

# Healthcare Law UPDATE

## FEDERAL UPDATE

### COVID-19 Reporting in Nursing Homes

Throughout the COVID-19 public health crisis, the Centers for Medicare & Medicaid Services (CMS) has acted to help prepare nursing homes in the face of the COVID-19 threat. Since February, CMS has been working to coordinate with nursing homes to ensure infection protocol standards are in place, by issuing guidance and providing memoranda regarding this pandemic. As of June 1, 2020, CMS issued guidance to states and a [letter](#) to state governors relaying new enhanced enforcement policies for nursing homes in violation of infection control policies.

The new enforcement policies are tied to funding from the CARES Act. The CARES Act was approved during this crisis to provide necessary financial support to the U.S., including funding for necessary [surveying and certification](#) work related to COVID-19. The [CARES Act will provide \\$80 million](#) in funding for states to increase surveys. In determining how the CARES Act monies will be allocated, CMS has stated it will be determined on performance-based metrics. Long-term facilities, commonly referred to as nursing homes, are regulated by CMS and can require such facilities to report data to CMS and the Centers for Disease Control (CDC). CMS and the CDC issued a letter to the Governors on May 31, 2020, informing them of increased penalties for noncompliance with long-standing infection control requirements. Additionally, CMS is binding funding to state agency performance. For instance, CMS has set



forth a deadline of July 31, 2020, for which states will need to complete 100% of focused infection control surveys of their nursing homes. If a state does not comply by July 31, 2020, it must submit a corrective action plan to CMS. If a lack of compliance still persists, then a state's CARES Act funding for 2021 may be reduced by 10%. CMS has stated additional delays in noncompliance could result in further reductions

### In This Issue:

Study Concerning Effects of Telehealth Changes During COVID-19

NJ Legislative Update

Brach Eichler in the News

HIPAA Corner

of CARES Act funding. The reductions would be allocated to other states who are complying.

In addition to monetary assistance to states, CMS is providing assistance through Quality Improvement Organizations (QIOs). The QIOs will be providing technical assistance as well as direct support to those nursing homes identified as needing the most infection control support. In addition, CMS is requiring greater transparency for residents and their families. As of April 2020, nursing homes are required inform residents and their families of a COVID-19 confirmed case. As of May 1, 2020, CMS is requiring nursing homes to report COVID-19 cases and deaths to the CDC directly in order to quickly identify problems and to assist in planning to control the infection. In its efforts for transparency, CMS will make available to the public the CDC-collected data, which will show a breakdown of infections by state, number of residents, and number of staff.

For more information, contact:

**Joseph M. Gorrell** | 973.403.3112 | [jgorrell@bracheichler.com](mailto:jgorrell@bracheichler.com)

**Carol Grelecki** | 973.403.3140 | [cgrelecki@bracheichler.com](mailto:cgrelecki@bracheichler.com)

**Erika Marshall** | 973.364.5236 | [emarshall@bracheichler.com](mailto:emarshall@bracheichler.com)

### Office for Civil Rights Issues Bulletin Addressing LEP Rights During COVID-19

On May 15, 2020, the federal Department of Health & Human Services, Office for Civil Rights (OCR) issued a [Bulletin](#) to health entities covered by OCR's civil rights authorities to ensure they are better able to serve individuals with Limited English Proficiency (LEP). OCR enforces Title VI of the Civil Rights Act of 1964 (Title VI) and Section 1557 of the Affordable Care Act (Section 1557). Under the Section 1557 implementing regulations, providers covered by the law must take reasonable measures to provide meaningful access to individuals with LEP in healthcare programs and activities. This may include, for example, written translations of documents and forms and interpreter services. OCR advises that these requirements are not waived during the COVID-19 public health emergency. The Bulletin provides a number of resources for providers to consult for information.

For more information, contact:

**Riza I. Dagli** | 973.403.3103 | [rdagli@bracheichler.com](mailto:rdagli@bracheichler.com)

**Lani M. Dornfeld, CHPC** | 973.403.3136 | [ldornfeld@bracheichler.com](mailto:ldornfeld@bracheichler.com)

**Keith J. Roberts** | 973.364.5201 | [kroberts@bracheichler.com](mailto:kroberts@bracheichler.com)

## OSHA Issues First COVID-19 Citation

The federal Occupational Safety & Health Administration (OSHA) recently disclosed that it issued its first coronavirus-related citation. The [OSHA citation](#), dated May 18, 2020, was issued against a nursing home in Georgia for failure to report within 24 hours, work-related hospitalizations of six employees, all of whom had COVID-19. This announcement comes after much [criticism](#) against OSHA for an alleged failure to take sufficient actions to protect employees during the COVID-19 crisis.

To date, OSHA has received [nearly 5,000 complaints](#) related to workplace safety due to the COVID-19 pandemic. Over 4,000 of these complaints have been closed, others are under investigation.

The highest number of complaints made against employers for workplace safety were in the healthcare industry—as of June 9, 30% of COVID-19-related complaints were from the healthcare industry. Additionally, general medical and surgical hospitals and skilled nursing facilities were the two categories of U.S. employers with the most complaints against them. Further, three geographic regions made up a majority of these complaints, with 21% from the New York region (which includes New Jersey), 22% from the Boston region, and 24% from the Chicago region.

The low number of citations seems to be a reflection of OSHA policies. Throughout the public health emergency, [OSHA has encouraged](#) its regional offices to use enforcement discretion as some employers “face difficulties complying with OSHA standards.” Specifically, OSHA directed its offices to “evaluate whether the employer made good faith efforts to comply with applicable OSHA standards and, in situations where compliance was not possible, to ensure that employees were not exposed to hazards from tasks, processes, or equipment for which they were not prepared or trained.”

*For more information, contact:*

**Riza I. Dagli** | 973.403.3103 | [rdagli@bracheichler.com](mailto:rdagli@bracheichler.com)  
**Keith J. Roberts** | 973.364.5201 | [kroberts@bracheichler.com](mailto:kroberts@bracheichler.com)  
**Jocelyn E. Ezratty** | 973.364.5211 | [jezratty@bracheichler.com](mailto:jezratty@bracheichler.com)

## New Congressional Bill Introduced to Study the Effects of Telehealth Changes During COVID-19

On June 1, 2020, Representative Robin Kelly of Illinois introduced a bill that would mandate a study on the impact of telehealth changes during the coronavirus (the Bill). Regulations regarding telehealth have relaxed since the COVID-19 emergency began. For example, the Centers for Medicare & Medicaid Services [broadened access to Medicare telehealth](#) services on a temporary emergency basis. The Bill, titled [“Evaluating Disparities and Outcome of Telehealth During the COVID-19 Emergency ACT of 2020.”](#) would require the Department of Health and Human Services to conduct a study within one year of the end of the emergency to assess whether the [relaxed regulations should become the new regulations](#). The Bill would direct HHS Secretary Alex Azar to

describe expenditures and savings as a result of telehealth and any instances of fraud and any privacy concerns.

*For more information, contact:*

**John D. Fanburg** | 973.403.3107 | [jfanburg@bracheichler.com](mailto:jfanburg@bracheichler.com)  
**Lani M. Dornfeld, CHPC** | 973.403.3136 | [ldornfeld@bracheichler.com](mailto:ldornfeld@bracheichler.com)  
**Cynthia J. Liba** | 973.403.3106 | [cliba@bracheichler.com](mailto:cliba@bracheichler.com)

## STATE UPDATE

### NJ Psychologist Suspension, \$110,000 Sanction Upheld for Disclosing Sensitive Patient Information to Debt Collection Attorneys

In August 2018, the New Jersey State Board of Psychological Examiners (Board) suspended for two years (with one served as probation) the license of a New Jersey psychologist, after he disclosed sensitive patient information to his debt collection attorneys. The Board also imposed a \$10,000 civil penalty and sanctioned the psychologist with \$110,542.08 in attorneys’ fees and costs. The psychologist appealed the Board’s order, and on May 29, 2020, the appeals court [upheld](#) the order in its entirety.

The court held that the suspension, sanctions, and penalty were appropriate given the totality of the circumstances surrounding the psychologist’s breach of confidentiality. The court found that by “providing the attorneys true bills with diagnostic and treatment codes, [the psychologist] overlooked the psychologist-patient privilege, regulations implementing the [Practicing Psychology Licensing Act], and his contractual commitments to his patients.”

For 25 years, the psychologist had been providing to his debt collection attorneys bills containing patient diagnostic and treatment codes. The attorneys in turn attached the true bills to civil complaints filed in court, which then became public record. The psychologist argued that he did not know the bills would be attached to more than 80 filed lawsuits, and that he never received from his attorneys a copy of a filed complaint. He further explained that while his collection attorneys told him they needed to see the full bills, had he known the bills would be attached to the complaints he would never have allowed it. Therefore, the psychologist argued, he should not be liable for the confidentiality breaches committed by his attorneys.

The court did not agree with the psychologist’s arguments, finding that his intent was not relevant, and that the breach of confidentiality was his disclosure to his attorneys and not the attorneys’ filing of the complaints. He did not need to provide the full bills to his attorneys, the court said, but rather he could have provided them with a transaction ledger containing just the patient’s name, date of service, amount charged, and the billable party. Some of the bills provided to the attorneys even included the sensitive information of children, despite the fact that they were not financially responsible for the bill. Moreover, it was the psychologist’s responsibility, explained the court, to review the complaints

## BRACH EICHLER

before they were filed to make sure they did not contain any sensitive information, but for 25 years, the psychologist did not review a single complaint. When a patient complained to the psychologist about the publicly disclosed information in the complaint, the psychologist refused to have it removed.

This case is a cautionary tale for healthcare providers to be extremely cautious in providing patient information to attorneys they retain to collect payment from patients.

### New Jersey Legislative Update

#### *Bill Introduced to Expand Coverage for Telemedicine Services –*

On June 1, 2020, [Bill A4179](#) was introduced in the New Jersey Assembly to revise New Jersey's telemedicine and telehealth law to require health benefits plans, Medicaid and NJ FamilyCare, the State Health Benefits Program (SHBP), and the School Employees' Health Benefits Program (SEHBP) to provide expanded coverage for services provided using telemedicine and telehealth. An identical bill was introduced in the New Jersey Senate on June 8, 2020. Specifically, the bill requires that reimbursement for telemedicine and telehealth services be equal to the reimbursement rate for the same services when they are provided in person. Current law provides that telemedicine and telehealth services may be reimbursed up to the amount at which the service would be reimbursed if provided in person. The bill also prohibits health benefits plans, Medicaid and NJ FamilyCare, the SHBP, and the SEHBP from imposing "place of service" requirements on services provided using telemedicine and telehealth, and expressly permits healthcare providers to provide services using telemedicine and telehealth regardless of whether the provider is located in New Jersey when providing services, as long as the provider is otherwise licensed to practice healthcare in New Jersey.

#### *Bill Introduced to Provide Immunity for Diagnostic Laboratories for Services Performed in Response to COVID-19 –*

On June 8, 2020, [Bill S2549](#) was introduced in the New Jersey Senate to provide civil and criminal immunities to diagnostic laboratories, and persons providing laboratory services, for diagnosis and testing performed in response to the COVID-19 outbreak. P.L.2020, c.18, which was enacted on April 14, 2020, provides immunity from civil and criminal liability for certain claims alleging injury or death incurred during the public health emergency and state of emergency declared by Governor Phil Murphy in Executive Order 103, issued on March 9, 2020. This bill would add clinical laboratories and persons performing services for such laboratories to the group of persons and entities granted such immunity. If enacted, the bill will be retroactive to March 9, 2020.

#### *Bill Introduced to Permit Expedited Licensure for Mental Health Professionals –*

On June 8, 2020, [Bill A4246](#) was introduced in the New Jersey Assembly to permit expedited licensure in mental health professions for certain out-of-State individuals during a state of emergency or public health emergency. This bill permits a professional licensing board regulating a mental health profession or, in the case of certain mental health professions, the director of the Division of Consumer Affairs,

to expedite the issuance of a temporary license, certificate of registration, or certification to practice a mental health profession to a recent graduate in another state who earned a degree that is intended to lead to a career in a mental health profession and is not yet licensed, registered, or certified to practice in any jurisdiction. Under the bill, the individual can be issued a temporary license, certificate of registration, or certification that must include an expiration date posted clearly and conspicuously. Additionally, the individual must be supervised by someone licensed in New Jersey in the same profession.

#### *NJBON Clarifies APN Scope of Practice Regarding Home Care Services –*

On June 24, 2020, the New Jersey Board of Nursing (Board) issued a letter to the Home Care and Hospice Association of NJ (Association), in which the Board responded to the Association's inquiry concerning the scope of practice of advance practice nurses (APNs) in light of changes under the CARES Act passed during the COVID-19 health emergency. In particular, the Association inquired about the ability of APNs to order the enrollment, continued care, and management of home care for their patients as skills within their "scope of practice." The Board stated that, prior to the CARES Act, Medicare rules only permitted physicians to order home care for patients and to establish a plan of treatment for such patients. However, the CARES Act "permanently authorized both APNs and Physician Assistants to order home care services for their patients." The Board acknowledged the Association's concerns that home care accrediting bodies "may not recognize this new ability since this specific authority is not articulated in the New Jersey statutes detailing the scope of practice of APNs." In response and after review of N.J.S.A. 45:11-49 concerning APN scope of practice, the Board stated that "the skills necessary to determine whether a patient needs home care, as well as the determination of continued care and management of the patient, are within the scope of practice of APNs. The CARES Act now permits these professionals to certify home care for all patients." The Board stated it would advise home care accrediting bodies that APNs are permitted to order home health services, establish and review plans of care for home health services, and certify and re-certify Medicare eligibility for patients.

*For more information, contact:*

**John D. Fanburg** | 973.403.3107 | [jfanburg@bracheichler.com](mailto:jfanburg@bracheichler.com)

**Joseph M. Gorrell** | 973.403.3112 | [jgorrell@bracheichler.com](mailto:jgorrell@bracheichler.com)

**Ed Hilzenrath** | 973.403.3114 | [ehilzenrath@bracheichler.com](mailto:ehilzenrath@bracheichler.com)

## Brach Eichler In The News

**John D. Fanburg**, Managing Member and Chair, Healthcare Law, was ranked #7 by *NJBIZ* in their [2020 Law Power 50 list](#).

**Lani M. Dornfeld, CHPC**, [spoke](#) to *Bloomberg Law* about the increase in telehealth as a result of the COVID-19 pandemic and important issues that have arisen around consent and uniform protocols.

**John D. Fanburg** [comments](#) in the *New Jersey Law Journal* about the NJ Assembly's passage of A-1897, a bill designed to decriminalize possession of small amounts of cannabis and pave the way for expungements.

## BRACH EICHLER

Brach Eichler and Withum will be hosting a three-part webinar series offering guidance for your healthcare organization from both the financial and legal perspective. Our first webinar, “**Post COVID-19 Return to Office Protocols,**” will take place on Wednesday, July 1 from 12:00 - 1:00 p.m. [Register today.](#)

## HIPAA CORNER

The Office for Civil Rights (OCR) within the Department of Health & Human Services (HHS) recently issued several alerts and announcements, including:

**Top 10 Routinely Exploited Vulnerabilities** – OCR distributed to its list serve an [Alert](#) identifying the top 10 cybersecurity vulnerabilities routinely exploited by foreign malicious actors. OCR stated it is sharing this alert with its listserv to raise awareness of these vulnerabilities so organizations can take appropriate actions to reduce the potential risk of exploitation.

**Rights of Disabled Persons to Have Reasonable Access to Support Persons in Hospital Settings During COVID-19** – On June 9, 2020, the HHS [announced](#) that the OCR resolved complaints with the State of Connecticut after the state issued an executive order regarding non-visitation policies for short-term hospitals, outpatient clinics, and outpatient surgical facilities to ensure that people with disabilities are not denied reasonable access to needed support persons. HHS stated, “As part of the resolution, Connecticut is issuing an executive order to ensure that people with disabilities have reasonable access to support personnel in hospital settings in a manner that is consistent with disability rights laws and the health and

safety of patients, healthcare providers, and support persons. The order includes establishing a statewide policy requiring hospitals and other acute care settings to permit the entrance of a designated support person for a patient with a disability and permitting family members, service-providers or other individuals knowledgeable about the needs of the person with a disability to serve as a designated support person. Where patients with a disability are in such a setting for longer than one day, they may designate two support persons, provided only one is present at a time.”

**Guidance on How Healthcare Providers Can Contact Former COVID-19 Patients About Blood and Plasma Donation Opportunities** – On June 12, 2020, the OCR issued an [announcement](#) and [guidance](#) on how healthcare providers can contact former COVID-19 patients about blood and plasma donation opportunities. The guidance explains that HIPAA permits covered healthcare providers to identify and contact patients who have recovered from COVID-19 for population-based activities relating to improving health, case management, or care coordination. The guidance emphasizes that, without patients’ authorization, the providers cannot receive any payment from or on behalf of a blood and plasma donation center in exchange for such communications with a recovered patient. OCR stated it wants to make sure “misconceptions about HIPAA do not get in the way of a promising COVID-19 response.”

*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:*

**Lani M. Dornfeld, CHPC** | 973.403.3136 | [ldornfeld@bracheichler.com](mailto:ldornfeld@bracheichler.com)

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Healthcare Law Practice | 101 Eisenhower Parkway, Roseland, NJ 07068

### Members

**Riza I. Dagli** | 973.403.3103 | [rdagli@bracheichler.com](mailto:rdagli@bracheichler.com)

**Lani M. Dornfeld, HLU Editor** | 973.403.3136 | [ldornfeld@bracheichler.com](mailto:ldornfeld@bracheichler.com)

**John D. Fanburg, Chair** | 973.403.3107 | [jfanburg@bracheichler.com](mailto:jfanburg@bracheichler.com)

**Joseph M. Gorrell** | 973.403.3112 | [jgorrell@bracheichler.com](mailto:jgorrell@bracheichler.com)

**Carol Grelecki** | 973.403.3140 | [cgrelecki@bracheichler.com](mailto:cgrelecki@bracheichler.com)

**Keith J. Roberts** | 973.364.5201 | [kroberts@bracheichler.com](mailto:kroberts@bracheichler.com)

### Counsel

**Shannon Carroll** | 973.403.3126 | [scarroll@bracheichler.com](mailto:scarroll@bracheichler.com)

**Debra W. Levine** | 973.403.3142 | [dlevine@bracheichler.com](mailto:dlevine@bracheichler.com)

**Richard B. Robins** | 973.403.3147 | [rrobins@bracheichler.com](mailto:rrobins@bracheichler.com)

**Jonathan J. Walzman** | 973.403.3120 | [jwalzman@bracheichler.com](mailto:jwalzman@bracheichler.com)

**Edward J. Yun** | 973.364.5229 | [eyun@bracheichler.com](mailto:eyun@bracheichler.com)

### Associates

**Colleen Buontempo** | 973.364.5210 | [cbuontempo@bracheichler.com](mailto:cbuontempo@bracheichler.com)

**Lindsay P. Cambron** | 973.364.5232 | [lcambron@bracheichler.com](mailto:lcambron@bracheichler.com)

**Paul J. DeMartino, Jr.** | 973.364.5228 | [pdemartino@bracheichler.com](mailto:pdemartino@bracheichler.com)

**Jocelyn E. Ezratty** | 973.364.5211 | [jezratty@bracheichler.com](mailto:jezratty@bracheichler.com)

**Susan E. Frankel** | 973.364.5209 | [sfrankel@bracheichler.com](mailto:sfrankel@bracheichler.com)

**Ed Hilzenrath** | 973.403.3114 | [ehilzenrath@bracheichler.com](mailto:ehilzenrath@bracheichler.com)

**Cynthia J. Liba** | 973.403.3106 | [cliba@bracheichler.com](mailto:cliba@bracheichler.com)

**Erika R. Marshall** | 973.364.5236 | [emarshall@bracheichler.com](mailto:emarshall@bracheichler.com)

Roseland, NJ | New York, NY | West Palm Beach, FL | [www.bracheichler.com](http://www.bracheichler.com) | 973.228.5700

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