

ACMS: COVID-19 PRIVATE PRACTICE GUIDANCE

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I. Introduction.

The COVID-19 pandemic presents all physicians, but especially private practice physicians, with numerous clinical, liability and business challenges. We have chosen the following categories to organize and present recommended guidance and linked resources for your information:

1. Clinical Guidance
2. Malpractice Liability
3. Reimbursement
4. Employer/Workers Compensation
5. Telehealth

II. Clinical Guidance.

Many authoritative sources are providing clinical recommendations, so we thought it would be more useful to curate some of the leading sources rather than attempt to summarize or paraphrase those recommendations:

1. PA Med: <https://www.pamedsoc.org/education-cme/public-health/coronavirus>
2. AMA: <https://www.ama-assn.org/delivering-care/public-health/covid-19-2019-novel-coronavirus-resource-center-physicians>
3. CMS: <https://www.medicare.gov/medicare-coronavirus#500>
4. CDC: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
5. WHO: <https://www.who.int/health-topics/coronavirus>

III. Medical Malpractice.

The medical malpractice category can be separated into two categories, i.e. following Clinical Practice Protocols and Malpractice Prevention.

1. Clinical Practice Protocols.

We reviewed many clinical practice protocols and decided the best combination of practical advice and risk management would be to publish the guidance Norcal, since it is one of the leading malpractice insurer.

The guidance is found at <https://www.norcal-group.com/covid-19>. It not only emphasizes patient communications, it also collects similar information from many other sources, i.e. CDC, WHO and NIH.

As with any other patient communication or informed consent process, it is critical to document that the patient has been made aware of or informed that the risk of COVID-19 infection cannot be totally eliminated, that there is no way of assuring via testing that none of your employees have not been exposed, that you have very little control, if any, regarding the health status of any patients (other than those obviously manifesting symptoms) of the patient's exposure from other sources, and that complete social distancing and quarantine are the only reliable protections. By coming to your office, patients are assuming the same risks as the general population in other crowded environments or situations.

2. Insurance Coverage. In its most basic sense, medical malpractice occurs when a physician or other healthcare professional commits medical negligence. A doctor or healthcare professional commits medical negligence when they breach what is referred to as the "standard of care." The "standard of care," in turn, is the generally accepted medical practice used by medical professional in the same geographic area for patients suffering from a particular illness or condition. In addition to proving that a healthcare professional committed medical negligence by breaching the standard of care, a claimant must also prove that the alleged medical negligence of the professional directly resulted in (i.e., caused) the claimant's injuries.

Given the novelty and unprecedented nature of the COVID-19 virus, healthcare professional, aided by guidance from organizations such as WHO, CDC, and NIH, are still in the process of establishing the standard of care for the screening and treatment of the virus. At this time, the best way to limit the risk of liability exposure that may arise from a patient contracting COVID-19 while visiting a doctor's office or other healthcare facility is to implement the risk management procedures referenced above. Employing these risk management procedures and remaining vigilant of warning signs that patients or employees may be carriers of the virus, and taking appropriate actions to separate those individuals from others upon such recognition, is in keeping with the proper standard of care as it presently exists. Absent the knowing or grossly negligent exposure of a patient to the virus, healthcare professionals should not be held liable for situations where a patient contracts the virus while present in their office of facility.

As noted above, by coming to your office, patients are assuming the same risks as the general population in other crowded environments or situations. To make these risks clear to patients, and to further protect against potential claims of liability, healthcare professionals should post flyers or similar notices advising of the potential risks of exposure to COVID-19 in prominent locations both outside and within their offices. These flyers should state in clear language that in spite of the implementation of risk management procedures and other controls, there is no way to ensure that a patient will not be exposed to the virus by virtue of their presence in the office. In addition, these flyers should explain the risks associated with the contraction of the virus, including

hospitalization and death. By making patients aware of these possibilities, they can make an informed choice and will be deemed to have assumed the risk of exposure in the unfortunate event such exposure occurs.

As healthcare professionals scramble to formulate policies in response to the COVID-19 outbreak, so too do medical professional liability insurers. Whether an insurer will defend against claims involving a patient contracting the virus while in the doctor's office will be determined on a case-by-case basis depending on the particular facts and coverage involved. Practitioners who are concerned by this issue should contact their insurers directly to obtain information regarding their coverage.

III. Reimbursement.

COVID-19 patient visits will presumably be treated as "E&M office visits," of some degree of complexity (excluding Telehealth), which we will address below. Reimbursement levels, pre-authorization requirements, etc. will be dictated by the terms of the third party payer/insurance plan. Attached is guidance from:

1. Medicare: <https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet>
2. Highmark: <https://hbcbs.highmarkprc.com/Newsletters-Notices/COVID-19-CORONAVIRUS-INFORMATION-FOR-PROVIDERS>
3. UPMC Health Plan: https://www.upmchealthplan.com/pdf/ReleasePdf/2020_03_13-telehealth-visits.html
4. Pennsylvania Medicaid: <https://www.medicaid.gov/state-resource-center/disaster-response-toolkit/covid19/index.html>

IV. Employment/Workers Compensation.

1. COVID-19 Legal Update. President Trump signed the Families First Coronavirus Response Act ("FFCRA") into law on Wednesday, March 18, 2020. It will take effect within 15 days.

The FFCRA requires employers with fewer than 500 employees¹ to provide two different kinds of paid leave for certain Coronavirus/COVID-19-related reasons, as follows: 1. Paid sick time. Employees shall receive paid² sick leave³ if they are unable to work (or telework) due to a need for leave because: a. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; b. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; c. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; d. The employee is

caring for an individual who is subject to an order as described in a., above, or has been advised as described in b., above; e. The employee is caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions; f. the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury. 1 An employer may exclude employees who are health care providers or emergency responders from coverage under this law. Additionally, the Secretary of Labor has the authority to issue regulations to grant exemptions to businesses with fewer than 50 employees upon a showing that compliance would “jeopardize the viability of a business as a going concern.”

Leave time taken for reasons 1a.-c. is to be paid at the employee’s regular rate of pay, subject to daily and aggregate limits of \$511 and \$5,110, respectively. Leave time taken for reasons 1d.-f. is to be paid at 2/3 of the employee’s regular rate of pay, subject to daily and aggregate limits of \$200 and \$2,000, respectively.

The duration of the paid sick leave is: 80 hours for full-time employees; or, for part-time employees, the number of hours each works on average over a two-week period.

Expanded FMLA leave. Employees who have been employed for at least 30 days are entitled to up to 12 weeks of job-protected⁴ paid⁵ leave if they are unable to work (or telework) due to a need to care for the son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a COVID-19-related public health emergency.

It is very important to note that not all Coronavirus/COVID-9-related reasons trigger the right to these leaves. For example, the FFCRA does NOT require employers to provide paid leave under broader circumstances, e.g., an employer’s decision to cease operations, reduce headcount or hours, etc. It is up to employers to decide whether to expand their current paid time off plans/policies to cover these other situations.

Some other key attributes of the FFCRA:

- This paid sick time is to be made available to employees in addition to existing paid leaves and, accordingly, an employer may not require an employee to use other paid leave before the employee uses this paid sick time;
- An employer may not require, as a condition of providing this paid sick time, that employees search for or find a replacement to cover the hours they are off;
- This paid sick time shall be available for immediate use by employees regardless of how long any employee has been employed; • The government will provide new tax credits to offset/cover the costs of the new leaves; • The requirement to provide both leaves sunsets on December 31, 2020.

So... what should an employer do now?

- (i) It should definitely determine whether it has fewer than 500 employees.
- (ii) If it has fewer than 50 employees, determine whether it will seek a waiver;
- (iii) If it is covered by this law, it should make sure that its FMLA administrator/HR staff fully understands what circumstances are and are not covered by these two leaves so that it is ready to properly determine individual employees' eligibility

Employers with fewer than 25 employees are exempt from the requirement to restore an employee to his/her prior position (or an equivalent) upon the expiration of the need for leave, if the employee's position no longer exists following leave due to operational changes occasioned by a public health emergency (e.g., a dramatic downturn in business caused by the COVID-19 pandemic), subject to certain conditions. 5 During the first two weeks of this expanded FMLA leave, an employee can opt (but not be required by the employer) to receive accrued vacation, personal, or sick leave. The remaining period is to be paid at 2/3 of the employee's regular rate, subject to daily and aggregate limits of \$200 and \$10,000, respectively. and otherwise administer these leaves (Do we need to draft or revise policies, forms, etc.?).

Since there are many situations under which employees may miss work that are outside of the FFCRA's scope, it should decide how to handle the most foreseeable ones. (What if the employer sends most/employees' home? What if wants some to work at home but others are unable to work offsite? What if an employee is asked to continue to report for work but objects for general reasons (not because he or she has been individually diagnosed, told to quarantine, etc.)?).

2. Covid-19 Workers' Compensation, etc. The PA Workers' Compensation Act recognizes "occupational disease" as a compensable work injury; employers (through WC insurance carriers) can be required to pay wage loss and medical benefits for time loss and medical care associated with COVID-19 as an occupational disease, or as an "injury" based on the onset of the infection. For employees who may be exposed to COVID-19 in the workplace, contract the virus, and miss work and require medical care as a result - the state Bureau of Workers' Compensation will recognize (and likely accept) the claim as compensable - forcing the employer/carrier to pay Workers' Comp benefits to the employee.

In fact, the PA Department of Labor & Industry website already lists "filing options" for employees who contract the disease, as follows:

- Option 1: An employee can file a typical "disease-as-injury" Worker's Compensation claim, which would require the employee to provide medical evidence that they were exposed to COVID-19 in the workplace. Employees must provide this type of evidence for all injury-related claims.
- Option 2: An employee could file an "occupational disease" Workers' Compensation claim, which would require showing that COVID-19 is occurring more in the employee's industry or occupation than in the general population, such as the healthcare industry.

www.dli.gov. In extreme circumstances, resulting in the death of an employee as a result of contracting COVID-19, the employee's spouse and/or surviving children would have a viable claim for survivor benefits as against the employer (WC carrier). Conversely, in the much more common/likely scenario, where the virus "runs its course" - and the employee makes a full recovery in less than ten days - Workers' Compensation wage loss benefits would be limited to the period of required time off for recovery and/or quarantine. It is important to note that an employees' legal right of recovery as against an employer, for any sort of work injury, is limited to recovery of wage loss and medical benefits.

In any/all scenarios where an employee is affected, and a Workers' Compensation claim is reported, the best strategy, from a Workers' Compensation liability exposure perspective, is to defer to the WC carrier to process payments for wage loss and medical care...while taking the necessary steps to prevent future COVID-19 exposure in the workplace.

V. Telehealth.

The telehealth issue is essentially whether the patient may be diagnosed and treated remotely.

1. Medicare already authorizes certain treatments, albeit with originating/treating site requirements, wherein would ordinarily preclude most such visits. However, recent Federal emergency relief action has warned those site restrictions effective March 6, 2020. Medicare also already allows virtual check-ins.

- <https://www.cms.gov/newsroom/press-releases/president-trump-expands-telehealth-benefits-medicare-beneficiaries-during-covid-19-outbreak>;
- <https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet>

2. UPMC Health Plan:
https://www.upmchealthplan.com/pdf/ReleasePdf/2020_03_13-telehealth-visits.html

3. Highmark: <https://hbcbs.highmarkprc.com/Newsletters-Notices/COVID-19-CORONAVIRUS-INFORMATION-FOR-PROVIDERS>

4. Medicaid: <https://www.medicaid.gov/state-resource-center/disaster-response-toolkit/covid19/index.html>

We would expect all third party payers to be relaxing telehealth restrictions in order to facilitate emergent and timely COVID-19 medical services, and to be pushing that information out through news releases and websites. We will curate and post it as it becomes available. Please submit any information you deem significant for our review.