BASS BERRY SIMS

6 Considerations for Your Next Hospice Transaction

Hospice care focuses on providing terminally ill patients with compassionate, interdisciplinary care focused on treating symptoms to improve quality of life rather than curing disease. Investment activity in the post-acute care sector continues to grow as the market remains largely fragmented and the need for end-of-life palliative care remains high for an aging population that is largely seeking to receive care in the home setting.

Regulatory compliance and transactional considerations should remain a top priority for potential acquirors. Buyers should strongly consider engaging legal counsel and other advisors who are experienced with the nuances and regulations specific to this space, including but not limited to the issues addressed below.

1. Transaction Structure

Business objectives or unavoidable regulatory requirements will drive the structure of a transaction. Reviewing the regulatory landscape specific to the state in which the hospice operates is a threshold consideration in determining the structure and timing for a transaction. The parties should analyze the change of ownership requirements in respect to operating licenses and provider numbers and also consider post-closing reimbursement mechanics as any of these considerations could dictate the transaction structure that the parties elect to pursue. Additionally, in transactions involving nonprofit entities, consideration should be given to any reporting obligations to and obtaining consents from the applicable state attorney general or other relevant state agency.

2. Medicare Reimbursement Caps

Hospice agencies are limited in the amount of reimbursement they can collect from Medicare in a single year which is known as the "hospice cap." The hospice cap is generally calculated by multiplying an annual per-patient cap amount by the number of patients served by the hospice; however, the actual calculation is complex, nuanced and frequently uncertain at the time of the transaction. Any reimbursement over the annual cap must be refunded to the hospice's Medicare Administrative Contractor. In an acquisition transaction, buyers must carefully assess the potential cap liability, and the buyer and seller should address who will be responsible for any potential post-closing refund owed by the hospice – frequently, as part of the working capital adjustment – and how that will be calculated.

3. Medicare Conditions of Participation

Hospice agencies must meet various requirements to participate in the Medicare program. These "Conditions of Participation" outline fundamental tenets of hospice operations such as patient rights, discharge planning, personnel qualifications and emergency preparedness. Failure to meet required conditions can negatively impact the agency's reimbursement or participation altogether in Medicare. Not only do agencies need to comply with these requirements, but they have practical issues that need to be addressed as part of the transaction. For example, hospice agencies are required to offer bereavement services to family and other individuals, including for one year following the death of a patient. When a sale takes place, the parties will need to address who will be responsible for providing bereavement services for family members of the seller's patients for the one year following closing.

4. Marketing and Referral Sources

Hospice agencies, like any other business, rely on outreach and marketing to reach their customer base. Outreach and marketing for hospice agencies can take different forms, such as developing relationships with referral sources including hospitals through community liaisons, retaining sales teams or public advertising. While broad-based marketing practices may be acceptable in other industries, the same is not necessarily true in the healthcare industry. Where state or federal healthcare payor programs are at play, special consideration has to be given to whether the agencies' marketing strategies and referral source relationships comply with the Anti-Kickback Statute and other fraud and abuse laws.

5. Relationships with Medical Directors

An agency's medical director plays an important role in ensuring that patients are provided with quality care and that they receive adequate pain or symptom management. Additionally, medical director services are required as a Medicare Condition of Participation for hospice agencies. However, these arrangements can be rife with compliance issues if not properly compensated, documented, substantiated and monitored. In any hospice acquisition, this is an area of diligence that should be carefully evaluated.

6. Controlled Substances

Enforcement efforts around controlled substances are high, and agencies must be diligent in ensuring they have adequate policies and procedures in place to meet regulatory requirements. Federal and state laws impact how agencies are to handle patient medications, including proper disposal upon a patient's death. In the same vein, buyers must properly conduct diligence and be clear in the purchase agreement regarding risk allocation for compliance with these regulatory requirements.

Read our additional articles in the series about private equity investing in other healthcare sectors:

- Avoid a Wrinkle in your Dermatology Deal
- X-Ray the Radiology Practice Before You Buy It
- Spring Cleaning: Healthcare Private Equity Compliance Checklist
- Want to Buy an "-Ology"? Six Things to Know Before You Buy a Physician Practice
- The Philosophy for Investing in Urology: 5 Key Regulatory Risks
- Pros & Cons of Behavioral Health Sector Investing
- Believing in Conceiving: Private Equity's Rebirth in the Fertility Sector
- 10 Trends in Physician Practice Transactions to Track in 2020
- Looking Through the Scope: 5 Key Diligence Considerations When Buying a GI Practice

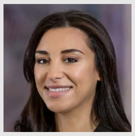
About the Bass, Berry & Sims Healthcare Private Equity Team

The Healthcare Private Equity Team at Bass, Berry & Sims has advised in over 150 private equity transactions in the healthcare industry over the past two years, including The M&A Advisor's Healthcare & Life Sciences Deal of the Year (Over $1B) and Corporate/Strategic Deal of the Year (Over $1B) in 2020. The firm is ranked the #6 Most Active in Healthcare Private Equity Deals in Pitchbook's 2020 Global League Tables. As the third largest healthcare law firm in the U.S. (as ranked by American Health Law Association in 2020), with deep corporate and healthcare regulatory expertise, Bass, Berry & Sims has long been recognized as the go-to law firm for private equity funds investing in healthcare. To learn more about our team, industry experience and value-add, click here.

Authors

Lara A. Flatau
(615) 742-6284
lflatau@bassberry.com

Tatjana Paterno
(615) 742-7928
tpaterno@bassberry.com



Angelique M. Salib
(202) 827-7978
angelique.salib@bassberry.com