



Richard D. Vroman, J.D.  
Shareholder and a Member  
of Health Law Practice Group  
Koley Jessen

# Nebraska's Regulatory Environment

## Not Always Black and White

**IN THE MEDICAL PROFESSION**, regulations abound – both at the federal and state level. Unfortunately, the interpretation of the meaning of these regulations is not always black and white. An example of the need to carefully consider the effect of the regulatory environment on seemingly insignificant business decisions was experienced earlier this spring.

In Nebraska, health clinics, including ambulatory surgery centers, birthing centers and public health clinics are required to be licensed. Similarly, assisted-living facilities, long-term-care facilities, pharmacies and home-health agencies are required to maintain a license separate from the license of the providers practicing within such facility. The Nebraska Department of Health and Human Services, Division of Public Health (the “Department”), oversees the licensing of these facilities; and notably, Nebraska regulations provide almost uniformly that such licenses are issued only for the premises and persons named in the application and are not transferable or assignable. Specifically, Chapter 175 of the Nebraska Administrative Code Section 7-004-04 (which governs health clinics) provides, in part, that a “[c]hange of ownership (sale, whether of stock, title, or assets, lease, discontinuance of operations) or change of premises terminates the license.” Section 7-004-05 goes on to state that “[t]he licensee must notify the Department in writing ten days before a health clinic is sold, leased, discontinued, or moved to new premises.”

On its face, this regulation appears to be black and white. If the owners of the clinic sell or lease the clinic, or if the clinic ceases operations, there is a change of ownership and notice of such an event must be provided to the Department. Of course, some reading this article are thinking

to themselves – if change of ownership is the “sale, lease or discontinuance of operations,” what do the terms “sale,” “lease” or “discontinuance” mean? Does the clinic need to sell all or only a part of its stock or assets? What if only one owner among many sold his or her stock in the clinic – would the license of the clinic terminate? We believe the proper interpretation of the regulations is that the license terminates upon the sale, lease or discontinuance of the entire entity. After all, the regulations state that notice must be given “before a health clinic is sold.” There is no mention of a shareholder’s interest. In addition, we must remember that the health clinic is a separate legal entity. The sale by one owner does not affect the legal status of the entity. Nevertheless, there seem to be a more than a few shades of grey when it comes to interpretation of this regulation.

So how does the Department interpret this regulation? What would happen if two individuals (the “Owners”) owned a health clinic equally (i.e., 50/50) and one Owner retired or died? In most situations, the Owners and the health clinic (which is a separate legal entity) would have a buy-sell structure in place where the retiring owner (or the deceased owner’s estate, if applicable) would have his or her interests in the health clinic redeemed by the entity for a preset price. In some instances, a new owner might be found and allowed to take the departing Owner’s place, but in many cases, the result is that the remaining Owner is now, by default, the sole remaining owner of the business. The question is whether this situation results in a change of ownership under the above stated regulations. Did the partner’s retirement or death automatically terminate the health clinic’s license? Was notice

required 10 days before the event? We believe the answer is no. After all, the health clinic was not sold or leased and the operations never ceased. Nevertheless, the Department disagreed.

Interestingly, however, the Department’s position did not arise from different interpretations of the meaning of the words “sale, lease or the discontinuance of operations.” Instead, the Department looked for guidance on the definition of change of ownership by looking to a federal regulation governing secondary education institutions promulgated under the Higher Education Act of 1965, as amended. Under the secondary education regulations, the definition of “a change in ownership and control occurs when (i) [a] person acquires more than 50 percent of the total outstanding voting stock of the corporation; (ii) [a] person who holds an ownership interest in the corporation acquires control of more than 50 percent of the outstanding voting stock of the corporation; or (iii) [a] person who holds or controls 50 percent or more of the total outstanding stock of the corporation ceases to hold or control that proportion of the stock of the corporation.”

Simply put, the Department’s position was that because the remaining Owner’s interest went from a 50 percent interest to a 100 percent interest, there was a change of control sufficient to trigger the termination of the license. This makes sense if we were discussing a “change of control.” Unfortunately, the Nebraska regulations make no mention whatsoever to a “change of control.” More importantly, who would ever have anticipated that a health clinic in Nebraska should consider the federal regulations for a change of ownership and control of secondary education institutions when determining if it was required



## Did You Know?

### Membership Allows Physicians to Connect

As a member of the Metro Omaha Medical Society, you have the unique opportunity to interact with your peers – physicians representing small and large practices, primary care and specialties, private practice and employed, administration or academic.

Whether you are seeking to build your referral network, want to collaborate professionally, work to address broader health-care issues or simply interact socially with your fellow physicians, we encourage you to attend one of our coming events or explore opportunities on our boards and committees.

Get connected with your peers and get more out of your membership.

For more information, contact  
Laura Polak at  
laura@omahamedical.com  
or (402) 393-1415.

**It's that simple.  
It's that important.**

## IN memoriam

**Timothy R. Fangman, M.D.**  
Aug. 7, 1946 - June 6, 2015

**Wesley G. Wilhelm, M.D.**  
May 3, 1932 - May 20, 2015


to provide notice to the Department? From the health clinic's perspective, is it now operating without a license? What other adverse effects flow from such a determination? How does it affect other contractual relationships? Is this now reportable?

What to do? Although the entity in the above scenario was able to take action (without resort to litigation) to avoid any lapse in its license, the Nebraska Administrative Code does provide a procedure for affected parties to appeal such contested cases to the district court. In such an appeal, the district court's review is limited to "determining whether the agency's action is (1) in violation of constitutional provisions, (2) in excess of the statutory authority or jurisdiction of the agency, (3) made upon unlawful procedure, (4) affected by other errors of law, (5) unsupported by competent, material, and substantial evidence in view of the entire record as made on review, or (6) arbitrary or capricious." *Meier v. State*, 227 Neb. 376, 417 N.W.2d 771 (1988). Adding terms such as change of "control" to the regulations would arguably be exceeding the Department's authority or at least acting in an arbitrary and capricious manner – especially given the reliance on an unrelated secondary education regulation for such guidance. That said, appeals, as with all litigation, can be costly and uncertain. In addition, there are some very strict timing deadlines and other rules involved when requesting an appeal, the scope of which exceed this article. Suffice it to say, affected parties would be well-advised to seek legal counsel in such a situation.

At the same time, licensed entities in Nebraska should make sure they understand the regulations applicable to them, and have a legitimate basis for the interpretation of the same. A strong legal argument in favor of your interpretation is the basis of any successful appeal from an adverse agency decision. Additionally, as to change of control matters specifically, licensed entities should consider whether it might make sense to contact the Department well in advance of any decision affecting the ownership interests or control of the entity to see what the Department's position would be. In the hope of

being able to advise licensed entities on exactly what constitutes a change of ownership in Nebraska, we inquired with the Department in the above situation to clarify that the interpretation provided in that case was the "position" of the Department. Unfortunately, the Department would not commit to using (or not using) the same interpretation in any future case, stating, "We all analyze the situation in terms of whether a change of control occurs. Whatever authority is available on that issue would merely be persuasive (obviously absent a controlling decision in Nebraska)."

In other words, a different rule or regulation might be used to assist the Department in interpreting this regulation in the next situation. Admittedly, there are numerous definitions available throughout the federal and state regulations for a change of ownership. Some (such as the secondary education regulation used by the Department in the scenario discussed above) include change of control in the definition, others (like Nebraska's health clinic regulations) expressly do not, and yet others (such as those governing Medicare provider agreements) go so far to specifically provide that the redemption of one partner would not constitute a change of control. With this in mind, there is currently no possibility of determining the Department's position on the meaning of its own regulation.

At the end of the day, although the whole purpose of publishing regulations is to provide consistent guidance to the public and those relying on the regulations, the Department's interpretation of those regulations is really the only one that counts, unless you are willing to take the matter to court. Given the uncertainty in this area, early involvement of legal counsel, a thoughtful understanding of the regulations in question, and proactively working with the Department is by far the less costly and least disruptive alternative. 

*We note for purposes of this article that Nebraska regulations for notice of change of ownership and the related non-transferability of the license are virtually identical for health clinics, pharmacies, assisted living centers and home health agencies.*