

Employee Benefits and Executive Compensation Compliance and Planning

Enhancing the Value of Growing Private Equity Platform
Companies via Proactive Compliance Initiatives

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Agenda

Understanding the Employee Benefits Aspects of the Health Care Acquisition

- Understanding the Groundwork for the Transaction
- What's Coming?
- Do the Due Diligence!
- Pay Attention to the Purchase Agreement
- What If There is a Problem?
- Going Forward



Corporate Practice of Professions – Overview and Best Practices

- Addressing CPOM Risks
- Overview of Compliant Structure
- Separate Identities
- Engaging In the Due Diligence Process
- Integrating Providers Following a Health Care Transaction

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Understanding the Employee Benefits Aspects of the Health Care Acquisition

Understanding the Groundwork for the Transaction

What Type of Business is Being Acquired?

- Acquisitions in the health care space encompass many types of entities and business platforms.
- Understand the workforce of the target and various nuances to the business.

What is the form of the purchase? Stock or Asset?

- Stock Transaction – most assets, liabilities, and benefit plans will be acquired.
- Asset Transaction – certain assets, liabilities and benefit plans may stay with the seller.

What's Coming?

What plans, agreements, or other perquisites are being acquired?

Look for:

- 401(k) plans, 403(b) plans, health plans (including dental, vision, disability, etc.), deferred compensation plans, equity plans (e.g., stock option plans), employment agreements with compensation possibilities or promises or anything similar.
- Pay particular attention to traditional defined benefit pension plans and multiemployer pension plans with the possibility of “withdrawal liability.”

-- these are typically big dollar liability items

Do the Due Diligence!

It pays to spend time performing due diligence.

- Undertake a review of every benefit plan, employment agreement, and any document that may contain a benefit or promise
- Look for compliance and risk points
- During review, think ahead for integration



Pay Attention to the Purchase Agreement

The Purchase Agreement terms must be evaluated very closely and drafted very specifically.

- The Representations and Warranties
 - What is the Seller representing about the plans?
 - Is the language strong enough?
 - Is the Seller required to produce all documents?
- The Covenants
 - Are you required to take any structural form or provide anything post-closing?
- Any indemnifications?

What If There is a Problem?

Identify Compliance Risks and Associated Costs

- 401(k) and 403(b) Plans
 - Look for plan document and amendment issues
 - Look for clues on operational compliance
 - Consider the IRS correction program to save the deal

- Health Plans
 - Look for plan document and amendment issues
 - Look for clues for operational compliance
 - Consider ERISA, ACA, COBRA, HIPAA, audits

What If There is a Problem? (cont.)

- Executive Compensation Arrangements
 - Don't forget to look in employment agreements and offer letters.
 - Are there any Code Section 409A issues?
 - there are severe penalties for violations
 - there is an IRS correction program, but not for all issues
 - Have promises been made for new stock issuances or bonus payouts on a going forward basis?

Going Forward

Planning for post-closing structure and related events should take place before closing

- What will happen with the acquired plans?
 - Will the acquired plans continue to operate?
 - if so, for a transition period or longer?
 - Will the acquired plans terminate?
 - if so, before or after closing?
 - Will the acquired plans merge into the Buyer's preexisting plans?

- What will happen with the acquired employees?



Going Forward (cont.)

- Do any employment agreements need to be transferred/assigned?
 - do any new agreements need to be prepared?
- Do any adjustments need to be made for equity promises?
- Special Retirement Plan and Health Plan issues
 - these plans have their own specific discrimination tests
 - determine how any surviving plans will be tested
 - determine if any controlled groups and/or affiliated service groups exist and how testing is impacted
- Are there professional corporations owned by medical professionals and management or other organizations owned by others?
 - most organizations try to avoid having a MEWA

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Corporate Practice of Professions Overview and Best Practices

Addressing CPOM Risks – How?

Friendly PC Structure



- So-called “friendly PC” or “captive PC” structure
- A professional entity, owned by a “friendly” professional is managed by a non-professional entity (typically referred to as a “Management Services Organization” or “MSO”).
- Professional entity is aligned with the MSO through an administrative/management services agreement
- Management agreement describes each parties’ responsibilities – **Manager is responsible for business decisions, practice is responsible for clinical decisions**
- Independence of clinical decision making maintained
- **Management entity and professional entity work together but are separate and distinct entities with separate and distinct responsibilities and authority**

Overview of Compliant Structure

Compliant structures preserve clinical independence



No Interference with Clinical Care

An MSO cannot interfere with the clinical services and decision-making provided by the professional practice entity and its professional staff, and the MSO should seek consensus with the professional practice entity over the development of clinical protocols, scheduling, and fees charged for professional services.

Employment of Professionals

In states with a corporate practice prohibition, the professionals must be employed by the professional corporation that is authorized to provide professional services; they cannot be employed by the MSO.

Separate Identities

Management Company and Practice are separate entities and should present themselves as such

Management Company should always say it acts on behalf of Practice, as Practice's Business Manager

Management Company employees should not represent they supervise, oversee, direct, or otherwise control Practice employees (outside of certain authority specifically granted by Practice)

Management Company should not say it that it is a "d/b/a" or alternate name for Practice

Management Company employees should not hold themselves out as being employed by Practice (email signatures, business cards)

Management Company and its employees should never represent or imply that they or Management Company provide professional services

Engaging In The Due Diligence Process

Restrictive Covenants

Existing Agreements

- Employment Agreements
- Management Agreements
- Purchase Agreements
- Vendor/Supplier Contracts

Proposed Agreements

- Purchase Agreement
- Management Agreement
- Employment Agreement

Integrating Providers Following a Health Care Transaction



Are new covenants being entered into?

Are the covenants related to:

- Purchase
- Employment
- Both

Integrating Providers Following a Health Care Transaction

Who Are The New Provider Contracts With?

Licensed Entities

Professional Corporations

Management Companies

Sellers

Integrating Providers Following a Health Care Transaction

If Restrictive Covenants Not Permitted



Are There Less Restrictive Alternatives?

Restrictions Limited to Certain Competitors



Restrictions Limited to Certain Activities

Restrictions Limited to Other Management Companies



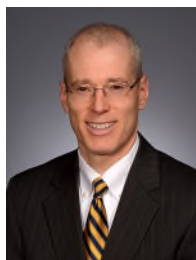
Questions?



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