

Oregon Health Authority
Report on Medical Liability and Cost of Defensive Medicine – HB 3650 (2011)
January 31, 2012

EXECUTIVE SUMMARY

HB 3650 (2011), Section 16 directed the Oregon Health Authority (OHA) to conduct a study and develop recommendations for legislative and administrative remedies that will contain health care costs by reducing defensive medicine and the overutilization of health services, while protecting access to services for those in need and their access to seek redress through the judicial system for harms caused by medical malpractice. Specifically, Section 16 directed the OHA to explore the costs, benefits and impacts of defensive medicine and several types of medical liability reform options.

To accomplish this work, OHA procured expert consultants in the areas of medical liability reform and health care data analysis and worked with the Oregon Department of Justice (DOJ) on a legal analysis of related policy. Over the last few months, OHA solicited input from several stakeholders on the best possible sources of information and ideas to consider in regards to medical liability reform options in the Oregon marketplace. This input was forwarded to the consultants for use in their studies. Final reports for each of the resulting components of work are can be viewed by visiting: www.oregon.gov/OHA/legactivity/. Below is a summary of the key findings:

Medical Liability Policy Analysis

Medical liability policy experts, Allen Kachalia, M.D., J.D., and Michelle Mello, J.D., Ph.D., from the Harvard School of Public Health, completed policy studies that included a thorough literature review and Oregon-specific data where available to determine the benefits and impacts of reform options:

- Noneconomic damages caps may bring some cost savings, but may exacerbate inequities in awards.
- Medical panels may have no tangible benefits and may increase litigation costs or lengthen resolution.
- Oregon Tort Claims Act (OTCA) extension to providers of Medicaid CCO patients are likely of little benefit as it would affect only a small number of patients and have minimal impact premium costs.
- Joint and Several Liability (JSL) reform offers little benefit for CCOs because settlements are almost always under policy limits and would also not address claim reporting concerns for providers.
- Administrative Compensation Systems (ACS) offer the greatest prospect for transformative change, but may face political and legal challenges.

Defensive Medicine and Overutilization Studies

Experts in health care data analytics, Bill Wright, Ph.D. from the Providence Center for Outcomes Research and Kate Baicker, Ph.D., from the Harvard School of Public Health, completed studies on defensive medicine and the overutilization of health care services that included a survey of Oregon medical providers and a thorough analysis of Oregon medical claims:

- An estimated \$650 million may be attributable to defensive medicine statewide, though most of these costs flow through private insurers or federal payments; Oregon state budget's share is \$31 million.
- Within services commonly associated with defensive practice, 14% may be medically unnecessary.
- Unnecessary care in hospital settings accounts for 74% of defensive medicine costs.
- Direct malpractice reforms (such as damage caps) might reduce total Oregon healthcare expenditures by \$345 million with an estimated annual savings of \$20 million to Oregon's budget.

Legal Analysis Under Oregon Law

As mentioned above, the OHA partnered with the DOJ to conduct a legal analysis on medical liability reform options and Stark law and related limitations on financial interests:

Stark Law and Related Limitations on Financial Interest Laws

- Stark law prohibits providers from making referrals for health care services to entities in which the provider has a financial relationship; exemptions exist.
- Anti-kickback laws prohibit payments for referrals.
- False claims law imposes civil liability for fraudulent claims and is supported by Stark law.

Legal Analysis of Medical Liability Reform Options

- Extension of the Oregon Tort Claims Act must be funded or made conditioned on appropriation by the Legislature in order to be constitutional.
- Caps on damages would most likely require a change to Oregon's Constitution.
- CCOs may potentially be held vicariously liable for the actions of apparent agents.
- Mandatory and binding medical panels would likely violate Oregon's jury trial provision.
- An ACS could be designed in a way that would not likely violate the jury trial provision and or Oregon's remedy clause.

Conclusions and Recommendations

In summary, these studies can provide detailed analysis and information to help policymakers make these tough decisions. However, they do not suggest any single solution that will solve all the issues of medical liability or defensive medicine in the health care system. An efficient medical liability system is a critical aspect of an efficient health care system, but it also has an impact on Oregon's workforce as it relates to provider education, retention and recruitment. Further, workforce capacity is strained when time is spent providing unnecessary lab or X-ray studies, or hospital stays ordered for defensive medicine purposes. Ultimately, any reforms chosen need to balance three key factors: reduction of costs, improved patient safety, and equity for those individuals who are injured as a result of medical errors.

Therefore, OHA recommends that the appropriate body, or in the case that no appropriate body is identified, the Oregon Health Policy Board, review these studies in detail, outline advantages and disadvantages as to how options meet the desired policy goals and then as appropriate, draft legislative concepts for the 2013 Legislature. Such suggestions may include:

- Consideration of the key next steps for an Administrative Compensation System (ACS) in Oregon. This evaluation should include assessing the best design for such a system and include an actuarial evaluation, specifically estimating the premiums paid and the potential number of injured, including a definition of "fault" vs. "no-fault," and setting payment thresholds.
- Evaluate the suggested refinements to Oregon's Joint and Several Liability statutes and assess the feasibility of making those changes in the 2013 Legislative session.
- Evaluate the feasibility and affordability of extending the OTCA or another type of liability funding arrangement for Oregon providers.
- Evaluate the viability of pursuing caps on non-economic damages, considering our current partial caps for wrongful death, prenatal and perinatal injury.
- Evaluate how CCOs could partner with hospitals in their community to adopt optimal apology and offer arrangements among their networks, and assess any needed statutory changes or other barriers to implementation.
- Evaluate the use of safe harbors through establishing a standard of care, with consideration of the results of Oregon's AHRQ grant-funded analysis of Safe Harbor closed-claims analysis.