



GARFUNKEL WILD, P.C.
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EXECUTIVE ORDERS AND CURRENT LEGAL LANDSCAPE

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TRAVEL ADVISORY – EXECUTIVE ORDERS 205 AND 202.45

- Travelers entering NY from a state with a positive test rate higher than 10 per 100,000 residents (or 10%) over a seven day rolling average, must quarantine for a period of 14 days.
 - Exemptions for essential workers, including nursing home workers.

As of June 30th:

- Alabama
- Arkansas
- Arizona
- California
- Florida
- Georgia
- Iowa
- Idaho
- Louisiana
- Mississippi
- Nevada
- North Carolina
- South Carolina
- Tennessee
- Texas
- Utah

TRAVEL ADVISORY – EXECUTIVE ORDERS 205 AND 202.45

- Quarantine requirement is superseded by industry-specific guidance.
 - for nursing home workers, a negative PCR test is required before the employee can return to work.
- Employees are not eligible for COVID-19 paid sick leave benefits if the employee voluntarily travels to a designated state.
 - This does not apply if the travel is done at the employer's direction.

TESTING OF PERSONNEL – EXECUTIVE ORDERS 202.40 AND 202.30

- Extends to **July 9, 2020**, the requirement for operators/administrators of nursing homes and adult care facilities to test or make arrangements for the testing of all personnel for COVID-19.
- Facilities in regions of the state that have reached Phase Two of reopening now only have to test once per week.
 - Personnel:
 - All employees
 - Medical staff
 - Contract staff
 - Operators and administrators

TESTING OF PERSONNEL - PENALTIES FOR NON-COMPLIANCE

- The Commissioner of Health is authorized to suspend or revoke the Nursing Home's operating certificate and appoint a receiver to continue operations.
- Other Penalties-
 - \$2,000 per violation per day (Public Health Law Section 12);
 - Subsequent violations - \$10,000 per violation per day (Public Health Law Section 12-b);
 - Any false statement in the required attestation are punishable as a Class A misdemeanor.
 - Personnel who refuse to be tested are prohibited from providing services.

TESTING OF PERSONNEL – EXECUTIVE ORDERS 202.44 AND 202.32

- **Extends to July 21, 2020** the suspension of law/regulations permitting clinical laboratories to:
 - accept and examine specimens for COVID-19 testing, from personnel of nursing homes and adult care facilities, without a prescription or order from an authorized ordering source, and
 - report the results of such tests to the appropriate to the appropriate staff at the facilities.

TESTING OF PERSONNEL – EXECUTIVE ORDERS

202.44 AND 202.32

- Directs the facility administrator to contact the local health department to ensure all facility personnel who test positive are provided appropriate clinical guidance as well as appropriate isolation orders; and
- Allows physicians to order COVID-19 tests, authorized by the FDA for self-collection, without otherwise having an initial physician-patient relationship with the patient.

TESTING – EXECUTIVE ORDER 202.36

- **Through July 2, 2020:**
 - Allows a questionnaire administered through an asynchronous electronic interface or electronic mail that is **approved by a NY State licensed physician** to be sufficient to establish a **practitioner-patient** relationship for purposes of ordering a clinical laboratory test.

FAMILY NOTIFICATION – EXECUTIVE ORDERS 202.39, 202.19, 202.18

- **Extends to July 7, 2020**, the requirement that any skilled nursing facility, nursing home, or adult care facility notify family members or next of kin:
 - if any resident tests positive for COVID-19, or if any resident suffers a COVID-19 related death,
 - within 24 hours of such positive test result or death.
- Penalties for non-compliance
 - \$2,000 per violation per day (Public Health Law Section 12);
 - Subsequent violations - punishable pursuant to Public Health Law Section 12-b.

RESIDENT ADMISSIONS – EXECUTIVE ORDERS 202.40 AND 202.30

- **Extends to July 9, 2020**, the requirement that general hospitals may not discharge a patient to a nursing home, unless:
 - the nursing home operator or administrator has first certified that it is able to properly care for such patient; and
 - the hospital has first performed a diagnostic test for COVID-19 and obtained a negative result.

LICENSURE – EXECUTIVE ORDERS 202.44, 202.39 AND 202.15 – 202.21

- **Extends to July 21, 2020**, prior orders allowing:
 - professionals licensed in other states and Canada to practice in New York;
 - the practice of professionals with an unencumbered license and currently in good standing but not registered in New York; and
 - graduates of registered nursing programs to work under supervision.

HYDROXYCHLOROQUINE – EXECUTIVE ORDERS 202.38, 202.28, 202.27, 202.11 AND 202.10

- **Extends to July 6, 2020**, the directive that pharmacists may dispense hydroxychloroquine or chloroquine under certain conditions, including for residents in a subacute part of a skilled nursing facility or as part of an study approved by an Institutional Review Board.
- However, on June 15th, the FDA revoked the Emergency Use Authorization for these drugs to treat COVID-19.
 - FDA concluded it is no longer reasonable to believe that oral formulations of HCQ and CQ may be effective in treating COVID-19, nor is it reasonable to believe that the known and potential benefits of these products outweigh their known and potential risks.

NURSING HOME REGULATIONS REINSTATED AS OF MAY 8, 2020 – EXECUTIVE ORDER 202.28

- PRI and Screen must be completed prior to admission.
- Comprehensive resident assessment and planning required within 14 days of admission.
- Physician order required for admission.
- Standard admission procedures must be restored.
- All record keeping requirements must be reinstated.

CMS ENDS WAIVER OF STAFFING DATA SUBMISSION REQUIREMENT

- All nursing homes are required to resume submission of staffing data through the Payroll Based Journal system.
 - Facilities must submit required staffing data for Calendar Quarter 2 (April – June) 2020 through the PBJ system by August 14, 2020.
 - Staffing measures and ratings will be updated in October 2020.
 - CMS also encourages nursing homes to submit data for Calendar Quarter 1 (January – March) 2020. (Not a requirement)
 - Calendar Quarter 1 data will not be used to calculate staffing measures or ratings.



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COVID-19 Related Investigations

NURSING HOME RESIDENTS HIT HARD BY COVID-19

- Nursing home residents account for nearly 1 in 10 of all the coronavirus cases in the United States and more than a quarter of the deaths.
- Nationwide, nursing homes reported:
 - nearly 179,000 suspected or confirmed cases among residents and
 - 29,497 deaths.

– Source: *Associated Press analysis of CMS data, published 6/17/2020*

INVESTIGATIONS – DHHS, OFFICE OF INSPECTOR GENERAL

- On June 29th, Senator Chuck Grassley and Representative Greg Walden issued a joint request to the OIG to initiate an investigation (and present findings by September 30th), into whether:
 - the decision by five states (including NY) to pressure nursing homes to admit COVID-19 patients from hospitals violated, or was in any way inconsistent with, guidelines or requirements for participation in Federal health care programs.
 - The authors noted in particular that this occurred despite the underutilized U.S. Navy hospital ship and the temporary hospital inside the Jacob K. Javits Center.

INVESTIGATIONS - THE HOUSE SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS

- Requested information from five of the nation's largest for-profit nursing homes related to:
 - coronavirus cases and deaths;
 - testing
 - personal protective equipment;
 - staffing levels/pay
 - legal violations;
 - efforts to prevent further infections, and
 - all emergency federal government funding received (*e.g.*, CARES Act, the Paycheck Protection Program and the Accelerated and Advance Payment Program) and a detailed description of how the funds were spent.
 - Also requested information from governors of several states, including NY, that had required nursing homes to admit recovering coronavirus patients from hospitals.

INVESTIGATIONS – ATTORNEY GENERAL INQUIRY

- Staffing
- PPE
- Financials
- Emails
- COVID-19 testing and hospital transfers



QUESTIONS?



Lourdes Martinez, Esq.

Lourdes M. Martinez is a Partner/Director at Garfunkel Wild, P.C., which she joined in 1998. She is a Co-Chair of the firm's Compliance and White Collar Defense, and a member of the HIPAA Compliance and Health Care Practice Groups.

Ms. Martinez's practice includes: defending clients in criminal, civil and regulatory government actions; assisting clients in implementing both fraud and abuse and HIPAA compliance programs; and advising clients on a wide array of compliance, regulatory and business matters.

Ms. Martinez has defended clients in federal False Claims Act cases, quality of care cases, physician licensing matters and federal, state and other third-party audits. Her clients include both for-profit and not-for-profit skilled nursing facilities, hospitals, home health agencies, physicians and other providers.

Ms. Martinez frequently writes and lectures on regulatory defense and compliance issues. Her published works include articles written for the New York Health Law Update and the New York State Bar Association's Health Law Journal. In addition, Ms. Martinez was a contributing author to the Legal Manual for New York Physicians, published by the New York State Bar Association in conjunction with the Medical Society of the State of New York.

Garfunkel Wild, P.C. (GW) was founded over forty years ago with a single purpose in mind—to attend to the specific business and legal needs of its clients in the health care industry and beyond. Our attorneys include physicians, nurses, former prosecutors, technology experts, former government officials and regulators.

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