

ALERTS

SUMMARY OF NORTH CAROLINA GOVERNOR'S APRIL 8, 2020 EXECUTIVE ORDER 130 - MEETING NORTH CAROLINA'S HEALTH AND HUMAN SERVICES NEEDS - INCLUDING WAIVER OF CERTAIN CERTIFICATE OF NEED REQUIREMENTS (April 10, 2020)

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On April 8, 2020, North Carolina Governor Roy Cooper issued Executive Order 130 (the "Executive Order") to provide necessary waivers to expand health care resources for treatment of COVID-19 patients and to provide additional waivers for certain child care, emergency management, food establishment, elder care, developmental disability, mental health and substance use disorder treatment services, and social services. The complete Executive Order is linked here: <https://files.nc.gov/governor/documents/files/EO130-Meeting-North-Carolinas-Health-and-Human-Services-Needs.pdf>.

Allowing Increases in Health Care Resources

In response to the potential surge of COVID-19 illness and to meet the need for additional beds and technology necessary to treat patients, the Executive Order delegated authority to the Secretary (the "Secretary") of the North Carolina Department of Health and Human Services ("DHHS") to waive or modify enforcement of any legal and regulatory constraints preventing or impairing the following:

- the increase of health care facilities' licensed bed capacity.
- relocating beds from a currently operating hospital, nursing home facility, or adult care home to another hospital, nursing home facility, adult care home, or other physical space.
- adding dialysis stations to an existing or approved kidney disease treatment center or hospital.

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- relocating dialysis stations from a currently operating kidney disease treatment center to another physical space.
- acquisitions by a hospital of Medical Imaging Equipment (defined as mobile MRI or CT equipment).
- allowing an ambulatory surgical facility to operate as a temporary hospital.

The Executive Order only allows these changes in status during the Governor's previously declared State of Emergency due to the COVID-19 public health emergency (the "State of Emergency") plus a 30-day grace period thereafter. Any equipment acquired under the Executive Order's authority must be returned no later than 30 days following the end of the State of Emergency. The Executive Order requires that providers seeking to increase, relocate, add, or acquire applicable health care resources obtain prior approval from the NC Department of Health Services Regulation ("DHSR") and includes the process for making these requests in writing (including by electronic mail). The Executive Order also specifically permits DHSR to approve these requests without requiring a provider to first obtain a Certificate of Need.

Child Care Facilities for Covered Children

The Executive Order also delegates to the Secretary authority to waive or modify enforcement requirements with respect to child care facilities serving children of employees of COVID-19 essential businesses and operations as defined in Executive Order 121[1], children who are receiving child welfare services, or children who are homeless or living in unstable or unsafe living arrangements (collectively, "covered children"). DHHS is directed by the Executive Order to establish certain emergency, health and safety, and operational guidelines for child care facilities that wish to open or remain open to served covered children. The Executive Order also permits child care facilities that are currently closed and wish to re-open for the sole purpose of serving covered children to do so upon submission of an emergency child care provider application prior to reopening. These waivers and modifications with respect to child care facilities are applicable only during the duration of the Executive Order.

Increasing the Pool of Professional Health Care Workers

Regulatory Flexibility to Expand the Health Care Workforce

The Executive Order also permits professional health care licensing boards to waive or modify, only for the duration of the Executive Order, enforcement of certain legal and regulatory constraints[2] that would prevent or impair allowing:

- persons licensed in other states to provide care within North Carolina without a North Carolina license.
- persons to provide care if they are retired or if their licenses are inactive.
- skilled but unlicensed volunteers to provide care.
- students in an appropriately advanced stage of professional study to provide care.

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Each professional licensing board is to document applicable waivers and modifications in writing, post them on its website, and provide guidance on training and qualifications necessary to address workforce shortages in essential health care services during the State of Emergency.

Utilizing the Emergency Management Assistance Compact

The Executive Order also directs the State Director of Emergency Management to identify resources available for response to Emergency Management Assistance Compact Requests. During the State of Emergency, a health provider licensed, registered, and certified in good standing in another U.S. jurisdiction may apply for an emergency license with the appropriate North Carolina licensing board and, if deemed eligible, may deliver services in North Carolina via telehealth provided the services are within the provider's authorized scope of practice in the jurisdiction where the professional is licensed. When assistance is requested by North Carolina, any person who owns a license, certificate, or other permit issued by another United States jurisdiction evidencing they meet the qualifications for a professional or other skills deemed licensed, certified, or permitted by the State of North Carolina may render aid involving the skill to meet the declared State of Emergency. Further, any licensure requirement applicable to any emergency management worker as defined in NCGS §166A-19.60(e) is waived with respect to professional, mechanical or other skill practiced during the State of Emergency.

Limitation of Liability

The Executive Order also provides that any persons who are licensed or authorized under the Executive Order to provide professional health care skills, to the extent they are providing emergency services, are considered emergency management workers as defined in NCGS §166A-19.60(e) and shall be insulated from civil liabilities up to the maximum extent authorized by NCGS §166A-19.60(e), except in cases of willful misconduct, gross negligence, or bad faith.

Public Health

The Executive Order also waives certain provisions related to the expiration dates of transitional food establishment permits and the expiration date of breath alcohol test analyst permits.

Mental Health, Developmental Disabilities, and Substance Abuse Services

The Executive Order waives certain requirements with respect to mental health and substance use disorder treatment services and support services for individuals with intellectual and developmental disabilities ("MH/DD/SAS Services"). These are to be waived or modified to the extent that they remove regulatory constraints that would prevent or impair the continued provision of MH/DD/SAS Services or the provision of MH/DD/SAS Services by telehealth.

Health Services Licensure

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The Executive Order also permits the Secretary to waive or modify certain requirements with respect to:

- the program of all-inclusive care for the elderly ("PACE") in order to provide in-home care commencing on March 25, 2020 and continuing for the duration of the Executive Order.
- in-home health aide rules for initial assessments and supervisory visits.
- screening of new hires because of disruption of fingerprinting services by counties.

Social Services Programs and Licensure

Under the Executive Order, the Secretary may waive or modify certain requirements applicable to social service programs and licensure, including the following:

- that applicants for State/County Special Assistance Programs apply in person, and instead directs that the county department of social services make alternate arrangements with the individual upon receipt of an application by mail or electronic submission.
- that eligibility factors for State/County Special Assistance Programs be reviewed at least every twelve (12) months, and instead directs that the eligibility factor review is to occur within 90 days of termination of the Executive Order and if not, the payment for the first month following the end of the 90-day period shall not be issued.
- enforcement of the loss of benefit upon leaving a Special Assistance-Adult Care Home facility for more than 30 days if the benefit recipients leave the facility for their health and safety.
- in-person visit, assessment, reassessment or quarterly visit requirements.
- enforcement of certain direct service care personnel standards for licensure of residential child-care facilities.

The foregoing is for your information only, is current as of April 9, 2020, and is not intended to constitute legal advice concerning any fact situation. Please contact either Carol Ewald Bowen at carolbowen@mvalaw.com or 704-331-2462, Kimberly Short Kirk at kimberlykirk@mvalaw.com or 704-331-3524 or any other member of the MVA Health Care Team with any questions you may have about health care issues presented by the COVID-19 pandemic or for assistance in determining the application of any particular waivers, rules, or guidance to your operations.

[1] See, <https://governor.nc.gov/documents/executive-order-no-121>.

[2] Including the admission and licensure requirements for physicians, nurses, midwives, respiratory care therapists, pharmacists, speech language pathologists and therapists, psychologists, clinical mental health counselors, substance use professionals, occupational therapist, physical therapists, recreational therapists, interpretation and translation professionals, nursing home administrators, assisted living administrators, and perfusionists.