

Alert | Health Care & FDA Practice



June 2019

2019 Colorado Health Care Legislative Update

The 2019 session of the Colorado Legislature adjourned May 3, and this year's legislature was very active in the health care space. Among the many changes to Colorado health care law are bills affecting home caregiver wages, out-of-network hospital billing, licensing requirements for freestanding emergency departments, and a new prohibition on conversion therapy. This GT Alert provides a summary of some of the most impactful health care bills that passed this session, organized by provider type.

General Applicability

HB19-1174: Out-of-Network Provider Disclosures

- Requires health insurance carriers, health care providers, and health care facilities by Jan. 1, 2020, to begin providing patients covered by health benefit plans with information about the potential impact of receiving services from an out-of-network provider or facility.
- Requires certain regulatory agencies to promulgate rules that specify the requirements for disclosures to consumers, including the timing, format, and contents, and language in the disclosures.
- Establishes the reimbursement amount insurance carriers must pay to out-of-network providers that provide health care services to covered persons at an in-network facility and for out-of-network providers or facilities that provide emergency services to covered persons.
- Prohibits “balance billing” patients who receive covered services from out-of-network providers at an in-network facility or who receive emergency services from out-of-network providers or facilities.

SB19-201: Provider Communication Following Patient Death or Injury

- Establishes a formal process to begin “open discussion” between a patient and a health care provider or health facility after an adverse health care incident.
- Provides that communications between a patient and provider or facility and made during “open discussions” are privileged and confidential, are inadmissible as evidence in any subsequent proceedings arising directly out of the adverse health care incident, and are not subject to discovery, subpoena, or other means of legal compulsion for release.
- To initiate protected communications, a health care provider (or a health care provider jointly with a health care facility) may, within 180 days of discovery of the adverse health care incident, provide the affected patient with written notice of the desire to enter into an open discussion. The notice must include an explanation of the patient’s right to receive copies of medical records, a statement regarding the patient’s right to seek legal counsel, a copy of certain relevant statutes, and notice that communications made in the course of the open discussion are protected and not discoverable in a legal proceeding.

Physicians and Physician Assistants

HB19-1095: Physician Assistant Supervision and Liability

- Adds definitions that deal with physician assistant supervisory requirements and liability, depending on the physician assistant’s level of experience. Notably, for physician assistants with less than three years of experience, after that physician assistant completes 160 working hours under supervision of a supervising physician, such supervising physician must still remain available to the physician assistant via a telecommunication device at all times when the physician assistant is working. For physician assistants with more than three years of experience practicing in Colorado, such physician assistant and a supervising physician must enter into a practice agreement that includes certain required provisions. And, HB19-1095 includes specific supervision requirements for physician assistants who have more than one year of experience, but are changing specialty.
- Provides that a physician assistant who has practiced for at least three years may be liable for damages related to the physician assistant’s negligent conduct, unless such conduct is a result of a direct order from a supervising physician.
- Requires physician assistants who have practiced for at least three years to maintain professional liability insurance in an amount of at least \$1,000,000 per claim/\$3,000,000 in the aggregate.
- Increases the number of physician assistants that a physician can supervise at any one time from four to eight, without needing to obtain specific approval from the Medical Board.
- A physician can supervise over four physician assistants at any one time only with the physician’s express agreement; an employer cannot require that a physician supervise more than four physician assistants at any one time as a condition to employment.
- Increases the number of members on the Medical Board from 16 to 17, and increases the number of physician assistants on the Medical Board from one to two.
- Adds a physician assistant as a member of the Medical Board’s licensing panel.

HB19-1131: Prescription Drug Cost Education

- In the context of prescription drug marketing, this bill requires that manufacturers and any representative of a manufacturer provide information about the wholesale acquisition cost of a prescription drug when providing information about that drug to a health care provider licensed to prescribe controlled substances or prescription drugs.
- When providing wholesale prescription drug price information, the manufacturer and any representative thereof must also provide a list of at least three generic prescription drugs from the same therapeutic class and the wholesale acquisition costs of those drugs; if three are not available, then the manufacturer or any representative thereof must provide information about as many as are available for prescriptive use.

SB19-013: Prescription of Medical Marijuana

- In the context of prescribing medical marijuana, any condition for which a physician could prescribe an opioid now qualifies as a “disabling condition” for which a physician could prescribe medical marijuana.
- With respect to prescribing medical marijuana to a minor, removes the existing requirement that a minor must be diagnosed as having a disabling medical condition by two physicians, one of whom must be a board-certified pediatrician, a board-certified family physician, or a board-certified child and adolescent psychiatrist who attests that he or she is part of the patient’s primary care provider team. Under SB19-013, to prescribe medical marijuana to a minor, two physicians still need to diagnose a patient with a disabling medical condition. But, if the physician recommending prescription of medical marijuana to a minor is not that patient's primary care physician, the recommending physician only needs to review the records of the physician or licensed mental health provider who diagnosed the minor patient as having a disabling condition.
- Permits a minor patient with a disabling medical condition to consume medical marijuana on school grounds or a school bus only in a non-smokable form.

Freestanding Emergency Departments

HB 19-1010: Freestanding Emergency Department Licensing

- Creates a new facility license for a freestanding emergency department (FSED) facility, which provides emergency care and may provide primary care or urgent care.
- Mandates that all FSEDs operating in Colorado obtain a FSED license by July 1, 2022, including FSEDs that:
 - are owned by, operated by, or affiliated with a hospital and located more than 250 yards from the main campus of the hospital; or
 - are independent from, and not operated by or affiliated with, any hospital or hospital system and not attached to or located within 250 yards of, or contained within, a hospital.
- Provides that a health facility that was licensed by the Colorado Department of Public Health and Environment prior to July 1, 2010, as a “Community Clinic” is not considered a FSED if the facility serves a rural community or a ski area.
- Requires the Board of Health to adopt rules by July 1, 2021, that:

- address requirements for licensure, safety and care standards, and fees for licensure and inspection;
- establish a waiver of the requirements for a community clinic (or a facility seeking a license as a community clinic) if the facility serves an underserved population; and
- require that every person seeking treatment at the FSED receive a medical screening examination without regard to insurance status or ability to pay.

Behavioral Health

HB19-1009: Certification of Recovery Residences

- Expands an existing housing voucher program to include individuals with a substance use disorder.
- Creates an opioid crisis recovery funds advisory committee to advise and collaborate with law enforcement on uses of funds the state receives as settlement or damage awards from opioid-related litigation.
- Defines a “recovery residence,” “sober living facility,” or “sober home” as a facility that provides housing accommodation for individuals with a substance use disorder that is alcohol- and drug-free and provides structured activities and recovery support services, except that a recovery residence does not include a private residence of a family member, licensed residential behavioral health facilities, or permanent supportive housing units incorporated into affordable housing developments.
- Prohibits the operation of a facility using the term “recovery residence,” “sober living facility,” or “sober home” and prohibits the referral by a health care provider of an individual requiring recovery support services to a facility unless the facility meets one of the following conditions:
 - Certification by an approved recovery residence certifying body;
 - Charter by Oxford House;
 - Operation as a recovery residence in Colorado for 30 or more years as of Jan. 1, 2020; or
 - Operation as a community-based organization that provides reentry services with the support of certain grants from the Colorado Department of Corrections.
- Prohibits “patient-brokering” (accepting anything of value in exchange for placement in a recovery residence) by a recovery residence owner, employee, or administrator or a relative of any such person.
- Creates a recovery residence certification grant program to provide grants to recovery residences for the purpose of gaining certification as a recovery residence.

HB19-1120: Consent for Mental Health Treatment of Minor Children

- Allows minor children, 12 years of age or older, to seek and obtain psychotherapy services without the consent of a parent or guardian if the mental health professional determines the minor is knowingly and voluntarily seeking the services and the services are clinically necessary.
- Allows the mental health professional providing the services, with the minor’s consent, to advise the minor’s parent or guardian of the services provided, unless notifying the parent or guardian would be inappropriate or detrimental to the minor’s care and treatment. The mental health professional may notify the minor’s parent or guardian without the minor’s consent if the minor is unable to manage his or her own care or treatment. The professional is required to notify a parent or guardian if the minor communicates a clear and imminent threat to commit suicide.

HB19-1129: Conversion Therapy

- Prohibits a licensed physician or a licensed, certified, or registered mental health care provider from engaging in or advertising the practice of conversion therapy with a patient under the age of 18.
- Conversion therapy is defined as any practice or treatment that attempts or purports to change an individual's sexual orientation or gender identity, including efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attraction or feelings toward individuals of the same sex.

HB19-1237: Behavioral Health Entity Licensing

- Combines various license types for entities providing behavioral health services into a single license as a Behavioral Health Entity.
- Authorizes the state Board of Health to promulgate rules for this new license.
- Requires entities previously licensed by the Department of Public Health and Environment to obtain the new license by July 1, 2022, and requires entities previously licensed or approved by the Department of Human Services to obtain the new license by July 1, 2024.

HB19-1044: Behavioral Health Advance Directives

- Allows an adult to establish, by execution of a behavioral health order for scope of treatment form, directives for the administration of behavioral health treatment in the event the adult later lacks decisional capacity to provide informed consent to, withdraw from, or refuse treatment.
- Details the duties and immunities of emergency medical services personnel, health care providers, and health care facilities with respect to treating an adult with behavioral health orders for scope of treatment.
- Details how a behavioral health order for scope of treatment form is executed, amended, or revoked.
- Prohibits an effect on a health insurance contract, life insurance contract, or annuity due to the individual's execution of or failure to execute a behavioral health advance directive.

HB19-1028: Medical Marijuana for Treatment of Autism Spectrum Disorder

- Adds autism spectrum disorders to the list of disabling medical conditions that authorize a person to use medical marijuana for his or her condition.

Hospitals and Ambulatory Surgery Centers

HB19-1041: Surgical Smoke Evacuation Systems

- Requires each hospital with surgical services and each ambulatory surgical center to adopt and implement on or before May 1, 2021, a policy that prevents human exposure to surgical smoke via the use of a surgical smoke evacuation system during any planned surgical procedure likely to generate surgical smoke. Surgical smoke is a gaseous byproduct produced by energy-generating surgical medical devices.

HB19-1320: Community Needs Assessments

- Requires the following hospitals to complete an annual community health needs assessment and an annual community benefit implementation plan:

- A hospital licensed as a general hospital and exempt from federal taxation pursuant to section 501(c)(3) of the federal internal revenue code;
- A hospital established pursuant to the Denver Health and Hospital Authority; and
- A hospital established pursuant to the University of Colorado Hospital Authority.

Skilled Nursing Facilities and Assisted Living Residences

HB 19-1268: Assisted Living Residence Referral Disclosures

- Requires any individual or entity that refers a prospective resident to an assisted living residence for a fee to disclose:
 - documentation of any financial, business, or familial relationship(s) the referring party has with the assisted living residence (disclosed in writing, signed and dated by the referring party and the prospective resident); and
 - that the referring party receives a fee from the assisted living residence for the referral.
- Prohibits an assisted living residence from paying a fee to the referring party until receipt of the documentation.
- Requires each assisted living residence to maintain written or electronic copy of the documentation for at least one year after the new resident is admitted.
- The referring party is subject to a civil penalty for a violation. The attorney general or a district attorney is authorized to bring a civil action to seek a civil penalty and to enjoin the continuance of the violation.

SB 19-238: Improve Wages and Accountability for Home Care Workers

- On and after July 1, 2020, establishes an hourly minimum wage of \$12.41 for persons who provide personal care services, homemaker services, or in-home support services for which a home care agency may receive reimbursement pursuant to the Colorado Medical Assistance Act.
- Requires the Department of Health Care Policy and Financing (HCPF) to request an increase of 8.1% to the reimbursement rate for certain services delivered to consumers through the home-based and community-based services waivers. For the 2019-20 fiscal year, each agency shall pay 100% of the funding that results from the rate increase as compensation for employees who provide covered services to consumers. For the 2020-21 fiscal year, each agency shall pay 85% of the funding that results from the rate increase as compensation for employees who provide covered services to consumers.
- Requires each home care agency to track and report how it used any funding resulting from the increase using a reporting tool developed by HCPF. HCPF may recoup part or all of the funding resulting from the increase if HCPF determines that an agency:
 - did not use 100% of any funding resulting from the rate increase to increase compensation for non-administrative employees for the 2019-20 fiscal year;
 - did not use 85% of the funding resulting from the rate increase to increase compensation for non-administrative employees for the 2020-21 fiscal year; or
 - failed to track and report how it used any funds resulting from the increase in the reimbursement rate.

- Requires HCPF and the Department of Public Health and Environment, in consultation with stakeholders, on or before Jan. 1, 2020, to establish a process for reviewing and enforcing initial and ongoing training requirements for persons who provide personal care services, homemaker services, or in-home support services for which a home care agency may receive reimbursement pursuant to the Colorado Medical Assistance Act.

SB 19-254: Nursing Home Penalty Cash Fund

- Currently, the Department of Public Health and Environment and the Department of Health Care Policy and Financing may not expend money from the nursing home penalty cash fund for grants benefitting nursing facility residents by fostering innovation and improving quality of life and care at the facilities if the expenditures would cause the fund balance to fall below \$1 million. SB 19-254 repeals this reserve and instead requires the Medical Services Board to establish a minimum reserve that will have the same limit on expenditures for such grants.

The 2019 Colorado Legislature made health law a priority and, generally, this year's legislative changes seemed to focus on reducing the cost of care for consumers and improving accountability for quality care.

Although the summaries above represent the most significant health care bills passed this year, not all health care bills are included here, and there may be additional legislative changes relevant to your practice or facility.

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