

BEFORE JAMES A. DODRILL, INSURANCE COMMISSIONER
OF THE STATE OF WEST VIRGINIA

In the Matter of:

**COVID-19 STATE OF EMERGENCY;
COVERAGE FOR CERTAIN COVID-19 DIAGNOSTIC
TESTING OF RESIDENTS AND/OR STAFF IN NURSING
HOMES, ASSISTED LIVING RESIDENCES AND
RESIDENTIAL CARE COMMUNITIES**

Emergency Proceeding: 20-EO-07

EMERGENCY ORDER

JAMES A. DODRILL, Insurance Commissioner of the State of West Virginia (Insurance Commissioner), by virtue of the authority vested in him pursuant to West Virginia law and the Proclamation of the Governor of West Virginia issued March 16, 2020, does **FIND** and **DECLARE** as follows:

1. On January 31, 2020, the Secretary of the United States Department of Health and Human Services (HHS), Alex M. Azar II, declared that, as of January 27, 2020, a public health emergency exists nationwide as the result of the 2019 novel coronavirus (COVID-19).
2. On March 13, 2020, the President of the United States declared a National Emergency in relation to the COVID-19 pandemic;
3. On March 13, 2020, the Insurance Commissioner entered Emergency Order 20-01 declaring that an insurance emergency exists in the State of West Virginia, which insurance emergency declaration remains in full force and effect;
4. On March 16, 2020, the Governor of West Virginia issued a Proclamation declaring a State of Emergency for every county in the State of West Virginia with respect to the novel Coronavirus 2019 (COVID-19) pandemic, which State of Emergency remains in full force and

effect, and in which the Governor recognized that it was of utmost importance for all Cabinet Secretaries, Commissioners and Directors have the ability to take all measures necessary to ensure the safety of citizens in this state, recognized that agencies can suspend certain rules that prohibit them from operating effectively, and delegated to all state agencies the authority to suspend rules if strict compliance therewith would in any way prevent, hinder or delay necessary action in coping with the emergency;

5. On March 18, 2020, the United States Congress enacted the Families First Coronavirus Response Act (FFCRA). Section 6001 of the FFCRA generally requires group health plans and health insurance insurers offering group or individual health insurance coverage to provide benefits for certain items and services related to diagnostic testing for the detection of COVID-19 when those items or services are furnished on or after March 18, 2020, and during the applicable emergency period. Under the FFCRA, plans and insurers must provide this coverage without imposing any cost-sharing requirements including deductibles, copayments, and coinsurance or prior authorization or other medical management requirements

6. On March 27, 2020, the United States Congress enacted the CARES Act. Section 3201 of the CARES Act amended section 6001 of the FFCRA to include a broader range of diagnostic items and services that must be covered without any cost-sharing requirements, prior authorization or other medical management requirements. This coverage must be provided when medically appropriate for the individual, as determined by the individual's attending healthcare provider in accordance with accepted standards of current medical practice. Additionally, section 3202 of the CARES Act generally requires plans and insurers providing coverage for these items and services to reimburse any provider of COVID-19 diagnostic testing an amount that equals the negotiated rate or, if there is no negotiated rate, the cash price for such service that is listed by the

provider on a public website. The plan or insurer may negotiate a rate with the provider that is lower than the cash price.

7. On April 11, 2020, HHS, along with the U.S. Department of Labor (DOL) and the Treasury issued joint, formal guidance on the FFCRA and CARES Act. The guidance clarifies that the section 6001 of the FFCRA, as amended by section 3201 of the CARES Act, applies to group health plans and health insurers offering group or individual health insurance coverage, including grandfathered health plans and insured and self-insured group health plans, as well as employment-based group health plans (ERISA plans), non-federal governmental plans and church plans. The guidance also provides that the FFCRA and CARES Act apply to individual health insurance coverage offered on or off an exchange, as well as student health insurance.

8. The joint guidance also noted that while insurers are generally not permitted to modify coverage mid-plan year, HHS will not take enforcement action against any health insurer that changes benefits or the cost-sharing structure of its plans mid-year to provide increased coverage for services related to the diagnosis and/or treatment of COVID-19. In the guidance, HHS encouraged states to take a similar approach, and stated that it will not consider a state to have failed in its enforcement obligations if it takes a non-enforcement position with respect to changes made during the COVID-19 public health emergency declaration or a national emergency declaration.

9. The Insurance Commissioner has, like HHS, chosen to take a non-enforcement position regarding mid-year plan changes, so long as those changes are made to provide increased coverage for services related to the diagnosis and/or treatment of COVID-19. However, as noted by HHS, DOL and the Treasury in the joint guidance, nothing in the FFCRA or CARES Act prevents a state from imposing additional standards or requirements on health insurers with respect to the diagnosis or treatment of COVID-19 so long as the standards or requirements do not prevent the

application of a federal requirement.

10. On May 6, 2020, the Governor of West Virginia issued *Executive Order 35-20*, which mandated the immediate testing of all individuals who reside or work in assisted living residences and residential care communities licensed by the DHHR's Office of Health Facility Licensure and Certification (OHFLC). In doing so, the Governor found and determined that individuals in assisted living residences, under *W. Va. Code § 16-5D-1 et seq.*, and residential care communities, under *W. Va. Code § 16-5N-1 et seq.*, throughout the State are some of the most vulnerable in our population and any instance of the COVID-19 virus at such a facility presents a serious issue that must be immediately identified and responded to. The Governor additionally found and determined that the health care professionals and other employees working in those assisted living residences and residential care communities must also be closely monitored and protected for their own safety and to ensure the safety of the residents of such facilities.

11. Previously, on April 17, 2020, the Governor of West Virginia issued *Executive Order 27-20*, which mandated the testing of all individuals who reside in, or work in, nursing homes in the state of West Virginia for COVID-19 finding that individuals who reside in nursing homes are particularly vulnerable and that any instance of COVID-19 in a nursing home presents a serious health issue that must immediately be identified and responded to.

12. On May 7, 2020, Dr. Catherine Slem, MD, MPH, the Commissioner and State Health Officer for the Bureau for Public Health (BPH) within the DHHR, issued a Memorandum regarding the implementation of *Executive Order 35-20* as to COVID-19 testing for all residents and staff of Assisted Living Facilities and Residential Care Communities licensed by the DHHR's OHFLAC. The Memorandum stated that Dr. Slem, in consultation with other medical leadership associated with the COVID-19 response, deems the COVID-19 testing at Assisted Living Facilities

and Residential Care Communities to be a necessary public health and medical action based upon West Virginia's population vulnerability.

13. The Insurance Commissioner, under the provisions of Chapter 33 of the *West Virginia Code* has broad authority to regulate the insurance industry in West Virginia, specifically including but not limited to, insurance companies, insurance brokers, agents (producers) and/or insurance agencies.

Inasmuch as a Public Health Emergency, National Emergency, Insurance Emergency and a State of Emergency have been declared and continue to exist in the State of West Virginia; inasmuch as it is essential for the citizens of West Virginia, specifically those who work or reside in nursing homes, assisted living residences and residential care communities, to be able to have access to, and insurance coverage for, diagnostic testing and services for COVID-19 without any cost-sharing requirements, prior authorization or other medical management requirements; and, inasmuch as the Commissioner of the BPH and State Health Officer, Dr. Catherine Slem, MD, MPH, has found that diagnostic testing and services for COVID-19 is a necessary public health and medical action for those residents and staff of Assisted Living Facilities and Residential Care Communities licensed by the DHHR's OHFLAC, it is hereby **ORDERED** as follows:

1. Health insurers offering group health plans and/or individual health insurance coverage in this state must, effective March 18, 2020, provide benefits for diagnostic testing for the detection of COVID-19, and services related thereto, to the persons identified in *Executive Order 27-20* and *Executive Order 35-20* because testing of these individuals has been deemed a necessary public health and medical action by the Commissioner of BPH and State Health Officer, Dr. Catherine Slem, MD, MPH and mandated by the Governor of West Virginia.

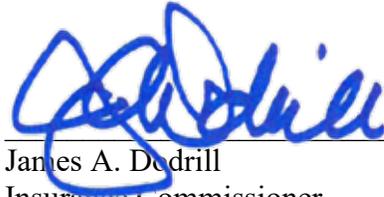
2. This coverage must be provided without imposing any cost-sharing requirements including deductibles, copayments, and coinsurance, or prior authorization or other medical management requirements.

3. Recognizing and acknowledging that many health insurers offering group health plans and/or individual health insurance coverage in this state currently have provisions in their policies and/or health plans that specifically exclude coverage for screening, examinations or testing that is solely required by a governmental agency or by an employer for work-related reasons, nevertheless, given the current Public Health Emergency, National Emergency, Insurance Emergency and State of Emergency, the mandates of *Executive Order 27-20* and *Executive Order 35-20*, the May 7, 2020 Memorandum from Dr. Catherine Slep, MD, MPH, and the provisions of the FFCRA and CARES Act which require coverage for services related to diagnostic testing for the detection of COVID-19 without imposition of any cost-sharing requirements, prior authorization or other medical management, and which do not prevent a state from imposing additional standards or requirements on health insurers so long as the standards or requirements do not prevent the application of a federal requirement, coverage for diagnostic testing must and shall be afforded as provided hereinabove.

4. The Insurance Commissioner will take a non-enforcement position in regard to mid-year plan changes, so long as those changes are made to provide increased coverage for services related to the diagnosis and treatment of COVID-19 during the declared public health emergency, national emergency, insurance emergency and State of Emergency, as noted herein. However, the Insurance Commissioner may take enforcement action against any health insurer that attempts to limit or eliminate other benefits, or to increase cost-sharing, to offset the costs of increasing the generosity of benefits related to the diagnosis and/or treatment of COVID-19.

5. This *Emergency Order* shall remain in force and effect until further notice. The Insurance Commissioner will continue to review and assess circumstances as they arise or change, and will amend, revise or rescind this *Emergency Order*, in full or in part, as necessary or appropriate.

ENTERED this 11th day of May, 2020.



James A. Doherty
Insurance Commissioner