

ACO Governance

Is Your ACO Still Compliant?

ACOs are required to submit documentation proving compliance with the governance requirements as part of the application process. However, as time within the program passes, ACOs often implement changes to their operations which can create compliance issues with their previously approved governance structures.

The Medicare Shared Savings Program Final Rule, released in 2015, updated the governance requirements for ACOs participating in the Shared Savings Program. While these changes did not raise many concerns, the most recent programmatic changes under Pathways to Success have many ACOs considering structural changes that could run afoul of these requirements.

A Quick Reminder

Each Shared Savings Program ACO is required to maintain an identifiable governing body with ultimate authority to execute the functions of an ACO, including processes to promote evidence-based medicine and patient engagement, to report on quality and cost measures, and to coordinate care. This Governing Body may be referred to in any number of ways. Most ACOs refer to the Governing Body as a Board of Managers or Management Committee. The name of the entity is irrelevant as long as all of the criteria are met. The following requirements seem to create the most concern for ACOs as they continue to move forward under the Shared Savings Program:

- The Governing Body must be separate and unique to the ACO and cannot be the same as the governing body of any ACO participant (unless the ACO is formed by a single participant TIN).
- The members of the Governing Body must have a fiduciary duty to the ACO, including the duty of loyalty, and must act consistent with that fiduciary duty.
- The ACO must establish a mechanism for shared governance among the Participants that formed the ACO.
- The ACO must provide for meaningful participation in the composition and control of the ACO's governing body of the Participants or their representatives.
- 75% control of the governing body must be maintained by Participants or their designated representatives. Note: this does not require participation by a physician and may include other individuals, such as the CEO of a Participant.

Shared Governance, Meaningful Participation and the 75% Control Requirements

As ACOs consider the implications of taking on risk, many ACOs are also considering whether to include additional Participants. In some cases, they are even considering whether or not all of

their current Participants are a great fit in a future where risk is on the table. It is important for ACOs to remember that any changes in Participants of the organization should be analyzed to ensure that all governance requirements are still being met. The 75% control requirement is easy enough to remember, but many ACOs forget that CMS has interpreted the Shared Governance requirement to mean that all Participants should have some amount of representation in the governance of the ACO. This does not require each Participant to have a voting seat on the Governing Body, but it does mean that each Participant should be represented and have the opportunity to be heard. The Meaningful Participation Requirement has been interpreted to mean that no Participant should overwhelmingly outnumber the others in voting authority on the Governing Body. As ACOs add or drop Participants, they should review the membership of the Governing Body to ensure these requirements are still being met.

Fiduciary Duty Requirement

As part of the commentary released with the Final Rule in 2015, CMS clarified that in situations where not all of the entities are participating in the Shared Savings Program, the ACO must be a separate legal entity to ensure governing body members have a fiduciary duty, including the duty of loyalty, to the ACO alone. CMS has also clarified that this duty of loyalty is due to the ACO itself, and not to the legal entity operating the ACO. As such, an ACO must do an additional analysis when the legal entity operating the ACO is engaged in activities outside of the Shared Savings Program. As ACO's become more sophisticated, many are considering advantages associated with becoming a Clinically Integrated Network, commercial contracts, and other value-based programs. It's important for you to remember:

If the governing body represents individuals or entities which are not participating in the Shared Savings Program, the ACO must be a separate legal entity to ensure governing body members have a fiduciary duty to the ACO alone.

Separate and Unique Governing Body Requirement

In the eyes of CMS, the requirement that the ACO's Governing Body be separate and unique to the ACO is tied to the Fiduciary Duty requirement. In order to comply with the requirement that the governing body be separate and unique, it cannot be responsible for representing the interests of any individual or entity that is not participating in the Shared Savings Program. This is true even in cases where all voting members of the Governing Body are participating in the Shared Savings Program, but the Governing Body is responsible for representing the interests of non-participating providers and/or entities. In other words, compliance with this requirement is based on your Shared Savings Program Participant and Provider/Supplier rosters rather than the membership of your Governing Body itself.