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Health systems and joint ventures: Reducing risk through compliance alignment

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As healthcare continues to evolve at breakneck speed, health systems must continually transform to keep pace. This transformation can take many forms, including strategic affiliations and partnerships that complement or expand a health system's current suite of service offerings.

A joint venture (JV) where two organizations agree to pool resources in pursuit of a business activity is a common affiliation strategy. JVs have been used in recent years as a means to pursue innovation and consolidate scale in core competencies.^[1] They expand market share, improve network integration, and increase capacity and access to services. Each JV partner brings their unique strengths to the entity to improve the service offerings to the communities served.

Value-based care models also require more collaboration across the continuum of care. JVs leverage the experience and services of specialized providers to more efficiently use capital infrastructure in the delivery of services.

Common JV arrangement for health systems

There are various kinds of JVs, but often in the JV arrangement, one of the parties is the controlling party with a greater than 50% share of the entity.

Also, a majority or minority stake usually determines the financial investment and resulting profits the parties will retain, as well as securing representative governance seats on the controlling board of the JV entity.

Health systems, due to their size and scope, often serve as the majority partner in the JVs and may look for a prospective partner that specializes in some type of care delivery, such as skilled nursing, inpatient rehabilitation, long-term acute care, emergent or urgent care, outpatient radiology, outpatient physical therapy, or ambulatory surgical services, in order to leverage the experience and services of these specialized providers rather than investing resources to develop or maintain them on their own.

The compliance professionals for the JV majority and minority partners will need to develop a partnership in order to foster a strong culture of compliance throughout the organization.

How JVs can lead to sleepless nights

JVs are often presented as a seamless part of a health system—especially to patients and prospective patients. From a marketing perspective, this is a solid strategy. But this does give rise to liability concerns. Some compliance professionals worry, and rightfully so, about the ripple effect a serious JV compliance concern could have across the entire health system if not addressed promptly. This is especially true if the health system does not directly oversee the JV's compliance program where, oftentimes, the management for the JV is given to the minority partner due to their technical expertise.

For example, if a health system partners with a specialty provider for inpatient rehabilitation in a JV, it would want the inpatient rehabilitation provider to manage the day-to-day operations of the JV entity since they have the technical expertise in that care setting, even though the health system may be the majority partner and brands the facility under the health system. To the public, the JV entity appears to be just another facility of the health system, although it is really managed by the JV minority partner, who usually runs the compliance program for the JV entity as well. Therein lies the reputational risk for the health system. It has essentially outsourced the management and the compliance function for a JV entity branded as part of the health system. So how does the health system compliance office get comfortable with this arrangement?

Pursue compliance due diligence before forming a JV

Getting comfortable with a JV relationship should start before the JV entity is even formed. The compliance team needs to be an essential part of the due diligence process when the health system first initiates discussions with the prospective JV partner. As part of the due diligence team, the health system compliance team should have their own document request list for the prospective JV partner. These documents will help the health system evaluate the type of compliance program the prospective JV partner may already have in place.

Requested documents can include:

- Organizational chart for the compliance, internal audit, and privacy functions;
- Code of conduct and annual education on compliance;
- Compliance and privacy policies and procedures;
- Current compliance and internal audit work plans;
- Proactive compliance initiatives undertaken in the last year;
- An annual report for compliance or internal audit, or the report from an external compliance program assessment, if performed;
- Board and senior leadership conflict of interest disclosures and management plans; and
- Scope and status of recent or open compliance investigations or HIPAA matters.

After reviewing documents like these, the health system compliance team can ask additional questions to fill in the blanks. After similarities and gaps between the two compliance programs have been identified, the two organizations can then discuss how they should be addressed.

As part of the JV negotiations, consideration should also be given to what aspects of the two compliance programs should be more closely aligned than others. For example, will the health system's code of conduct also apply to the JV entity? Will JV employees be required to attest to it or complete annual compliance education similar to the health system's compliance education? The conflict of interest policy is another important consideration. Will the health system policy and process for identifying and managing potential conflicts apply to

the JV entity? These and other aspects of the compliance program should be clarified up front and documented in the management agreement between the health system and the JV partner.

Five steps for creating a stronger JV compliance relationship

With the JV up and running, compliance must continue as an ongoing topic of discussion between the two organizations.

The following suggestions can help prevent unpleasant compliance surprises from occurring within JV entities once they become operational.

Establish communication channels for regular dialogue

Ongoing and structured dialogue between a health system and its JV partner is critical for keeping both organizations on the same page and avoiding the liability that could come from unaddressed compliance questions or concerns.

Regularly scheduled calls between the compliance professionals for both partners provide an opportunity to discuss material risk items and ongoing developments. At a minimum, quarterly meetings in person or by phone should be held between the compliance professionals to stay current on JV entity matters. This helps give the health system's compliance professional a line of sight into how the JV partner is managing compliance issues and staying current with requirements such as compliance education or policy updates.

For more serious matters, the JV partner's compliance professional should contact the health system's compliance professional as soon as possible once the issue is identified. This assures there are no surprises at the regular meetings. The health system's compliance professional can also keep other senior leaders at the health system informed of the serious issues in case the health system wants to take a more active role in mitigating the issue.

This regular dialogue does not have to be limited just to the compliance professionals and can be expanded to the respective boards and compliance committees for both the health system and the JV. JV's compliance professionals can be invited to present to the health system board of directors and compliance committees at least once a year. This gives senior management who serve on the health system's compliance committee and the health system's board of directors audit and compliance committee a deeper understanding of the JV compliance program and the peace of mind that the JV partner is managing it effectively.

Since the JV entity will have its own board, but that board may not be big enough to have separate committees like an audit and compliance committee that may be common for healthcare systems, reports of compliance activity should be added as an agenda item for the JV board meetings on a regular basis (e.g., quarterly or annually). As stated in the *Practical Guidance for Health Care Governing Boards on Compliance Oversight*,^[2] it is important for the fiduciary board of a healthcare organization to be accountable for the compliance program of the entity. In the JV setting, this would be the fiduciary JV entity board. As such, routine updates to that board are needed—just as the health system's compliance professional and the JV partner's compliance professional each report to their respective boards.

Regular reporting

While quarterly meetings or calls and significant issue outreach are great options to stay in touch, there needs to be structure in place to these communications so they do not devolve into just asking “How is everything going?” and then receiving the basic response of “Everything is fine.”

If the health system has multiple JV partners, it is important to require a reporting update structure from each entity so the updates look the same and generally cover the same topics. This is especially true if you plan to share the JV partner reports with the health system's compliance committee or members of the health system's board of directors. They will want to see standard information to compare activities among the JV partners to identify any variances. Quarterly reporting, through a standardized template such as a JV update report, ensures that baseline assessments get evaluated on an ongoing basis. This update can then serve as the discussion foundation for the regularly scheduled calls between the healthcare system's compliance professional and the JV's compliance professional.

The JV update report can include common topics such as the following:

- What is shared at the JV partner board – and management – level compliance committees;
- When and what is shared at the JV board for compliance updates;
- Compliance communications distributed in the JV entity;
- Compliance education and training conducted in the JV entity, the completion percentages, and how it's holding individuals accountable for completing the lessons;
- Auditing and monitoring activities and results, including corrective action plans;
- HIPAA incidents or breaches;
- Policies and procedures created, revised, or retired;
- Compliance hotline report volume and types of reports;
- Any significant compliance issues it's had; and
- Any other compliance initiatives the JV is pursuing.

Develop baseline compliance and privacy assessments

In addition to regular communication, baseline compliance and privacy assessments serve as a necessary first step, as they offer a window into the structure, strengths, and weaknesses of a JV compliance program. Future assessments can then be compared against the baseline for ongoing improvement.

Assessments can be developed using existing resources such as compliance program maturity model tools; various checklist resources offered by the Office of Inspector General, Office for Civil Rights, Department of Justice, or professional associations; interviews by phone or in person; and through supporting documentation such as a code of conduct, policies and procedures, compliance program overview, and audit plans. If the health system does its own self-assessment periodically to compare its program against the seven elements of an effective compliance program^[3] or the *Evaluation of Corporate Compliance Programs* document,^[4] the same approach can be shared with the JV partner to ask it to complete a similar assessment for the JV entity and share the results with the health system.

Similarly, if the health system gets an external compliance program evaluation periodically, the JV partner can be encouraged to use the same firm for a similar assessment to compare findings, or the scope of the health system review can even be expanded to include the JV entities.

Implement ongoing monitoring

Gauging the compliance strength of a JV requires ongoing monitoring and evaluation, which can take the form of an annual recertification of documentation provided in the initial assessment, review of material changes to the JV compliance program, review of a security scorecard provided by an IT security rating company, as well as Google alerts that can bring attention to issues in the news.

In addition to regular and routine communication between the compliance professionals, it is also good to obtain external information like that cited above to verify what you are hearing from the JV partner. Sometimes the JV partner may not even know the substance of the external information or have yet to be informed of the details by its own leadership. This helps keep everyone informed.

Partners helping partners

The health system has a responsibility to support its JV partners' efforts by providing education and feedback or distributing compliance updates and risk areas to JV partner's compliance professionals.

If a risk area is identified at the health system and the JV entity could be at risk for that same issue, it is incumbent upon the health system's compliance professional to also share that information with their JV partners. Doing so helps protect the JV entity that operates under the same brand as the health system.

The JV partner, depending on its size and scope, may benefit from the health system sharing resources such as policies, procedures, education lessons, or communication tools. Of course, the JV partner may also contribute its own best practices that the health system can benefit from as well. There may be occasions when the JV partner finds itself struggling with a policy or issue and can reach out to see if the health system has dealt with the matter before or to request a copy of a policy to help facilitate the development of a similar one for the JV entity. Likewise, JV partners have come up with creative approaches to compliance education and communication that the health systems may want to consider adopting. Being unselfish in sharing information and resources strengthens the health system/JV relationship and ultimately makes both parties stronger.

Another way information can be shared to foster greater collaboration and partnership between the JV entities is by inviting the JV partner's compliance professional to retreats or educational events held by the health system. If the health system holds an annual compliance retreat or other ongoing education for its staff, the JV compliance professionals can also be invited to participate so both groups can share ideas and brainstorm solutions to common concerns. Some health systems may also offer a quarterly conference call with all of their JVs' compliance professional if they have multiple JVs to share ideas.

Prepare for the future

The state of change in healthcare isn't likely to slow down anytime soon, which means your organization will look considerably different in five years, two years, or even one year from now.

By establishing strong JV compliance relationships, you will be able to do your job more effectively as a compliance professional while also possibly managing the addition of even more JVs in the future.

Regardless of what the future holds, taking an active and proactive role with JV partners right from the beginning and continuing to develop that relationship will establish a reporting history and ongoing pattern of oversight that can safeguard your current organization for many years to come, which is the best kind of legacy to leave behind for a compliance professional.

Takeaways

- A joint venture (JV) is a common affiliation strategy among healthcare provider partners to more
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efficiently use capital infrastructure in the delivery of services.

- The compliance professional of the JV majority and minority partners will need to develop a close partnership in order to foster a strong culture of compliance in the JV entity.
- The compliance team needs to be an essential part of the due diligence process when a health system first initiates discussions with a prospective JV partner.
- Establish communication channels for regular dialogue and reporting between JV partners.
- Develop baseline compliance and privacy assessments with ongoing monitoring of JV entities and partners.

1 Molly Farber, “An Inside Look at Joint Ventures and Other Deals in U.S. Healthcare,” Chief Executive, January 3, 2019, <https://bit.ly/2XnUUEZ>.

2 U.S. Department of Health and Human Services, Office of Inspector General; Association of Healthcare Internal Auditors; American Health Lawyers Association; and Health Care Compliance Association, *Practical Guidance for Health Care Governing Boards on Compliance Oversight*, April 20, 2015, <https://bit.ly/3ahysOP>.

3 Publication of the OIG Compliance Program Guidance for Hospitals, 63 Fed. Reg. 8,987 (February 23, 1998); OIG Supplemental Compliance Program Guidance for Hospitals, 70 Fed. Reg. 4,858 (January 31, 2005).

4 U.S. Dep’t of Justice, Criminal Div., *Evaluation of Corporate Compliance Programs* (Updated June 2020), <http://bit.ly/2Z2Dp8R>.

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