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Know your legal obligations before joining an ACO

The decision to participate in an accountable care organization (ACO) is entirely voluntary for healthcare providers. If you choose to participate you will be required to sign a contract that is generally referred to as a participating provider agreement. Carefully review these contracts with experienced legal counsel, because they may contain provisions that could broadly affect your practice of medicine in the ACO context and beyond.

Restrictive covenants. For example, in reviewing these agreements on behalf of our physician clients, we have detected restrictive covenants that would preclude a doctor from joining any other provider network, including a non-ACO independent practice association or a physician-hospital organization. A broad-based restriction such as this is not mandatory under law (although the ACO regulations do preclude a primary care physician from joining more than one ACO). In practice, physicians often participate in several provider networks, which is perfectly appropriate. As such, think long and hard before agreeing to a restrictive covenant of this sort.

On the other hand, certain provisions are mandatory for inclusion in an ACO participating provider agreement, so become familiar with these terms and their implications.

Clinical protocols and quality measures. Doctors in an ACO will need to abide by the clinical protocols and

quality measures adopted by the ACO. Therefore, request copies of such policies and procedures, and review them before signing an ACO participating provider agreement.

Record retention. Under ACO regulations, you also will be required to retain clinical documentation and payment records for 10 years—a longer time than generally prescribed under applicable state law—and possibly longer in the event of a government audit. You therefore may need to modify your document retention policies to comport with this mandate.

Compliance plan. Because the ACO is compelled by law to adopt a corporate compliance plan, you may be required by your ACO's participating provider agreement to implement your own compliance plans as well as abide by the ACO's compliance plan. When implementing a compliance plan, physician practices will need to, among other things, screen their employees and affiliates for Medicare program exclusions and other such sanctions. Moreover, under the newly enacted ACO regulations, an ACO must ensure that its own staff members and its participating providers undergo compliance training.

Notification of participation. In terms of informing patients of ACO participation, you will be obligated by the participating provider agreement to post signage and distribute

pre-approved notices to ACO patient beneficiaries informing them that your practice is participating in an ACO.

Federal laws. Participating provider agreements will contain broad language obligating you to abide by certain federal laws, including, but not limited to:

- federal criminal laws;
- the False Claims Act (31 U.S.C. section 3729 et seq.);
- the anti-kickback statute (42 U.S.C. section 1320a-7b(b));
- the Civil Monetary Penalties law (42 U.S.C. section 1320a-7a); and
- the Physician Self-Referral law (commonly referred to as the Stark law, 42 U.S.C. 1395nn).

The world of ACOs presents unique opportunities for physicians. Contracting with an ACO should not be undertaken lightly, so understand the implications of the contracts and other documents that you will be required to sign as a condition of participation.

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