

Minnesota Attorney General Notification of Health Care Transactions

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On May 26, 2023, the Governor of Minnesota signed into law Minnesota bill HF 402 to increase government oversight of health care transactions that occur in Minnesota or involve Minnesota-based health care entities. Minnesota joins a growing number of states considering or enacting similar measures, including New York, Connecticut, Delaware, Massachusetts, Nevada, New Jersey, Oregon, Rhode Island, Washington, and California. The following is a general overview of this new law, many portions of which have gone into effect already.

General Prohibition and Key Definitions

HF 402's purpose is to prohibit transactions by any health care entity that would "substantially lessen competition or tend to create a monopoly or monopsony." In order to enforce this prohibition, HF 402 institutes a number of transaction notification requirements and grants the Minnesota attorney general with the power to review, enjoin, or unwind any applicable transaction in violation of HF 402.



Here are key definitions from HF 402 that outline the law's scope:

- "Health care entity" is defined as hospitals, hospital systems, captive professional entities, medical foundations, health care provider group practices, entities organized or controlled by one of the above entity types, and entities that own or exercise control over one of the above entity types.
- "Transaction" is defined as a single action or a series of actions that occur within a five-year period in Minnesota or involving a health care entity formed or licensed in Minnesota, that constitutes:
 - A merger or exchange of a health care entity with another entity;
 - The sale, lease, or transfer of 40 percent or more of the assets of a health care entity

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to another entity;

- The granting of a security interest of 40 percent or more of the assets of a health care entity to another entity;
- the transfer of 40 percent or more of the shares or other ownership of a health care entity to another entity;
- An addition, removal, withdrawal, substitution, or other modification of one or more members of a health care entity's governing body that transfers control, responsibility for, or governance of the health care entity to another entity;
- The creation of a new health care entity;
- An agreement or series of agreements that results in the sharing of 40 percent or more of a health care entity's revenues with another entity, including affiliates of such other entity;
- An addition, removal, withdrawal, substitution, or other modification of the members of a health care entity formed under the Minnesota Nonprofit Corporation Act that results in a change of 40 percent or more of the membership of the health care entity; or
- Any other transfer of control of a health care entity to, or acquisition of control of a health care entity by, another entity.
- "Control," along with "controlling," "controlled by," and "under common control with" is defined as the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a health care entity, whether through the ownership of voting securities, membership in an entity formed under the Minnesota Nonprofit Corporation Act, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with, corporate office held by, or court appointment of, the person. Control is presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing 40 percent or more of the voting securities of any other person, or if any person, directly or indirectly, constitutes 40 percent or more of the membership of an entity formed under the Minnesota Nonprofit Corporation Act. Furthermore, the attorney general may determine that control exists in fact, notwithstanding the absence of a presumption to that effect.

If a transaction meets the definition above (noting that certain transactions are excluded from the definition, including, for example, those involving only nursing homes and home care providers), such transaction may be subject to certain reporting requirements as outlined further below.

Reporting Requirements



Now effective, HF 402 requires notice to the attorney general and the Minnesota commissioner of health at least 60 days before the proposed closing date of any transaction where either "(i) the health care entity involved in the transaction has average revenue of at least \$80,000,000 per year; or (ii) the transaction will result in an

entity projected to have average revenue of at least \$80,000,000 per year once the entity is operating at full capacity."

The notice to the attorney general and the commissioner of health must include a

number of disclosures, including the following non-exhaustive list of items:

- The entities involved in the transaction;
- The leadership of the entities involved in the transaction, including all board members, managing partners, member managers, and officers;
- The services provided by each entity and the attributed revenue for each entity by location;
- The primary service area for each location;
- The proposed service area for each location;
- The current relationships between the entities and the affected health care providers and practices, the locations of affected health care providers and practices, the services provided by affected health care providers and practices, and the proposed relationships between the entities and the affected health care providers and practices;
- The terms of the transaction agreement or agreements;
- All consideration related to the transactions;
- Markets in which the entities expect post-merger synergies to produce a competitive advantage;
- Potential areas of expansion, whether in existing markets or new markets;
- Plans to close facilities, reduce workforce, or reduce or eliminate services;
- The brokers, experts, and consultants used to facilitate and evaluate the transaction;
- The number of full-time equivalent positions at each location before and after the transaction by job category, including administrative and contract positions;
- The current governing documents for all entities involved in the transaction and any amendments to these documents;
- The transaction agreement or agreements and all related agreements;
- Any collateral agreements related to the principal transaction, including leases, management contracts, and service contracts;
- All expert or consultant reports or valuations conducted in evaluating the transaction, including any valuation of the assets that are subject to the transaction prepared within three years preceding the anticipated transaction closing date and any reports of financial or economic analysis conducted in anticipation of the transaction;
- Copies of all filings submitted to federal regulators, including any filing the entities submitted to the Federal Trade Commission under the Hart-Scott-Rodino Act in connection with the transaction;
- A certification sworn under oath by each board member and chief executive officer for any nonprofit entity involved in the transaction; Audited and unaudited financial statements from all entities involved in the transaction and tax filings for all entities involved in the transaction covering the preceding five fiscal years; and
- Any other information or documents relevant to evaluating the transaction that are requested by the attorney general or the commissioner of health.

Effective January 1, 2024, HF 402 requires data reporting of certain smaller transactions to the commissioner of health at least 30 days before the proposed closing date of the transaction or within 10 business days of the date the parties first reasonably anticipate entering into the transaction if the expected completion is within less than 30 days, where either “(i) the health care entity involved in the transaction has average revenue between \$10,000,000 and \$80,000,000 per year; or (ii) the transaction will result in an entity

projected to have average revenue between \$10,000,000 and \$80,000,000 per year once the entity is operating at full capacity.” This data reporting includes disclosure of much of the same type of information as outlined above.

Please note that HF 402 imposes additional requirements on nonprofit health care entities not identified above.

Attorney General Enforcement Powers

HF 402 grants the attorney general broad enforcement powers. It permits the attorney general to extend the notice and waiting period for the \$80,000,000+ transactions for an additional 90 days by notifying the health care entity in writing of the extension or to waive all or any part of the waiting period or disclosure requirements, including requirements for disclosures to the commissioner of health.

Additionally, the attorney general is permitted to bring an action in district court to compel compliance with the notice, waiting period, disclosure and submission requirements, or to enjoin or unwind a transaction or seek other equitable relief necessary to protect the public interest if a health care entity or transaction violates HF 402 or is contrary to the public interest. Failure of the entities involved in a transaction to provide timely information to the attorney general or the commissioner of health is an independent and sufficient ground for a court to enjoin or unwind the transaction or provide other equitable relief, however the attorney general must notify the entities of the deficiency and provide a reasonable opportunity to remedy it.

If you have any questions regarding HF 402 and how your organization or transaction may be impacted, please contact the authors or your regular Dorsey attorney.