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Accountable Care Organizations –

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Why should a concept that occupies only four of over 2,000 pages in the ACA rank as the second most important health law issue two years in a row? Even after the Centers for Medicare and Medicaid Services (CMS) issued the much-anticipated Final Rule on the Medicare Shared Savings Program (MSSP) on October 20, 2011, and provided the healthcare industry with extensive guidance about the formation, operation, and payment of accountable care organizations (ACOs), these entities remain uncommon and, in most cases, more theoretical than real. ACOs do have, however, the potential of being the most transformative part of healthcare reform.

In simple terms, ACOs are provider-led organizations whose purpose is to manage the full continuum of care and be accountable for the overall cost and quality of care for a defined population. The ACA directs CMS to experiment with a variety of ways to cause providers to assume responsibility for clinical and financial outcomes. Together with medical homes and several new payment mechanisms, ACOs represent a dramatic paradigm shift away from traditional fee-for-service medicine to a more holistic way of delivering and paying for patient care. 2012 will likely be remembered as the year Medicare first recognized the intrinsic value created when providers voluntarily join together and cooperatively manage the care they deliver to beneficiaries. Although the MSSP is still in its infancy and is likely to undergo extensive change in the coming years, its significance has been compared to Medicare's adoption of the Prospective Payment System (based on diagnosis-related groups) in the 1980s. Fee-for-service may not be dead yet, but its days surely seem numbered.

The importance that the Obama Administration has given to ACOs was demonstrated by its coordinated issuance of a series of proposed and somewhat more final rules, policy statements, and notices by several federal agencies in March and October of 2011. Literally hundreds of pages in the *Federal Register* were devoted to addressing the unique fraud and abuse, tax, and antitrust implications of ACOs and their participation in the MSSP. Much of the regulatory landscape that predated ACOs was either at odds with the public poli-

cies behind the ACA or unprepared to deal with some of the novel legal questions that the law presents. Congress clearly understood that additional agency guidance would be needed to address these new payment methodologies and provider-to-provider relationships, as well as to answer many legal questions that were neither anticipated nor relevant during the pre-ACO era. Also, of particular interest to health law practitioners are a raft of new health information technology, licensure and certification, state insurance law, and organizational issues that are raised by the creation and operation of ACOs. Fortunately for health lawyers, these and many other aspects of ACOs have been addressed in a new AHLA publication: *The ACO Handbook: A Guide to Accountable Care Organizations*. (www.healthlawyers.org/bookstore)

For some veteran health lawyers, the introduction of ACOs may seem reminiscent of the days when physician-hospital organizations and other kinds of provider arrangements were all the rage. Admittedly, there are a few similarities between ACOs and these older models, but they pale in comparison with major advances in health information technology and cultural changes that make it unlikely that accountable care will turn out to be just a 21st Century version of managed care. There is a growing recognition that today's budgetary pressures can only be addressed by a fundamental realignment of the risks and rewards inherent in the American healthcare system. Indeed, some private payors have indicated they are ready to embrace ACOs even if CMS' experimentation with this concept fails to meet Washington's expectations. This is why ACOs are more than another fad. CMS terminology will surely evolve, as will the particulars of the MSSP, but it is very hard to imagine that the principles of accountable care will end up being scrapped completely.

Therefore, whatever comes of the ACO initiative, health lawyers will be grappling with a fundamentally changed regulatory environment because of this particular aspect of health reform. That reason alone ensures that AHLA will be giving special attention to ACOs in the year ahead.

