
ASSISTED LIVING LAW - LEGAL STUDY GROUP

LIST OF QUESTIONS & ISSUES TO ADDRESS

February 17, 2021

Background

We are all attorneys in private practice who regularly advise clients involved in providing assisted living services. Our clients include large health systems, small private operators, management companies, home care agencies, and real estate investors. They include both nonprofit organizations and for-profit companies.

We are asking for clarity on foundational business structure questions. Specifically, how the new licensing rules will apply to the myriad business structures that are critical to supporting and providing assisted living services to seniors. Having clarity on these points will greatly help the assisted living provider community in appropriately structuring business arrangements now to comply with the new licensing rules when they become effective.

We are concerned that, without this clarity, providers will be left to guess what arrangements will be permitted when they submit their applications, and we expect the Department of Health will be faced with countless business relationships that the Department is unsure meet the requirements, which will complicate the processing of applications at a time when neither the Department nor the providers can afford delays. Finally, not having clarity on these issues could result in uneven interpretation by MDH staff over time.

Time is of the essence. We are getting these questions from our clients now, and anticipate that we need answers on these issues by April 1 so that our clients can structure their business relationships, negotiate and finalize contracts, address and restructure staff employment and employee benefit programs as needed, prepare and submit applications and send notices to residents of anticipated changes by the May 31/June 1 deadlines.

Clarifications Needed

Licensing Issues

1. Whether a vendor providing “assisted living services” in an AL licensed facility pursuant to a contractual arrangement with an AL licensee must hold a comprehensive home care license.
 - a. Proposed Answer. No, the services to be provided are assisted living services that are covered under the facility’s AL licensure; they are not home care services being provided under the home care law. As such, a vendor providing assisted living services by contract with the AL licensee is not required to carry a comprehensive home care license.

- b. Explanation. It is currently very common in this field to have one entity own the real estate—often a real estate investor—and another entity, a health care company, provide the assisted living services to residents under a comprehensive home care license. In the transition to AL licensure, those business arrangements are likely to continue, with the building owner holding the AL license, and contracting with the health care company to provide the services to residents.

We believe the language throughout 144G is clear that these services are “assisted living services” as defined in 144G.08, subd. 9. However, we do not believe such vendor-provided services are subject to additional or different licensure. Instead, services provided by a vendor pursuant to contract with an AL licensee are provided under and covered by the licensee’s AL license. In support of this, 144G.10, subdivision 1 states, “The licensee is legally responsible for the management, control, and operation of the facility, regardless of the existence of a management agreement or subcontract.” Similarly, 144G.40, subdivision 1, states, “The facility is directly responsible to the resident for all housing and service-related matters provided, irrespective of a management contract.”

Requiring a contracted provider of assisted living services to also carry a comprehensive home care license would be entirely duplicative and would be contrary to the plain language of 144G.10, subdivision 1.

Despite what we believe is clarity in the statute, we have heard MDH staff state that providers of assisted living services to AL residents would continue to need a comprehensive home care license for this activity, even for services provided under contract with the licensee.

This is different from a provider who has not contracted with an AL licensee to provide “assisted living services” included in the facility’s contract with its residents but that provides services to individuals residing in an assisted living facility independent of the AL licensee. In this situation, we would conclude that the provider is actually providing home care services and must hold a comprehensive home care license to do so. Such situations are not uncommon and occur for a variety of reasons (most notably for Medicare eligible home health services but also in other circumstances).

- 2. Whether a management company that is not the owner, lessee, or other operator of the assisted living building can hold the AL license.
 - a. Proposed Answer. Yes, a management company can hold an AL license, so long as the management contract with the building owner, lessee, or other operator provides the management company sufficient authority to be “responsible for the management, control, and operation of a facility” as required by 144G.08, subd. 32.
 - b. Explanation. Because there can be a wide variety of business and financing arrangements involved in owning and operating an assisted living facility, we recommend clarifying that only one party needs to hold the license, but that it is

not necessarily the case that the owner, lessee, or other operator of the real estate be the licensee.

For example, we work with several real estate investment trusts (REITs) that own assisted living facilities, solely as an investor. In the current regulatory system, they, or the entities to which the buildings are leased or otherwise operated, are the registered housing with services provider, because that is simply a real estate role. All care-related services and management are provided by a different and expert senior care organization. In this example, it would potentially make more sense for the senior care organization to hold the assisted living license. That this is an option is a reasonable reading of the statutory language, but it is not entirely clear.

3. Whether every party involved in the control, operation or marketing of an assisted living facility must be licensed.
 - a. Proposed Answer. No, only one license for the facility is required.
 - b. Explanation. Section 144G.10, subd. 1, (c) as enacted in the 2020 7th Special Session provides that a “single license for each building that is operated by the licensee. . .” will be issued. However, proposed rule 4659.0040, subpart 1 prohibits anyone from managing, controlling or operating an AL facility, and from advertising, marketing or otherwise promoting its facility as providing assisted living services, without an assisted living license. It appears from this language that everyone involved in these separate aspects of providing services would need to be licensed. We do not believe this is what is intended. Instead, we believe what is intended is that the *facility* must be licensed, and that all of the regulated activities as identified in 144G and the AL rule operate under that license, even if they are delivered by multiple parties.

Transition Issues

4. Whether a current comprehensive home care licensee can transition to an AL licensee and not be treated as a “new” licensee requiring a provisional license under 144G.16.
 - a. Proposed Answer. A comprehensive home care provider that is currently an arranged home care provider for a HWS facility, if it applies for an AL license for that same facility as of August 1, 2021 will be treated as converting to an AL license and will not be treated as a new licensee under 144G.

In addition, the arranged home care provider, when it converts to the AL licensee, would not be treated as a new provider for purposes of doing the nursing assessments under 144G.70, subd. 2, service plans under 144G.70, subd. 4, medication management plans under 144G.71, subd. 5, and treatment and therapy plans under 144G.72, subd. 3, and staff training under 144G.60 through 144G.64. Those items would be updated in order to meet the standards of the sections cited if so needed. unless they for other reasons require an update in order to meet the standards of the sections cited. The date the resident started receiving services

from the arranged home care provider will be treated as the date the resident started receiving services from the AL licensee.

- b. Explanation. We believe that provision has been made to allow for this transition for current HWS providers, but in the situation where the current arranged home care provider will be the AL licensee, that should likewise be treated as a conversion.
5. Whether new resident assessments and service plans will be needed to transition residents from the comprehensive home care provider to an AL licensee that is not currently the comprehensive home care provider and whether current employees will need to be re-trained, re-oriented and re-competency tested.
 - a. Proposed Answer. A resident who received services from an arranged home care provider prior to August 1, 2021 in a facility in which the current housing with services registrant, or a related entity, will also hold the AL licensee on and after August 1, 2021, shall be treated as if no change in provider occurred, with respect to nursing assessments under 144G.70, subd. 2, service plans under 144G.70, subd. 4, medication management plans under 144G.71, subd. 5, treatment and therapy plans under 144G.72, subd. 3 and staff training under 144G.60 through 144G.64. Those items would be updated in order to meet the standards of the sections cited if so needed. The date the resident started receiving services from the arranged home care provider will be treated as the date the resident started receiving services from the AL licensee.
 - b. Explanation. Technically, residents in a facility with an arranged home care provider where the building owner will hold the AL license after August 1 will be “changing” service providers from the home care provider to the building owner. The AL licensing rule has a number of requirements for *new* residents, but these are duplicative of the current admission and service initiation requirements on the current home care provider. Only in connection with the transition from the current regulatory system to the new AL licensing system, this change should not be treated as a change in actual provider requiring every resident in every assisted living facility in Minnesota to undergo a new nursing assessment on August 1, 2021.
6. Whether new employee background studies, TB screening and basic training will be needed if the employees are moved from a current arranged home care provider to the AL licensee as of August 1, 2021.
 - c. Proposed Answer. Staff of an arranged home care provider whose W-2 employer is changed to the AL licensee in connection with the transition to AL licensure on August 1, 2021 shall be treated as if no change in employer occurred, with respect to orientation, training, tuberculosis testing, background studies, and competency testing and training.
 - d. Explanation. Under the current regulatory system, if an arranged home care provider is a different legal entity from the building owner, the home care provider must be the W-2 employer of at least one staff person who provides

services to the home care clients. Many building owners will become the AL licensee and may want to also be the W-2 employer of the staff. The AL licensing rule has a number of requirements for *new* staff, but these are duplicative of the current requirements for the current home care provider. Only in connection with the transition from the current regulatory system to the new AL licensing system, this change should not be treated as a change in employer requiring every employee to undergo new background studies, screening, orientation and testing on August 1, 2021. Our suggested answer above draws from the change of ownership language in the home care licensing statute, 144A.472, subd. 5(b).

7. Whether MDH will prioritize providers making the transition from HWS/home care to AL and, if so, what that means for the applications of new providers who have not yet operated.
 - e. Proposed Answer. MDH should not prioritize transitioning providers over new providers. Instead, MDH should prioritize AL license applications based on the order in which they are received, regardless of whether the provider is transitioning from the current HWS/home care structure or whether the provider is new and seeking a provisional license. This will ensure that all providers who need an AL license to be effective by Aug. 1, 2021 (and who submit their license applications by Jun. 1, 2021) are treated similarly.
 - f. Explanation. Currently, there are providers whose buildings are in development and are expected to open on or before Aug. 1, 2021. These providers may not yet have their HWS registrations and have been unable to apply for a conditional home care license. If they submit their AL license application by Jun. 1, 2021, they should not be penalized and placed at the back of the line simply because they intend to operate a newly-opened building. There may also be providers whose buildings are able to open prior to Aug. 1, 2021 but who choose to wait because they are unable to obtain a home care license and are unable (or unwilling) to enter into a short-term arrangement with a home care agency to provide services in the new building. These providers should be permitted to open as licensed AL facilities on Aug. 1, 2021 and their license applications should be processed simultaneously with the applications of those providers making the transition from HWS/home care to AL.

Staffing Issues

8. Whether the AL licensee must be the W-2 employer of staff at the facility.
 - a. Proposed Answer. No, the AL licensee is not required to be the W-2 employer of staff at the facility, so long as the AL licensee retains by contract with the W-2 employer sufficient authority to be “responsible for the management, control, and operation of a facility” per statutory language.
 - b. Explanation. Chapter 144G uses a number of different words to describe the people who work in and provide services to residents in an assisted living facility. For example, it uses “personnel” (144G.09, subd. 1(3)), “employees” (144G.41,

subd. 2(2)) and “staff” (144G.41, subd. 2(3) and (4)). It also uses a variety of verbs to describe how a facility engages these individuals. For example, it must “develop and implement a staffing plan (144G.41, subd. 1(11)), it must “have” a clinical nurse supervisor (144G.41, subd. 4), and it must “employ” a licensed assisted living director (144G.10, subd. 1a).

As a result, it is not clear who must or may be the W-2 employer of these individuals.

We believe the statute contemplates that the W-2 employer may be an entity other than the licensee precisely because it avoids using the term “employ” or “employee” to refer to staff (with the limited exception of the assisted living director, discussed below). This stands in contrast to the home care statute, which requires a provider to “directly provide” at least one home care service, which has been interpreted to mean the home care provider must be the W-2 employer of an individual providing services to clients. In addition, the AL licensing statute provides that the “facility is directly responsible to the resident for all housing and service-related matters provided, irrespective of a management contract.” Minn. Stat. § 144G.40, subd. 1 (emphasis added).

It is a common arrangement in larger health systems to have one entity serve as the W-2 employer of record of all staff for ease of administering payroll and benefits. The staff are then leased to various subsidiaries that are the licensed operators of the health care facilities.

This question of who must be the W-2 employer of staff has been a source of confusion in the current housing with services and home care licensure regime, as well as in other areas such as nursing facilities. Having a simple, clear position on this issue would allow providers to structure both their business arrangements and their workforce management in confidence. It would also give providers flexibility to deploy staff across multiple facilities, which is essential to meeting staffing needs given the current workforce shortage.

9. Whether the assisted living director must be a W-2 employee of the AL licensee.
 - a. Proposed Answer. No, the assisted living director may be a W-2 employee of another entity, so long as the assisted living licensee retains sufficient authority to be responsible for management, control and operation of the facility including the performance of the assisted living director.
 - b. Explanation. The new 144G.10, subdivision 1a from the December 2020 Special Session uses the term “employ” to describe the relationship between the AL licensee and the assisted living director. However, interpreting the term “employ” to mean be the *W-2 employer* for this purpose is an inappropriate extension of IRS wage reporting rules with the state statute’s concern regarding control and deployment of a particular position. More than one entity can be in the position of having control and supervision over a single employee (*e.g.*, see the DOL [fact sheet](#) on joint employers for Fair Labor Standards Act purposes). So long as the AL licensee has sufficient control over, and responsibility for, the assisted living

director, it should not matter who the W-2 employer is for purposes of wage and tax reporting and employee benefits administration. In addition, when the AL licensee is not the W-2 employer of the other staff working at the facility, it would be impractical, if not totally impossible, for the AL licensee to be the W-2 employer of just one person.

Assisted Living Contract Issues

10. Whether assisted living contracts may contain liability waivers not related to the resident's health, safety or personal property.

- a. Proposed Answer. Section 144G.50, subdivision 5 prohibits the inclusion of a "waiver of facility liability for the health and safety or personal property of a resident" in an assisted living contract. However, an assisted living contract may contain facility liability waivers for damage to or loss of property, caused by the resident, their guests or parties other than the AL licensee and its agents, whether as a result of receiving services from a third party not under contract or control of the AL licensee or as a result of some other reason that is not the fault or responsibility of the AL licensee or its agents. In addition, liability waivers for personal harm or injury are permitted in an assisted living contract to the extent that such harm or injury is caused by the resident, the resident's guests or agents or by parties other than the AL licensee and its agents.
- b. Explanation. 144G.50, subdivision 5 prohibits AL licensees from requiring residents to waive the facility's liability for its own conduct related to the resident's health, safety or personal property. Waivers of liability arising from others' conduct, such as the residents themselves, their guests, or other service providers they may engage separate from the AL licensee are not within the prohibition of the statutory language and should be permitted.

Clarity on this point will assist both providers in preparing their new resident contracts and MDH staff in its survey and enforcement activities in the future.

Marketing Issues

11. Whether a facility may engage in pre-opening marketing as an assisted living provider before its AL license is issued.

- a. Proposed Answer. Yes, a facility may market itself as intending to provide assisted living services before it obtains an AL license, so long as it does not operate as an AL facility until has obtained an AL license.
- b. Explanation. Proposed rule 4659.0040 subpart 1 requires a license to "control, operate, or *market*" assisted living services (emphasis added). Numerous parties associated with an assisted living facility need to identify and promote a prospective facility as providing assisted living services prior to a license being issued, in order to have the facility planned, designed, acquired, constructed, financed, marketed, and staffed, so that, as of the date the license is issued, assisted living services can begin. A gag order on all parties to the development of

a facility would be detrimental to its ability to serve residents immediately upon opening. Essentially, the proposed rule interpreted literally would have the effect of prohibiting any mention of assisted living prior to the effective date of the license. We do not believe this is what was intended.

12. Whether a marketing agent or other third party may engage in marketing on behalf of an AL licensee.
 - a. Proposed Answer. Yes, an AL licensee may engage third parties to promote and market the facility on behalf of the AL licensee.
 - b. Explanation. Again, a literal read of the language of proposed rule 4659.0040 subpart 1 would require a license to “market” an AL facility. Service providers and parties other than the AL licensee must be able to engage in marketing on the AL facility’s behalf. Such actions are done pursuant to the AL licensee’s license, and should not require a separate license.

DHS Provider Enrollment Questions

13. Whether an entity currently enrolled in MHCP as a customized living provider (because it is the comprehensive home care provider) that becomes the AL licensee will need to re-enroll with MHCP as an AL provider. If so, whether it will be able to do so before August 1, even though it will not yet have an AL license.
 - a. Proposed Answer. Currently enrolled MHCP providers of customized living services should not be required to re-enroll once they obtain their AL license. Instead, currently enrolled MHCP providers should simply be required to notify DHS of their change to assisted living, and should be permitted to do this in advance of the August 1 licensing date so that there is no interruption in payment for services provided to assisted living residents.
 - b. Explanation. If a comprehensive home care provider is transitioning to the AL licensee, the transition of its customized living provider enrollment to AL provider enrollment should be straightforward. However, typically DHS requires proof of licensure for such enrollment. We encourage DHS to make an exception to this normal practice to accommodate existing providers who are merely changing status because of the change in the AL law.
14. Whether an entity that becomes the AL licensee but is not currently enrolled as a customized living provider (because it is the HWS registrant or another entity related to either the HWS registrant or the enrolled provider) will need to enroll with MHCP as an AL provider. If so, whether it will be able to do so before August 1, even though it will not yet have an AL license.
 - a. Proposed Answer. Current HWS registrants and other related but not enrolled entities must apply to MHCP to be an enrolled provider but may do so in advance of the August 1 licensing date so that there is no interruption in payment for services provided to assisted living residents. No proof of AL licensure would be

required for the application to be accepted and processed, subject to provision of the AL license once issued by MDH.

- b. Explanation. If a housing with services registrant who had a separate arranged home care provider is transitioning to the AL licensee, or if the AL licensee will be an entity related to either the HWS registrant or the currently-enrolled home care provider, it will not currently be an enrolled provider in MHCP. While a new enrollment would be expected to be required, typically DHS requires proof of licensure for such enrollment. We encourage DHS to make an exception to this normal practice to accommodate existing providers who are merely changing status because of the change in the AL law.

AL Legal Study Group

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