

Health Law Alert: Governor Cuomo Executive Order No. 202 (COVID-19); NYSDOH Dear CEO Letter (EMTALA) (02.26.2020); OCR February 2020 Guidance

As a result of the rise of confirmed cases in New York of COVID-19 (commonly referred to as “Coronavirus”), Governor Cuomo has signed Executive Order No. 202 declaring a disaster emergency across the state. Under the Executive Order, certain statutes, rules and regulations have been temporarily suspended or modified through April 6, 2020. Several are specific to healthcare providers and facilities. Below is a summary of statutes, rules and regulations that have been temporarily suspended or modified pursuant to the Executive Order:

Education Law §§ 6521 and 6902: Definitions of Practice of Medicine/Nursing

- Modifications have been made to allow non-practitioners to conduct Coronavirus testing if properly trained to conduct such tests and if they are conducted under the supervision of nursing staff

Public Health Law §§ 2510 and 2511: Child Health Insurance

- Modifications have been made to, among other things, waive or revise eligibility requirements, documentation requirements and premium contributions

Public Health Law §§ 224-b and 225(4):

- Modified in order to permit the Commissioner of Health to promulgate emergency regulations and amend the State Sanitary Code.

Public Health Law § 2803(2):

- Modified to allow the Commissioner of Health to promulgate emergency regulations for Article 28 facilities, including but not limited to general hospitals.

Public Health Law § 273(3) and Social Services Law §§ 364-j (25) and (25)(a):

- Modified to allow patients to receive prescribed drugs without delay.

10 NYCRR §§ 400.9, 405.9(7)(h) and 42 USC § 1395dd (EMTALA):

- Modified to permit Article 28 facilities treating patients during the emergency period to “rapidly discharge, transfer, or receive such patients” as long as they take all reasonable measures to protect their health and safety, including safe transfer and discharge practices

10 NYCRR § 400.11: Assessment of Long-Term Care Patients

- Modified to permit Article 28 facilities that receive patients as a result of the emergency to

complete patient review instruments as soon as practicable

10 NYCRR Part 405 et seq. Hospital Minimum Standards

- Modified to the extent necessary to “maintain the public health with respect to treatment or containment or individuals with or suspected to have COVID-19”

10 NYCRR §§ 800.3 (d) and (u): Definitions of Emergency Medical Services and Advanced Life Support System

- Modified to permit emergency medical service personnel to provide community paramedicine, transportation to places other than hospitals or healthcare facilities and telemedicine to facilitate treatment of patients in place

18 NYCRR § 505.14(f)(3): Personal Care Services (administrative and nursing services)

Education Law §§ 8602 and 8603; 10 NYCRR § 58-1.5: Laboratory Testing

- Modified to permit nursing supervision visits as soon as practicable for personal care services to individuals affected by the emergency

Education Law §§ 6909(4) and 6527(6); 8 NYCRR § 64.7: Special Provisions to Regulations of the Professions (Medicine/Nursing)

- Modified to allow physicians and certified nurse practitioners to issue a regimen to authorized personnel to collect swab specimens from individuals suspected of having COVID-19 for testing, or to provide care for individuals diagnosed with or suspected of suffering from COVID-19

14 NYCRR § Part 596: Office of Mental Health Telemedicine Regulations

- Modified to allow for rapid approval of the use of telemental health services

By its terms, the Executive Order will be in effect until September 7, 2020; however, the aforementioned statutes and regulations will be suspended until April 6, 2020. The Governor’s Office has yet to issue any additional guidance on how specifically the above-mentioned laws and regulations have been “suspended or modified” apart from what is contained in the Executive Order, which is fairly broad. The Office has simply suggested that providers continue to follow the CDC’s clinical guidelines. We expect that if the number of cases continues to increase as currently predicted, the Governor’s Office will issue further guidance and/or suspend or modify additional rules or regulations.

Additional waivers or modifications being discussed by GNYHA include:

- Increases of bed capacity and/or use of exempt beds or additional beds;
- Relaxation of documentation of services-rendered requirements for billing purposes;
- Additional guidance on patient discharge or transfers between facilities (i.e., patients returning to nursing homes, skilled nursing facilities, or OMH facilities when the facility does not wish to accept the patient/resident);
- Increased use of Telehealth for patients staying at home and relaxing the rules around the originating site;

- Waiver of co-pays for Coronavirus tests;
- Visitation policies for hospitals, nursing homes and other facilities.

The NYS Department of Health reissued a Letter from 2009 on how a hospital can meet its EMTALA obligations when experiencing a surge in the number of patients presenting to its ED. These measures include the use of “fast-track clinics” and/or posting signs outside the ED for persons who do not have influenza-like symptoms but are seeking information on Coronavirus, about where they can obtain such information without entering the ED.

It is important to remember that a hospital’s EMTALA obligations do not disappear during a pandemic. While a formal waiver process exists, it has not been implemented. On the annexed CMS Fact Sheet, however, CMS describes the ability of a hospital to set up influenza-like illness (“ILI”) screening sites at **off-campus, non-emergency department** locations. EMTALA does not apply to those locations, allowing screenings for ILI to be conducted without implicating EMTALA. If a patient screened at an ILI screening site requires medical attention, the Hospital must arrange a transfer to an appropriate facility, as required under the Medicare Conditions of Participation. Communities may also set up ILI screening sites.

Finally, the U.S. Department of Health and Human Services, Office of Civil Rights (“OCR”) has issued a bulletin reminding covered entities and business associates of their obligations under HIPAA to protect PHI under the Privacy Rule. In certain circumstances, it will also be necessary to keep in mind certain considerations under New York law, including the following:

- Treatment communications: New York follows HIPAA rules for disclosure of patient information to treatment providers without written authorization. In its bulletin, OCR has clarified that care coordination and management are considered treatment communications.
- Public Health Activities: Providers are obligated to report communicable disease outbreaks to NYSDOH and local departments of health under 10 NYCRR Sections 2.1 and 2.10. Effective February 1, 2020, NYSDOH has designated COVID-19 a communicable disease.
- Disclosures to Family, Friends: Disclosures to family and friends involved in a patient’s care or payment for that care, are permissible under New York law where the patient has consented to such disclosures. For example, if a family member is listed as an emergency contact or accompanies the patient during an exam or assessment, the patient’s consent to such disclosures may be implied from the circumstances. If the patient objects to disclosures to family or friends, providers must honor the patient’s objection.
- Disclosures to Prevent a Serious or Imminent Threat: New York law permits disclosures of patient information when the patient demonstrates that he or she poses a clear and present danger to a third party. Disclosures are permitted to the extent necessary to protect a threatened interest, which means the warning should be targeted to the potential victim of an imminent threat, or to law enforcement, with regard to the threatened individual.
- Disclosures to the Media: Like HIPAA, New York does not permit disclosures of identifiable patient information to the media without a written authorization from the patient. Staff should be directed to refer to facility policy on media communications for any matters implicating specific patients cared for at the facility.

Please contact one of our Firm's health law attorneys identified below if you would like more information. This communication is for informational purposes and is not intended as legal advice.

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