiating Contracts with Insurance Companies for the ACO & Contracting Third Parties	Managed Care Liability	Antitrust activity claims start here
Antitrust Activity	Managed Care Liability	The Regulatory exclusion carves back government antitrust action coverage; the anti-stacking provision doesn’t limit access to to aggregates; antitrust fines and penalties are covered losses

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*The observations, comments and suggestions we have made in this report are advisory and are not intended nor should they be taken as medical/legal advice. Please contact your own medical/legal adviser for an analysis of your specific facts and circumstances.*

## SOURCES

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