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*Presenting a live 90-minute webinar with interactive Q&A*

# Healthcare Providers & COVID-19: Telemedicine, Facility Preparedness, Supply Concerns, Staffing Policies

Ensuring Pandemic Readiness in the Face of Novel Coronavirus

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THURSDAY, APRIL 16, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Sandra M. DiVarco, Partner, **McDermott Will & Emery**, Chicago

Lisa Schmitz Mazur, Partner, **McDermott Will & Emery**, Chicago

Carole A. Spink, Partner, **McDermott Will & Emery**, Chicago

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# STRAFFORD WEBINAR

## Speakers:

Sandra DiVarco, Partner | Chicago

Lisa Schmitz Mazur, Partner | Chicago

Carole Spink, Partner | Chicago

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# SPEAKERS



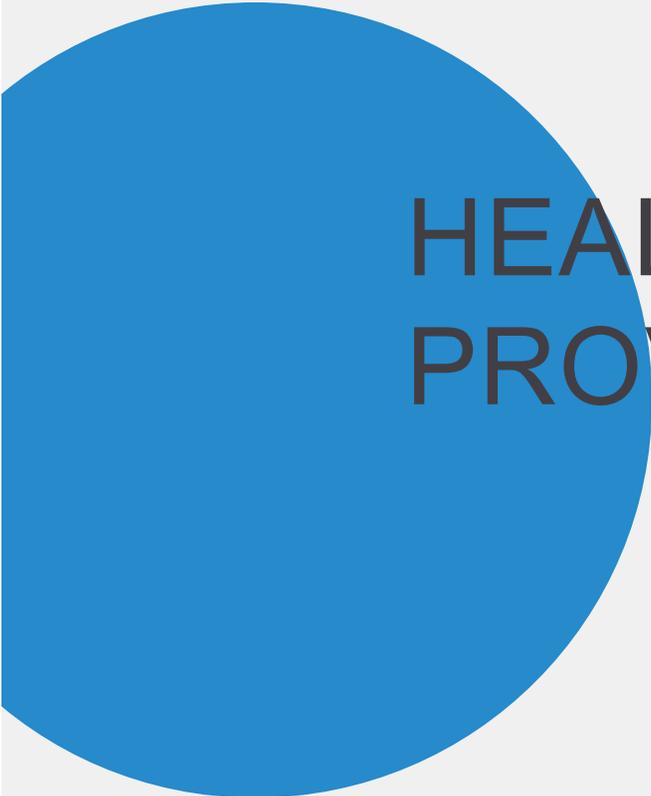
**Sandra DiVarco** focuses her practice on the representation of hospitals and health systems. She has counseled health care facility and system clients regarding all aspects of health law transactions and health system restructurings. In addition to maintaining an active transactional practice, Sandy has a deep knowledge of regulatory, licensing and accreditation issues of particular concern to health care providers in today's heightened enforcement climate. One of the partners leading McDermott's Coronavirus Resource Center, Sandy is involved in COVID-19 related matters for hospital and health care clients across the country.



**Lisa Schmitz Mazur** advises health care providers and technology companies on a variety of legal, regulatory and compliance matters. She advises a variety of health care providers and technology companies involved in "digital health" – the intersection of health software applications, analytical tools, medical technology and electronic data assets enabled by the Internet and mobile devices – on the applicable legal and regulatory infrastructure, with a particular focus on telehealth, telemedicine, mobile health and consumer wellness programs. Lisa also advises hospitals, health systems, skilled nursing facilities, physician practices, commercial payers, consultants and vendors on a wide range of business, legal and regulatory issues.



**Carole Spink** focuses her practice on international and domestic employment law counseling. Carole advises on appropriate employment structures, onboarding requirements, employment agreements, handbooks and policies, bonus and commission plans, expats, non-competes, reductions in force and terminations. She has extensive experience handling employment issues in mergers and acquisitions, spin-offs, corporate reorganizations, outsourcings as well as post acquisition integration matters. She also advises on cross-border employment compliance.



# HEALTHCARE PROVIDERS & COVID-19

## HOW IS US HEALTH CARE RESPONDING TO COVID-19?

- When we agreed to do this webinar, we were in a very different place – we are past “preparedness” and well into “implementation”
- Those in the trenches are learning valuable – and costly lessons about our ability to respond to a global pandemic
- Healthcare will be changed forever by the lessons learned
  - Bed capacity and surge potential
  - Privacy
  - FDA/government processes
  - Care for the most vulnerable/care rationing
  - Telemedicine
  - Regulatory complexity (and complexities of regulatory relief)

# WHAT IS HAPPENING IN THE TRENCHES?

- Hospitals handling onslaught of patients with “influenza like illness” (ILI) and potential and actual COVID-19 cases
  - Shortage of anticipated need for ICU and inpatient beds
  - Emergency Preparedness Plans off the shelf
  - Staffing – retired and other licensed health care professionals asked to volunteer
  - Space – “pop-up” locations, Hospitals Without Walls
  - Testing limitations, presumed v. confirmed cases, new testing modalities/antibody testing
  - EMTALA and emergency services
- Regulations and regulatory flexibility related to COVID-19 for providers generally
  - Guidance
  - Waivers
  - State/Federal

# THE OTHER SIDE OF THE LEDGER

- Hospitals and Other provider types
  - Limitations on non-essential procedures v. treatments and services (state/federal)
  - PPE limitations
  - What is “non-essential”?
  - Pros and Cons
  - Irony of furloughs at the same systems that are in need of ICU/ED staff
  - Novel use of facilities to build capacity

# REGULATORY ACCOMMODATIONS TO THE PANDEMIC

- Flexibility

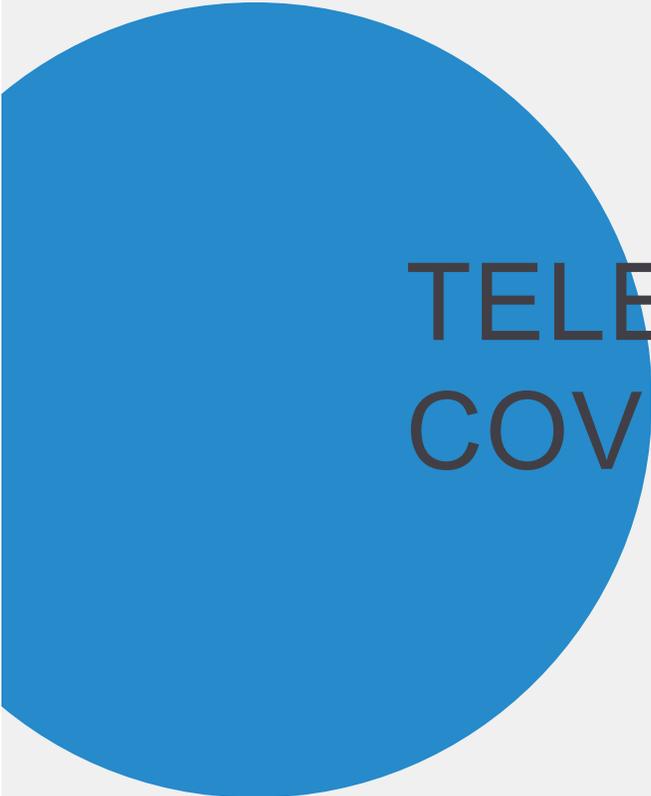
- Interpretive guidance, i.e., QSO memos for CMS
- States “looking past” issues
- Near-cessation of non-emergent state, CMS and accreditation organization
- Survey activity

- Waivers

- Federal – Section 1135 Waivers (what they are and are not)
- State – Waivers applicable to state law
- Medicare v. Medicaid processes
- Provider action items

# OTHER ISSUES OF INTEREST

- Immunity Provisions
  - Federal v. State
  - Civil v. Criminal
  - COVID-19 care focused
- Care Rationing and Resource Allocation
  - Mechanisms hospitals are planning/using
  - Intersection of law and medical ethics
  - OCR and other government statements



# TELEHEALTH AND COVID-19

# OVERVIEW OF RECENT ACTIONS IMPACTING TELEHEALTH

## Refresher on Vehicles:

- Public Health Emergency Declared: January 27, 2020
- Three bills from congress (Coronavirus Preparedness and Response Supplemental – 3/6; Families First Coronavirus Response Act- 3/18; Coronavirus Aid, Relief, Economic Security Act (CARES) – 3/27)
- Numerous Administrative Actions:
  - Waivers (1135 and 1115)
  - Guidance
  - Interim Final Rules
  - Spans many different agencies (CMS, OCR, DEA, OIG, for example)
- State Actions

# OVERVIEW OF RECENT ACTIONS

## Changes to Telehealth:

- Changes Broadly Applicable Across Provider Types
  - Originating site
  - Telehealth codes added
  - Payment rates
  - Audio-visual telecommunications requirements
    - Audio-only E/M codes added
  - Patient/Doctor relationship
  - Provider enrollment
- Regulatory Changes Providing Increased Flexibility to Use Telemedicine in Place of In-Person Requirements
  - Direct supervision
  - Diagnostic testing/review
  - Remote Patient Monitoring
  - NCD/LCD

# STATE LICENSURE

- Initial phase of activity may be over
  - Most states have taken action
- Governors, departments of health, licensure boards continue to refine
  - Narrow statements broadened, process being created, etc.
- State action is not consistent across the country

# COMPARISON

- Delaware

- Practitioners with out of state licenses who, if licensed in Delaware could practice telemedicine, are permitted to practice telemedicine in Delaware
- Limitations on telemedicine-based prescriptions are suspended

- Michigan

- Individual who meets the requirements for licensure in Michigan can render medical care without a license during a disaster
- The exemption does not allow unlicensed individuals to prescribe controlled substances

- Nevada - ?

- Licensure requirements for out of state licensed providers is temporarily “waived” by executive directive
- Before a provider can direct or manage care, render a diagnosis or write a prescription via telemedicine, the provider must hold a valid “license or certificate to practice” in Nevada

- New Jersey

- Out of state licensed practitioners can provide telemedicine services
  - Patients with pre-existing relationship; or
  - To screen, diagnose or treat COVID-19

# VARIABLES

Types of Providers

Waiver / Expedited Licensure

Filing Requirements

Timing of Filing Requirements

Services Permitted

Modality of Services

Multiple Pathways

# FUNDING OPPORTUNITIES

As provided through CARES:

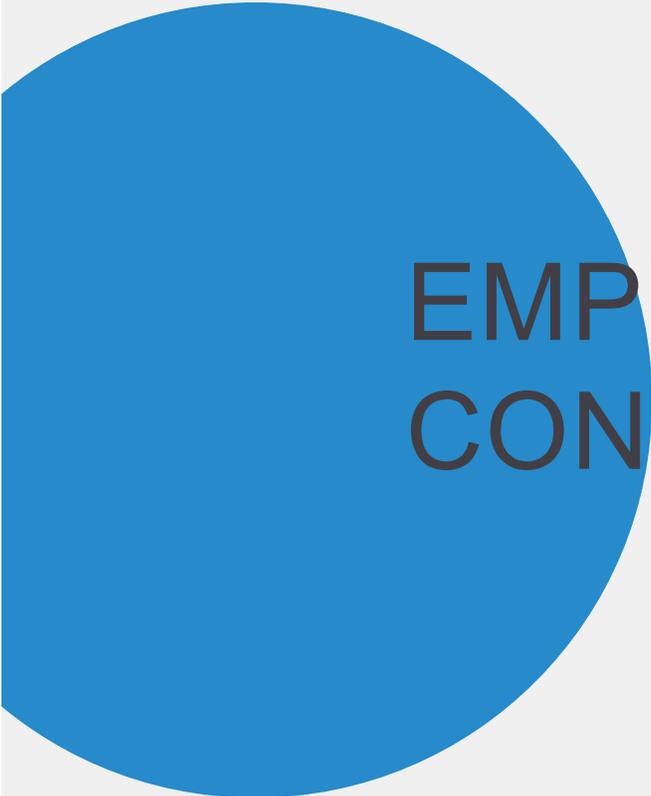
## HRSA

Telehealth Network Grant Program

Telehealth Resource Centers Grant Program

## FCC

\$200 million for the FCC to support healthcare providers addressing COVID-19 by providing telecommunications services, information services and devices necessary to enable the use of telehealth services during the PHE.



# EMPLOYMENT CONSIDERATIONS

## DEVELOP A COMPREHENSIVE STRATEGY

**Healthcare employers should have a comprehensive strategy in place for handling the challenges raised by COVID-19. Recommended elements include:**

- A dedicated COVID-19 Team (ideally represented by the major organizations of the company)
- Safety protocols for COVID-19 issues such as exposure, symptoms, positive tests
- Proposed solutions for immediate issues likely to arise
- Analysis and consideration of potential longer term issues (retention arrangements, hiring decisions, or conversely compensation adjustments, temporary furloughs)
- Keeping current on newly enacted laws
  - Spotlight on FFCRA and CARES Act

## FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

- Effective April 1, 2020 – December 31, 2020
- Covered employers
- EPSLA
- EFMLEA
- Questions, questions, questions!

In the days between signing of the law (March 18, 2020) and effective date (April 1, 2020), employers needed to rely on Q&As, which were posted without schedule leading up to April 1. On April 1, the DOL published its temporary regulations to implement the FFCRA.

## DOL REGULATIONS ON THE FFCRA

- Definitions and the ability to exclude employees who are healthcare providers and emergency responders
  - For the purposes of Employees who may be exempted from paid sick leave or paid expanded family and medical leave under the FFCRA, the definition of “health care provider” is very broad

NOTE: Election to exclude does not apply to regular FMLA leave or emergency sick leave where a healthcare provider has advised the employee to self-quarantine due to concerns related to COVID-19.

## DOL REGULATIONS ON THE FFCRA

- Number of employees and timing of leaves
- Small employer exemption
  - Intersection of EFMLEA and FMLA
  - Notice (Employer and Employee)
- Employer Poster
- Employee Documentation of Need for Leave
- Recordkeeping

## CARES ACT – EXPANDED UNEMPLOYMENT BENEFITS

- Extends to individuals not traditionally qualified for benefits including self-employed and independent contractors
- Extra \$600/week in benefits through July 31, 2020
- Funding to eliminate the traditional waiting period (1 week)
- 13 extra weeks of benefits will be added on to the existing number of weeks of state benefits
- \$100 million of funding to states to support “short-term compensation” programs (employees receive a pro-rata UI benefit for reduced hours)

## CARES ACT – EMPLOYEE RETENTION TAX

- Delay employer portion of Social Security taxes over 2 years
- Employee Retention tax credit under specific circumstances
- Availability of credits turns on the number of employees
- Limitations

# LOOKING AHEAD...

- Make sure your COVID-19 Task Force stays current on all developments
- Ensure regular communication with employees
- Make sure employees understand the resources available to them, including medical benefits, employee assistance programs, and prescription drugs
- Start planning for return to work / business operations
- Consider potential need for longer term measures such as staff augmentation, retention arrangements, hiring decisions, or conversely compensation adjustments, temporary furloughs and RIFs

# CORONAVIRUS RESOURCE CENTER

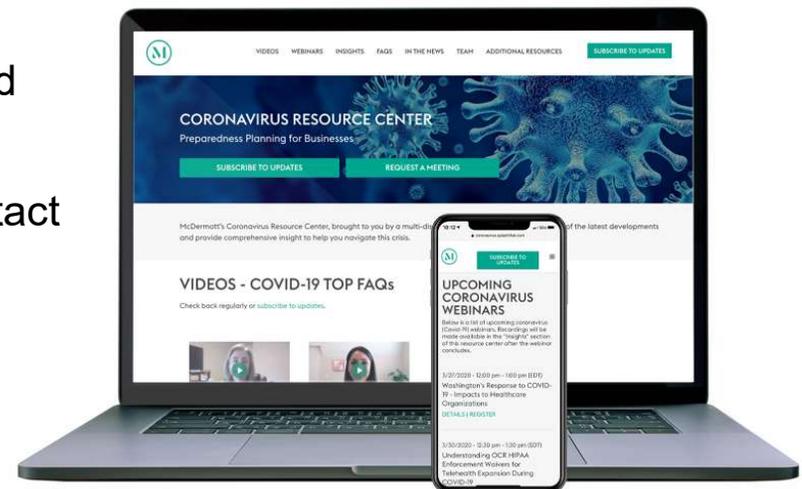
The McDermott Coronavirus Resource Center includes information on the latest developments and comprehensive insight for:

- Employers in all industries
- Those on the front lines caring for patients
- Teams delivering and developing diagnostics and vaccines
- Individuals traveling for business or in close contact with individuals who travel or may have been affected.
- And much more.

**Preparedness and prevention are crucial.**

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