

POST-PANDEMIC PHYSICIAN ALIGNMENT STRATEGIES

IT'S A BUYER'S MARKET

The COVID-19 pandemic has wreaked havoc on the financial viability of many independent physician practices across the country. Hospitals and health systems may need to act quickly to help stabilize these valuable community health care resources and also may have opportunities to enhance integration with their independent physicians. Now is the time for hospitals and health systems to connect or reconnect with their independent physicians to open lines of communication and to signal a willingness to discuss and implement an array of alignment strategies to support and integrate these practices, that, pre-pandemic, may not have been of interest to such practices.

However, stiff competition exists for the attention of these independent physicians – hospitals and health systems, larger physician practices, payors and most assuredly private equity are all interested. “Speed to market” will be important, since post-pandemic, many of these independent practices have or will have urgent needs, and will have already been approached by others. The time to act is now.

WHAT JUST HAPPENED?

Prior to the pandemic, the economy was strong and physician practices were doing well. The pandemic has caused a rapid and significant drop in the financial performance and stability of many of these independent practices. In a period of fewer than three months, elective procedures have been deferred, routine visits have dried up, and many patients are now fearful of returning to their physicians' offices. The financial impact is staggering and many practices were forced to furlough or lay off staff, reduce compensation, seek rent abatement, apply for loans under the Paycheck Protection Program or take out other loans, all in an attempt to stay afloat. These challenges hit quickly as shown by a Medical Group Management Association surveyed 724 physicians back in early April, 75% of whom were independent practices. At that time, 97% of the practices **surveyed** indicated that the pandemic was already having either a direct or indirect negative impact on their practices.

WHAT'S DIFFERENT NOW?

This is not the typical slow decline or stagnation of the operational and/or financial performance of a practice that we've seen in the past, which in some instances, caused practices, or their physicians individually, to consider alternative arrangements. Today's practices are in survival mode. They are seeking a life-line, and many need one quickly. Even fiercely independent practices may (i) now be weighing their options for a closer relationship with a hospital or health system, (ii) have received other offers or (iii) unfortunately for some, the group may already be breaking up due to the financial stress caused by the pandemic. For a number of reasons, potentially including their practice's history and culture, these physicians may be reluctant participants in any discussion and may want to retain as much independence as possible. Hospitals and health systems should be sensitive to this reluctance and open to models that preserve facets of private practice. Hospitals and health systems should consider options for allowing these physicians to exit a particular alignment strategy without penalty or undue cost. Exit strategies could include “buy-back” options in practice acquisitions, short-term contractual arrangements without non-competition/non-solicitation covenants, protocols for the return of medical records, reassignment of lease agreements and similar terms that will alleviate fears regarding a transition into what may be a more lasting alignment strategy with the hospital or health system.

WHAT SHOULD HOSPITALS AND HEALTH SYSTEMS BE DOING NOW?

First, consider the consequences to patients and the community of not stepping in to help independent physician practices devastated by these times and assess opportunities to enhance quality and efficiency of care through greater alignment with these practices.

Second, key practices should be identified and approached – inclusion is likely better than exclusion. Signal to these practices an understanding of their predicament, and a willingness to engage in succinct, to-the-point discussions regarding alignment strategies. If the answer is “no,” leave the door open – your goal is to be the first to offer a pathway for the viability of the practice and to become their first option if they change their minds. These discussions can take place on a one-to-one basis, or potentially with a larger group by way of a virtual “Town Meeting.”

Third, hospitals and health systems need to be ready to engage and execute much faster than before – some of these practices may not be able to withstand a drawn-out transaction process or may have other offers in hand. Quick action can be accomplished by way of a truncated

due diligence process, quick FMV valuation, documents at the ready, and a team empowered to make decisions.

WHAT IS THE ARRAY OF ALIGNMENT STRATEGIES THAT CAN BE DEPLOYED?

No one size fits all when it comes to developing and deploying physician alignment strategies. Each market is different, and no two practices are necessarily alike (even in the same market). The strategy deployed has to be responsive to why the physicians are now willing to entertain alignment discussions. Remember, some physician practices may be “reluctant participants” in these conversations, given their history of independence. The concept of “selling one’s practice to the hospital or health system” may still be off the table for some physicians, but not for others. Listening to the challenges and concerns of a particular practice and crafting a responsive offer will save precious time and will garner the physician practice’s confidence in the hospital or health system. Here are some potential alignment strategies:

- Urgent Need Strategies
 - Loans for financial stabilization
 - Acquisition of all or a percentage of the stock/equity of a practice
- Intermediate Strategies
 - Acquisition of certain practice assets (or leasing of those assets and subleasing of offices) in combination with a professional services agreement (“PSA”) with the physicians remaining the employer of the staff and providing certain management services to the hospital or health system
 - Purchasing of the real estate or other assets with a lease back arrangement to the practice
 - Development of management services organization (“MSO”) type arrangements where the MSO manages the independent practice or practices
 - Granting of an option to acquire the practice
- Long Term Strategies
 - Acquisition of the practice assets, employment of the practice’s staff and either employment of the physicians directly or engagement by virtue of a PSA
 - Formation of joint ventures for certain ancillary services
 - Development of service line co-management and other **clinical integration arrangements** (see slide 11 for additional information on recommended strategic alignment strategies)

WHAT ARE THE LEGAL GUARDRAILS TO THESE ALIGNMENT STRATEGIES?

Each alignment strategy implicates a number of state and federal laws and regulations, the navigation of which is key to a compliant arrangement. Most importantly, compliance with a Stark Law exception will be necessary. Available exceptions may include fair market value exception, personal services exception, isolated transaction exception, bona fide employment exception, rental of office space, and others. Potential alignment strategies should be analyzed to see if they can be structured to fit within the waivers. However, since the Stark Law Blanket Waivers issued by the Department of Health and Human Services on March 30, 2020, expire once the National Emergency is lifted, these waivers may be of limited use since many physician alignment strategies will be structured as longer-term arrangements. See our recent articles [here](#) and [here](#) for updates on the Stark Law Blanket Waivers. Similarly, each alignment strategy needs to be analyzed under the Anti-Kickback Statute and its applicable Safe Harbors.

HOW CAN HALL RENDER HELP?

Hall Render has counseled clients on physician alignment strategies in virtually every market of the country. We have developed checklists, work plans, due diligence lists, purchase agreements and other transaction documents that can be quickly, and efficiently, tailored to the particular facts and circumstances of the selected alignment strategy or strategies. We also can provide reasoned and practical advice on the application of the various state and federal laws and regulations governing relationships between referring physicians and hospitals and health systems. Hall Render stands ready to assist and support the General Counsel Offices and their C-Suite colleagues in developing and

implementing a successful post-pandemic alignment strategy. **We will be holding a complimentary webinar to explore potential alignment strategies in more detail in June.** In the meantime, if you have any questions or would like additional information about this topic, please contact:

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Hall Render's attorneys and professionals continue to maintain the most up-to-date information and resources at our [COVID-19 Resource page](#), through our 24/7 COVID-19 Hotline at (317) 429-3900 or by contacting your regular Hall Render attorney.

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