California Department of Public Health Requests 1135 Waiver During COVID-19 Emergency

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On March 24, 2020, the California Department of Public Health (CDPH) requested CMS issue a blanket section 1135 waiver allowing healthcare facilities flexibility with respect to staffing, space, program, and other requirements during the current COVID-19 emergency. If approved, the waiver would offer California providers significant and unprecedented flexibilities on a statewide basis.

Earlier this week, CMS approved a separate 1135 waiver request from California's Department of Health Care Services (DHCS) concerning prior-authorization for Medi-Cal fee-for-service benefits, State fair hearings and appeal timelines, provider enrollment, and the provision of care in alternative settings. Separately, the Department of Health & Human Services (HHS) has issued blanket, nationwide waivers on March 13, 2020 and March 15, 2020, which we addressed in our March 18, 2020 Health Law Advisory.

Specifically, the CDPH waiver request asks that **staffing requirements** be lifted or modified as follows:

- ***Use of Other Trained Professionals.*** Allow all health facilities to utilize the services of other trained professionals to provide care and services to other lower level positions with training suitable for the situation
- ***Student Nurses as CNAs.*** Allow General Acute Care Hospitals (GACHs,) Skilled Nursing Facilities (SNFs) and Intermediate Care Facilities for Individuals with an Intellectual Disability (ICF/IIDs) to hire student nurses to be employed in Certified Nurse Assistant positions.
- ***Health Care Professionals Licensed in Foreign Countries.*** Allow GACHs, SNFs, ICF/IIDs, Home Health Agencies (HHAs), hospices and primary care clinics (PCCs) to use health care professionals licensed in foreign countries but not yet licensed in California to fully act within their discipline.
- ***Tuberculosis Testing.*** Suspend/defer Tuberculous test on health care professionals in order to facilitate the availability of additional health care professionals.
- Allow physicians whose privileges will expire during the emergency period and new physicians, to practice at GAHCs before full medical staff/governing body review and approval.

The request further seeks the following waivers on **space requirements**:

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- ***Surge Tents.*** Allow the GACH, SNFs, Ambulatory Surgery Centers (ASCs), End-Stage Renal Dialysis (ESRDs), ICl/IIDs, Adult Day Health Care (ADHCs) and PCCs facilities to use additional space, including surge tents set up in parking lots, to set up triage area for patients, while maintaining the designated 6-foot distance, to allow additional patients access to care in these facilities.
- ***Non-Hospital Space.*** Allow non-hospital building/space to be used for patient care, as long as sufficient safety and comfort are provided for patients and staff.
- ***Sub-Acute Room Size.*** Waive the room size requirement for all sub-acute beds to allow the use of rooms that meet all other regulations except square footage requirements to expand bed-capacity in facilities.
- ***SNF Room Size.*** Waive the room size requirements for SNF resident rooms to allow more residents per room.
- ***Relocation of SNF Residents.*** Allow SNFs to relocate residents to other rooms or locations, either with in the SNF or transfer to another SNF, in order to create isolation areas where COVID-19 patients could be cohabitated.

Additionally, CDPH requests the following **program requirements** be waived during the emergency:

- ***ICF/IID Day Program.*** Waive the ICF/IID requirement of day program as the participants in these programs are usually considered in the high-risk categories for COVID-19.
- ***Telephonic Outreach.*** Permit HHAs, hospices, and ADHCS to make telephonic outreach to clients to assess wellness, detect developing needs, deliver meals and supplies, and initiate face-to-face visits by appropriately credentialed professionals when agreed upon by the member and the provider.
- ***SNF Discharge Notices.*** Reduce the requirement of the 30-day notice prior to discharge of a resident in a SNF facility to 10-days to facilitate access to care for additional patients. Suspend notice to Ombudsman Program for facility initiated discharges
- ***Visitor Restrictions.*** Allow GACHs, SNFs, ICF/IIDs, and ADHCs facilities to develop written policies that may restrict, deny or place conditions upon visitors into the facility to maintain patient safety.
- ***Renal Dialysis.*** The requirement that renal dialysis services be performed in an ESRD unit at a GACH facility. ESRD services should be allowed to be performed at the patient's bedside in order to maintain patient safety.
- ***Home Health.*** Allow HHAs to perform certifications and initial assessments.
- ***Resident Review.*** Suspend pre-admission and annual resident review (PASRR) level I and II for 30 days.

Finally, the CDPH blanket waiver request includes the following miscellaneous flexibilities:

- ***Certification and Temporary Shut Downs.*** Allow any facility to maintain certification if they temporarily shut down due to COVID-19.
- ***Life Support Certification Renewals.*** Extend certificate renewal dates for advanced cardiovascular life support (ACLS), cardiopulmonary resuscitation, pediatric advance life support and similar skills for at least 90 days for those renewals coming due during the emergency.
- ***Non-Certified Personnel and Vitals.*** Allow non-certified personnel to take vital signs upon basic training.
- ***Cross-Border Care.*** Maintain federal eligibility and allow GACHs, SNFs, HHAs, hospice funding for treatment of patients that receive care in or from neighboring states, in the event the local area neighboring state borders are impacted and the transfer of patients across state lines allows timely access to care.
- ***Background Checks.*** Suspend background checks for all health care personnel until the State determines live scan operations have resumed at which time individuals will be required to submit and undergo background checks.

Hooper Lundy & Bookman attorneys will continue to monitor the status of this waiver request to CMS.

For further information, please contact Mark Reagan, Katrina Pagonis, Scott Kiepen or Emily Brinkman in San Francisco, Lloyd Bookman or Nina Adatia Marsden in Los Angeles, Mark Johnson in San Diego, or your regular Hooper, Lundy & Bookman contact.

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