

**Katten**

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**COVID-19: NYS Executive Orders: A Legal  
Perspective**

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# HHS Secretary Azar Letter to Governors

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- “Allow health professionals licensed or certified in other states to practice their professions in your state, either in person or through telemedicine”
  - Existing Standards
    - Physicians and healthcare providers must be licensed/certified in the state where the patient is receiving services
    - Healthcare professionals must be credentialed and privileged either by the hospital consistent with existing compliant procedures or it can accept the distant site decisions if it participates in Medicare or is accredited or if not, the parties enter into an agreement that conforms with all Medicare CoP credentialing and privileging standards

# HHS Secretary Azar Letter to Governors

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- CMS Waivers
  - Scope of Medicare reimbursable telehealth services is greatly expanded for Medicare patients which will be reimbursed.
  - This means that there will be many more telehealth arraignments and specialists who can provide telehealth services both within the hospital and at a distant site provider.
  - Physicians and non-physician providers no longer need to be licensed in the state where they are providing services, subject to state requirements, as long as:
    - > Must be enrolled in the Medicare program
    - > Must possess a valid license in the state where they are enrolled
    - > Is furnishing services, whether in person or via telehealth, in a state in which the emergency is occurring and is providing relief support for COVID-19
    - > Is not affirmatively excluded from practice in the enrolled state or any state that is part of an 1135 emergency area

# HHS Secretary Azar Letter to Governors

- New York
  - Executive Order No. 202 – March 7, 2020
    - > Governor declares a disaster emergency in New York
  - Executive Order No. 202.1 – March 12, 2020
    - > Expanded the number of categories of providers who can provide telehealth services
    - > Extended to September 4, 2020
  - Executive Order No. 202.5 – March 18, 2020
    - > Allowed physicians in any state and in good standing or licensed but not registered in New York to practice in New York
    - > Allowed registered nurses, licensed practical nurses and nurse practitioners licensed to practice in any state and in good standing to practice in New York
    - > Extended to September 4, 2020

# HHS Secretary Azar Letter to Governors

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- Executive Order No. 202.10 – March 23, 2020
  - > APNs with a masters or doctorate specializing in administering anesthesia services in a general hospital or a free standing surgery center are not required to be supervised by a qualified physician
  - > Same for physician assistants and specialist assistants
  - > Nurse practitioners can provide services within their scope of practice without a written practice or collaborative agreement with a supervising physician
  - > Allows graduates of foreign medical schools with at least one year of graduate medical education to provide patient care in hospitals even if they do not have a license – must have limited permits
  - > Expired May 8, 2020

# HHS Secretary Azar Letter to Governors

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- Executive Order No. 202.18 – April 16, 2020
  - > Allowed physicians, registered nurses, licensed practical nurses and similar practitioners with a substantially similar title license and in good standing in Canada to practice in New York without a license
  - > Allowed clinical nurse specialists, specialist assistants certified and in good standing in any United States state and Canada to practice without a license
  - > Extended to September 4, 2020

# HHS Secretary Azar Letter to Governors

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- “Waive certain statutory and regulatory standards not necessary for the applicable standards of care to establish a patient-provider relationship, diagnose, and deliver treatment recommendations utilizing telehealth technologies”
  - Existing Standards
    - Standards of care as well as requirements for establishing physician-patient relationships as well as responsibilities in order to provide services and/or receive reimbursement are going to vary from state to state and community to community
    - Although the request from Secretary Azar is rather vague and broad, the focus is for states to consider the removal, waiver or relaxation of standards that, for example, would require in-person face to face meetings between a physician and a patient as opposed to a telehealth video conference

# HHS Secretary Azar Letter to Governors

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- Another example could be the formal requirements for obtaining informed consent from the patient
- CMS Waivers
  - Other than the CMS Waivers which are described in this presentation, you need to look to state declarations, executive orders and 1135 waivers which may affect the standards for which physician-patient relationships are established as well as other related standards concerning treatment of COVID-19 patients
- New York
  - No change in standards of care

# HHS Secretary Azar Letter to Governors

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- “Relax scope of practice requirements for healthcare professionals, including allowing professionals to practice in all settings of care”
  - Existing Standards
    - A healthcare professional’s scope of practice is determined by state law, licensing and certification standards as well as the clinical privileges which hospitals have granted to these professionals
    - Some state statutes and/or hospital policies also limit the settings in which the healthcare professional can provide services. For example, an LPN might only be allowed to provide services in a clinic as opposed to an in-patient setting.

# HHS Secretary Azar Letter to Governors

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- CMS Waivers
  - Waive requirements of supervisory or collaborative agreements between physicians and advanced practitioners – not Illinois
  - Allow the treatment of patients in clinics, homes and other locations if otherwise limited by policy
  - Limit restrictions on the type of nurse practitioners, RNs and physicians who may furnish care in homes or other settings
  - Allow expansion for allowable activities such as EMTs and paramedics to provide additional care services during an emergency
- New York
  - No real changes

# HHS Secretary Azar Letter to Governors

- “Allow physicians to supervise a greater number of health professionals and to do so using remote or telephonic means”
  - Existing Standards
    - Federal law and most state laws limit the number of advanced practitioners which a physician can supervise under standards of care as well as reimbursement requirements
    - These standards also typically require that the physician be immediately available in order to provide his or her supervisory responsibilities
  - CMS Waivers
    - Waive requirements regarding physical proximity of supervising physician
    - Allow supervision remotely via telehealth
  - New York
    - Does not require nurse practitioners to be supervised by a physician but they must work in collaboration with a physician pursuant to written protocols
    - See Executive Order No. 2021.10 above.

# HHS Secretary Azar Letter to Governors

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- “Allow for rapid certification/licensure and recertification/relicensure of certain healthcare professionals”
  - Existing Standards
    - Certification and licensure standards are controlled by state licensing boards as well as certifying entities for other healthcare professionals.
    - See the website for the Federation of State Medical Boards ([www.FSMB.org](http://www.FSMB.org)) to determine whether there are any relaxed standards which has been adopted during the pandemic for each state.
  - CMS Waivers
    - Allows physicians whose privileges have expired to continue practicing and for new physicians to practice before full medical staff/governing board review and approval

# HHS Secretary Azar Letter to Governors

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- CRNAs do not need to be under the supervision of a physician - standard is up to the hospital, not ASC and state law
- For critical access hospitals (“CAHs”), CMS is waiving minimal qualifications for clinical nurse specialists, nurse practitioners and PAs, subject to state restrictions if not exceeded by federal requirements
- All licensing, certification and registration requirements are waived for CAH staff subject to state laws and state emergency/pandemic plans
- New York
  - No change

# HHS Secretary Azar Letter to Governors

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- Develop the list of your state liability protection for in-state and out-state health professionals, including volunteers, during this national emergency - work with state insurance commissioners to modify or rescind provisions which prevent coverage for professionals providing COVID-19 emergency services who are rendering services in a different state
  - Existing Standards
    - Most states have passed statutes which address disaster/emergency declarations and therefor apply Good Samaritan liability protections for such professionals and volunteers who provide services during the declared emergency as long as the standards for issuing disaster privileges are followed

# HHS Secretary Azar Letter to Governors

- CMS Waivers
  - There is no CMS new waiver.
  - There are, however, six federal statutes, HIPAA, the Volunteer Protection Act of 1997 and the Public Readiness Emergency Preparedness Act which do provide broad immunity though the latter a statute was deemed to apply to COVID-19 circumstances by Secretary Azar, CARES Act, Emergency Management Assistance Compact and the Uniform Emergency Volunteer Health Practitioners Act.
- New York
  - Executive Order No. 202.10
    - > Physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered professional nurses and licensed practical nurses are immune from alleged liability for any injury or death alleged to have been sustained directly as a result of an act or omission in the course of providing medical services in support of the State's response to the COVID-19 outbreak unless it is established that such injury or death was caused by the gross negligence of the medical professional
    - > Expired May 8, 2020

# HHS Secretary Azar Letter to Governors

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- Modify laws to allow medical students to conduct triage, diagnose and treat patients under supervision of licensed medical staff
  - Existing Standards
    - Scope of practice for medical students is controlled by state law, medical schools and hospitals
    - Consult with the state as to whether emergency declarations or waivers were issued to address this recommendation
    - Controlled by state law and/or hospital policies
  - CMS Waivers
    - There are no waivers issued for this particular recommendation

# HHS Secretary Azar Letter to Governors

- New York
  - Executive Order No. 202.14 – April 7, 2020
    - > Allows any 2020 graduate from an accredited academic program and who has been accepted into an ACGME accredited residency program within or outside of New York to practice at any institution under the supervision of a licensed physician.
    - > Extended to September 4, 2020
  - Executive Order No. 202.15 – April 9, 2020
    - > Allows 2020 graduate of a New York accredited medical program to produce medicines without a license if supervised by a licensed New York physician registered to practice medicine in New York
    - > Extended to September 4, 2020

# Other applicable CMS waivers

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- Hospitals can provide benefits to medical staff such as daily meals, laundry services, child care services, etcetera while engaged in delivering care to COVID-19 patients
- Verbal orders can be authenticated in a time period longer than 48 hours
- Medical records do not need to be completed within 30 days but must be done as promptly as possible
- Requirement to provide patients with information on advanced directives is waived

# The Joint Commission

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- Disaster Privileges
- Temporary Privileges
- Will abide by State 1135 waivers
- Surveys presuming in June

# Impact on MSPs

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- CMS Waivers only apply to the treatment of Medicare patients
- A good resource to review all of the state 1135 waivers or declarations and emergency executive orders can be found at [www.nga.org](http://www.nga.org).
- The Federation of State Medical Boards has a COVID-19 resource link which summarizes the actions taken by each state licensing board in response to the pandemic (see [www.FSMB.org](http://www.FSMB.org))
- See also
  - [NYSED.gov](http://NYSED.gov)
  - [health.ny.gov](http://health.ny.gov)

# Impact on MSPs

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- Keep in mind that any and all applicable waivers and emergency executive orders will be limited in time - they only will apply during the term of the declared disaster or national emergency issued by the federal government or by the state
- The rule to follow is to abide by all current appointment, reappointment, privileging, credentialing and other applicable bylaw procedures connected with state, federal and accreditation standards
- The relaxation of privileging, credentialing and other similar standards should only be considered if in fact the hospital is faced with an insufficient number of physicians, PAs, nurse practitioners and other healthcare professionals to provide needed services to COVID-19 patients and the state has declared a disaster/emergency
- Under these circumstances, consider using disaster, temporary, expedited credentialing that before relying on the waivers

# Impact on MSPs

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- It is expected that the relaxation of such standards could result in negligent care being provided to patients thereby increasing the likelihood of medical malpractice and other similar lawsuits against the hospital and healthcare practitioners irrespective of the Good Samaritan limits on liability as well as other tort liability protections being issued by the federal government and states during the pandemic.
- These protections again will only last during the declared disaster or emergency by federal and state government
- MSP's shall not independently rely on and/or apply the relaxed standards – hospitals should first adopt a board resolution or similar directive before implementing.

# Impact on MSPs

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- To the extent that the hospital is obligated to apply the relaxed measures afforded under CMS or state waivers you should carefully document why the hospital is deviating from the existing legal and accreditation standards in order to support access to the liability protections.
- It is likely that The Joint Commission will take a non-aggressive approach to hospitals which deviate from accreditation standards assuming again that the hospital can demonstrate the urgency in terms of its capability and capacity to treat COVID-19 patients which require deviation from accreditation standards

# Questions?



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A nationally recognized advisor to health care providers across the country, Michael Callahan provides deeply informed business and legal counseling in all areas of hospital-physician relations and health care regulatory compliance and governmental investigations, including the Emergency Medical Treatment and Active Labor Act (EMTALA), the Health Insurance Portability and Accountability Act (HIPAA), Medicare Conditions of Participation (CoPs), hospital licensure and accreditation standards. He is widely respected for his leading work on the Patient Safety Act from a regulatory compliance, policy and litigation standpoint, including the development of patient safety organizations (PSOs).

### **The knowledge to identify efficient and practical solutions**

Health systems, hospitals and physician groups large and small across the country come to Michael for practical, real-world guidance and answers to challenging legal and operational issues, which he can provide quickly because of his many years of experience. He understands the reality of hospital quality, peer review, risk management and related operational legal and regulatory complexities and can rely on a large client base in order to provide better and comparative solutions.

He also is sought out by many of the largest health systems around the country for his understanding and interpretation of the Patient Safety Act. In a case of first impression he advised a national pharmacy that became the first provider to successfully assert an evidentiary privilege under the Patient Safety Act. Since that case, he has represented or advised many hospitals, physician groups and other licensed providers in creating or contracting with federally certified PSOs and has been directly involved in most of the major state appellate and federal court decisions interpreting the Patient Safety Act.

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