

UPDATES TO OUT OF STATE PROVIDER LICENSURE, REIMBURSEMENT, AND LIABILITY DURING COVID-19 PUBLIC HEALTH EMERGENCY

May 29, 2020

During the COVID-19 Public Health Emergency (PHE), several regulatory flexibilities have been offered to out-of-state health care practitioners seeking to provide care in Virginia. These changes are temporary and only in effect for the duration of the declared state or federal emergency, depending on the waiver. Below is a summary of the regulatory waivers for licensure and reimbursement as well as liability implications for out-of-state health care practitioners providing services in Virginia during the COVID-19 emergency.

LICENSURE

On March 12, 2020, Governor Northam declared a state of emergency in Virginia due to the COVID-19 pandemic with Executive Order (EO) 51. Upon that declaration, the Virginia Emergency Operations Plan (VEOP), as updated by EO 42, was activated. The VEOP states that an out-of-state health care practitioner, licensed in good standing, may provide services of the same type in Virginia for which he or she is licensed in another state provided that the practitioner is engaged by a hospital, licensed nursing facility, or dialysis facility for the purpose of assisting that facility in disaster response. The facility must submit the practitioner's name, license type, state of license, and license identification number within a reasonable time to the appropriate licensing body in Virginia.

Subsequently, on April 17, Governor Northam issued EO 57, which expands upon the provisions in the VEOP to allow physician offices, hospital-affiliated facilities, and other facilities (in addition to hospitals, nursing facilities, and dialysis centers) to have out-of-state licensees provide care in Virginia to aide in response to COVID-19. The facility must also submit the practitioner's licensing information to the appropriate licensing board in Virginia.

Under both EO 51 and EO 57, the engagement of an out-of-state practitioner by a facility or office may be for in-person or telehealth services. Additionally, EO 57 allows out-of-state practitioners to provide telehealth services to current patients located in Virginia for continuity of care purposes, regardless of whether they have been engaged by a facility or office in Virginia. The EO also authorizes a licensed out-of-state clinical psychologist, professional counselor, marriage and family therapist, and clinical social worker to be issued a temporary license by endorsement as a health care practitioner of the same type upon submission of an application.

EO 51 was amended to be in effect indefinitely, and EO 57 is in effect until June 10 unless amended or rescinded by a sooner executive order. Facilities and offices that have engaged out-of-state providers during the emergency period should plan to coordinate and transition care from such out-of-state providers accordingly.

REIMBURSEMENT

The Centers for Medicare and Medicaid Services (CMS) has temporarily waived requirements for out of state health care practitioners to be licensed in the state in which they are providing services.¹ This waiver applies to physician or non-physician practitioner licensing requirements provided that 1) they are enrolled in the Medicare program; 2) they possess a valid license to practice in the state which relates to their enrollment; 3) they provide services, in person or via telehealth, in a state in which the emergency is occurring for the purpose of contributing to COVID-19 relief efforts; and,

¹ COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers, <https://www.cms.gov/files/document/summary-covid-19-emergency-declaration-waivers.pdf> (last updated 5/15/20).

4) they are not affirmatively excluded from practice in the state or any other state that is part of the emergency area. The CMS waivers remain in effect through the end of the federal emergency declaration, which may be terminated by a Joint Resolution from Congress or by a subsequent presidential proclamation.

The Virginia Department of Medical Assistance Services (DMAS) has also waived the requirement that physicians and other health care (including behavioral health care) professionals be licensed in Virginia to provide services to Virginia residents provided that they have equivalent licensure in another state.² Additionally, DMAS is allowing enrollment in Medicaid to providers licensed by another state provided that they meet relevant requirements set forth by the Department of Health Professions (DHP), the Department of Behavioral Health and Developmental Services, and the Department of Health. These DMAS waivers remain in effect for as long as the declaration of emergency is in effect.

For out-of-state practitioners providing telehealth services to patients in Virginia under EO 57, please note that DMAS has waived originating site fees for telehealth provided in the home. Additionally, CMS is paying telehealth visits at the same rate as in-person visits during the PHE.

As for reimbursement from private carriers, we encourage you to reach out to your in-network health plans to determine the extent to which services provided by out-of-state practitioners are covered.

LIABILITY

Virginia has two statutes that grant immunity from simple negligence before or during declared disasters. VA Code § 8.01-225.01 provides immunity for “health care providers” who must abandon care of other patients in response to a disaster. VA Code § 8.01-225.02 provides immunity for “health care providers” for the delivery or withholding of health care during a disaster. On April 28, 2020, Governor Northam issued EO 60, which clarified that these two liability statutes apply during the COVID-19 emergency.

We note that both statutes only apply to “health care providers” as defined by the Medical Malpractice Act, specifically, § 8.01-581.1. Health care provider includes a health care professional licensed by a regulatory board of the DHP. For example, physicians, nurses, clinical social workers, professional counselors, and clinical psychologists are all health care providers. An entity that employs or engages a health care provider is generally deemed a health care provider under the definition.

Out-of-state health care practitioners providing services in response to COVID-19 in Virginia are protected by these statutes because the language in the VEOP and EO 57 states that such out-of-state providers are deemed to have an active license issued by the Commonwealth. Virginia’s medical malpractice cap on damages would apply to out-of-state practitioners providing care in Virginia. However, the cap would not apply to Virginia practitioners providing care in another state. We encourage practitioners to seek guidance from their medical malpractice insurance carrier for more information on coverage.

For questions, please contact a member of our [COVID-19 Task Force](#).

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² Medicaid Memo regarding New 1135 Waiver and Administrative Provider Flexibilities Related to COVID19, https://www.vhca.org/files/2020/05/5.26.20_New-1135-Waiver-and-Administrative-Provider-Flexibilities_FINAL.pdf (5/26/20).