Expiration of Arkansas' Public Health Emergency



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Since the COVID-19 public health emergency was initiated in Arkansas in March 2020, Governor Asa Hutchinson has repeatedly renewed the emergency order, maintaining the public health emergency for fourteen (14) months. However, Governor Hutchinson has declared that he will not renew the current emergency order, which is set to expire at 11:59 p.m. on ***May 30, 2021***, stating that executive orders such as ones expanding telemedicine and protecting businesses from virus-related lawsuits, were no longer relying on the emergency order as similar language had been enacted into law. This blog briefly summarizes some of the changes relevant to healthcare providers that will take effect upon the expiration of the public health emergency and recent legislation that permanently adopts some of the policies implemented during the public health emergency.

TELEMEDICINE:

Historically, Arkansas has been slow to adopt telemedicine policies, but the COVID-19 public health emergency revealed that telemedicine is vital to expanding access to healthcare across the state. As part of the public health emergency, under Executive Order 20-05, the Governor suspended ***for the duration of the emergency*** the Telemedicine Act at Ark. Code Ann. § 17-80-401, *et seq*. This allowed physicians licensed in Arkansas who have access to a patient's personal health record to establish a professional relationship with a patient using any technology deemed appropriate by the provider, including the telephone, with a citizen located in Arkansas to diagnose, treat and prescribe non-controlled drugs.

Because the expiration of this Executive Order would have reduced access to healthcare for many Arkansans, during Arkansas's 2021 legislative session, lawmakers passed several bills to extend coverage. Directly related to the Executive Order, House Bill 1063 amended the Telemedicine Act to also allow a healthcare professional licensed in Arkansas to establish a professional relationship with a patient using any appropriate technology, including the telephone, so long as the healthcare professional has access to a patient's health record. Similar to the Executive Order, the amended Act also is limited to diagnosing patients, treating patients, and, if appropriate, prescribing non-controlled drugs. Because the bill contained an emergency clause, HB1063 went into effect as Act 829 on April 21, 2021. Thus, Arkansans will continue to have more access to telemedicine.

LICENSURE:

In an effort to increase the number of healthcare workers available to treat and mitigate the spread of COVID-19, the Arkansas State Medical Board temporarily permitted physicians practicing in any of Arkansas's six border states who held an active and unrestricted medical license in that state to apply for a Border State Temporary License. This gave eligible physicians the ability to offer continuation of care, whether in person or by telemedicine, to their established Arkansas patients while completing the full licensing process. Additionally, the Arkansas State Medical Board temporarily permitted Arkansas medical

residents who had completed at least one year of postgraduate training and had a written recommendation from their program director to apply for an Emergency Temporary License. Upon expiration of the public health emergency, both temporary licenses will no longer be available.

UPDATED June 8, 2021: In cooperation with the Centers for Medicare and Medicaid Services' ("CMS") Hospitals Without Walls initiative, the Arkansas Department of Health (the "DOH") established a temporary hospital license for Arkansas licensed ambulatory surgery centers to expand the state's capacity to fight COVID-19. The temporary hospital license required an application and attestation that all hospital basic requirements were met, with the one exception of operation of an emergency department. Senate Bill 603 (Act 723) provides guidance for insurers that contracted with temporary hospital facilities and their conversion back to ambulatory surgery centers. The full text of Senate Bill 603 (Act 723), adopted on April 15, 2021, can be found here. In addition, Senate Bill 663 (Act 1055), adopted on April 29, 2021, clarifies that the Arkansas DOH has the regulatory authority to continue the regulatory flexibilities for the duration of the CMS Hospitals Without Walls initiative and other CMS-certified facility flexibilities for the purpose of promoting public health in Arkansas. Under this authority, the department can defer to CMS as to when such initiatives are terminated during the current COVID-19 national public health emergency as well as future national public health emergencies. As a result, the temporary hospital licenses will remain in place until the CMS waiver is terminated by CMS or the current national public health emergency is declared over. The full text of Senate Bill 663 (Act 1055) can be found here.

IMMUNITY:

The end of the public health emergency in Arkansas, does not necessarily end the liability protections for healthcare workers initially established by Executive Orders. On March 3, 2021, the Arkansas Legislature extended liability protections relating to COVID-19, as Act 510 of 2021, until May 1, 2023. For hospitals this means protections for physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered nurses, and licensed practical nurses providing care to contain and treat the COVID-19 epidemic cannot be sued because of their efforts to mitigate the spread of the disease. Moreover, health care workers redeployed and practicing outside their normal scope of practice to alleviate the burden created by the pandemic still enjoy blanket immunity protections for an additional two (2) years. For a complete list of liability protections for hospitals and healthcare workers ceding with the expiration of the State of Emergency, see this blog.

FEDERAL WAIVERS:

The Centers of Medicare and Medicaid Services (CMS) has issued blanket protections and waivers for health care providers during the COVID-19 pandemic. Of these protections, there is only one that expires with Arkansas' public health emergency, and that is the waiver of out-of-state licensure requirements for physicians and non-physicians. This waiver is specific only to healthcare workers who (1) are enrolled as such in the Medicare program; (2) possess a valid license to practice in the state; (3) are furnishing services – whether in person or via telehealth – in a state in which the emergency is occurring; and (4) are not affirmatively excluded from practice in the state.

However, notably, the Federal Public Health Emergency is still in effect, and there is, nevertheless, risk in assuming the state-specific waivers continue at the expiration of the Arkansas public health emergency. These waivers include the following:

- Suspension of Pre-Admission Screening and Annual Resident Review (PASRR) Level I and Level II Assessments for 30 days
- Provider Enrollment – Arkansas currently has the authority to rely upon provider screening that is performed by other State Medicaid Agencies and/or Medicare.
- Suspension of Medicaid fee-for-service prior authorization requirements. The State of Arkansas has indicated in its approved state plan specific requirements about prior authorization processes for benefits administered through the fee-for-service delivery system.

- Requirement to Obtain Beneficiary and Provider Signatures of HCBS Person-Centered Service Plan

For a more in-depth analysis of CMS blanket waivers for health care providers, visit this link.

If you have any questions about the expiration of the public health emergency and its effect on healthcare providers, please contact one of the authors listed above or a member of our Health Care Regulatory Group.