PUBLICATION

Temporary Regulatory Relief for North Carolina Health Care Providers Responding to Helene

Authors: William F. Maddrey, Bahati Mutisya, Kimberly M. Randolph, Iain M. Stauffer, Matthew W. Wolfe
October 01, 2024

North Carolina Governor Roy Cooper declared a State of Emergency on September 25, 2024, due to the impending impact of Tropical Storm Helene (Helene). On September 28, 2024, a Federal Major Disaster Declaration (FEMA-4827-DR) was issued following Helene. On September 29, 2024, the Centers for Medicare & Medicaid Services (CMS) declared a public health emergency in affected areas of North Carolina and provided several blanket waivers for health care providers to enhance flexibility in care delivery in order to maintain services and compliance during the public health emergency. These waivers (detailed below) provide health care facilities with flexibility in service delivery, staffing, and patient care, aimed at alleviating the strain caused by the disaster. Additionally, the United States Department of Health and Human Services, the North Carolina Department of Health and Human Services, and other regulatory bodies have announced other relief efforts aimed at reducing administrative burden as providers care and treat those in need.

North Carolina Medicaid Flexibilities

North Carolina Medicaid has implemented temporary flexibilities due to Helene. Earlier today, NC Medicaid published an Update on NC Medicaid Temporary Flexibilities Due to Hurricane Helene – October 1, 2024, which extended the flexibilities from September 26, 2024, to October 15, 2024. The current flexibilities include:

- Reimbursement for medically necessary services without prior authorization (PA)
- Overrides for medication PA requirements
- Expedited nursing home admissions for displaced individuals
- Early prescription refills
- Flexibilities for Medicaid beneficiaries needing personal care, and waiver adjustments for Innovations and Traumatic Brain Injury services
- Disaster relief applications available for providers not currently enrolled in NC Medicaid
- Expanded ability for hospital swing beds
- Private Duty Nursing flexibilities
- A reminder that the Hospital at Home program remains active

North Carolina Professional Licensing Board Actions

In response to Helene, several professional licensing boards in North Carolina took swift action to facilitate disaster relief efforts. For example, the NC Medical Board activated Limited Emergency Licensure for out-of-state physicians and physician assistants (PAs) to volunteer their services during the recovery. North Carolina-licensed physicians may volunteer without additional licensure requirements, while PAs still need to have a supervising physician per state law. Similarly, the North Carolina Board of Nursing implemented measures to support nurses providing care during the emergency, including waiving certain licensing requirements for out-of-state nurses under emergency protocols. Nurses were encouraged to coordinate efforts through official

disaster relief channels before self-reporting to affected areas. These actions will allow medical professionals to quickly deploy to assist communities while maintaining legal and regulatory oversight.

North Carolina Facility Licensure Changes

Although the North Carolina Department of Health and Human Services has not issued licensure waivers or flexibilities yet, it is widely anticipated that they will do so shortly. We will provide updates if and when those are released.

CMS Blanket Waivers

CMS has issued blanket waivers impacting several Medicare-certified provider types.

1. General CMS Waivers for Health Care Facilities

- **Emergency Medical Treatment and Labor Act (EMTALA) Waiver**: CMS waived the enforcement of EMTALA (Section 1867(a) of the Social Security Act), allowing hospitals, including psychiatric hospitals and critical access hospitals (CAHs), to screen patients at offsite locations, provided it aligns with state emergency preparedness or pandemic plans.
- **Telemedicine**: CMS waived provisions under 42 CFR §482.12(a)(8)-(9) for hospitals and §485.616(c) for CAHs, allowing hospitals to more easily furnish telemedicine services through agreements with offsite hospitals. This waiver will increase access to care for patients, especially those requiring specialty services, during the emergency.
- **Medical Staff Credentialing**: Hospitals may allow physicians whose privileges are set to expire to continue practicing, and newly hired physicians can begin work without full medical staff or governing body approval. This waiver provides flexibility for workforce shortages.

2. Critical Access Hospitals (CAHs)

- **Licensure and Location Flexibility**: CMS deferred staff licensure requirements to state laws, allowing facilities more flexibility in deploying staff across different locations.
- **Bed and Length of Stay Limits Waived**: The usual limit of 25 beds for CAHs and the 96-hour annual average length of stay per patient requirement have been waived to allow facilities to handle increased patient volume.

3. Hospital and Long Term Care Facilities

- **Swing-Bed Waiver**: CMS granted a waiver under section 1135(b)(1) of the Act allowing hospitals to use beds normally reserved for acute care patients to provide Skilled Nursing Facility (SNF) care, provided the hospital meets the applicable SNF standards. This allows hospitals to transition patients who no longer need acute care but cannot be placed in a SNF.
- **Physical Environment Waivers**: Hospitals and long term care facilities are permitted to use spaces not typically intended for patient care, such as conference rooms and dining areas, provided the space is safe and approved by the state.

4. Skilled Nursing Facilities (SNFs)

- **Three-Day Prior Hospitalization Waiver**: Under Section 1812(f) of the Social Security Act, CMS is allowing SNFs to admit Medicare beneficiaries without the usual requirement of a three-day prior inpatient hospitalization. This waiver also includes a one-time renewal of SNF coverage for beneficiaries who were delayed in completing their benefit period due to the emergency.
- **Telehealth and Physician Visits**: CMS is waiving the requirement for in-person physician visits in SNFs, allowing for visits to be conducted via telehealth, reducing the strain on health care providers.

5. Home Health Agencies (HHAs)

- **Initial Assessments**: HHAs can now perform initial Medicare-covered patient assessments remotely or via record review, helping to reduce the need for in-person visits during the emergency.
- **OASIS Submission Deadlines Extended**: CMS has extended the five-day comprehensive assessment deadline to 30 days and modified the 30-day OASIS submission requirement, permitting delays during the public health emergency.

6. Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS)

- **DMEPOS Replacement**: If durable medical equipment (DME) is lost, destroyed, or damaged during the disaster, CMS is waiving the face-to-face requirement, a new physician's order, and new medical necessity documentation for replacements. Suppliers must provide a narrative explanation of the need for replacement due to the emergency.

7. Hospices

- **Assessment Timeframe Extension**: CMS is extending the timeframe for updating comprehensive hospice patient assessments from 15 to 21 days, though initial and ad-hoc assessments must still be completed based on patient needs.

8. Practitioner Licensure and Enrollment

- **Out-of-State Practitioner Waiver**: CMS is allowing practitioners who are licensed in another state to provide services in North Carolina without requiring additional licensure, provided they meet certain criteria (e.g., enrollment in Medicare, valid licensure, and participation in emergency relief efforts).
- **Provider Enrollment Flexibility**: Screening requirements for provider enrollment are waived, including application fees, fingerprint-based criminal background checks, and site visits. This allows providers to render services outside their state of enrollment during the emergency

These waivers enable health care facilities to adapt to the operational challenges presented by Helene and ensure continuity of care for patients despite the public health emergency. Health care providers should utilize these flexibilities where necessary but strive to return to normal operations as soon as feasible.

HIPAA

The U.S. Department of Health and Human Services issued a limited waiver of HIPAA sanctions during the public health emergency for Helene in North Carolina. This waiver allows covered entities to bypass certain HIPAA Privacy Rule requirements, such as obtaining patient consent to share health information with family or emergency personnel. The waiver is effective for 72 hours after hospitals implement disaster protocols. The HIPAA Privacy Rule still allows sharing necessary health information for treatment, public health activities, and preventing imminent threats. More details are available here.

Disaster Relief Funding May Be Available to Some NC Health Care Providers

Although health care providers are currently focused on their patients and staffs, it is also important to remember that some may be eligible for significant federal support to cover certain emergency expenses and the cost of "repairing, restoring, reconstructing, or replacing" damaged facilities. Potentially eligible providers include:

- Public entities (e.g., local and state governments, public hospitals, public school districts); or

- Private non-profit entities that provide governmental-type services or essential social services (e.g., utilities, hospitals, custodial/long term care facilities, private educational facilities, houses of worship, community centers open to the public).

Providers' eligibility to receive this assistance (and to retain it) is jeopardized if they do not comply with federal regulations, including those applicable to procurements funded by federal grants, which are enforced strictly.

* * *

Given the rapidly evolving situation on the ground and the emerging public health and regulatory issues, we anticipate the above guidance will change and that we will see further regulatory relief efforts directed at health care providers. If you have any questions or would like to discuss further, please contact a member of Baker Donelson's Health Law Team or Disaster Recovery and Government Services Group.