



ACO/CIN Provider Denials and Terminations: Procedural Protections, Immunities, and Databank Reporting

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Goals of CIN/ACO

1. Financial

- Earn financial rewards from payors for delivering high quality, efficient care
 - Track 1: Shared savings/metrics-based bonuses (upside only)
 - Track 2: Upside & downside risk; moving towards capitation
 - Pay for Performance standards

2. Clinical Integration/Effective Management of Care

- Bending the quality curve through EHR, care coordination, evidence-based clinical pathways/protocols, dashboards, metrics-based quality oversight
- Reduce never events, HACs and avoid penalties tied to unacceptable hospital readmission rates
- Reduce liability claims

CIN/ACO Structure

1. **Entities** extending throughout a geographic region and spectrum of care --
 - *Hospitals, PCP Offices, SNFs, LTCS, ASCs, Dialysis, Diagnostic Centers, Labs, Clinics*
2. **Professionals** who practice in & for those entities --
 - *PCPs, Specialists, CRNPs, APNs, PAs*
3. **Separate and Distinct** corporate structure and ownership, practice setting, medical records systems, billing systems

ACO/CIN Quality Oversight/Governance

1. Governing Body With Significant Physician Participation
 - Ultimate accountability
 - Final decision-making authority
 - Financial and Quality
2. Physician Quality Committee
 - Analyzes quality data (internal and external)
 - Develops/implements metrics and protocols
 - Evaluates effectiveness and refines/improves the system of care
3. Finance Committee
 - Designs system of metrics-based rewards & punishments
 - Applies metrics to determine financial rewards

Initial Membership Considerations

1. Eligibility Criteria

- Existing member of medical staff
- Acceptable performance from a quality and utilization standpoint
- Documented experience with managed care patients including capitation arrangements
- Board certified
- Limited to employed/contracted physicians?
- Consider non-medical staff providers who CIN/ACO will need to deliver continuum of care

Initial Membership Considerations (cont'd)

2. Criteria for Exclusion

- Employed by or has contract with a competing hospital/health system/ACO/CIN
- Financial, ownership, or other economic relationship with a competing health care facility/ACO/physician group
- Serves as a Board member, CMO, Department Chair, medical staff officer at a competing health care facility/ACO/CIN/physician group
- Unacceptable quality/utilization “score card”
 - Denials should be made by administrators and not competing physicians or physician committees

Proposed Model: Peer Review Committee:

1. Function

- To track compliance with quality metrics and to create or participate in development of dashboards/periodic reports
- To address **practitioner** issues that are having a material adverse impact on the **system** of care.
- To work in tandem with, but outside, the “regular” committee structure.
- To utilize available privileges and protections for immunity, privilege and confidentiality
- To provide a path for **remediation** and, if necessary, recommended **termination** of non-performing or disruptive practitioners.

Legal Landscape: Exposures From Denied or Terminated Physicians

1. Liability from denials, expulsion or other negative impacts on terminated providers
 - Antitrust
 - Economic credentialing – Anti-Kickback Statute
 - Contractual/quasi-contractual causes of action
 - Defamation/tortious interference with business and/or physician/patient relationship
 - State unfair trade practices laws
 - Federal and state civil rights claims

Legal Landscape: Exposures From Denied or Terminated Physicians (cont'd)

2. Immunity Protections

- Health Care Quality Improvement Act (HCQIA)
- State peer review immunity protections

3. Privilege and Confidentiality Protections

- State peer review privilege laws
- Federal Patient Safety and Quality Improvement Act (PSQIA)

Legal Landscape: Exposures from Plaintiffs/Third Parties

1. Exposures/abuse of privileged/confidential data
 - Malpractice actions
 - Respondent superior
 - Apparent agency
 - Corporate negligence
 - Media exploitation/24-hours news cycle
 - Government regulators (state and federal)
 - HIPAA/HITECH/State Privacy Laws
 - QAPI
 - The Joint Commission

Legal Landscape: Exposures from Plaintiffs/Third Parties (cont'd)

2. Immunity Protections

- None

3. Privilege and Confidentiality Protections

- State peer review privilege laws
- State “patient safety act” privileges
- PSQIA

HCQIA

1. HCQIA was enacted:

- to provide a national clearinghouse for negative malpractice and adverse action history that would follow physicians from state-to-state, and
- to promote proactive industry “self-policing” through its immunity provisions

2. HCQIA:

- Created the National Practitioner Data Bank (NPDB)
- Provides *immunity* from damages in litigation arising out of adverse peer review actions, such as terminations (including antitrust (treble damages/attorneys fees) but *excluding* civil rights actions).

Requirements for HCQIA immunity

1. Must be a “health care entity” i.e., “provide healthcare services” – either itself or through provider networks.
 - protections can extend to ACOs – (Data Bank confirmation).
2. Must follow a formal peer review process for the purpose of furthering quality health care.
 - Includes, specifically, notice and hearing rights.
3. HCQIA protects individuals, committees, the Governing Body and the entity itself taking “professional review actions.”

HCQIA's requirements for “professional review action”

1. For immunity protection, a professional review action must have been taken –
 - in the reasonable belief that it was in furtherance of quality healthcare,
 - after a reasonable effort to obtain the facts,
 - after adequate notice and hearing procedures or such other procedures as are fair to the physician under the circumstances,
 - in the reasonable belief that the action was warranted after reviewing the record created in the investigation and hearing phase.

. . .in the reasonable belief that it was in furtherance of quality healthcare. . .

1. Is that standard met by a termination based on failure to achieve metrics?
 - What are the metrics?
 - Are they financially driven or quality driven?
 - Are quality metrics really a standard of care?
 - Was the decision based on “numbers” or on a quality/competence evaluation?
 - If based on “numbers” or purely on financial considerations, HCQIA protections will not apply.

. . .after a reasonable effort to obtain the facts. . .

- 1.** What kind of investigation was done?
 - Is this purely “numbers” driven?
 - Was there an attempt to look behind the numbers for “systems” issues – and fix them?
 - Was the practitioner given the chance to provide input and explain the deficiencies or challenge the findings?
 - Was the practitioner given meaningful feedback and an opportunity to come into compliance?

. . .after adequate notice and hearing procedures or such other procedures as are fair to the physician under the circumstances. . .

1. This does not necessarily require a full-blown medical staff hearing before peer physicians.
 - HCQIA's "safe harbor" provides for an arbitrator agreed to by the parties and/or a hearing officer appointed by the Entity
 - *Must also review state law.*
 - HCQIA's "safe harbor" provides a variety of explicit procedural protections but they are **not mandatory** – an entity may use other procedures so long as they are "fair under the circumstances."
 - *The opportunity to appear before the Governing Body **without counsel** to "plead one's case" could be fair under the circumstances.*

. . .in the reasonable belief that the action was warranted after reviewing the record created in the investigation and hearing phase.

1. The Governing Body must review the complete record, but having done so, the only requirement is that it “act reasonably.”
2. This provides a lot of latitude, so long as a decision is well reasoned and documented.
3. HCQIA provides a **presumption of reasonableness** which must be overcome by the physician challenging the action.

State Peer Review Immunity Protections

1. Do they extend to a “peer review committee” of an ACO/CIN?
 - Is the **entity** protected? Are the **decision-makers**?
 - What if the ACO/CIN crosses state lines?
 - Are the activities protected-quality versus financial grounds for termination?

2. Is the Committee and its operations structured so as to comply with the requirements for peer review immunity?
 - Are all peer review participants protected?
 - Limited to hospital committee meetings?
 - Limited to practitioners licensed in a particular state?

State Peer Review Confidentiality Protections

1. What is “peer review” information –
 - **Narrow:** individual “records-based” review for quality/competence.
 - **Broad:** quality metrics, quality audits, risk management, patient safety.
2. What is “peer review” activity –
 - Routine review and analysis of quality metrics
 - Focused review/investigation by an **individual**
 - Focused evaluation/action by a **committee**
3. How must information be protected –
 - Limited access/firewalls/locked drawers
 - Used/disclosed only for peer review purposes

State Peer Review Confidentiality Protections

(cont'd)

4. If improperly disclosed are protections waived?
5. Can information be shared throughout ACO/CIN?
6. Remember that state protections will not be applied by federal courts to preempt a federal claim.

PSQIA Protections

1. Information generated by patient safety activities, such as root cause analysis, patient incident reports and related quality data, reports, minutes, etc., if collected in a licensed provider's patient safety evaluation system (PSES) for reporting to a federally certified patient safety organization (PSO), is privileged and confidential and not subject to discovery or admissibility into evidence in any state or federal proceeding.
2. Peer review activities qualify as a patient safety activity but if reported to a PSO the information can be used for remedial measures but not for terminations.

PSQIA Protections (cont'd)

3. PSQIA only applies to licensed providers, entities that can provide health care services under state law and corporate parents of a provider.
4. If the ACO/CIN is simply a managed care arrangement it will not qualify as a provider.
5. Need to analyze whether other exceptions apply in order to seek protections under the Act.

Peer Review Committee: Physician “Strike Force”

1. Composition
 - Highly respected physician leaders.
2. Nature of Referrals
 - Intractable/“big impact” issues
3. Source of Referrals
 - Governing Body, Physician Quality Committee, Finance Committee or other sources (e.g., “complaint hotline”).
4. Methods
 - One-on-one interventions up to/including terminations

Peer Review Committee: Methods and Tools

1. Analysis of Data & Practice for “systems” issues
 - Demographics/high risk population
 - Office procedures/staff/EHR
2. Provide consultation/problem solving advice as to “systems” issues
 - Deploy CIN/ACO resources if available.
3. Identify individual competence/conduct issues
 - Disregard of protocols, competency-based inability to achieve metrics, disruptive conduct.
4. Implement range of interventions

Peer Review Committee: Interventions

1. Collegial/consultative

- Mentor the physician to better appreciate the new approach to care, its methods and its **value**: improved efficiency and quality, financial rewards.
- Problem-solve barriers to achievement.
- Provide support and monitoring.
- Provide periodic scorecards and related data to chart progress.

2. Remedial Intervention

- Implement a remedial action plan; monitor; remove when targets are consistently achieved.
- Focus on actions that do not trigger hearing rights.
- Consider allowing physicians to resign but keep in mind reporting obligations.

Peer Review Committee: Interventions (cont'd)

3. Termination Proceedings

- Implement a review process geared towards determining whether the physician should be suspended or terminated from the network.

Peer Review Committee: Termination Procedures

1. Grounds for Termination

- Chronic, egregious failure to achieve metrics despite remedial efforts
- Other disruption of the “system of care”
 - Competence or conduct issue

2. Termination Procedures – HCQIA Mandates

- Action taken in furtherance of quality healthcare
- Reasonable investigation conducted
- Adequate fair hearing procedures provided
- Reasonable decision based on the entire record by the final decision-maker.

Termination Path – Model 1

1. Recommendation by the Peer Review Committee after investigation (and remediation efforts if applicable)
 - Supported by comprehensive investigation report that may include internal/external peer review analysis, as well any PRC attempts to remediate.
 - Copy provided to Physician.
2. Hearing before a Hearing Officer.
 - Formal record created, with openings/closings, witness examination, rulings on evidence, and a “report & recommendations” by Hearing Officer.
 - No right to a formal appeal.
3. Review of Record and Final Decision by Governing Body.

Termination Path – Model 2

1. Recommendation by the Peer Review Committee after investigation (and remediation efforts if applicable)
 - Supported by comprehensive investigation report that may include internal/external peer review analysis, as well any PRC attempts to remediate.
 - Copy provided to Physician.
2. “Hearing” before the Governing Body
 - Physician may submit a written response (with supporting documentation).
 - Physician may appear (without counsel) before the Governing Body and present his position.
3. GB Final Decision/Written Explanation

NPDB Reporting

1. For ACOs/CINs HCQIA/NPDB participation is optional – based on whether or not the entity provides a formal process for peer review.
2. Positives –
 - Gain HCQIA immunity.
 - Gain benefit of NPDB Querying (for credentialing purposes).
3. Negatives –
 - NPDB Reporting “raises the stakes” for physicians.
 - Increased process/decreased flexibility.
 - Increased likelihood of legal challenge.

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