# WHAT ORGANIZATIONS NEED TO KNOW ABOUT HIPAA, TELECOMMUTING AND FORCE MAJEURE PROVISIONS IN THE WAKE OF THE CORONAVIRUS.

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# Disclosure

**THE INFORMATION PRESENTED IS NOT MEANT TO CONSTITUTE LEGAL ADVICE. CONSULT YOUR ATTORNEY FOR ADVICE ON A SPECIFIC SITUATION.**

# Headline Highlights

- **The Public Readiness and Emergency Preparedness Act ("PREP Act"),** Pub. L. 109-148 (Dec. 30, 2005), **authorizes the Secretary of Health and Human Services** (the Secretary) **to issue a Declaration to provide liability immunity to certain individuals and entities (Covered Persons) against any claim of loss caused by, arising out of, relating to, or resulting from the manufacture, distribution, administration, or use of medical countermeasures** (Covered Countermeasures), **except for claims involving "willful misconduct"** as defined in the PREP Act.
- A provision of the Families First Coronavirus Response Act, or H.R. 6201, expands liability protections for N95 face masks — which filter out 95% of airborne particles — under the PREP Act of 2005 for emergency use during the outbreak. Those protections will expire Oct. 21, 2024. Thee bill passed by a 90-8 vote and headed for the President's desk to be signed.
- Face masks approved by the U.S. Food and Drug Administration have additional splash protection and **were already immune** from liability claims under the PREP Act. However, the **ones that are approved by just the National Institute for Occupational Safety and Health are not. The latter type comprises the bulk of the face masks on the market and is also used in medical settings.**

# Headline Highlights

- "The U.S. Department of Health and Human Services said Monday [March 16, 2020] that it is investigating a suspicious spike in activity on its network over the weekend, in what security officials called a "cyber incident" that did not disrupt the agency's response to the COVID-19 virus." Notably, HHS oversees the CDC and NIH.
- **Attorney General William Barr issued a directive to federal prosecutors to prioritize investigations of scam artists and hackers looking to exploit the coronavirus pandemic. "The Department of Justice stands ready to make sure that bad actors do not take advantage of emergency response efforts, healthcare providers, or the American people during this crucial time," said Attorney General William P. Barr.**

# Oregon U.S. Attorney Statement

- Oregonian (3/18, Bernstein) reports, "Oregon's U.S. Attorney Billy J. Williams on Wednesday announced he's appointed federal prosecutors to coordinate and lead consumer financial fraud and civil rights violation cases that result from the coronavirus pandemic. '**While Americans work to protect themselves and their loved ones from the threat of COVID-19, some individuals are actively trying to profit off of this emergency,**' Williams said in a prepared statement. 'Equally concerning, we have received reports of alleged civil rights violations stemming from the false belief that certain groups of people are more susceptible to carrying or contracting the virus based on their real or perceived race, ethnicity, employment or other demographic characteristics.'"

# Overview

(1) CoVID-19, allocation of resources & quarantine

(2) HIPAA and disclosures of communicable diseases

(3) Teleworker v. Telehealth considerations

(4) OSHA

*(5) Force majeure* contractual provisions

(6) Compliance Nuggets

(7) Take-aways and Questions

# COVID-19, ALLOCATION OF RESOURCES & QUARANTINE

# Ebola v. COVID-19

**While there are <u>some similarities</u> between Ebola and CoVID-19 (i.e., the virus is transmitted to people from animals, the virus originated outside of the United States and the disease can be fatal), the disparity in the statistics regarding the number of individuals affected is staggering.**

# Ebola

- The first case of Ebola was reported in the Democratic Republic of Congo in 1976.
- The pinnacle of the virus was reached between 2014-2016, with most of the diagnoses and deaths coming from the Guinea, Liberia and Sierra Leone.
- The most recent Ebola outbreak was in the Congo. "The rVSV-ZEBOV vaccine is being used in the ongoing 2018-2019 Ebola outbreak in DRC."
- WHO reported four (4) cases in the United States with one (1) fatality.
- **Early supportive care with rehydration, symptomatic treatment improves survival. There is no licensed treatment proven to neutralize the virus but a range of blood, immunological and drug therapies are under development.**

# Ebola and the Wedding Dress

- Coming Attractions Bridal Shop Case
  - Presbyterian Dallas nurse Amber Vinson was a customer of the Coming Attractions bridal shop of Akron OH after she had helped treat Ebola Patient Thomas Duncan. **She had not yet been diagnosed with the virus**.
  - After Vinson had been diagnosed, state regulators in Ohio temporarily closed the shop as a precaution. Coming Attractions later reopened, but never was able to recover. The owner "sued the hospital, alleging that the hospital failed to prevent transmission of the Ebola virus to the nurse through proper precautions and training, and that the hospital's negligence caused the shop to close due to health concerns and adverse publicity." according to court papers.
  - A trial judge refused to dismiss the complaint against Texas Health Resources, but an appeals court reversed that ruling "Coming Attractions is a "claimant" under the statute, and that its claim against the hospital is a health care liability claim as the statute defines it. **Because Coming Attractions did not file the required expert report, the court of appeals dismissed the lawsuit. The Texas Supreme Court upheld the court of appeals ruling.**

# COVID-19, COV-19 or Coronavirus

- COV-19 was discovered in 2019 in China.
- March 11, 2020, WHO declared CoV-19 a pandemic, which is a global outbreak of disease.
  - The CDC uses the Pandemic Severity Assessment Framework to determine the impact of the pandemic.
  - Two main factors are used to determine the impact of a pandemic. First, the **clinical severity**, or how serious is the illness associated with infection. Second, the **transmissibility**, or how easily the pandemic virus spreads from person-to-person.

- As of March 16, 2020 -
  - total of 167,511 confirmed cases
  - 6606 deaths – most of which have occurred outside of China.

# Healthcare & Allocation of Resources

- Universal Precautions should continue to be utilized by all healthcare workers.
- Concepts related to resource allocation
  - **Libertarian**: everyone should receive healthcare benefits in proportion to what he or she will pay for.
  - **Egalitarian**: everyone should receive health care benefits in equal proportion to his or her medical needs.
  - **Basic decent minimum**: everyone should receive health care benefits in proportion to his or her basic medical needs, but beyond that everyone should receive health care benefits in equal proportion to what he or she will pay.
  - **Social justice** – broad distribution of benefits and burdens in society.

**When a finite number of resources exist, such as ventilators, then allocation of the resources need to be made based on a variety of factors.**

# WHO – "DO THE FIVE"

**(1) hands – wash them often;**

**(2) elbow – cough or sneeze into it;**

**(3) face – don't touch it;**

**(4) feet – stay more than 3 feet apart;**

**(5) Feel sick? Stay home.**

# HIPAA & PUBLIC HEALTH DISCLOSURES

# Who Is Under the Legal Umbrella?

- HIPAA
  - **Covered Entities -** Health Care Providers, Health Plans and Health Care Clearinghouses
  - **Business Associates** – contract w/ Covered Entities
  - **Subcontractors** – contract w/ Business Associates
- TX House Bill 300 (TX HIPAA)
  - Different definition of "covered entity" that encompasses anyone who creates, receives, maintains and transmits PHI.
- Federal Trade Commission
  - Fills the "gap" of the Federal HIPAA definitions. anyone who creates, receives, maintains and transmits PHI.

# Legislative History

- 1996 -HIPAA (Public Law 104-191) – need for consistent framework for transactions and other administrative items.
- 2002 – The Privacy Rule (Aug. 14, 2002)
- 2003 – The Security Rule (Feb. 20, 2003)
- 2009 - Health Information Technology for Economic and Clinical Health ("HITECH") Act, Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Feb. 17, 2009)
- 2009 – The Breach Notification Rule (Aug. 24, 2009)
- 2010 – Privacy and Security Proposed Regulations (Feb. 17, 2010)
- 2013 – Omnibus Rule (Effective March 26, 2013, Compliance Sept. 23, 2013).

# The Federal Trade Commission

- FTC's Health Breach Notification Rule "-requires certain businesses not covered by HIPAA to notify their customers and others if there's a breach of unsecured, individually identifiable electronic health information."
- FTC enforcement began on February 22, 2010.

# General HIPAA Items

- The HIPAA Privacy Rule and Security Rule are still applicable during this pandemic.
- The Privacy Rule has always had an exception for health providers to report certain diseases or conditions of an individual patient to various state and federal government agencies, such as a state's Department of Health and Human Services or the Centers for Disease Control and Prevention (CDC). 45 CFR § 164.512(b)(1)(i).
- The transmission of the patient's information still needs to occur in accordance with the Security Rule.

# Exceptions

- HIPAA allows certain disclosures without the patient's written authorization, including disclosures to other providers or third-party payers for purposes of treatment, payment, or healthcare operations; to family members or others involved in the patient's care or payment if certain conditions are met; or for certain government or public safety concerns if regulatory requirements are satisfied. (45 CFR 164.502, 164.506, 164.510 and 164.512).
- Other disclosures generally require the patient's consent or written authorization. (45 CFR 164.502).

# PII and PHI

- Privacy Rule sections CFR §§ 164.514(b), (c) apply in relation to the de-identification of PHI.
- The HIPAA Privacy Rule sets forth two acceptable de-identification methods: expert determination (an expert is utilized to ascertain that an individual could not be identified); and safe harbor (no actual knowledge that PII, **including biometrics**, can identify an individual).
- Satisfying either method would demonstrate that §164.514(a) has been met and that the likelihood of exposure is slim. Persons should also be familiar with certain exceptions, such as HIPAA's law enforcement exception (45 CFR §164.512) and the protections afforded to whistleblowers and workforce member crime victims (45 CFR §164.502(j)).
- https://www.physicianspractice.com/hipaa/intersection-hipaa-and-illinois-biometric-information-privacy-act

# HHS Coronavirus Bulletin (Feb. 2020)

***"In general, except in the limited circumstances described elsewhere in this Bulletin, affirmative reporting to the media or the public at large about an identifiable patient, or the disclosure to the public or media of specific information about treatment of an identifiable patient, such as specific tests, test results or details of a patient's illness, may not be done without the patient's written authorization[.]"***

# HHS Bulletin Emphasized…

- ***Treatment*** Under the Privacy Rule, covered entities may disclose, without a patient's authorization, protected health information about the patient as necessary to treat the patient or to treat a different patient. Treatment includes the coordination or management of health care and related services by one or more health care providers and others, consultation between providers, and the referral of patients for treatment. See 45 CFR §§ 164.502(a)(1)(ii), 164.506(c), and the definition of "treatment" at 164.501.
- ***Public Health Activities*** The HIPAA Privacy Rule recognizes the legitimate need for public health authorities and others responsible for ensuring public health and safety to have access to protected health information that is necessary to carry out their public health mission. Therefore, the Privacy Rule permits covered entities to disclose needed protected health information without individual authorization: ***To a public health authority; At the direction of a public health authority, to a foreign government agency*** that is acting in collaboration with the public health authority; ***To persons at risk*** of contracting or spreading a disease or condition if other law, such as state law, authorizes the covered entity to notify such persons as necessary to prevent or control the spread of the disease or otherwise to carry out public health interventions or investigations.

# Disclosures to Family, Friends, etc.

- ***A covered entity may share protected health information with a patient's family members, relatives, friends, or other persons identified by the patient as involved in the patient's care. A covered entity also may share information about a patient as necessary to identify, locate, and notify family members, guardians, or anyone else responsible for the patient's care, of the patient's location, general condition, or death. This may include, where necessary to notify family members and others, the police, the press, or the public at large. See 45 CFR 164.510(b).***
- Covered Entities should do the following:
  - Get verbal permission from individuals or otherwise be able to reasonably infer that the patient does not object, when possible; if the individual is incapacitated or not available, covered entities may share information for these purposes if, in their professional judgment, doing so is in the patient's best interest.
  - For patients who are unconscious or incapacitated: A health care provider may share relevant information about the patient with family, friends, or others involved in the patient's care or payment for care, if the health care provider determines, based on professional judgment, that doing so is in the best interests of the patient. **For example, a provider may determine that it is in the best interests of an elderly patient to share relevant information with the patient's adult child, but generally could not share unrelated information about the patient's medical history without permission.**

# Disaster Relief Disclosures

**In addition, a covered entity may share protected health information with disaster relief organizations that, like the American Red Cross, are authorized by law or by their charters to assist in disaster relief efforts, for the purpose of coordinating the notification of family members or other persons involved in the patient's care, of the patient's location, general condition, or death. It is unnecessary to obtain a patient's permission to share the information in this situation if doing so would interfere with the organization's ability to respond to the emergency.**

# *Disclosures to Prevent a Serious and Imminent Threat*

- Health care providers may share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public – consistent with applicable law (such as state statutes, regulations, or case law) and the provider's standards of ethical conduct. See 45 CFR 164.512(j).
- Thus, providers may disclose a patient's health information to anyone who is in a position to prevent or lesson the serious and imminent threat, including family, friends, caregivers, and law enforcement without a patient's permission.
- HIPAA expressly defers to the professional judgment of health professionals in making determinations about the nature and severity of the threat to health and safety. See 45 CFR 164.512(j).

# *Disclosures to the Media or Others Not Involved in the Care of the Patient/Notification*

- In general, except in the limited circumstances described elsewhere in this Bulletin, affirmative reporting to the media or the public at large **about an identifiable patient**, or the disclosure to the public or media of specific information about treatment of an identifiable patient, such as specific tests, test results or details of a patient's illness**, may not be done without the patient's written authorization (or the written authorization of a personal representative who is a person legally authorized to make health care decisions for the patient).** See 45 CFR 164.508 for the requirements for a HIPAA authorization.

# Minimum Necessary

- For most disclosures, a covered entity must make reasonable efforts to limit the information disclosed to that which is the "minimum necessary" to accomplish the purpose.
- Coveredentitiesmayrelyonrepresentationsfromapublichealthauthorityorotherpublicoffici althat the requested information is the minimum necessary for the purpose, when that reliance is reasonable under the circumstances.
  - For example, a covered entity may rely on representations from the CDC that the protected health information requested by the CDC about all patients exposed to or suspected or confirmed to have Novel Coronavirus (2019-nCoV) is the minimum necessary for the public health purpose.
  - **In addition, internally, covered entities should continue to apply their role-based access policies to limit access to protected health information to only those workforce members who need it to carry out their duties. See 45 CFR §§ 164.502(b), 164.514(d).**

# TELEWORKER V. TELEHEALTH CONSIDERATIONS

# Safeguarding Patient Information - Teleworking

- According to the February 2020 HHS Bulletin:

**In an emergency situation, covered entities must continue to implement reasonable safeguards to protect patient information against intentional or unintentional impermissible uses and disclosures. Further, covered entities (and their business associates) must apply the administrative, physical, and technical safeguards of the HIPAA Security Rule to electronic protected health information.**

# Policies & Procedures

- Should already be in place; however, they can be updated.
  - Disaster Recovery and Business Continuity Plans
  - Telecommuting or teleworker
    - a check-list
    - Attestation
    - training
    - Install appropriate software
    - Secure WiFi
  - Employers should keep workforce members up to date on government directives and changes in hours of operation.

# Waiver 1135

- Because the President exercised his authority under the 1135 Waiver when he declared an emergency, in the case of the COVID-19 Pandemic, either pursuant to the Stafford Act or National Emergencies Act and the HHS Secretary declared a public health emergency under Section 319 of the Public Health Service Act, certain actions may be taken.
- "under section 1135 of the Social Security Act, [the Secretary] may temporarily waive or modify certain Medicare, Medicaid, and Children's Health Insurance Program (CHIP) requirements to ensure that sufficient health care items and services are available to meet the needs of individuals enrolled in Social Security Act programs in the emergency area and time periods and **that providers who provide such services in good faith can be reimbursed and exempted from sanctions (absent any determination of fraud or abuse)."**

# Telehealth/Telemedicine

- On March 17, 2020, the HHS Office for Civil Rights (OCR) announced that that it will waive potential HIPAA penalties for **good faith use of telehealth** during the nationwide public health emergency due to COVID-19.
- Effective immediately, this exercise of discretion applies to telehealth provided for any reason, regardless of whether the telehealth service is related to the diagnosis and treatment of health conditions related to COVID-19.
- **Communication Technology Considerations between Covered Entities and Patients**
- ***Permissible***
- •Any non-public facing remote communication product available. This includes applications that allow for video chats, such as Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, or Skype
- –Providers are encouraged to notify patients that these third-party applications potentially introduce privacy risks, and **providers should enable all available encryption and privacy modes when using such applications.**

- ***Non-Permissible***
- **Public facing video communications** such as Facebook Live, Twitch, or TikTok

# Telehealth Applies to Providers

Key Items from CMS update released March 17, 2020

- **Effective Date:** Dates of service on or after March 6, 2020 and continuing throughout the COVID-19 Public Health Emergency
- **Site of Service:** Services provided in all areas of the country, in all settings, including the patients home (Use POS 02)
- **Reimbursement:** **Telehealth visits, which are distinct from e-visits and "check-ins" are considered the same as in-person visits and are paid at the same rate as regular, in-person visits.**
- **Patient Deductible/Co-share:** The Medicare coinsurance and deductible would generally apply to these services. However, the HHS Office of Inspector General (OIG) is providing flexibility for healthcare providers to reduce or waive cost-sharing for telehealth visits paid by federal healthcare programs.
- **Patient Status –New versus Established:** To the extent the 1135 waiver requires an established relationship, HHS will not conduct audits to ensure that such a prior relationship existed for claims submitted during this public health emergency. **Types of Service:** Reasonable & necessary services including E/M services, ESRD, mental/behavioral health and preventive services.
- **Eligible Providers:** Physicians and certain non-physician practitioners such as PA's, NP's and CNM's. Other practitioners, such as certified nurse anesthetists, licensed clinical social workers, clinical psychologists, and registered dietitians or nutrition professionals may also furnish services within their scope of practice and consistent with Medicare benefit rules that apply to all services.
- **Telecommunication Technology:** An interactive audio and video telecommunications system that permits real-time communication between the provider and patient who are located at different sites.

# CMS Telehealth Coding

Summary of Medicare Telemedicine Services

| TYPE OF SERVICE | WHAT IS THE SERVICE? | HCPCS/CPT CODE | Patient Relationship with Provider |
|---|---|---|---|
| **MEDICARE TELEHEALTH VISITS** | A visit with a provider that uses telecommunication systems between a provider and a patient. | Common telehealth services include:<br>• 99201-99215 (Office or other outpatient visits)<br>• G0425-G0427 (Telehealth consultations, emergency department or initial inpatient)<br>• G0406-G0408 (Follow-up inpatient telehealth consultations furnished to beneficiaries in hospitals or SNFs)<br>For a complete list: https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/Telehealth-Codes | For new* or established patients.<br>*To the extent the 1135 waiver requires an established relationship, HHS will not conduct audits to ensure that such a prior relationship existed for claims submitted during this public health emergency |
| **VIRTUAL CHECK-IN** | A brief (5-10 minutes) check in with your practitioner via telephone or other telecommunications device to decide whether an office visit or other service is needed. A remote evaluation of recorded video and/or images submitted by an established patient. | • HCPCS code G2012<br>• HCPCS code G2010 | For established patients. |
| **E-VISITS** | A communication between a patient and their provider through an online patient portal. | • 99431<br>• 99422<br>• 99423<br>• G2061<br>• G2062<br>• G2063 | For established patients. |

# Key Considerations When Selecting a Code

- **New Patient:** An individual who did not receive any professional services from the physician/non-physician practitioner (NPP) or another physician of the same specialty who belongs to the same group practice within the previous 3 years.
- **Established Patient:** An individual who received professional services from the physician/NPP or another physician of the same specialty who belongs to the same group practice within the previous 3 years.
- Virtual check-ins **(G2012, G2010)** and e-visits **(99421-99423, G2061-G2063)** require that the patient be an established patient, even with the Coronavirus exceptions.
- A **Medicare Telehealth visit does not have that same language.**

# COVID-19 ICD-10 Coding Guidelines
## Effective February 20, 2020 –September 30, 2020

**Exposure to COVID-19**

- **Z03.818** (Encounter for observation for suspected exposure to other biological agents ruled out)
  - Use for cases with concern about possible exposure to COVID-19, but is ruled out after evaluation.
- **Z20.828** (Contact with and (suspected) exposure to other viral communicable diseases)
  - Use for cases with actual exposure to someone who is confirmed to have COVID-19.

**Signs and Symptoms**

- For patients presenting with any signs/symptoms (such as fever, etc.) and where a definitive diagnosis has not been established, assign the appropriate code(s) for each of the presenting signs & symptoms such as:
  - **R05** (Cough)
  - **R06.02** (Shortness of breath)
  - **R50.9** (Fever, unspecified)

**Pneumonia**

- For a pneumonia case confirmed as due to the 2019 novel coronavirus (COVID-19), assign codes:
  1. **J12.89** (Other viral pneumonia)
  2. **B97.29** (Other coronavirus as the cause of diseases classified elsewhere)

**Bronchitis**

- Acute bronchitis confirmed as due to COVID-19, assign codes:
  1. **J20.8** (Acute bronchitis)
  2. **B97.29** (Other coronavirus as the cause of diseases classified elsewhere)
- Bronchitis not otherwise specified (NOS) due to COVID-19, assign codes:
  1. **J40** (Bronchitis, not specified as acute or chronic)
  2. **B97.29** (Other coronavirus as the cause of diseases classified elsewhere)

# Medicare Waivers May Not Apply to Medicaid & Private Insurers – Subject to Change

| | | |
|---|---|---|
| Anthem Blue Cross | 3/11/20 | --Cost-sharing including, but not limited to, co-pays, deductibles, and coinsurance is being waived for all medically necessary screening and testing for COVID-19, including hospital (including emergency department), urgent care visits, and provider office visits where the purpose of the visit is to be screened and/or tested for COVID-19.<br>--Anthem has their own telehealth provider, LiveHealth Online<br>https://providernews.anthem.com/california/article/information-from-anthem-for-care-providers-about-covid-19-5 |
| Blue Shield of California | 3/16/20 | --Provides Teladoc Health Virtual Care; waives copays & coinsurance for any Teledoc Health visits for members enrolled in a commercial plan through 5/31/2020 https://news.blueshieldca.com/2020/03/16/teladod-covid-19 |
| BCBSTX | undated | --Many members have telehealth benefits. For those members, telehealth visits will be covered as a regular office visit for providers who offer the service through 2-way, live interactive telephone or digital video consultations.<br>--Some plans also provide access to MDLive or a similar approved vendor with a network of physicians who provide telehealth services. https://www.bcbstx.com/provider/covid-19-preparedness.html |
| BCBSIL | 3/10/20 | --Expanded telehealth program to include 99441-99443 & 99421-99423<br>https://www.bcbsil.com/provider/providersearch.html?keyword=covid&x=0&y=0&state=il&portal=&collectionType=il_prod_provider |
| Cigna | 3/13/20 | --Waives customer cost sharing for office visits related to COVID-19 testing through 5/31/2020<br>--Waives customer cost sharing for telehealth screenings for COVID-10 through 5/31/2020<br>--Makes it easier for customers to be treated virtually for routine medical examinations by in-network physicians<br>--Applies to all plans except self-insured plans administered by Cigna https://www.cigna.com/newsroom/news-releases/2020/cigna-takes-additional-actions-to-protect-customers-and-communities-against-covid-19 |
| UHC | 3/17/20 | --Effective immediately, UHC is expanding policies on telehealth services for MA, Medicaid, and commercial members.<br>--UHC will waive originating site restrictions so providers can bill for telehealth services performed while a patient is at home. -<br>--This change is in effect from now until 4/30/2020. Further instruction can be found at<br>https://www.uhcprovider.com/en/resource-library/news/provider-telehealth-policies.html |
| Medicaid Colorado | 3/16/20 | --The department currently allows for telemedicine coverage, but currently do not have authority to cover services delivered over the phone. They are working with CMS to have phone services covered.<br>https://www.colorado.gov/pacific/sites/default/files/COVID%2019%20Telemedicine%20FAQs%203.15.2020.pdf |

# OSHA

# Occupational Safety & Health Act of 1976

"To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health."

# OSHA COVID-19 Guidance

- "This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace."
- The Occupational Safety and Health Administration (OSHA) developed this COVID-19 planning guidance based on traditional infection prevention and industrial hygiene practices. It focuses on the need for employers to implement engineering, administrative, and work practice controls and personal protective equipment (PPE), as well as considerations for doing so.
- OSH Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.
- Check with your State Plan, as applicable, for more information.
-

# OSHA Factors

- Where, how, and to what sources of SARS-CoV-2 might workers be exposed, including:
  - The general public, customers, and coworkers; and
  - Sick individuals or those at particularly high risk of infection (e.g., international travelers who have visited locations with widespread sustained (ongoing) **COVID-19 transmission, healthcare workers who have had unprotected exposures to people known to have, or suspected of having, COVID-19).**
  - Workers' individual risk factors (e.g., older age; presence of chronic medical conditions, including immunocompromising conditions; pregnancy).
  - Occupational safety and health professionals use a framework called the "hierarchy of controls" to select ways of controlling workplace hazards. In other words, the best way to control a hazard is to systematically remove it from the workplace, rather than relying on workers to reduce their exposure.
  - Use a **surgical N95 respirator** when **both respiratory protection and resistance to blood and body fluids is needed.**

# OSHA's Bloodborne Pathogen Standards

- OSHA's Bloodborne Pathogens standard (29 CFR 1910.1030) applies to occupational exposure to human blood and other potentially infectious materials that typically do not include respiratory secretions that may transmit SARS-CoV-2. However, the provisions of the standard offer a framework that may help control some sources of the virus, including exposures to body fluids (e.g., respiratory secretions) not covered by the standard.
- Worker Risk Occupational Exposure Levels (Industry Type, contact)
  - Very high
  - High
  - Medium
  - Low

# FORCE MAJEURE

# General Definition

***Black's Law Dictionary* defines *force majeure* as, "[a]n event or effect that can be neither anticipated nor controlled."**

# *Force majeure* clauses

- Allocate risk between the contracting parties if performance becomes impossible or impracticable because of an unforeseen event.
- Courts first look to the "four corners" of the document.
- Industry customs, as well as the relationship between the parties is also considered.
- An "act of God" could be and has been interpreted differently than a "emergency measures"
  - For example, if the parties have a limited and closed list then it will depend upon the events specified in the contract. If the contract includes pandemics, epidemics or quarantine then it will almost certainly be applicable given that COVID-19 was declared by WHO as a pandemic and several countries have imposed quarantines in attempts to contain the spread of the virus.

# Questions Companies Should Ask

- **Relevant questions companies should address are:**
  - (i) whether the failure to perform contractual obligations due to COVID-19 related causes constitutes a breach of contract or default,
  - (ii) whether there is an exemption under contractual force majeure provisions for such pandemic causes,
  - (iii) whether government or quasi-government (Civil Authority) directed closures and shut downs due to COVID-19 are covered by insurance and
  - (iv) whether events caused by or related to COVID-19 constitute a material adverse change under the terms of a contract.

# If your contract is silent as to force majeure…

- Courts look to the common law.
- The Uniform Commercial Code (UCC) excuses a seller from timely delivery or for non-delivery of goods where its performance has become impracticable either:
  - (A) By the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made; or
  - (B) By compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

# COMPLIANCE NUGGETS

# Considerations

- Everyone should take the suggested steps of increased hand-washing, wiping down surfaces, social distancing, sneezing or coughing into the elbow.
- HIPAA still applies, as well as other laws that deal with the privacy and security of sensitive data.
- Use the minimum necessary rule.
- Telecommuting requires the utilization of the same technical, administrative and physical safeguards, as well as training.
- Force majeure clause interpretation depends, first and foremost, upon the contractual language.
- Keep employees up to date in terms of guidance from the government, changes in operations.
- Use universal precautions, especially in health care and read the medical records.

# Thank you and Questions

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# Resources

- https://www.medpagetoday.com/practicemanagement/medicolegal/48381
- https://www.physicianspractice.com/ehr/ebola-misdiagnosis-raises-liability-concerns
- https://www.hhs.gov/sites/default/files/hippa-disclosure-chcklist102314.pdf
- https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf
- https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf
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