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TO: Memo Distribution List

LeadingAge New York

FROM: Hinman Straub P.C.

RE: Explanation of Legislation re. Changes to Ownership or Operations of Nursing Homes

DATE: June 30, 2021

NATURE OF THIS INFORMATION: This is information explaining enacted legislation (S.4983-A/A.5684-A) and a subsequent chapter amendment (S.6767, Rivera/A.7517, Gottfried).

DATE FOR RESPONSE OR IMPLEMENTATION:

HINMAN STRAUB CONTACT PEOPLE: Sean Doolan, Katy Coleman and Leanne Kontogiannis

THE FOLLOWING INFORMATION IS FOR YOUR FILING OR ELECTRONIC RECORDS:
Category: #10 Miscellaneous/Other Suggested Key Word(s):

In April, the Governor signed into law legislation (S.4893-A, Rivera/A.5684-A, Gottfried) (“Original Bill”) that is intended to: (1) bolster transparency, increase notice requirements, and develop approval standards regarding any changes to the ownership of nursing homes; and (2) enhance the disclosure of common or familial ownership and rates to residents and the public. The Original Bill was subsequently amended pursuant to a chapter bill (S.6767, Rivera/A.7517, Gottfried) (“Chapter Amendment”), which was also signed into law by the Governor (Chapter 141 of the laws of 2021). The resultant requirements of both bills are explained below.

1. REQUIREMENTS RE. APPLICATIONS FOR ESTABLISHMENT

Pursuant to existing law, no nursing home may be “established” or change ownership without written approval by the Public Health and Health Planning Council (“PHHPC”).¹ The new law imposes various new requirements regarding what information must be contained in an application for establishment, the provision of notices pursuant to the filing thereof, and the criteria to be applied in determining whether to approve such an application.

In addition to currently required assessments of public need and examinations of the “character, competence, and standing in the community[] of the proposed incorporators, directors, sponsors, stockholders, members or operators,”² the new law requires the PHHPC to evaluate every “individual and entity” of the applicant before approving an application for establishment or change of control. For each individual and entity – including, but not limited to, controlling persons, principal stockholders, and principal members – the application must include: (1) information regarding these individuals’ and entities’ character, competence and standing in the community; (2) the identity of every nursing home in which such individuals and entities held a controlling interest – or were a controlling person, principal stockholder or principal member – during the past seven years; and (3) the nature of such interest. These requirements are largely required by the Department of Health (“DOH”) on current applications – prior to the new law going into effect.

In evaluating an application, the PHHPC must determine if, during the past seven years, each individual and entity demonstrated satisfactory character, competence, and community standing; and whether all identified nursing homes in the United States provided a “consistently high level of care” during that period. Criteria for determining a “consistently high level of care” will be set forth in rules and regulations adopted by the PHHPC and subject to DOH approval. In addition, in assessing whether a nursing home has delivered a “consistently high level of care,” the PHHPC shall consider, at a minimum, whether a facility: (1) received a two-star rating or less by the Centers for Medicare and Medicaid Services (“CMS”), or a comparable grade under any successor systems; (2) has been found to have violated state or federal laws, rules or regulations in a manner that “threatened to directly affect the health, safety or welfare of any patient or resident, including, but not limited to a finding of immediate jeopardy or actual harm and [such violations] were recurrent or were not promptly corrected, including but not limited to repeat deficiencies for the

¹ N.Y. Public Health Law §2801-a(1).

² N.Y. Public Health Law §2801-a(3).

same or similar violations over a three year period or during the entire duration of ownership if less than three years, or any facility which has been in receivership”; (3) closed as a result of a settlement agreement from a decertification action or licensure revocation; or (4) was involuntarily terminated from the Medicare or Medicaid program in the prior five years (unless the applicant had recently taken over a facility and promptly corrected the deficiencies).

Within 30 days of acknowledging such applications for establishment of a nursing home, the DOH must notify to the State Office of the Long-Term Care Ombudsman (“LTC Ombudsman”) – which shall then provide its recommendations to the DOH and PHHPC. Further, when the DOH notifies the PHHPC of a meeting of the Establishment and Project Review Committee (“EPRC”), it must also inform the LTC Ombudsman.

Regarding applications for establishment relating to an *existing* nursing home (i.e. a change in control), the new law requires both the established operator and applicant to provide written or electronic notice to residents, residents’ representatives, staff, and union representatives within 30 days of the DOH’s acknowledgement of the application. Further, immediately upon being informed that an application is scheduled for consideration by the EPRC, the established operator and applicant must notify the same groups.

Finally, following a transfer of ownership, the new law requires new owners and operators to retain all employees for a 60-day transition period (except for cause), with the exception of: the administrator, the director of nursing, any supervisors, controlling persons, principal stockholders, and principal members. Wages and benefits may not be reduced, and other terms and conditions of employment may not be modified, during this transition period. However, owners and operators may continue any disciplinary actions initiated prior to the sale of a nursing home, terminate employees for cause, and otherwise “determin[e] the overall size of the workforce”

2. REQUIREMENTS RE. RELATED ASSETS AND OPERATIONS

The bills also amended existing law – which currently requires nursing home operator to notify the DOH of any common or familial ownership of any entity or individual providing services to a nursing home or operator – to also require such information be included in new residency agreements (or addendums thereto for current residents). Further, prior to entering into any new service agreements with an individual or entity sharing common or familial ownership, operators must: (1) provide 90-days’ notice to the DOH; and (2) inform patients and their representatives, staff and their representatives, and the LTC Ombudsman.

Additionally, the bill amends existing law that requires nursing home operators to notify the DOH 90 days prior to executing a letter of intent or contract relating to the disposition of real property, to also require operators to notify: (1) the DOH 90 days before entering an agreement pertaining to a “consulting, operations, staffing agency or other entity to be involved in the operations of the facility”; (2) the LTC ombudsman 90 days prior to engaging in either type of arrangement; and (3) the LTC Ombudsman, residents and their representatives, and staff and their representatives within

five days of executing such letters of intent or contractual agreements. Notably, when a nursing home enters into an arrangement to delegate an activity or responsibility through such an arrangement, the new law explicitly provides that the operator remains liable.

3. ADDITIONAL DISCLOSURE REQUIREMENTS

The Chapter Amendment also amends existing law relating to the information that must be filed with the DOH when a proposed certificate of incorporation, articles of organization, or an application for establishment of a residential health care facility is filed to include “[i]nformation pertaining to staffing, the source of staffing, and staff skill mix.”

Finally, the new law requires a nursing home to include on its website: (1) maximum rates for residency and services, including detailed rates for each non-governmental payer, to be updated by April 1 each year; (2) a list of all owners, which shall also be provided to the DOH for posting, to be updated within 30 days of any change; (3) the name and address of any landlord of the facility, to be updated regularly; and (4) a summary of all contracts for goods and services for which a facility uses Medicaid or Medicare funds, or other agreements entered into by the nursing home, to be updated within 30 days of execution.

4. EFFECTIVE DATES

The Original Bill – which set forth the initial version of the provisions discussed in Sections 1 (REQUIREMENTS RE. APPLICATIONS FOR ESTABLISHMENT) and 2 (REQUIREMENTS RE. RELATED ASSETS AND OPERATIONS) above – technically took effect immediately upon its signing on April 27, 2021. However, pursuant to the Chapter Amendment and some unusual drafting, upon enactment of the Chapter Amendment, the changes to law resulting from the Original Bill ceased to control and the law reverted back those provisions in effect prior to the Original Bill.

As a result, the requirements of both bills will take effect on October 24, 2021 (180 days after the Original Bill was signed). Until that time, the laws in effect prior to the Original Bill will control.

As the new law includes numerous new notice requirements which, in some cases are in addition to recently enacted other notice requirements, we thought the attached chart might be of assistance when seeking to comply with such requirements.

PHL §2801-A NOTIFICATION REQUIREMENTS PERTAINING TO ESTABLISHMENT CON APPLICATIONS
EFFECTIVE OCTOBER 24, 2021

WHEN NOTICE IS REQUIRED	WHO IS REQUIRED TO PROVIDE NOTICE	TIMING	CONTENT	RECIPIENTS	TYPE OF NOTICE
CON application received by the DOH	DOH	Within 30 days of DOH acknowledgment of the CON application	CON application has been submitted to DOH	State Office of the Long-Term Care Ombudsman	Written or electronic
Submission of a change of ownership CON application	Established Operator and Applicant	Within 30 days of DOH acknowledgment of the CON application	CON application to establish a new operator has been submitted to DOH	(1) NH residents and reps (2) NH staff including, union representatives	Written or electronic
CON application is scheduled for consideration by the EPRC	DOH	Simultaneously with notification to PHHPC members	CON application is scheduled for consideration by the EPRC	(1) State Office of the Long-Term Care Ombudsman	Written or electronic
Change of ownership CON application is scheduled for consideration by the EPRC	Established Operator and Applicant	Immediately upon receipt of notification from the DOH/PHHPC	CON application to establish new operator is scheduled for consideration by the EPRC	(1) NH residents and reps (2) NH staff including, union representatives	Written or electronic

**PHL §2803-X NOTIFICATION REQUIREMENTS PERTAINING TO NURSING HOMES
AND RELATED ASSETS AND OPERATIONS
EFFECTIVE OCTOBER 24, 2021**

ACTION REQUIRING NOTICE BY OPERATOR	TIMING	CONTENT	RECIPIENTS	TYPE OF NOTICE
Law becomes effective – October 24, 2021. *Statute does not specify whether such information must be provided re. service agreements entered into prior to the law taking effect.		Relationship between operator and entity providing services to the operator of the facility. No further details in statute.	Current or prospective residents	Must be included in residency agreements for prospective residents, and addendums for existing residents
Entering into any new common or familial ownership of any corporation, or other entity or individual providing services to the operator or facility *	At least 90 days prior to execution of agreement/transaction date re. notification to DOH. Timing re. other recipients not specified in statute.	Relationship between operator and entity that will be providing services to the operator of the facility	(1) DOH (2) Residents and representatives (3) Staff and representatives (4) State Office of the Long-Term Care Ombudsman	Format not specified by statute; written or electronic acceptable as appropriate
Execution of a letter of intent or other contractual agreement related to: (1) the sale, mortgaging, encumbrance or other disposition of the real property of the facility; and	At least 90 days prior to executing letter of intent or contractual agreement	Brief statement advising whether a letter of intent or contractual agreement is being considered, what it is related to, and effective date	(1) DOH** (2) State Office of Long-Term Care Ombudsman	Format not specified by statute; written or electronic acceptable as appropriate

(2) the consulting operations, staffing agency or other entity to be involved in the operations of the facility				
Execution of a binding letter of intent or other contractual agreement related to: (1) the sale, mortgaging, encumbrance or other disposition of the real property of the facility; and (2) the consulting operations, staffing agency or other entity to be involved in the operations of the facility	Within 5 days of executing a binding letter of intent or other contractual agreement	Brief statement advising whether letter of intent or contractual agreement, what it is related to and effective date	(1) Residents and their representatives (2) Staff and their representatives (3) State office of Long-Term Care Ombudsman	Format not specified by statute; written or electronic acceptable as appropriate

*Current law requires operators to: (1) notify DOH re. any common or familial ownership of an entity providing services, and (2) annually attest to DOH that the information provided is accurate. The new law adds notification provisions to these requirements.

**Current law requires an operator to notify DOH at least 90 days prior to executing a letter of intent or other contractual agreement related to the sale, mortgaging, encumbrance, or other disposition of the real property of the facility. The new law supplements this provision.

***Current law also contains provisions, which are unaffected by the new law, that: (1) prohibit a nursing home from entering into any arrangement to guarantee the debt or other obligation of a party without establishment approval; and (2) “[i]n any instance where a nursing home is sold or otherwise transferred and used for a purpose which is not a health care purpose,” require an operator to remit to the DOH “an amount equivalent to the undepreciated value of capital assets for which the provider has been funded or reimbursed through Medicaid rate adjustments or otherwise funded or reimbursed with resources provided by the state for the purpose of improvement or transformation.”

PHL §2829 NURSING HOME DISCLOSURE REQUIREMENTS*
EFFECTIVE OCTOBER 24, 2021

INFORMATION TO BE DISCLOSED	METHOD OF DISCLOSURE	TIMING
Maximum rates to be charged for residency and services, including rates for each non-governmental payor source	Publicly accessible website	Update on an annual basis, no later than April 1 st of each year
Identity of all owners	Website maintained by the facility, and submit to the DOH for posting on its website	Update within 30 days of any change or transaction affecting ownership
Name and business address of any landlord of facility's premises	Facility's website	Update regularly
Summary of all contracts for provisions of goods or services for which the facility pays with any portion of Medicare or Medicaid funds, other agreements entered into by a nursing home	Facility website	Update within 30 days of execution of the contract

* DOH may promulgate regulations to implement these statutory requirements.