

Healthcare Law UPDATE

FEDERAL UPDATE

COVID-19 News

Over the past two months, news in the healthcare sector has been overwhelmingly COVID-oriented. Below are some federal-level highlights.

The U.S. Department of Labor issued guidance regarding the **Families First Coronavirus Response Act (FFCRA)**, which is of particular importance to employers in the healthcare field. FFCRA requires that employers provide employees with paid sick leave and paid family leave benefits for certain COVID-19-related circumstances. All employers with up to 500 employees should print and post the new U.S. Department of Labor [notice](#) regarding the new employee leave rights effective April 1, 2020 through December 31, 2020. As with some of the other regulatory guidance issued during the COVID-19 pandemic, the guidance has been shifting. Visit Brach Eichler's [COVID-19 Resource Center](#) for more information.

The **Coronavirus Aid, Relief, and Economic Security (CARES) Act** was signed into law by President Trump on March 27, 2020, with the stated intent of protecting the American people from the public health and economic impacts of COVID-19. The law has a four-pronged approach for providing assistance to American workers and families, assistance for small businesses, preserving jobs for American industry, and assistance for state and local governments. A portion of CARES, known as the **Paycheck Protection Program**, creates a new non-recourse and forgivable SBA guaranteed loan requiring no personal guarantee. Visit our [COVID-19 Resource Center](#) for a number of articles summarizing the changing nature of the government's guidance for the program, as well as our COVID-19 on-demand webinar series.

The CARES Act also contains [provisions](#) relating to **retirement plans**, including pension plan funding, expanded distribution rights, expanded plan loan rights, and the required minimum distribution waiver.

Last month, the Centers for Medicare & Medicaid Services (CMS) began to release to eligible healthcare providers \$30 billion of the \$100 billion available from the **Public Health and Social Services Emergency Fund (PHSSEF)** under the CARES Act, through direct deposit into business bank accounts. Under the program, there is no application for the

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PHSSEF Payment (Payment). Rather, each medical practice automatically receives a Payment in an amount based upon the receipt of Medicare fee-for-service (FFS) reimbursements in 2019. The Payment is not a loan, but may need to be repaid if certain terms and conditions are not met. It is imperative that Providers who receive a PHSSEF Payment carefully review the terms and conditions and decide within 30 days of receiving the Payment whether to accept or remit the Payment. If a practice does not wish to or cannot comply with the Terms and Conditions, the full amount received must be remitted to HHS within 30 days of receipt as instructed by HHS. Visit our [COVID-19 Resource Center](#) for additional information, or contact us for guidance.

On March 23, 2020, the **Department of Health & Human Services, Office of Inspector General (OIG)** issued a [Fraud Alert](#) to make the public aware of fraud schemes related to COVID-19. The OIG discussed "scammers" and "fraudsters." COVID-19 scammers are offering COVID-19 tests to Medicare beneficiaries in exchange for personal data, including Medicare information. However, the OIG asserts "the services are unapproved and illegitimate." Fraudsters are targeting Medicare beneficiaries through telemarketing calls, social media platforms, and door-to-door visits. These bad actors may use

the individual's information to commit medical identity theft and fraudulently bill Medicare or Medicaid, potentially leaving the victim responsible for denied claims. The OIG cautions Medicare beneficiaries to be mindful of unsolicited requests for their Medicare or Medicaid numbers, to be suspicious of unexpected calls or visitors offering COVID-19 tests or supplies, and to ignore offers or advertisements for COVID-19 testing or treatments on social media sites.

On May 14, 2020, OSHA issued a [news release](#) and [Alert](#) titled "**COVID-19 Guidance for Nursing Home and Long-Term Care Facility Workers.**" The Alert sets forth safety measures employers can implement to protect workers in the nursing home and long-term care industry. Some of the safety measures include:

- Screen workers and residents regularly for signs and symptoms consistent with the coronavirus; send sick workers home or to seek medical care.
- Closely monitor and take additional precautions regarding employees and residents who may have been exposed to an individual with the coronavirus.



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- Ask visitors to inform the facility if they develop a fever or symptoms consistent with the coronavirus within 14 days of their visit.
- Maintain at least 6 feet between workers, residents, and visitors to the extent possible, including while workers perform their duties and during breaks.
- Stagger break periods to avoid crowding in breakrooms.
- Consider alternatives to in-person large group gatherings (e.g., staff meetings, resident activities).
- Continually monitor personal protective equipment (PPE) stocks, burn rate, and supply chains. Develop a process to decontaminate and reuse PPE, such as face shields and goggles, as appropriate. Follow CDC recommendations for optimization of PPE supplies.
- Encourage workers to report any safety and health concerns.

In the Alert, OSHA referenced its COVID-19 [guidance](#) for healthcare workers and employers, which contains information on how employers should assess the hazards to which their workers may be exposed; evaluate the risk of exposure; and select, implement, and ensure workers use controls to prevent exposure to COVID-19.

Federal Public Health Emergency Privacy Act Bill Introduced

Five Democrats from both houses of Congress introduced a [bill](#) on May 14, 2020, titled the “Public Health Emergency Privacy Act” (PHEPA). The bill is intended to protect consumer health data when using digital contact tracing technology that aims to slow the spread of COVID-19. This includes technology Apple and Google are developing for their smartphone software.

If passed into law, PHEPA would require privacy and security protections for COVID-19 exposure-notification and contact-tracing technology applications developed by the government or private endeavors. The law also would require “affirmative, express consent” to collection, use or disclosure of data collected during the COVID health crisis. The law would apply to “covered organizations” that collect, use or disclose emergency health information electronically or through communication by wire or radio, or that develop or operate a website, web application, mobile application, mobile operating system feature, or smart device application for the purpose of tracking, screening, monitoring, contract tracing, or mitigation, or otherwise responding to the COVID-19 public health emergency. Health care providers, in their traditional role of providing health care services, would not be “covered organizations” under the law, and therefore would continue to be covered under HIPAA and other existing federal and state privacy laws.

The law would require covered organizations that collect emergency health data to limit the collection, use and disclosure of the data for a “good faith public health purpose,” take reasonable measures to ensure the accuracy of the data, adopt reasonable safeguards to prevent unlawful discrimination on the basis of emergency health data, and only disclose such data to governmental entities when they are a

public health authority and made solely for good faith health purposes and in direct response to exigent circumstances. Users would have to actively consent (opt-in) to have their data collected.

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STATE UPDATE

Telemedicine Rules – On April 20, 2020, the New Jersey Department of Health (DOH) re-published proposed rules concerning standards for telemedicine and telehealth organizations, and the New Jersey State Board of Medical Examiners (BME) published final telemedicine rules for physicians and nurse midwives.



DOH Registration Standards for Telemedicine and Telehealth Organizations – In short summary, the proposal would implement a portion of New Jersey’s telemedicine statute requiring registration of telemedicine and telehealth organizations and the penalties that may be imposed for failing to comply with the requirements. Under the statute, N.J.S.A. 45:1-61 et seq., “telemedicine or telehealth organization” is defined to mean a corporation, sole proprietorship, partnership, or limited liability company that is organized for the primary purpose of administering services in the furtherance of telemedicine or telehealth. The re-proposal includes a corrected application for registration.

BME Publishes Final Telemedicine Regulations for Physicians and Podiatrists – The BME’s [final telemedicine regulations](#) for physicians and podiatrists are effective as of April 20, 2020. The regulations permit a New Jersey-licensed physician and podiatrist to provide telemedicine services (i) if he/she is located in New Jersey and provides healthcare services to any patient located in or out of New Jersey by means of telemedicine or telehealth, or (ii) if he/she is located outside of New Jersey and provides healthcare services to any patient located in New Jersey by means of telemedicine or telehealth, and requires a BME license to do so. The regulations contain requirements for (a) the standard of care, (b) establishing the licensee-patient relationship for telemedicine and telehealth services, (c) the

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provision of telemedicine and telehealth services, (d) prescribing through telemedicine or telehealth, (e) record-keeping requirements, (f) protocols for prevention of fraud and abuse, and (g) requirements for privacy policies and practices.

BME Publishes Final Telemedicine Regulations for Nurse Midwives – The BME’s [final telemedicine regulations for nurse midwives](#) are effective as of April 20, 2020. Pursuant to the regulations, a midwife must hold a New Jersey BME license if he or she (i) is located in New Jersey and provides healthcare services to any patient located in or out of New Jersey by means of telemedicine or telehealth, or (ii) is located outside of New Jersey and provides healthcare services to any patient located in New Jersey by means of telemedicine or telehealth. The regulations contain requirements for (a) the standard of care, (b) establishing the licensee-patient relationship for telemedicine and telehealth services, (c) the provision of telemedicine and telehealth services, (d) prescribing through telemedicine or telehealth, (e) recordkeeping requirements, and (f) requirements for privacy policies and practices.

Rules Adopted to Permit Advanced Practice Nurses to Use Electronic Prescriptions – The New Jersey Board of Nursing adopted [new rules](#) effective April 20, 2020 authorizing advanced practice nurses to transmit electronic prescriptions to pharmacies. Such prescriptions must contain all the information that is required on a written prescription pursuant to the existing Board of Nursing regulations, except that an electronic prescription need not contain a handwritten original signature. The electronic system used to transmit electronic prescriptions must have security safeguards to prevent unauthorized access, modification, or manipulation of prescriptions.

Board of Nursing Proposes Regulations to Effectuate Joining Nurse Licensure Compact – On July 19, 2019, New Jersey entered into the Nurse Licensure Compact. The Compact is an agreement between states in which nurses licensed in one member state (home state) may work in another member state (remote state) without obtaining a license in the remote state. In order to work in the remote state, a nurse must obtain a license with multistate privileges from his or her home state, which must be the nurse’s primary state of residence. In order to effectuate the Compact, the Board of Nursing is proposing [amendments and new rules](#) to establish the procedures for applying for licenses with multistate privileges and to incorporate by reference the Compact’s regulations that have been developed by the Interstate Commission of Nurse Licensure Compact Administrators.

Education Requirements for Advanced Practice Nurses Amended – Effective April 20, 2020, the [regulatory requirement](#) that an applicant for certification as an advanced practice nurse must have completed his or her education no more than two years prior to submitting an application to the New Jersey State Board of Nursing has been removed. The Board had previously found that otherwise qualified candidates had not been able to obtain certification due to this requirement. The Board believes that the requirement that applicants hold current certification from a national certifying agency will ensure that applicants are

competent to practice as advanced practice nurses in a safe and effective manner, even if they completed their education more than two years ago.

Board of Nursing Proposes Amendments to Education Requirements – On April 20, 2020, the New Jersey State Board of Nursing proposed [amendments](#) to the rules governing education requirements. New Jersey law requires registered professional nurses and licensed practical nurses to complete one credit of continuing education concerning prescription opioid drugs every biennial renewal period. The law also requires that an advanced practice nurse’s initial education in pharmacology include issues concerning prescription opioid drugs. In order to effectuate New Jersey law, the Board proposes amending its rules to require registered professional nurses and licensed practical nurses to complete continuing education or initial education in pharmacologic therapy, addiction prevention and management, and issues concerning opioid drugs. An applicant for certification as an advanced practice nurse must complete this education as part of his or her six contact hours in pharmacology.

Bill Introduced to Address Financial Security Impacted by COVID-19 – On April 9, 2020, [Bill S2330/A3908](#) was introduced in the New Jersey Legislature. Entitled the “COVID-19 Financial Security for Consumers Act,” the Bill addresses financial security issues related to the COVID-19 pandemic, including future financial security issues which may be caused by medical debt. With regard to medical debt, the Bill prohibits, until 180 days after the first bill for a medical debt has been sent, medical creditors and medical debt collectors from taking any legal action against an individual, including but not limited to, placing a lien on an individual’s property; attaching or seizing an individual’s bank account or any other personal property; commencing a civil action against an individual; or garnishing an individual’s wages. At least 30 days before taking legal action against an individual, a medical creditor or medical debt collector is required to provide to the individual written information on: (1) any financial assistance that is available for eligible individuals; (2) any legal actions that may be initiated in order to obtain payment; and (3) a deadline after which those legal actions may be initiated, which date must be no earlier than 30 days after the date of the notice. The Bill also prohibits medical creditors and medical debt collectors from taking legal action unless the action is described in the creditor’s or collector’s billing and collections policy.

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Brach Eichler In The News

Managing Member and Healthcare Law Chair **John D. Fanburg** is quoted in this [article](#) in New Jersey Marijuana on nj.com May 12 about a provision in the new coronavirus stimulus bill allowing banks to offer financial services to legal cannabis businesses.

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Also on May 12, Litigation Co-Chair and Healthcare Law Member **Keith J. Roberts** comments on the politics around liability protections in "[Covid Pits Nursing Homes Against Seniors' Groups Over Liability](#)" in *Bloomberg Government*.

John D. Fanburg spoke to *Modern Healthcare* for this article on May 8 about the huge hit the healthcare sector has sustained as a result of COVID-19 and what to expect with regard to a recovery.

We announced on May 4 that noted ranking company Chambers USA has once again ranked Brach Eichler's Healthcare Law Practice as one of the top law practices in the state of New Jersey. In addition, **John D. Fanburg** and Healthcare Law Member **Joseph M. Gorrell** were recognized as top healthcare law practitioners.

Seventeen Brach Eichler attorneys were named to [New Jersey Super Lawyers](#) recently including Healthcare Law Members **John D. Fanburg**, **Joseph M. Gorrell**, **Carol Grelecki**, and **Keith J. Roberts**. Healthcare Law Associate **Shannon Carroll** was named to the 2020 Rising Stars list, a recognition program for attorneys under the age of 40.

On April 10, Healthcare Law Member **Lani M. Dornfeld** was quoted in *Modern Healthcare* on how HIPAA restricts the release of data on COVID-19 deaths.

HIPAA CORNER

The Department of Health & Human Services, Office for Civil Rights (OCR), the HIPAA enforcement agency, has been busy sending out COVID-related HIPAA and other guidance. Some highlights include:

- [Limited waiver](#) of HIPAA sanctions and penalties – sanctions and penalties for non-compliance with certain provisions of the HIPAA Privacy Rule have been waived during the public health emergency.
- [Guidance](#) relating to HIPAA privacy and disclosures in emergency situations, including for treatment purposes, public health emergencies, to family and friends, and to prevent or lessen a serious and imminent threat.
- [OCR enforcement discretion](#) during the COVID crisis, relating to the use of telehealth technology, including additional [Q&A](#) guidance.
- [A reminder](#) of non-discrimination obligations in the provision of healthcare, and bulletins concerning HIPAA flexibility during the COVID crisis.
- [Additional notice](#) of enforcement discretion concerning the good faith use and disclosure of protected health information by business associates for public health and oversight activities during the public health emergency.
- [Alert](#) concerning cybercriminal exploitation of COVID-19 and steps to mitigate risk.
- [Guidance](#) relating to media access to healthcare facilities during the COVID-19 crisis, along with a reminder about the requirement to obtain written patient authorization for media disclosures.

If you would like assistance with your HIPAA privacy and security program, in managing a breach incident, or in business associate analysis and contracting, contact:

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