



Legal Issues Associated With Medicaid ACOs

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Presented by
Elizabeth G. Litten, Esq.

New Legal Entity

- The Medicaid ACO will be a new nonprofit corporation
- Purpose: Improve health outcomes and reduce FFS costs for Medicaid recipients residing in defined geographic region
- Shared Governance – Shared Accountability
- Multi-stakeholder representation and decision-making
- Transparency

Antitrust Issues

FTC/DOJ “Statements of Antitrust
Enforcement Policy in Health Care”
issued August 1996

www.usdoj.gov/atr/public/guidelines/1791.htm

FTC/DOJ “Horizontal Merger Guidelines”
issued August 2010

www.ftc.gov/os/2010/08/100819hmg.pdf

Antitrust Issues

- Classic manifestation of market power – increase in unit price (rates) -- not an issue with Medicaid FFS payments
- ACO goal to improve quality and reduce cost; goal consistent with purpose of antitrust laws
- Health care “per se” antitrust violations typically involve joint negotiating/pricing without financial or clinical integration

Antitrust Issues

- Medicaid ACO must be clinically integrated; improper conduct to be evaluated under “rule of reason”
- “Rule of reason” will focus on net benefit or harm to consumers (patients and taxpayers)
- Possible antitrust “safe harbor” from DOJ/FTC/CMS (expected March/April 2011)

Fraud and Abuse Issues

- Civil Monetary Penalty (CMP) Law (42 U.S.C. 1320a-7a(b)): Hospital may not knowingly make a payment to induce a physician to reduce or limit services to Medicare or Medicaid patient under physician's direct care
- Medicaid ACO, not hospital, makes payment only when quality standards are met
- Sharing of cost savings among all ACO participants, not just physician making care-related decision

Fraud and Abuse Issues

- Anti-Kickback Statute (42 U.S.C. 1320a-7b(b)): Person may not knowingly offer or receive any remuneration to induce or influence purchase of health care services payable in whole or part by federal program
- Medicaid ACO model designed to influence more efficient utilization, rather than overutilization
- Medicaid ACO's quality standards act as counter to improper financial inducement

Fraud and Abuse Issues

- Beneficiary Inducement Prohibition (42 U.S.C. 1320a-7a): Persons prohibited from providing remuneration as inducement to Medicare or Medicaid beneficiary to influence beneficiary to choose particular provider
- Medicaid ACO improvement in access may induce use of provider; no remuneration to beneficiary

Fraud and Abuse Issues

- Stark Law (42 U.S.C. 1395nn): Physician with a financial relationship with an entity may not make referrals to that entity for Designated Health Services (“DHS”) reimbursed by Medicare
- Absolute prohibition: must meet exception
 - * “direct” employer/financial relationship
 - * “personal services” compensation
- Medicaid ACO/Medicaid FFS reimbursement; gainsharing related to quality, not volume/value

Focus on ACO Tenets to Avoid Legal Issues

- Patient-centered
- Transparent
- Coordinated/integrated
- Voluntary, nonexclusive
- Quality-focused



Contact Information

Elizabeth G. Littten, Esq.

609.895.3320

elittten@foxrothschild.com