

NHS England publishes updated guidance on NHS subsidiary companies

07 March 2024

NHS England (NHSE) has published new guidance on the approvals process for those NHS trusts and foundation trusts implementing plans to form or materially change subsidiaries.

The guidance updates the previous requirement for NHSE to be notified of all proposals involving subsidiaries so that now the reporting requirements will be determined by thresholds based on size (assets or income) and the number of staff affected by the proposals. This is intended to strike a balance allowing lower risk schemes to proceed without review by NHSE. These thresholds should be considered against the cumulative effect of proposals over a 24-month period.

NHSE retains a discretion, stating that “novel, contentious or repercussive” schemes remain reportable, regardless of size. Trusts are encouraged to engage with NHSE to determine whether their proposals fall within this flexible definition, which NHSE expects to evolve over time.

Schemes involving NHS trusts still require the consent of the Secretary of State and are therefore reportable to the Department of Health and Social Care. NHS trusts may only participate in subsidiaries where the arrangements are income generating. NHSE has previously confirmed that NHS trusts may not rely on their general power to form companies and this guidance remains unchanged. NHS trusts also cannot form or participate in limited liability partnerships.

As with other types of transactions, the outcome of the NHSE review will be a risk rating (red/amber/green) based on a review of key documents including the business case and financial plans (which should be supported by appropriate due diligence) as well as interviews with stakeholders and the parent trust board(s). The guidance emphasises that the strategic rationale for such arrangements must be consistent with and support the wider goals of the ICS.

NHSE has also published guidance on workforce engagement and consultation where trusts are entering into subsidiary arrangements. Workforce implications should be expressly considered within the business case. Importantly, NHSE requires trusts to not engage in formal consultation with employees (including TUPE consultations) before NHSE has finished its business case review and concluded that the transaction can proceed.

Browne Jacobson's [health lawyers](#) are experts in arrangements for subsidiaries within the NHS and our team are experienced in supporting trusts through the NHSE transaction review process, particularly in the context of system working and provider collaborative arrangements. To discuss how the new guidance may impact your subsidiary proposals, please contact us.

Contact

Mark Hickson

Head of Business Development



onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000



Rebecca Hainsworth

Partner

Rebecca.Hainsworth@brownejacobson.com

+44 (0)330 045 2738

Related expertise

Commercial and outsourcing for health

Corporate transactions for health

Governance for health

Service reconfiguration, consultation, transformation and decommissioning