THE 411 ON 5/11: COVID-19 PUBLIC HEALTH EMERGENCY TO END MAY 11, 2023

February 3, 2023

On January 30, 2023, President Biden announced his administration's intent to end the COVID-19 Public Health Emergency ("PHE") effective May 11, 2023. This change will impact providers across the care spectrum as flexibilities and waivers relating to provider licensure and reimbursement, as well as health program beneficiary enrollment, are slated to automatically sunset with the end of the PHE. Some of the broader impacts that providers should note include the following:

HOSPITALS

- **Temporary Expansion Sites, Swing Beds, and Physical Environment Waivers**: Under the PHE, the Centers for Medicare & Medicaid Services ("CMS") waived key Medicare conditions of participation to permit hospitals to increase capacity addressing surges in patient caseload by placing patients in areas not within a Medicare-enrolled hospital department, and by relocating hospital-based departments. Coupled with this waiver, CMS also waived key requirements relating to the hospital physical environment in order to permit patients to be placed in areas otherwise not compliant with such requirements. Finally, hospitals were permitted broad flexibilities to add skilled nursing facility ("SNF") "swing beds" for patients in need of SNF care, provided certain requirements were met. With the PHE ending, hospitals will be required to provide services to patients within their hospital departments as they did before the PHE, and CMS rules relating to hospital facilities' physical environment and establishment of SNF swing beds will once again be in effect.

- **Off Site Patient Screening**: During the PHE, CMS waived enforcement of section 1867(a) of the Social Security Act (the Emergency Medical Treatment and Active Labor Act, or EMTALA), allowing hospitals to screen patients at a location off site from the hospital's campus in order to prevent the spread of COVID-19. With the PHE ending, hospitals will no longer be able to screen patients off site and instead will be required to screen them in a hospital facility.

- **Remote Outpatient Therapy and Education Services**: Under the PHE, CMS permitted hospitals to provide behavioral health and education services furnished to patients in their home by hospital-employed counselors or other professionals who do not bill Medicare directly. Under this waiver, the patient's home was considered a "provider-based department of the hospital." With the PHE ending these services are no longer able to be paid for when provided in a patient's home but will need to be provided in the hospital in order to be billable by the hospital.

- **Practitioner Oversight of Care**: During the PHE, CMS has waived requirements at § 482.12(c)(1)-(2) and (4) that Medicare patients in the hospital must be under the care of a physician. This has allowed hospitals to use other practitioners, such as physician assistants and nurse practitioners, to the fullest extent possible. This waiver is required to

be implemented in accordance with a state's emergency preparedness or pandemic plan and ends upon the conclusion of the PHE.

NURSING HOMES

- **Medicaid Redeterminations for Residents**: During the PHE, nursing home residents enrolled in Medicaid were largely shielded from requirements to periodically redetermine Medicaid eligibility. This in turn has relieved many providers from having to monitor or assist residents in the eligibility redetermination process, including collecting documents (e.g., bank statements) and ensuring timely submission of redetermination paperwork. In tandem with the end of the PHE, states are also implementing processes to reinitiate Medicaid redeterminations going forward.

- **Three-Day Prior Hospitalization and 60-day Wellness Period Waivers**: Under the PHE, CMS waived the requirement for a three-day prior hospitalization for Medicare coverage of a skilled nursing facility ("SNF") stay. CMS also included a limited exception for renewing Medicare coverage for certain beneficiaries who exhausted their SNF benefits, permitting such renewal for residents without first having to start and complete a 60-day "wellness period" if certain key requirements were met. These waivers will end when the PHE terminates, and SNFs will once again need to ensure incoming residents satisfy the three-day prior hospitalization requirement for Medicare to cover skilled nursing facility benefits under Part A.

- **Pre-Admission Screening and Annual Resident Review ("PASARR")**: Under the PHE, CMS allowed nursing homes to suspend PASARR assessments for up to 30 days for incoming residents. Once the PHE ends, facilities will no longer be permitted to suspend PASARR assessments for incoming residents.

HOME HEALTH

- **Clinical Records**: During the PHE CMS extended the required time period to provide a patient with a copy of their medical record at no cost. Normally, this time period is limited to the next visit or within four business days (when requested by the patient). Specifically, CMS has allowed Home Health Agency ("HHAs") ten business days to provide a patient's clinical record, instead of four. CMS will end this waiver at the conclusion of the PHE.

- **Training and Assessment of Aides**: During the PHE, CMS has been waiving the requirement for a registered nurse, or in the case of an HHA, a registered nurse or other appropriate skilled professional (physical therapist/occupational therapist, speech language pathologist) to make an annual onsite supervisory visit (direct observation) for each aide that provides services on behalf of the agency. Specifically, CMS postponed such assessments until no later than 60 days after the expiration of the PHE. CMS also postponed the deadline for home health aides to complete their annual 12-hour in-service training until the end of the first quarter after the PHE ends. Providers should be mindful of these upcoming, post-PHE deadlines.

- **OASIS Reporting and Comprehensive Assessments**: During the PHE, CMS has provided flexibility on timeframes related to OASIS transmission by extending the five-day completion requirement for the comprehensive assessment to 30 days and waiving the 30-day OASIS submission requirement. Delayed submission has been permitted during the PHE, and CMS has allowed 30 days for the completion of comprehensive assessments. These relaxed timeframes will no longer be in effect after the PHE ends.

- **Skilled Professional Assessments**: During the PHE, CMS waived requirements that only rehabilitation skilled professionals perform the initial and comprehensive assessment when only therapy services are ordered. This permitted any rehabilitation professional (OT, PT, or SLP) to perform the initial and comprehensive assessment for all patients receiving therapy services as part of the plan of care regardless of whether or not the service established eligibility for the patient to be receiving home care. This waiver will end with termination of the PHE, but note that CMS finalized changes to permanently allow occupational therapists to complete the initial and comprehensive assessments for patients going forward.

HOSPICE

- **Comprehensive Assessments**: During the PHE, CMS has been waiving required timeframes for updates to the comprehensive assessments from 15 to 21 days. This waiver will end with termination of the PHE.

- **Non-Core Services**: During the PHE, CMS has been waiving the requirement for hospices to provide certain non-core hospice services, including the requirements for physical therapy, occupational therapy, and speech language pathology. This waiver will end with termination of the PHE.

- **Training Requirements**: During the PHE, CMS has been waiving the requirement for a registered nurse to make an annual onsite supervisory visit (direct observation) for each aide that provides services on behalf of the agency, allowing for postponement of such visits to no later than 60 days after the expiration of the PHE. CMS also postponed the requirement for annual assessment of the skills and competence of all individuals furnishing care and provision of in-service training and education programs where required. Such assessments and training must now be completed by the end of the first full quarter after the end of the PHE. Providers are encouraged to remain mindful of these deadlines.

- **Volunteers**: During the PHE, CMS has been waiving the requirement at 42 CFR §418.78(e) that hospices are required to use volunteers (including at least 5% of patient care hours). This waiver will terminate at the end of the PHE.

PHYSICIANS/OTHER PRACTITIONERS[1]

- **Medicare Physician Supervision Requirements**: During the PHE, CMS temporarily modified the regulatory definition of direct supervision, which requires the supervising physician or practitioner to be "immediately available" to furnish assistance and direction during the service, to include "virtual presence" of the supervising clinician through the use of real-time audio and video technology. This flexibility is currently set to return to pre-PHE rules at the end of the calendar year that the PHE ends.

- **Remote Patient Monitoring ("RPM")**: During the PHE, CMS has permitted clinicians to bill for RPM services furnished to both new and established patients, and to patients with both acute and chronic conditions. When the PHE ends, clinicians must once again have an established relationship with the patient prior to providing RPM services. However, CMS will continue to allow RPM services to be furnished to patients with both acute and chronic conditions (pre-PHE, an initiating visit was required before RPM services could be billed).

[1] Beyond noting updates which will come into effect at the end of the PHE, physicians/practitioners are encouraged to review the 2023 Medicare Physician Fee Schedule and other guidance pertaining to frequency limitations on provision of certain telehealth services (for example, the limitation on providing subsequent skilled nursing facility visits via telehealth, reduced from once every 30 days to once every 14 days).

A NOTE ON TELEHEALTH

The Consolidated Appropriations Act, 2023 signed into law by President Biden on December 29, 2022, extended telehealth reimbursement waivers for two years until December 31, 2024. This extension includes the following provisions of telehealth flexibilities:

- Ending the requirement that providers be licensed in the same state as the patient receiving care;
- Allowing more types of eligible practitioners to provide telehealth services to include occupational therapist, physical therapist, speech-language pathologist, and audiologist;
- Permitting coverage and payment for audio-only telehealth services;
- Delaying the six-month in-person requirement for mental health patients seeking treatment through telehealth;
- Extending the ability to use telehealth services to meet the face-to-face recertification requirement for hospice care;
- Expanding the list of Medicare-covered services that can be provided via telehealth; and
- Allowing federally qualified health centers and rural health clinics to provide telehealth services, rather than being limited to being an originating site provider for telehealth.

The Consolidated Appropriations Act, 2023 extended these flexibilities regardless of the status of the PHE. Additionally, the Secretary of Health and Health Services must submit a report on how telehealth has affected Medicare beneficiaries' overall health outcomes and whether there are geographic differences in use of telehealth (interim report in October 2024, with final report due in April 2026).

All 50 states and D.C. expanded Medicaid telehealth coverage and temporarily waived some aspects of state licensure requirements for the practice of telehealth during the PHE.

WHAT THIS MEANS FOR PROVIDERS

The above summary is not intended to be comprehensive of all impacts at the end of the PHE. Providers are encouraged to review key CMS PHE waiver information at https://www.cms.gov/coronavirus-waivers which provides detailed information, by provider type, on applicable PHE waivers currently in place and how the end of the PHE will impact them. Providers should also be mindful of state-specific rules and waivers which may also be impacted by the end of the PHE. Hancock Daniel remains available as a resource for providers across the care spectrum in matters relating to reimbursement, compliance, and strategic planning as the PHE comes to an end. Please contact a member of Hancock Daniel's COVID-19 Task Force for more information.