

THREE KEY THINGS IN HEALTH CARE

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Three Key Things in Health Care offers snapshots of three significant issues in health care that we believe merit your attention. Published weekly by the Hunton Andrews Kurth Health Care Practice Group, the goal of *Three Key Things* is not to repeat what is already in the trade press, but to provide actionable ideas that will benefit your organization. We welcome your feedback!

- **The COVID-19 crisis will be a driver for provider affiliation transactions.**
 - COVID-19 will have a disparate impact on providers based on a number of factors. Some are internal, such as their agility in adapting to new care delivery models and the strength of their balance sheet and cash position. But many are external, such as the level of outbreak locally, the degree to which local officials proactively evaluate public health interventions and permit reopenings, and the relative amount of assistance received under the CARES Act and other relief measures.
 - The impacts on the most vulnerable providers (e.g., physician practices and small community hospitals) are likely to spur further interest in affiliations with larger health systems better positioned to weather continuing effects or resurgences of the pandemic and potential future pandemics.
 - A significant increase in providers seeking bankruptcy protection while they pursue options for restructuring and potential affiliations also seems likely.
 - Affiliation transactions undertaken against the COVID-19 backdrop will leverage unique benefits. The pandemic has illustrated the need for collaboration and effective utilization of resources across the spectrum of health care providers; collaboration is much easier to implement across affiliated rather than independent providers.
 - For example, it might be more efficient to segregate care for non-COVID patients in designated ASCs, outpatient centers or nursing facilities so hospitals can focus on treating COVID-19 patients, but providers may be reluctant to outsource or allocate services in such manner to independent providers.
 - Providers should anticipate regulators' closely scrutinizing efforts to use the crisis to justify consolidation transactions that are not good for the consumer. There may be a potential role for the "failing firm" defense in certain unique situations where there is no alternative purchaser, but this defense will continue to face a high bar.
 - **Key takeaway:** Some providers will be much better positioned to execute affiliation transactions (e.g., well-capitalized health systems) and take advantage of strategic opportunities as a result of the crisis. However, they need to be prepared to navigate potential bankruptcy and antitrust considerations in the COVID-19 context to be successful executing such strategy.
- **Compliance amidst the crisis is critical.**
 - Routine business processes have been upended by the pandemic.
 - Remote working by those unaccustomed to doing so against a backdrop of severe financial pressures may make cutting corners seem tempting.
 - Providers therefore must remain vigilant and rigorously apply established compliance mechanisms to avoid potentially existential risks.

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- **Key areas to consider:**
 - **Telemedicine** – Fraud will be on the radar screens of payors, so extra attention to compliant coding and billing practices is warranted.
 - **Protection of PHI** – Be mindful of communications that have the potential to implicate HIPAA. The use of personal devices under “exigent circumstances” can result in improper uses or disclosures of PHI.
 - **Physician Compensation/Financial Arrangements** – Throughout the world of commercial real estate, tenants are seeking rent abatements, rent waivers or renegotiation of lease terms and rent rates. But granting real estate or loan concessions to a key referral source could spell trouble if done without consideration of the restrictions imposed by the Stark and Anti-kickback statutes.
 - **Monitoring and Reporting Under CIAs** – Don’t assume the current crisis suspended the obligation to undertake monitoring and reporting functions pursuant to corporate integrity agreements. Absent written confirmation to the contrary from the government, those obligations continue in full force and effect.
- **The PPP loan forgiveness application as a cautionary tale.**
 - Published on May 15, the PPP loan forgiveness application is confusing, poorly explained and requires submission of detailed employment, payroll and other financial information, making it much more onerous to complete than the original loan application form.
 - Recipients of aggregate payments of \$150,000 or more from the various health care relief funds had to do little to receive these payments, but are subject to a quarterly reporting requirement and a requirement to maintain appropriate records and cost documentation under a rubric imported from HHS grant administration requirements as well as “other information required by future program instructions.”
 - **Key takeaway:** Track everything. If the PPP is any indication, providers can expect (i) the back-end reporting and documentation requirements to be an order of magnitude more complex than the information (if any) required to obtain relief fund payments, and (ii) the requirements to be augmented, interpreted and reinterpreted over the coming weeks.

Contacts

Mark S. Hedberg
mhedberg@HuntonAK.com

Matthew D. Jenkins
mjenkins@HuntonAK.com

James M. Pinna
jpinna@HuntonAK.com

Elizabeth A. Breen
ebreen@HuntonAK.com

Holly E. Cerasano
hcerasano@HuntonAK.com

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