

With Executive Order 112, NJ Waives Regulatory Restrictions on Scope of Licensure for Healthcare Professionals and Provides Broad Immunity from Civil Liability

On April 1, 2020, New Jersey Governor Phil Murphy signed Executive Order 112, invoking powers under the Civil Defense Act and Disaster Control Act as well as the Emergency Health Powers Act to expand the availability of healthcare professionals to respond to the COVID-19 public health emergency.

Executive Order 112 uses a broad meaning of "healthcare professionals" to include (but not be limited to) physicians, physician assistants, advanced practice nurses, registered professional nurses, licensed practical nurses, respiratory care therapists "and others" whose training and experience enable them to manage critically ill patients, perform essential invasive procedures, conduct diagnostic testing or render general medical care to patients presenting with non-COVID-19 emergencies in support of the statewide response to the COVID-19 outbreak.

Executive Order 112 acts in two complementary ways, as follows:

Licensure Requirements

Using the authority to "suspend any regulatory provision of law when its enforcement is detrimental to the public welfare during an emergency," the Order empowers the New Jersey Division of Consumer Affairs to liberally issue temporary licenses to healthcare professionals who had retired or inactivated their licenses within the last five years, as well as to any physician who was licensed, in good standing, in another country.

For retired healthcare professionals, the Order suspends and waives requirements pertaining to fees, affidavits of employment during retirement, and proof of continuing education. For foreign-licensed physicians, the Order suspends and waives requirements for examination, minimum premedical education and additional post-graduate education. In both instances, the Order waives the requirement for the mandated minimum medical malpractice insurance coverage for both physicians and physician assistants. These provisions are in effect for the duration of the public health emergency.

Scope of Practice

In conjunction with the relaxation of licensure requirements, the Order sets aside statutory provisions that limit the scope of practice of advanced practice nurses/nurse practitioners (APN) and physician

assistants (PA). The APN-related requirements regarding a collaborating physician are suspended and waived "for the duration" concerning (a) a joint protocol; (b) inclusion of the name and telephone of a collaborating physician on any prescription being written; (c) chart review; and (d) authorization to dispense narcotic drugs for maintenance treatment or detoxification treatment of substance use disorders. Similarly, as to PAs, the Order suspends and waives requirements for (a) physician supervision; (b) a signed delegation agreement limiting the scope of practice to enumerated procedures; (c) authorization to order or prescribe a controlled dangerous substance; and (d) limitations on assistance in the operating room. The statutory provision regarding physician supervisory responsibility is correspondingly suspended and waived.

Civil Liability Immunity

Executive Order 112 further incentivizes participation by retired and foreign-licensed physicians by providing immunity from civil liability "for any damages" alleged to have been sustained as a result of any act or omission undertaken in good faith, whether or not within the scope of the licensee's practice if done in the course of providing healthcare services in support of the COVID-19 response in New Jersey. This would encompass non-COVID-19 care and treatment. As is the case with most immunity provisions, the immunity does not apply to acts or omissions that constitute a crime, actual fraud, actual malice, gross negligence or willful misconduct.

As originally issued on April 1, the Order took a different stance regarding the immunity provided to currently licensed healthcare professionals, including APNs and PAs, for acts outside the scope of their ordinary practice as authorized by the Order. While covering claims for damages as a result of acts or omissions in the course of providing healthcare services in support of the COVID-19 response, the immunity would have only been effective "to the extent that the practitioner's existing liability insurance does not provide coverage or an applicable limit is exceeded." Similarly, any healthcare facility or sites such as hotels or student dormitories used on a temporary basis as designated by the Commissioner of the Department of Health were given immunity from civil liability "to the extent that its existing liability insurance coverage does not provide coverage or an applicable limit is exceeded" for claims based on the conduct of its agents, officers, employees, servants, representatives or volunteers.

As revised and finalized before the end of the day on April 1, that "to the extent" language was removed. The immunity for damages is no longer limited beyond the exception for acts or omissions constituting a crime, actual fraud, actual malice, gross negligence or willful misconduct. While the immunity "for damages" is broad, it does not preclude a lawsuit seeking to establish one of the exceptions to the immunity.

The immunity made available by Executive Order 112 applies to acts or omissions occurring at any time during the declared public health emergency and is given retroactive effect to include acts or omissions occurring before the Order was issued.

The Order includes a paragraph declaring:

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