

# Health Law Alert: COVID-19 Guidance Update

It has been a busy week of guidance coming from federal and New York state agencies in response to the COVID-19 pandemic. This bulletin highlights some of the more significant guidance impacting healthcare providers and facilities issued [this past week](#).

**Telehealth Expansion:** Modifications at both the federal and state level allow providers to expand the use of telehealth for an array of health care services, not just those related to testing and diagnosis of COVID-19.

- In one of the more significant moves this week, the Office of Civil Rights (“OCR”) issued a March 17, 2020, Notification of Enforcement Discretion for Telehealth Communications, stating that it will not impose penalties for non-compliance with HIPAA related to “good faith provision of telehealth” during the COVID-19 public health emergency. The exercise of discretion applies to any Telehealth service, not just those related to diagnosis and treatment of COVID-19. OCR’s notification states that providers may use “any non-public facing remote communication product” as the mechanism for providing such services, naming as examples, Apple FaceTime, Facebook Messenger video chat, Google Hangouts video and Skype. Please note, however, that Facebook Live, Twitch, and TikTok may not be used because these are public facing communication products. Providers are encouraged to notify patients of potential privacy risks and to use encryption and privacy tools when available.
- For dates of service beginning on March 6, 2020, Medicare will reimburse providers for office visits, mental health screenings, and preventive screenings provided via telehealth. CMS’s Fact Sheet and FAQs on the expansion of Telehealth reimbursement are available here: <https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet>
- On March 15, 2020, New York state agencies, along with the Department of Financial Services (“DFS”), issued guidance expanding access to Telehealth services state-wide. Under the DFS guidance, no insured is required to pay copayments, coinsurance, or annual deductibles for an in-network service delivered via telehealth when such service would have been covered under the policy if it had been delivered in person. During the state of emergency for COVID-19, Telehealth services include telephonic or video modalities (including technology commonly available on smart phones and other devices) when medically appropriate. The guidance dovetails with the Governor’s executive order suspending Public Health Law § 2999-cc in order to allow additional provider categories and modalities to utilize Telehealth with established patients. The DFS guidance document is available here: [https://www.dfs.ny.gov/industry\\_guidance/circular\\_letters/cl2020\\_06](https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2020_06)
- Effective March 13, 2020, Medicaid will reimburse providers for telephonic evaluation and management services provided to Medicaid enrollees in cases where face-to-face visits may not be recommended, so long as the services are medically appropriate. Telephonic services are only to be rendered for the care of established patients or the legal guardian of an established patient. See New York State Medicaid Special Edition, available here: [https://www.health.ny.gov/health\\_care/medicaid/program/update/2020/index.htm](https://www.health.ny.gov/health_care/medicaid/program/update/2020/index.htm)

**OCR Notices on HIPAA and COVID-19:** In addition to OCR's notice that it will waive potential HIPAA penalties for good faith use of Telehealth modalities, OCR has issued bulletins clarifying enforcement discretion with respect to several privacy rule requirements.

- For covered entities that have instituted a disaster protocol, OCR will waive sanctions and penalties for failure to comply with the following provisions of the HIPAA Privacy Rule: (1) the requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care; (2) the requirement to honor a request to opt out of the facility directory; (3) the requirement to distribute a notice of privacy practices; (4) the patient's right to request privacy restrictions; and (5) the patient's right to request confidential communications. The waiver is available for up to 72 hours from the time the hospital implements its disaster protocol. OCR's guidance on COVID-19 Enforcement Discretion is available here: <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/index.html>
- OCR has shared a notice from the Cybersecurity and Infrastructure Security Agency (CISA) regarding defense against cyber scams. CISA warned that cyber attackers may send emails with malicious attachments or links to fraudulent websites to trick victims into revealing sensitive information or donating to fraudulent charities or causes. Staff should be cautioned when handling any email with a COVID-19-related subject line, attachment, or hyperlink, and be wary of social media pleas, texts, or calls related to COVID-19.

**SAMHSA Guidance on 42 CFR Part 2:** On March 19, 2020, the Substance Abuse and Mental Health Services Administration ("SAMHSA") issued guidance for substance use disorder treatment providers that wish to provide telehealth services and consultations. SAMHSA indicated that it recognizes there has been an increased need for Telehealth services and that in some instances the providers may not be able to obtain the required written patient consent. As such, SAMHSA has determined that in those instances, "the prohibitions on use and disclosure of patient identifying information under 42 C.F.R. Part 2 would not apply in these situations to the extent that, as determined by the provider(s), a medical emergency exists." The SAMHSA guidance is available here:

<https://www.samhsa.gov/sites/default/files/covid-19-42-cfr-part-2-guidance-03192020.pdf>

**Limitations to Visitors:** On March 18, 2020, the NYS Department of Health ("NYSDOH") issued a Health Advisory to hospital operators directing that "effective immediately" hospitals should suspend all visitation, except when medically necessary (i.e., where a visitor is essential to the care of the patient) or for family members or legal representatives of patients facing imminent end of life situations.

**CMS Waivers:** On March 13, 2020, CMS issued a COVID-19 Emergency Declaration, which included the following:

- CMS is waiving the requirement for a three-day prior hospitalization for SNF stay coverage for patients needing to be transferred as a result of the emergency.
- Acute care hospitals may house acute inpatients in excluded distinct part units where the distinct part is appropriate for an acute care inpatient. Hospitals should document that the patient is an acute care inpatient housed in the excluded unit due to capacity issues.
- CMS has temporarily waived requirements that out-of-state providers be licensed in the state where they are providing services. This is applicable to Medicare and Medicaid services.
- Additional waivers may be possible. Up-to-date information on CMS waivers is available here: <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/1135-Waivers>

**Cuomo Executive Order No. 202.5 Amending No. 202: Continuing Temp. Suspension and Modification of**

**Laws (March 18, 2020)** (<https://www.governor.ny.gov/news/no-2025-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>):

- **Education Laws and Regulations** have been temporarily suspended or modified to allow:
  - Physicians licensed and in good standing in any US State to practice medicine in NY State without licensure in NY State (see also CMS Blanket Waivers including state licensure waiver available at <https://www.cms.gov/files/document/covid19-emergency-declaration-health-care-providers-fact-sheet.pdf>);
  - Physicians licensed and in good standing in NY State, but who are otherwise not registered in NY State, to practice medicine in NY State despite the lack of registration;
  - Registered nurses, licensed practical nurses, and nurse practitioners licensed and in good standing in any US State to practice in NY State; and
  - Physician assistants licensed and in good standing in any US State to practice in NY State.
- **Public Health Laws and Regulations** have been temporarily suspended or modified to allow:
  - Staff with necessary professional competency and who are privileged and credentialed to work in a facility in compliance with NY State; OR who are privileged and credentialed to work in a facility in another state in compliance with the applicable laws and regulations of that state, to practice in a facility in NY State; and
  - Adoption of existing policies and procedures in a general hospital at a new, temporary facility created for purposes of treating patients during COVID-19 outbreak.
- Any code of construction, energy conservation, or other building code, and all other state and local laws, ordinances, and regulations, temporarily suspended or modified to allow changes to physical plant, bed capacities, and the construction of temporary hospital locations and extensions, to allow for the increase in and/or exceeding of certified capacity limits.
- **Mental Hygiene Law and Regulations** have been temporarily suspended or modified to allow:
  - To the extent necessary, to restrict visitors to OMH-certified facilities, and permit restrictions on community outings for residents of such facilities; and
  - To permit abbreviated training, including medication administration training, of direct support professionals employed in OMH programs and facilities that are experiencing staff shortages.

**CMS Recommends Delay of Elective Surgeries, Non-Essential Medical, and Dental Procedures (March 18, 2019)** (<https://www.cms.gov/files/document/31820-cms-adult-elective-surgery-and-procedures-recommendations.pdf>):

- The recommendations outline factors that should be considered for postponing elective surgeries, and non-essential medical, surgical, and dental procedures. Those factors include patient risk factors, availability of beds, staff and PPE, and the urgency of the procedure. This will help providers focus on addressing more urgent cases and preserve resources needed for the COVID-19 response. The decision to proceed with non-essential surgeries and procedures will be made at the local level by the clinician, patient, hospital, and state and local health departments.

**NY Isolation and Quarantine Procedures (March 9, 2020)** (<https://regs.health.ny.gov/volume-title-10/content/section-213-isolation-and-quarantine-procedures>):

- NYSDOH Public Health and Health Planning Council amended and enacted new regulations to requirements for reporting, investigation, and issuing quarantine orders in actual or suspected cases of contagious diseases. A new 10 NYCRR Section 2.13 was added to clarify isolation and quarantine procedures. Copies of new Section 2.13 are in the link above.

- In short, Section 2.13 says:
  - NYSDOH and local health departments have authority to issue isolation and quarantine orders;
  - Clarifies the locations where isolation or quarantine may be appropriate;
  - Sets forth requirements for the content of isolation and quarantine orders; and
  - Explicitly provides that violations of orders are grounds for civil and/or criminal penalties.

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*Please contact one of our Firm's healthcare law attorneys if you would like more information.*