

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

In the Matter of:

**COVID-19 STATE OF EMERGENCY;
TRANSFERRING PATIENTS DUE
TO FACILITY CAPACITY OR OTHER
MEDICAL NECESSITY.**

Emergency Proceeding: 20-EO-10

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 16, 2020, the Governor of West Virginia (Governor Justice) 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. The West Virginia Department of Health and Human Resources (DHHR) maintains a database for tracking COVID-19 infections, outbreaks, and hospitalizations in West Virginia. On Friday, December 4, 2020, the statistics from the DHHR show that 634 individuals are currently hospitalized for COVID-19 in West Virginia – a new pandemic high. Additionally, on December 2, 2020, Governor Justice reported detailed information about a surge of COVID-19 infections and hospitalizations, specifically that the number of COVID-19 cases in West Virginia has increased

91% from October 31 to November 30, 2020, and that 49% of West Virginia’s total cases during the COVID-19 pandemic have occurred in the past 30 days. Furthermore, from October to November, West Virginia saw an increase of 73% in reports of deaths associated with COVID-19, with 50% of all reported deaths in West Virginia associated with COVID-19 occurring in the past eight weeks.

10. On November 30, 2020, Governor Justice announced that he and state health experts had asked all hospitals and hospital systems across the state to reevaluate their “surge plans” that had originally been created several months ago and to update them in light of the recent increase in COVID-19 cases in West Virginia. Governor Justice also asked hospitals and hospital systems to temporarily reduce the number of elective medical procedures being performed to ensure hospital space and resources are available to treat COVID-19 patients. Governor Justice noted that state health experts are genuinely concerned about the possibility of hospitals reaching and exceeding capacity due to the recent surge in infections and hospitalizations.

11. Given the record high number of hospitalizations currently in West Virginia, and the probability that those hospitalization numbers may increase due to the escalating number of COVID-19 infections in West Virginia, there is a significant potential for individual hospitals and hospital systems in this state to reach or exceed patient capacity creating the need for hospitals and hospital systems to be able to swiftly and safely transfer patients to other hospitals or facilities within or without their hospital system when the transferring hospital or facility is at capacity or can otherwise not provide the appropriate level of care to the covered person or patient. Requiring prior authorizations or other medical management prior to transferring patients between hospitals or facilities in these emergency and medically necessary situations could result in delay of care or treatment and be unduly burdensome to providers as well as detrimental to patients.

12. 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, 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 in need of hospital care due to COVID-19, to be able to have access to hospital care as promptly as possible without undue burden or delay, it is hereby **ORDERED** as follows:

1. Health insurers offering group health plans and/or individual health insurance coverage in this State must, effective December 4, 2020, permit covered persons to be transferred between facilities or hospitals, without prior authorization or other medical management, to the nearest appropriate hospital or other facility when the transferring hospital or facility is at capacity or cannot otherwise provide the appropriate level of care to the covered person or the necessary level of care is not available at the transferring hospital or facility. Transportation in these circumstances is considered to be medically necessary by the Commissioner and is to be covered at the in-network rate. Furthermore, this coverage must be provided without imposing any prior authorization or other medical management requirements.

2. The Commissioner recognizes and acknowledges 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 require prior authorization prior to transportation between hospitals or facilities. Nevertheless, given the current Public Health Emergency, National Emergency, State of Emergency, and the provisions of the FFCRA and

CARES Act 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 transportation of covered persons or patients between hospitals or facilities must and shall be afforded as provided hereinabove.

3. The Commissioner will take a non-enforcement position in regard to midyear 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, and State of Emergency, as noted herein. However, the 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.

4. 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 4th day of December, 2020 at 8:58 p.m., EST.



James A. Dodrill
Insurance Commissioner