

VIRGINIA ISSUES NEW GUIDANCE ON COVID-19 SURGE CAPACITY

March 25, 2020

Amid the developments related to COVID-19, many Virginia hospitals are seeking guidance on how to accommodate a surge of patients while staying in compliance with hospital licensure and Medicare certification requirements. Given that these situations evolve quickly, we have outlined the current guidance on how hospitals should manage surge capacity situations.

LICENSING—VIRGINIA DEPARTMENT OF HEALTH

According to [Executive Order Number Fifty-Two \(2020\) \(“EO 52”\)](#), issued on March 20, the State Health Commissioner (the “Commissioner”), at his discretion, may now authorize any general hospital or nursing home to increase licensed bed capacity as determined necessary to respond to increased demand for beds resulting from COVID-19. Further, any beds added by the general hospital or nursing home under an authorization of the Commissioner will constitute licensed beds that do not require further approval or the issuance of a new license. Importantly, the Commissioner has advised that not all requests for additional licensed beds will be approved. Authorizations for bed increases will include a time limit of not later than 30 days after the expiration or termination of the Declaration of a State of Emergency Due to COVID-19.

If a facility plans to add licensed beds, the Executive Officer of the facility should send a letter requesting authorization to add the beds under the authority of EO 52. Requests should be emailed to COPN@VDH.Virginia.gov, or mailed to Division of Certificate of Public Need, 9960 Mayland Drive, Suite 401, Henrico, Virginia 23233. Each request should provide:

- Name and address of the specific facility requesting the additional beds;
- Number of additional licensed beds requested;
- A breakdown of requested beds by type (e.g., med/surg, ICU, long term care);
- A description of where the additional licensed beds will be located and if the proposed space currently meets life safety code requirements for the type of patients or residents expected to occupy the space; and if not, what will be done to meet life safety code requirements for the space;
- An explanation of how the additional licensed beds will be used (e.g., used to supplement normal operations due to existing bed occupancy by COVID-19 patients, or specifically for COVID-19 patients); and

- A staffing plan for the additional beds.

The Division of Certificate of Public Need will immediately evaluate each request and provide a brief analysis and recommendation to the Commissioner. In making his decision, the Commissioner will evaluate requests on a case by case basis, considering the information contained in the request along with the following factors:

- Ongoing efforts to increase the availability of existing beds, such as suspension of elective procedures;
- Availability of medical supplies and personal protection equipment in the facility;
- Availability of beds at other community hospitals and nursing homes in the community;
- Alternatives to adding bed capacity; and
- Current state of COVID-19 in the community.

As discussed below, any bed additions that raise compliance concerns under the Life Safety Code may require a Section 1135 waiver from the Centers for Medicare & Medicaid Services (“CMS”).

MEDICARE CERTIFICATION—SECTION 1135 WAIVERS

Importantly, certified hospitals must operate under normal CMS imposed rules and regulations, unless they have been granted a Section 1135 waiver. Section 1135 of the Social Security Act authorizes the Secretary of the Department of Health and Human Services to waive or modify certain requirements related to the CoPs, certification requirements, EMTALA and limitations on payments for health care items and services, in times of emergency. For example, if a hospital is planning to locate additional licensed beds in space that does not currently meet life safety code requirements contained in 42 CFR § 482.41, the hospital should seek a Section 1135 waiver.

If you have any questions or need further guidance regarding Section 1135 waivers, please contact a member of Hancock Daniel's [Accreditation and Certification Surveys](#) or [Licensure, Certification and Enrollment](#) teams.

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