

### **One Month Until May 11, 2023 – the Expiration Date for the COVID-19 Public Health Emergency**

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The Secretary of the U.S. Department of Health and Human Services (HHS) first declared the existence of a public health emergency (PHE) on January 31, 2020. The PHE allowed HHS to implement a number of regulatory waivers and exercise enforcement discretion, granting providers greater flexibility to deliver medical services. As announced by the White House on January 30, 2023, the PHE is set to end on May 11, 2023. The PHE expiration ends several of those flexibilities.

#### ***What Health Care Entities Should Know about Certain Regulatory Changes***

##### Professional Licenses and Certificates of Need

The State of Michigan Department of Licensing and Regulatory Affairs (LARA) extended special privileges and exemptions to health care providers and health facilities during the PHE.

As a means of coping with medical professional shortages during the PHE, LARA permitted out-of-state health professionals to practice in Michigan without specific Michigan licensure.

Michigan Certificate of Need (CON) emergency certificates were also issued to hospitals and health systems for the approval of additional beds during the PHE.

Effective May 12, 2023, all health care providers and health facilities operating in Michigan must have appropriate licenses and permits as required under Michigan and federal law.

##### Medicare Physician Supervision Requirement

Under Medicare Part B, certain types of services (diagnostic tests, services incident to physicians' or providers' professional services, etc.) must be furnished under the "direct supervision" of a physician or provider. "Direct supervision" requires a supervising physician or provider to be "immediately available" to furnish assistance and direction during the service. As part of the PHE, the Centers for Medicare and Medicaid Services (CMS) temporarily amended the definition of "direct supervision" to include "virtual presence".

“Virtual presence” allowed a supervising physician to meet the “direct supervision” requirements via the use of real-time audio and video technology.

CMS has rejected requests to make “virtual direct supervision” a permanent feature of Medicare. Thus, “virtual direct supervision” is currently set to expire on December 31, 2023.

### Stark and Anti-Kickback

Stark Law is a strict liability statute that prohibits physician referrals for certain designated health services if the physician has a financial relationship with the health care entity, unless an exception is met. Effective March 1, 2020, CMS issued 18 waivers to provide health care entities and physicians with greater flexibility to respond to the pandemic and deliver needed health care services to patients. For example, health care providers were permitted to pay above or below fair market value for personal services of physicians or below fair market value for items or services or equipment rentals for COVID-19 purposes.

Under the Federal Ant-Kickback Statute, administrative sanctions can be imposed on relationships that create fraud and abuse concerns. On April 3, 2020, the Department of Health and Human Services Office of the Inspector General (OIG) issued a Policy Statement that it would exercise enforcement discretion and refrain from imposing administrative sanctions under the Anti-Kickback Statute on financial arrangements permitted by 11 of the 18 Stark Law Waivers.

Stark Law Waivers and enforcement discretion will expire immediately on May 11, 2023. Health care entities and providers that are relying on Stark Law Waivers and enforcement discretion should review those arrangements prior to the end of the PHE and either terminate or reform those arrangements.

### Medicaid

During the PHE, the State of Michigan made changes to its Medicaid program’s eligibility, administration and policies to ease rules for providers and prevent Medicaid beneficiaries from losing their health coverage. In particular, due to a federal provision known as Medicaid Eligibility Maintenance of Effort, states had to stop reviewing the eligibility of existing Medicaid enrollees. However, Michigan now plans to restart eligibility renewals. Michigan Medicaid redeterminations began on April 1, 2023. As a result, a significant number of previously eligible individuals will no longer be eligible for Medicaid and the first group of individuals will lose Medicaid eligibility in July.

### Conclusion

Providers and health care entities should review their current policies and processes to ensure compliance with regulatory requirements going forward. Stay tuned for Part II of this Bodman Health Care Law Update to learn more about the end of the PHE and its impacts on telehealth.

***Bodman PLC can provide guidance on this matter and others and provide practical advice to meet your needs. To discuss these or any other legal issues affecting your organization, please contact Annalise Lekas Surnow at (313) 392-1059 or [alekas@bodmanlaw.com](mailto:alekas@bodmanlaw.com) or Brandon Dalziel at (313) 393-7507 or [bdalziel@bodmanlaw.com](mailto:bdalziel@bodmanlaw.com). Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.***