

Attorneys:

- **Russell F. Anderson**
randerson@pullcom.com
203.330.2271
- **Collin P. Baron**
cbaron@pullcom.com
203.330.2219
- **Margaret A. Bartiromo**
mbartiromo@pullcom.com
203.330.2276
- **Stephen M. Cowherd**
scowherd@pullcom.com
203.330.2280
- **Nancy A. D. Hancock**
nhancock@pullcom.com
203.330.2118
- **Karen A. Jeffers**
kjeffers@pullcom.com
203.330.2284
- **Randall C. Mathieson**
rmathieson@pullcom.com
203.330.2037
- **Karen P. Wackerman**
kwackerman@pullcom.com
203.330.2278

Due Diligence in Home Health M&A Transactions

November 12, 2021

by Karen P. Wackerman

In the first article in our series discussing home health M&A transactions, we discussed the various structures that may be used to combine home health agencies (HHAs) with each other or with other entities. Whichever structure is used for the transaction, thorough due diligence by the acquirer is critical to the success of the combined entity. The acquirer will want to minimize any possibility that it could be held liable for violations of law by the seller or home health agency sought for merger or acquisition (target).

In any business transaction, the parties engage in “due diligence” – the examination of the other party’s records, contracts, financial statements and history to determine whether they want to proceed with the transaction. In addition to the usual due diligence that would be performed in any business transaction, HHAs must consider additional areas for investigation, including billing practices, contracts and regulatory compliance.

Billing Practices

The billing practices of the target should be examined to determine whether billing has complied with Medicare and Medicaid rules. Significant irregularities in an HHA’s billing practices may indicate that the HHA was overpaid by Medicare or Medicaid and may be liable for repayment of overpayments as well as penalties. This is a potentially large liability that might come to light only after the transaction closes and would then be imposed on the buyer. A potential buyer should review the target’s billing practices and randomly selected bills along with their corresponding medical records and its history of repayments to federal and private payors to get a sense of the target’s general attention to the requirements of billing. We often recommend that a buyer engage a third party to perform a billing audit, which will involve sampling a portion of the target’s bills to determine the rate of errors.

Due Diligence in Home Health M&A Transactions

Contracts

In addition to all of the usual reasons that contracts of a target should be reviewed by a buyer (e.g. determining whether the contract party's consent will be needed for the transaction and reviewing other terms), contracts of the target should also be examined to determine whether any arrangements may violate the federal Anti-Kickback Statute, which prohibits providing remuneration in exchange for referrals of business that will result in payments from federal payment programs, including Medicare and Medicaid. Both criminal and civil penalties can be imposed for violation of this statute.

The Office of Inspector General of the U.S. Department of Health and Human Services has instituted a number of safe harbor provisions that can be relied upon by parties to ensure compliance with the Anti-Kickback Statute. See 42 C.F.R. §1001. These include safe harbors for leases of real estate or personal property, employment, and other activities. For example, an office lease that is in writing, signed by the parties, for a term of at least one year, includes fair market rent that is set in advance, describes the premises rented and does not cover a greater portion of the premises than is reasonably necessary, will be protected by the safe harbor. Failure to follow a safe harbor provision to the letter does not necessarily result in a violation of the statute, but the closer a party adheres to the requirements of a safe harbor the more protection it will be afforded.

HHAs and hospice agencies are also required to follow federal regulations with respect to their contracts with facilities such as nursing homes. Facility contracts should be reviewed for compliance with these regulations.

Regulatory Compliance

A general compliance review of each HHA is also recommended, to determine whether each is generally complying with federal and state regulations for home health agencies and, if applicable, hospice agencies. In Connecticut, HHAs are licensed and regulated by the Department of Public Health (DPH). These DPH regulations include very detailed requirements for staffing and operations of a licensed HHA in Connecticut. The Connecticut Department of Consumer Protection (DCP) requires that homemaker companion agencies (HCAs), which provide nonmedical assistance with such tasks as cooking, cleaning, dressing, etc. to clients in their homes, be registered with DCP. An HHA can provide these nonmedical services but may instead operate a separate HCA, in which case compliance with the DCP statutes and regulations relating to HCAs should also be confirmed.

Federal Medicare and Medicaid laws and regulations impose many operational requirements for HHAs and hospices in order for them to be eligible for payment, such as these hospice requirements and these HHA requirements. Other federal laws (such as the Health Insurance Portability and Protection Act of 1996, or HIPAA) also apply. Due diligence for HIPAA compliance would include a review of the target's written policies as well as its actual practices with respect to the personal health information of patients. It is also important to determine whether the target has experienced any HIPAA breaches and if so, how those have been

Due Diligence in Home Health M&A Transactions

addressed.

Thorough due diligence by a purchaser of an HHA is critical to protecting the purchaser from potential future liability for violations of state and federal health care law by the target. If the purchase of or merger with an HHA is in your plans, please contact a member of Pullman & Comley's Health Care practice to review and discuss the special considerations and nuances unique to the home health sector.

This publication is intended for educational and informational purposes only. Readers are advised to seek appropriate professional consultation before acting on any matters in this update. This report may be considered attorney advertising. To be removed from our mailing list, please email unsubscribe@pullcom.com with "Unsubscribe" in the subject line. Prior results do not guarantee a similar outcome.