For the better part of the last year, the M&A marketplace was especially hot, particularly with the respect to healthcare M&A transactions. Though the marketplace has cooled considerably in light of various external factors, it remains important for businesses, including healthcare providers, to prepare for acquisition, even if only for the purpose of maintaining appropriate corporate hygiene.

Having assisted various healthcare providers (i.e., physician practices, ambulatory surgical centers, and assisted living facilities, among others) in both buy-side and sell-side M&A transactions, we’ve seen firsthand that the lack of preparation on the part of sellers can delay closing deadlines and sometimes even cause the deal to fail. While there are many due diligence “surprises” that can lead to either party having cold feet and the ultimate failure of the deal, there should not be “surprises” with respect to fundamental matters that the seller should already be aware of prior to the acquisition. For a healthcare provider, perhaps the most important of the fundamental matters includes reviewing its universe of contracts so as to have a general understanding of its various obligations, the types of contracts it is a party to, and to otherwise what actions such provider may need to take in the event of an acquisition.

The extent of a healthcare provider’s contract review will be dictated by the type of acquisition transaction. Generally speaking, acquisitions typically fall into two categories: equity transactions (i.e., change of control transactions) or asset purchase transactions. Equity transactions involve the sale of the healthcare provider’s ownership interests (e.g., if the provider is a corporation, the transaction will be structured as a stock sale, and, conversely, if the provider is formed partnership, the transaction will be structured as a unit purchase or membership interest purchase). Asset purchase transactions involve the sale of substantially all of the assets of a provider (i.e., assets include, among many other assets, the material contracts, intellectual property, real property owned by, licensed to, or leased to the healthcare provider), while certain liabilities of the provider (i.e., debt obligations) will remain with the provider entity following the closing of the transaction.

Although the type of the acquisition transaction will usually dictate the extent of the review, as a matter of course, providers should, prior to any acquisition, already have a general understanding of the various buckets under which its contracts fall and the different obligations the provider may be subject to within each of those buckets.

### Outlining and Categorizing

Practically speaking, the first step for a business to take is to outline a list of all of its contracts, whether written and unwritten, and then attempt to categorize those contracts based on the nature of its business. While there are innumerable ways to organize contracts, healthcare providers may find it convenient, as a starting point, to generally categorize contracts into the following buckets:

- **Payor Agreements**: Any agreements related to Medicare, Medicaid and other federal or state health care programs, and all third-party payor programs, managed care plans, or any other private party insurance programs.
- **Government Agreements**: While there is some overlap here with payor agreements (i.e., federal or state health care programs), providers should understand how many government contracts it is a party to, as these agreements typically involve rigid notice and consent provisions in the event of acquisition.
- **Vendor and Administrative Agreements**: These agreements encompass all agreements relating to the business of the provider, including operations and internal administration (i.e., insurance policies, custodial agreements, software agreements, etc.).
- **Employment Related Agreements**: Any employment (including executive agreements) and independent contractor agreements that the provider is a party to.
- **Real Estate Related Agreements**: Any leases of the provider, whether the provider is the landlord or the tenant, and any real estate purchase agreements relating to real property directly owned by the provider.
- **Indebtedness Agreements**: Any loan documents and agreements (including revolving lines of credit, promissory notes, security agreements, etc.), and any equipment lease agreements.
- **Miscellaneous Agreements**: Any other agreements of the provider, including any related party transaction agreements (i.e., between the provider and officers/employees, between the provider or officers/employees and family of officers/employees; between the company and owners/family of owner), intellectual property agreements, and other miscellaneous agreements relating to the provider’s business.

### Understanding Contractual Obligations

After a provider has outlined the universe of its contracts, the provider should have a general sense of certain contractual obligations. A provider does not need to undertake an extensive review of each of its agreements. Instead, a provider should seek to have a general understanding of those contractual obligations that will be prevalent in the event of an acquisition or other material change to its business. Below are some questions that a provider can ask itself to facilitate its review:

- Does the contract include any notice or consent obligations in the event of an acquisition (typically referred to as change of control and/or anti-assignment provisions)?
- Would entering into the acquisition accelerate the provider’s obligations under the agreement or otherwise result in the provider’s default or breach of the agreement?
- Does the contract in any way restrict a provider’s right to engage in commercial and/ or marketplace activities (i.e., restrain its ability to compete with or conduct any business, impose exclusive dealing obligations, contain “most favored nations” or similar pricing terms, or limit the solicitation or hiring of any person)?
- How difficult is the agreement to terminate? Are there any post-termination obligations?

### Conclusion/Takeaway

As mentioned above, reviewing and understanding your contractual obligations is a function of good corporate hygiene. Moreover, in the event that a provider finds itself in the throws of an acquisition, it will be in a significantly better position to respond to the demanding and time-sensitive nature of such an acquisition.

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