September 20, 2021

TO: OFFICERS, COUNCILORS, AND TRUSTEES

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RE: REPORT FROM THE DIVISION OF GOVERNMENTAL AFFAIRS

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ALBANY

Federal Judge Temporarily Restrains Enforcement of Healthcare Worker Vaccination Mandate as it Pertains to Religious Exemptions

A Central New York federal judge issued a ruling last week that will, at least temporarily, permit health care workers to evade the State's vaccination requirement if they put forward a religious exemption. Based on an updated ruling this week, the Judge will decide to end the temporary restraining order or issue or issue a continuing injunction on October 12.

MSSNY President Dr. Joseph Sellers issued a statement expressing dismay with the federal court's ruling MSSNY Opposes Northern District Decision to Permit Religious Exemptions to State's Healthcare Worker Vaccination Requirements - (mssnyenews.org), noting that "No major religious denomination opposes vaccinations, and the Supreme Court has for over 100 years upheld vaccination requirements as a means to protect the public health." Dr. Sellers' statement was included in dozens of articles regarding this court decision.

In August, the New York Public Health and Health Planning Council (PHHPC) approved an emergency regulation requiring health care workers in all Article 28 regulated settings – hospitals, nursing homes, clinics, Ambulatory Surgery Centers, dialysis facilities, etc. – to be vaccinated against Covid. This includes physicians and other care providers who may not be employed directly but who provide care at these health care settings (such as a physician with privileges at a hospital or who sees patients at a nursing home). There is an exemption for health care workers for documented medical contraindications, but after objection from various groups including MSSNY, the proposed "religious exemption" to this vaccination requirement was dropped from the regulation.

President Biden also announced that he would impose a vaccination worker mandate on hospitals, dialysis, home health, and ambulatory surgical centers also require vaccinations that accept Medicare and Medicaid payments. According to the AMA, it is not applicable to private physician offices.

The DOH regulation provides that an acceptable medical exemption to the required vaccine is where a "licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of member of a covered entity's personnel, based upon a pre-existing health condition". It further provides "the requirements of this section relating to COVID-19 immunization shall be inapplicable only until such immunization is found no longer to be detrimental to such personnel member's health." Furthermore, it instructs these covered health care entities that "the nature and duration of the medical exemption must…be in accordance with generally accepted medical standards, (see, for example, the recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services), and any reasonable accommodation may be granted and must likewise be documented in such record".

The ACIP has developed information regarding clinical considerations for practitioners here: Interim Clinical Considerations for Use of COVID-19 Vaccines | CDC. The only listed contraindications are:

- Severe allergic reaction (e.g., anaphylaxis) after a previous dose or to component of the COVID-19 vaccine; and
- Immediate (within 4 hours of exposure) allergic reaction of any severity to a previous dose or known (diagnosed) allergy to a component of the vaccine

Moreover, as with other mandatory vaccinations, physicians or other care providers risk disciplinary sanction for certifying a medical exemption without an adequate medical justification for doing so.

Please Governor to Sign into Law 2 Bills to Assist Patients to Receive Needed Medications

Physicians are urged to contact Governor Hochul to request that she sign into law legislation passed at the end of the Legislative Session critical to helping patients to be able to receive the medications they need as well as to ensure greater oversight over pharmacy benefit formulary development practices. A letter or tweet can be sent from here: Urge Governor to SIGN two RX bills - Regulating PBMs and Restricting Mid-Year Formulary Changes (p2a.co)

- A.1396, Gottfried/S.3762, Breslin will provide greater accountability and transparency of the practices of Pharmacy Benefit Managers (PBMs). The bill would require that PBMs be licensed by the Department of Financial Services (DFS) and adhere to standards established by DFS. The bill would also provide for the disclosure of all possible revenue streams and terms and conditions that they place on their networks of pharmacies. MSSNY has supported greater oversight and regulation of PBMs as one manner to address restrictive formularies and excessive prior authorization requirements that interfere with patients obtaining needed medications.

- A.4668, People-Stokes/S.4111, Breslin will significantly limit the ability of health insurers to move medications to higher cost-sharing tiers for their prescription drug formularies during a policy year. A substantially similar passed the Assembly and Senate in 2019 but was vetoed. To address concerns raised in the 2019 veto message, the new legislation would prohibit the applicability of a mid-year formulary change for those patients who were on the medication at the beginning of the policy year or suffer from a condition for which the medication is part of a treatment regimen, for that condition. However, other mid-year formulary changes could still occur.

Please Urge Governor to Veto Multiple Pro-Trial Lawyer Tactical Bills

Physicians are urged to contact Governor Hochul's office to urge Urge Governor to VETO Regressive Liability Bills (p2a.co) that she veto multiple problematic pro-trial lawyer bills passed at the end of the Legislative Session that if signed could have the effect of significantly disadvantaging defendants generally in litigation in New York State, including physicians and hospitals defending against malpractice claims. While these bills do not have the same gargantuan premium impact as other legislation sought by the trial bar that would expand lawsuits and awards against physicians, they would continue to make New York's already dysfunctional medical liability adjudication system even more unbalanced and add to New York's notorious outlier status with regard to medical liability payouts. These bills include:

- **A2199/S473 –** Expanding the time period for the imposition of New York's excessive 9% judgment interest in cases where a plaintiff's request for summary judgment was not initially granted, but then overturned on appeal.
- **A8040/S7093 –** Changing a long-standing rule that heretofore excluded a "hearsay" statement made by a defendant's employee.
- **A8041/S7052 –** Imposing excessive insurance disclosure requirements on defendants during litigation. Please see this attached Crains op-ed urging Governor Hochul to veto this bill because of the overwhelming burden it would impose Hochul must veto burdensome insurance disclosure bill | Crain's New York Business (crainsnewyork.com)

MSSNY Praises WC Telehealth Coverage Regulation while Also Raising Concerns with Aspects

MSSNY has written to the New York State Workers Compensation Board (NYSWCB) to praise its proposal to continue WC coverage for telehealth services provided to injured workers but also to raise

concerns with aspects of the proposal. In particular, MSSNY thanked the NYSWCB for not only continuing telehealth coverage for care to injured workers after the end of the declared state of emergency, but also continuing audio-only coverage of telehealth services.

However, MSSNY also raised concerns, shared by the psychiatric and orthopedic societies, with a component of the NYSWCB proposal requiring that an initial encounter and every third encounter be an in-person assessment regardless of the clinical circumstances. MSSNY also raised concerns with a provision that would require the initial medical provider to be required to also provide treatment and care at any subsequent telehealth encounter, which does not reflect the fact that care is often delivered in teams of physicians and other care providers. MSSNY also raised concerns with a component of the proposal that would prohibit supervision of surgical assistants by remote intra-operative monitoring. Finally, MSSNY urged that the regulation require parity in payment between in-person care and care delivered via telehealth, which MSSNY has been pushing for across all insurance coverage lines.

Check with Your Legal Counsel Whether You Are Required to Follow Federal or State Infection Disease Employee Protection Standards

Physician offices should consult with their legal counsel to determine if they are required to comply with the recent federal OSHA Emergency Temporary Standard (ETS) rules for protecting employees from airborne Covid-19 transmission or instead required to comply with newly enacted state requirements for all employers who are not subject to federal rules.

In July, MSSNY's General Counsel law firm, Garfunkel Wild, prepared an alert OSHA Issues Emergency Rules For Healthcare Employers And Updated Guidance For All Employers | Garfunkel Wild, that provided a summary of the requirements for the OSHA ETS. The alert notes that exempted from compliance with the OSHA ETS are "employers performing healthcare services on an outpatient basis in a non-hospital setting, if non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter."

However, employers that are exempt from the OSHA ETS must establish an airborne infectious disease plan required by New York State for all employers under the "HERO" Act. This week Governor Hochul announced that the Commissioner of Health had designated Covid as a highly infectious communicable disease that presents a serious risk of harm to the public health, which requires all employers to implement workplace safety plans in the event of an airborne infectious disease, helping to prevent workplace infections The New York State Department of Labor (NY DOL) has developed model forms for all New York employers to adopt NY HERO Act | Department of Labor.

The question is whether physician offices are required to follow the federal OSHA ETS or the NY HERO Act standards. MSSNY has received clarification from the NY DOL that "the standard published by the Department provides that it does not apply to 'Any employee within the coverage of a temporary or permanent standard adopted by the Occupational Safety and Health Administration setting forth applicable standards regarding COVID-19 and/or airborne infectious agents and diseases.' As such, employers within the coverage of the current OSHA ETS (which is currently limited to healthcare) are not currently required to take action or adopt a plan pursuant to the NY HERO Act."

Therefore, whether a physician's office is required to follow the federal OSHA ETS or the NY DOL standard may vary from office to office. For example, a primary care practice that treats patients with suspected Covid-19 would likely be required to comply with the federal OSHA standard, but an orthopedic practice that instructs all patients with suspected Covid to not enter the office may not be required to follow the federal standard but instead would be required to comply with New York's HERO Act standards.

To repeat, physicians should consult with their legal counsel for how best to ensure their offices comply with these state or federal requirements, since they will need to comply with one or the other.

WASHINGTON

Keep Up the Pressure! Urge Congress to Push Back Against Steep Medicare Cuts for 2022

Physicians are again urged to contact their local Representatives of Congress to request that they join a letter ("Dear Colleague" letter) initiated by Reps. Ami Bera, MD (D-CA) and Larry Bucshon, MD (R-IN) demanding action by Congress to prevent a nearly 10% cumulative cut to Medicare physician payment in January 2022. Please ask your Representative to sign-on NOW!

The deadline for the letter is October 7. We thank the following New York delegation members for signing on so far. Delgado (D-Hudson Valley); Garbarino (R-Long Island); Katko (R-Syracuse); and Morelle (D-Rochester).

In what amounts to a "perfect storm" of payment cuts going into effect on January 1, 2022, physician practices face the following stack of Medicare financial hits:

- Expiration of the current reprieve from the repeatedly extended 2% sequester stemming from the Budget Control Act of 2011. Congress took action earlier this year to prevent the 2% cut but that authorization expires 1/1/22.
- Imposition of a 4% Statutory "PAYGO "sequester resulting from passage of the American Rescue Plan Act. Should lawmakers fail to act, it will mark the first time that Congress has failed to waive Statutory PAYGO.
- Expiration of the Congressionally enacted 3.75% temporary increase in the Medicare physician fee schedule (PFS) conversion factor to avoid payment cuts associated with budget neutrality adjustments tied to PFS policy changes.

This would result in a combined **10 %** payment cut on January 1! And all of this comes at a time when physicians are still confronting the pandemic, and practices recover from the enormous emotional and financial impact of the public health emergency. It's time to give New York's and our country's physicians the peace of mind they deserve as they continue to fight on the front lines of the COVID-19 pandemic without having to worry if their practices will survive these potentially catastrophic cuts.

MSSNY has been working together with the AMA and other state and specialty medical associations to prevent these cuts from going forward. Please contact your Representative today and urge them to show their support by signing on to Reps. Bera and Bucshon's "Dear Colleague" letter.

MSSNY Submits Comments Urging Methodology for No Surprises Act that Is Not Biased Towards Insurance Companies

MSSNY President Dr. Joseph Sellers submitted comments on behalf of New York's physicians to the US Department of Health & Human Services regarding regulations to implement portions of the federal No Surprises Act enacted by Congress last December, and in effect January 1, 2022. This effort has been joined by many other medical associations across the country urging similar rules for implementation, including the American Medical Association and state and specialty societies across the country.

The letter notes that MSSNY strongly supports the goal of the regulation to protect consumers, including specifically provisions to help reduce cost-sharing obligations for patients, and provisions to ensure enforcement of the "prudent layperson" standard and other protections impacting upon the delivery of emergency care, However, MSSNY also raised concerns that the proposal to calculate the Qualifying Payment Amount (QPA) to be considered in any Independent Dispute

Resolution (IDR), if implemented as proposed, will be unfairly held artificially low (and be biased towards insurers) since it treats payments to individual physicians equally with payment to large physician practices. MSSNY also urged that there be a far more robust information disclosure requirement imposed on insurers regarding how than QPA was calculated, as well as a detailed process for auditing health insurers to ensure they are being honest in developing this information.

Furthermore, MSSNY raised concerns that the faulty methodology for QPA calculation poses a risk of negative impact on access to care. Many hospitals and other providers rely on out-of-network specialists to cover care, including emergency and urgent care as well as complicated procedures. This is particularly true for rural and urban areas with unmet needs. The letter notes that, if the QPA is fundamentally unfair to physicians, we may see coverage and access to care issues particularly in hospital emergency departments as it may not be feasible for some out-of-network physicians to continue to take call for patients. This was a critical public health aim that New York's similar law sought to address when it passed by the State Legislature in 2014. Given these profound concerns, MSSNY argued that the QPA should not be the priority factor in determining payment under an IDR, and that all factors should be weighted equally.

Additional $25.5 Billion Provider Relief Funding Made Available

The U.S. Department of Health and Human Services (HHS), through the Health Resources and Services Administration (HRSA), recently announced is making $25.5 billion in new funding available for health care providers affected by the COVID-19 pandemic. This funding includes $8.5 billion in American Rescue Plan (ARP) resources for providers who serve rural Medicaid, Children's Health Insurance Program (CHIP), or Medicare patients, and an additional $17 billion for Provider Relief Fund (PRF) Phase 4 for a broad range of providers who can document revenue loss and expenses associated with the pandemic.

Consistent with the requirements included in the Coronavirus Response and Relief Supplemental Appropriations Act of 2020, PRF Phase 4 payments will be based on providers' lost revenues and expenditures between July 1, 2020, and March 31, 2021. According to the HHS press release, PRF Phase 4 will reimburse smaller providers—who tend to operate on thin margins and often serve vulnerable or isolated communities—for their lost revenues and COVID-19 expenses at a higher rate compared to larger providers. PRF Phase 4 will also include bonus payments for providers who serve Medicaid, CHIP, and/or Medicare patients, who tend to be lower income and have greater and more complex medical needs. HRSA will price these bonus payments at the generally higher Medicare rates to ensure equity for those serving low-income children, pregnant women, people with disabilities, and seniors.

For more information, click here: HHS Announces the Availability of $25.5 Billion in COVID-19 Provider Funding | HHS.gov

Hurricane Ida Added to Automatic Extreme and Uncontrollable Circumstances Policy for MIPS

In response to the Federal Emergency Management Agency (FEMA) designation of Hurricane Ida as a major disaster, CMS has determined that the automatic extreme and uncontrollable circumstances (EUC) policy will apply to Merit-based Incentive Payment System (MIPS) eligible clinicians in FEMA-designated disaster areas of Louisiana, Mississippi, New York, New Jersey, and Missouri.

MIPS eligible clinicians in these areas will be automatically identified and receive a neutral payment adjustment for the 2023 MIPS payment year. During the data submission period for the 2021 performance period (January 3, 2022 to March 31, 2022), all 4 performance categories for these clinicians will be weighted at 0%, resulting in a score equal to the performance threshold.

However, if MIPS eligible clinicians in these areas choose to submit data on 2 or more performance categories, they'll be scored on those categories and receive a 2023 MIPS payment adjustment based on their 2021 MIPS final score.

The automatic EUC policy won't apply to MIPS eligible clinicians participating in MIPS as a group, virtual group, or Alternative Payment Model (APM) Entity.

For More Information

Please reference the Extreme and Uncontrollable Circumstances Overview section on the MIPS > About Exception Applications page and review the fact sheet.