

COVID-19 and US Health Insurance

New Regulatory Directives

Stafford Act – State of Emergency

(Update, March 16, 2020)

On March 13, 2020, President Trump declared the Coronavirus Disease 2019 (COVID-19) pandemic a state of emergency, invoking section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207 (Stafford Act).¹ On January 31, 2020, Secretary of Health and Human Services (Secretary) Alex M. Azar II declared COVID-19 a public health emergency in the United States. The Stafford Act declaration has several implications in terms of escalating the federal government's response, and this alert serves as a guide to assist our clients with understanding those implications.

1135 Waivers

When the President declares an emergency through the Stafford Act or National Emergency Act, and the Secretary declares a Public Health Emergency, the Secretary is authorized to waive certain Medicare, Medicaid and Children's Health Insurance Program (CHIP) requirements under Section 1135 of the Social Security Act. As a result, the following blanket waivers were declared:

- **Skilled Nursing Facilities** – CMS has waived the requirement for a three-day hospital stay before transfer to a nursing home.
- **Critical Access Hospitals** – CMS has waived the requirements that Critical Access Hospitals limit the number of beds to 25, and that the length of stay be limited to 96 hours.
- **Housing Acute Care Patients in Excluded Distinct Part Units** – CMS has waived rules that severely restrict hospital care of patients within the hospital itself, ensuring that the emergency capacity can be enhanced.
- **Durable Medical Equipment** – Where Durable Medical Equipment Prosthetics, Orthotics and Supplies (DMEPOS) are lost, destroyed, irreparably damaged or otherwise rendered unusable, contractors have the flexibility to waive replacement requirements, including requirements related to a new face-to-face visit and new medical necessity documentation.
- **Care for Excluded Inpatient Psychiatric Unit Patients in the Acute Care Unit of a Hospital** – CMS has waived requirements to allow acute care hospitals with excluded distinct inpatient psychiatric units to relocate inpatients to an acute care bed and unit.
- **Supporting Care for Patients in Long-Term Care Acute Hospitals (LTCH)s** – CMS will allow patient stays in a long-term care hospital (LTCH) in order to meet the demands of the emergency rather than requiring the 25-day average length of stay requirement.
- **Provider Locations** – CMS has waived certain federal licensing requirements so doctors from other states can provide services across state lines.
- **Provider Enrollment** – CMS is establishing a toll-free hotline for non-certified Part B suppliers, physicians and non-physician practitioners to enroll and receive temporary Medicare billing privileges, and has waived the following new physician screening requirements: (1) the application fee; (2) criminal background checks; and (3) site visits. CMS will also allow providers to render services outside their state of enrollment, and expedite pending and new provider applications.
- **Medicare Appeals in Fee for Service, MA and Part D** – CMS is waiving requirements related to the appeal processes and the time periods associated with providing additional information. CMS will also allow greater flexibility in processing appeals if good cause is shown.

1135 waivers typically end when the emergency period ends or 60 days from the date of the waiver. CMS will also suspend non-emergency survey inspections, allowing providers to focus on patients.

¹ See March 13, 2020 [Letter from President Donald J. Trump](#).

FEMA Assistance

The Stafford Act declaration also means that the Federal Emergency Management Agency (FEMA) will take a larger role in coordinating a response to the emergency. FEMA's resources are now available for control efforts. FEMA will work with the various state governments to determine their needs on a case-by-case basis.

FEMA has stated that it will not duplicate assistance provided by the Department of Health and Human Services, including the Centers for Disease Control and Prevention, or other federal agencies. This includes emergency protective measures for activities taken in response to the COVID-19 incident. FEMA assistance will be provided at the 75% federal cost share, meaning FEMA will provide emergency protective measures to the state at a 75% federal to 25% state cost share for eligible expenses and activities. States will not need to request separate emergency declarations to receive FEMA assistance under the nationwide declaration.

Additionally, the Stafford Act declaration opens access to up to US\$50 billion for states, territories and localities dealing with the outbreak. The President has also said that every state will set up an emergency operations center and that the secretary of Department Health and Human Services would be empowered to waive some regulations in order to better mitigate viral spread.

Conclusion

The COVID-19 federal and state response is continuing to evolve and we are monitoring the regulatory developments on a daily basis. For questions or assistance in navigating this regulatory space, please contact the lawyers listed.

For additional information, our [Coronavirus Resource Hub](#) provides guidance on key legal issues for businesses to consider, together with some practical steps for businesses to take.

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