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## Forward Thinking Healthcare Solutions It's What We Do

### Our Health Law Practice Group:

Joan W. Feldman  
(860) 251-5104  
jfeldman@goodwin.com

Vincenzo Carannante  
(860) 251-5096  
vcarannante@goodwin.com

William J. Roberts  
(860) 251-5051  
wroberts@goodwin.com

Damian J. Privitera  
(860) 251-5504  
dprivitera@goodwin.com

Alexander R. Cox  
(860) 251-5236  
acox@goodwin.com

Stephanie M. Gomes-Ganhão  
(860) 251-5239  
sgomesganhao@goodwin.com

## COVID-19: New HHS Waivers

Following President Trump's national emergency declaration on Friday, March 13, Secretary of Health and Human Services Alex Azar exercised his authority under the Social Security Act to waive or modify portions of that Act. See <https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx>.

While it is not entirely clear how all of these waivers will be interpreted by HHS, we wanted to advise you of the HHS waivers that have been issued so far:

### 1. Reimbursement Requirements and Limitations

HHS is waiving conditions of participation, certification requirements, program participation or similar requirements for individual health care providers or other types of health care providers, including hospitals or other providers of services, physicians or other health care practitioners, or suppliers of health care items or services, and pre-approval requirements. For more on specific CMS waivers, please see Shipman & Goodwin's alert regarding COVID-19 CMS Waivers.

- HHS is allowing physicians or other health care professionals to provide services in states in which they do not hold licenses, as long as they hold an equivalent license from another state and are not affirmatively barred from practice anywhere nationwide. For more on specific CMS waivers, please see Shipman & Goodwin's alert regarding COVID-19 CMS Waivers.
- HHS is waiving sanctions relating to limitations on physician referral, under such conditions and in such circumstances as CMS determines appropriate. We will have to wait and see the various scenarios in which this will apply. One can imagine that the prohibition against physicians referring to physician-owned laboratories would be one area for waiver.
- HHS is waiving limitations on payments for health care items and services furnished to individuals enrolled in a Medicare Advantage plan by health care professionals or facilities not included in the plan's network.
- For the above waivers, health care providers may be reimbursed for health care items and services furnished pursuant to those waivers, absent any determination of fraud or abuse.

### 2. Hospital Disaster Protocol Waivers for EMTALA & HIPAA

- HHS is waiving sanctions under EMTALA for the direction or relocation of an individual to another location to receive medical screening pursuant to an

appropriate state of emergency preparedness plan, or the transfer of an individual who has not yet been stabilized if the transfer is necessitated by the circumstances of the declared public health emergency for COVID-19. Please make sure that such moves are documented in your hospital's emergency preparedness plan.

- HHS is waiving sanctions and penalties arising from noncompliance with the certain provisions of HIPAA, including: (a) the requirements to obtain a patient's agreement to speak with friends and family or to honor a patient's opt out from the facility directory; (b) the requirements to distribute a notice of privacy practices; and (c) the patient's right to request privacy restrictions or confidential communications. Please note that you are still required to comply with HIPAA, and that only the penalties and sanctions are being waived for noncompliance with these specific provisions. Please see [Shipman & Goodwin's alert regarding COVID-19 privacy considerations for providers](#) for more, including additional discussion of sharing information with family and friends, and releasing facility directory information during an emergency.
- Please note that unlike other waivers issued by HHS, the EMTALA and HIPAA waivers are only effective for up to 72 hours from the implementation of a hospital disaster protocol. A hospital might implement its disaster protocol when the medical needs of its community or the needs of the hospital itself exceed available resources. Most likely, the circumstances for a hospital to declare a disaster would be set forth in its Emergency Preparedness Plan. The EMTALA and HIPAA waivers also are not effective with respect to any action taken that discriminates among individuals on the basis of their source of payment or ability to pay.

### **3. Deadlines and Timetables**

- While we know that HHS is intending to modify and not waive certain deadlines to ensure that sufficient health care items and services are available to meet the needs of individuals enrolled in Medicare, Medicaid and CHIP, we will have to wait and see the specific modifications. Check back here for updates on the specific deadlines, timetables, and required activities being modified by HHS and CMS.

Except as noted otherwise, these waivers became effective on March 15, 2020, with retroactive effect to March 1, 2020, and are effective nationwide. They will continue until the end of the COVID-19 public health emergency declared by Secretary Azar, or the end of the national emergency declared by President Trump.

### **Questions or Assistance**

If you have any questions about this alert, please contact any member of our Health Law Practice Group listed on page 1.

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