

NEW YORK AND FEDERAL LAWMAKERS EASE PROFESSIONAL PRACTICE, LICENSING, AND DOCUMENTATION REQUIREMENTS IN RESPONSE TO COVID-19 PANDEMIC

Hodgson Russ Healthcare Alert
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The rapid spread of the COVID-19 pandemic has highlighted the urgent need to expand the ranks of physicians and practitioners who are available to respond to the emergency. To increase system capacity, New York has temporarily amended or suspended multiple statutory and regulatory provisions affecting practitioners by Executive Order. The Centers for Medicare & Medicaid Services (CMS) likewise has issued multiple emergency blanket waivers that should permit practitioners to receive reimbursement through Medicare or Medicaid for services provided pursuant to these state Executive Orders.

This Alert focuses on three areas of change of particular relevance to healthcare systems and practitioners: (1) scope of practice; (2) practice in New York without a New York license or without New York registration; and (3) recordkeeping requirements.

I. Scope of Practice

In recent weeks, New York Governor Andrew Cuomo issued a series of Executive Orders aimed at relaxing various requirements to facilitate delivery of COVID-19 medical care, all of which are now effective until May 7, 2020, under Executive Order (E.O.) 202.14. These changes seek to increase the healthcare provider ranks primarily by permitting certain practitioners to perform functions that they would otherwise be unable to perform. Specifically, under E.O. 202.10:

- Advanced practice registered nurses with a doctorate or master's degree specializing in the administration of anesthesia may administer anesthesia in a general hospital or free-standing ambulatory surgery center without the supervision of a qualified physician.
- Physician assistants and specialist assistants may provide medical services appropriate to their education, training, and experience without oversight from a supervising physician and without civil or criminal penalty related to such lack of oversight.

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NEW YORK AND FEDERAL LAWMAKERS EASE PROFESSIONAL PRACTICE, LICENSING, AND DOCUMENTATION REQUIREMENTS IN RESPONSE TO COVID-19 PANDEMIC

- Nurse practitioners may provide medical services appropriate to their education, training, and experience, without a written practice agreement, or collaborative relationship with a physician, and without civil or criminal penalty related to a lack of such agreement or relationship.

Likewise, CMS temporarily waived certain regulations requiring that Medicare patients be under the care of a physician, thereby permitting hospitals to utilize other practitioners to a far greater extent than previously possible. CMS also waived the requirements that a certified registered nurse anesthetist (CRNA) practice under the supervision of a physician.

The intent of these changes is to allow CRNAs and other practitioners to function to the fullest extent allowed by the state, to free up physicians and practitioners from the supervisory requirement, and to expand the capacity of physician and other practitioners during the COVID-19 emergency.

Other Executive Orders expand the availability of personnel to facilitate COVID-19 testing:

- Physicians and certified nurse practitioners may issue a non-patient specific regimen to nurses or any such other persons authorized by law or by executive order to collect throat or nasopharyngeal swab specimens from individuals suspected of suffering from a COVID-19 infection, for purposes of testing, or to perform such other tasks as may be necessary to provide care for individuals diagnosed or suspected of suffering from a COVID-19 infection. (E.O. 202.1)
- Registered nurses may order the collection of throat or nasopharyngeal swab specimens from individuals suspected of being infected by COVID-19, for purposes of testing. (E.O. 202.10)

II. Practice in New York Without New York License or Registration

Additionally, on March 30, 2020, Governor Cuomo issued a plea to health care workers nationwide: “I am asking health care professionals across the country, if you don’t have a health care crisis in your community, please come help us in New York right now . . . We need relief.” To make such assistance possible, the Governor issued a series of orders suspending laws and regulations requiring a New York license to practice the following professions in New York:

- Physicians, registered nurses, licensed practical nurses, nurse practitioners, and physician assistants, under E.O. 202.5;
- Respiratory therapists and radiologic technologists, under E.O. 202.10;
- Midwives, under E.O. 202.11.

Under these Executive Orders, the specified professionals who are licensed and in current good standing in any state in the United States may practice in New York without risking civil or criminal penalty in New York related to lack of licensure.

CMS likewise temporarily waived requirements that out-of-state practitioners be licensed in the state where they are providing services, when a state has also waived its licensing requirements and when the practitioner: (i) is enrolled in the Medicare program; (ii) possesses a valid license to practice in the state which relates to his or her Medicare enrollment; (iii) is furnishing services – whether in person or via telehealth – in a state in which the emergency is occurring in order to contribute to relief efforts in his or her professional capacity; and (iv) is not affirmatively excluded from practice in the state or any other state that is part of a declared emergency area.

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Governor Cuomo has further issued orders permitting those who are licensed and in good standing in New York, but who lack New York State registration, to practice the following professions in the state, without civil or criminal penalty related to lack of registration:

- Physicians, under E.O. 202.5; and
- Registered nurses, licensed practical nurses, nurse practitioners, physician assistants and radiologic technologists, under E.O. 202.10.

Unlike the orders related to practice in New York with an out-of-state license, these orders do not extend to respiratory therapists or midwives.

Most recently, Governor Cuomo issued an order allowing 2020 medical school graduates to practice in New York. Executive Order 202.14 permits any physician who (1) will graduate in 2020 from an academic medical program accredited by a medical education accrediting agency for medical education by the Liaison Committee on Medical Education or the American Osteopathic Association, and (2) has been accepted by an Accreditation Council for Graduate Medical Education accredited residency program within or outside of New York State to practice at any institution under the supervision of a licensed physician. (E.O. 202.14)

III. Recordkeeping Requirements

Executive Order 202.10 suspends certain recordkeeping requirements to permit practitioners to remain focused on patient care during the period of the COVID-19 outbreak. This specifically includes, to the extent necessary to respond to the COVID-19 outbreak, the requirements:

- to maintain medical records that accurately reflect the evaluation and treatment of patients, or requirements to assign diagnostic codes, and
- to create or maintain other records for billing purposes.
- Any person acting reasonably and in good faith under this provision shall be afforded absolute immunity from liability for any failure to comply with any recordkeeping requirement. (E.O. 202.10)

Similarly, at the federal level, CMS has temporarily waived requirements that cover the subjects of the organization and staffing of the medical records department, requirements for the form and content of the medical record, and record retention requirements, so long as the waiver is not inconsistent with a state's emergency preparedness or pandemic plan.

This summary is not an exhaustive list of the ongoing steps New York and the federal government have taken and are continuing to take to increase healthcare system capacity in response to the COVID-19 crisis. We are monitoring these quickly changing developments and will update this Alert to reflect them. Check back often for more information.

Additional Considerations — Protection from Liability

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Finally, newly-enacted Article 30-D of the New York Public Health Law provides wide-ranging immunities from liability for health care facilities, practitioners, and volunteer organizations, related to acts or omissions in the provision of health care services. N.Y. Pub. Health Law § 3802. More information about the statute and its implications is available [here](#).

CONTACT US

If you have questions about how these Executive Orders and CMS waivers may affect your practice, please contact Jane Bello Burke (518.433.2404), Cynthia Giganti Ludwig (716.848.1689) or Joshua Feinstein (716.848.1318).

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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