

Legal Lens

Students from the Saint Louis University School of Law Center for Health Law Studies contributed the following items to this column. Amy N. Sanders, associate director, supervised the contributions by Valerie De Wandel, J.D. (Ph.D. anticipated 2021), and Shannon Rempe, J.D., M.H.A.

HHS WARNS STATES NOT TO PUT PEOPLE WITH DISABILITIES AT THE BACK OF THE LINE FOR CARE

As the number of COVID cases continues to increase, making it difficult for hospitals to decide how to allocate the limited staff and resources they have, the U.S. Department of Health and Human Services is reminding states and health care providers that civil rights laws are still applicable. This greatly concerns disability groups, who are anxious about rationing or decisions that might exclude the elderly or individuals with disabilities. Roger Severino, the director of the Office for Civil Rights, echoed concern that “crisis standards of care may start relying on value judgments as to the relative worth of one human being versus another, based on the presence or absence of disability. We’re concerned that stereotypes about what life is like living with a disability can be improperly used to exclude people from needed care.” The HHS guidelines set by HHS are warnings to states. The department’s Office for Civil Rights has the authority to investigate health care providers and correct them if they have violated civil rights law. If not corrected,

the office can ask the Department of Justice to move forward with prosecuting the perpetrator.

Joseph Shapiro, <https://www.npr.org/2020/03/28/823254597/hhs-warns-states-not-to-put-people-with-disabilities-at-the-back-of-the-line-for-care>, March 28, 2020.

HOSPITALS, HEALTH CARE WORKERS GIVEN CIVIL IMMUNITY

Executive Order 2020-19, authorized by Illinois Governor J.B. Pritzker, was issued to grant broad immunity from civil liability to “health care facilities, health care professionals, and health care volunteers” who are “rendering assistance” in the state’s disaster response. Karen Harris, general counsel of the Illinois Health and Hospital Association, indicated that her organization, along with others, recommended this order to be implemented. She stated, “If you are a retired health care worker in the last couple of years, and want to come help out in this difficult time, you may not have liability coverage. Having assurances that your efforts would not result in a lawsuit is important for making sure we are encouraging those who might want to or be able to come back and help be able to do so.” The order specifically defines and distinguishes health care professionals and health care volunteers.

Sarah Mansur, <https://www.chicagolawbulletin.com/exec-order-gives-civil-immunity-to-hospitals,-health-care-workers-20200403>, April 3, 2020.

TRUMP WILL URGE SUPREME COURT TO STRIKE DOWN OBAMACARE

The Trump administration said it would urge the Supreme Court to overturn Obamacare amidst the COVID-19 pandemic with millions of Americans depending on its coverage. This statement is consistent with the administration's continued legal attacks on the health care law despite Attorney General William Barr's warnings about the potential political blowback of undermining the decade-old health care safety net during this pandemic emergency. The Justice Department had a chance to reverse its position in a case challenging the Affordable Care Act (ACA) brought by Republican-led states. However, President Trump told reporters that his administration would not alter its course. The DOJ's current legal strategy is to have the entire law struck down by arguing that the elimination of the tax penalty in the law rendered the ACA invalid. Previously, the DOJ argued the courts should merely remove the preexisting condition protections of the ACA. This position seems to be more congruent with the wishes of President Trump's current Secretary of Health and Human Services, who opposed a broad attack on the law. Nevertheless, the Trump administration has indicated it intends to continue with their scheme to strike down the ACA that has covered more than 20 million people and is expected to serve as a vital safety net during the economic disaster that has been triggered by the pandemic. The ACA is being defended by a coalition of House Democrats and Democratic state attorneys general in court.

Susannah Luthi,
<https://www.politico.com/news/2020/05/06/trump-supreme-court-obamacare-240366>, May 6, 2020.

INFECTING THE MIND: BURNOUT IN HEALTH CARE WORKERS DURING COVID-19

As a direct result of the stress caused by the COVID-19 pandemic, health care providers across the United States are experiencing occupational burnout and fatigue. In a recently published article in the journal *Anesthesia & Analgesia*, Dr. Farzan Sasangohar, assistant professor in the department of industrial and systems engineering, indicated "the COVID-19 pandemic exacerbated an already existing problem within our health care systems and is exposing the pernicious implications of provider burnout." Doctors and nurses are facing additional stress from a variety of sources, including longer shifts and more patient deaths. Additionally, the fear of exposure is an overriding concern. Sasangohar and his research team identified four main areas of stress as occupational hazards — national versus locally scaled responses, process inefficiencies and financial instability. The purpose behind defining these areas of stress was to identify mitigation strategies to reduce burnout amongst these health care providers. Such identification is imperative, as there will be more world-wide pandemics to come, which is why Houston Methodist Hospital has already begun making changes to increase resilience and prepare for future crises.

Texas A&M University, <https://www.sciencedaily.com/releases/2020/05/200513143749.htm>, May 13, 2020.

CORONAVIRUS DRIVES HEALTH INSURERS BACK TO OBAMACARE

Due to the COVID-19 pandemic, tens of millions of people are losing their jobs and health benefits. Few individuals will be able to sign up for costly COBRA plans. Insurers are increasingly valuing a marketplace offering government subsidized private insurance to those Americans during this time. The Kaiser Family Foundation recently released a study indicating that insurers who served Obamacare patients continued to see profits last year. However, Obamacare markets or Medicaid are unavailable to much of the vulnerable population in the 14 states that have not expanded the programs under the health law, and programs are at risk for likely cuts as states limit their budgets due to the pandemic. While many states and plans are still constructing rates for the next year, last week Vermont indicated a conglomeration of new proposals from its Obamacare marketplace. Dave Dillon, a fellow of the Society of Actuaries, mentioned that “It does not appear Covid-19 will be a significant variable.”

Dan Goldberg and Susannah Luthi , Politico, <https://www.politico.com/news/2020/05/14/coronavirus-health-insurers-obamacare-257099>, May 14, 2020.

HHS MOVES TO CURTAIL ABORTION, TRANSGENDER HEALTH PROTECTIONS

In early June, the Trump administration finalized a policy that removes women seeking abortions and LGBTQ people from the Affordable Care Act’s (ACA) non-discrimination protections. As expected, there is planned legal action and some lawmakers have criticized the administration for this

move — calling it “cruel and unconscionable.” This new regulation would allow health care workers, hospitals, and insurance companies (that receive federal funding) to refuse provision and/or coverage of services such as abortions or transition-related care. This policy demonstrates the administration’s continued effort to preserve “religious freedom,” and essentially protect health care professionals from getting penalized for refusal of service based on their moral beliefs. Lambda Legal, the Human Rights Campaign, the Transgender Law Center, Harvard Center for Health Law and Policy Innovation, Transgender Legal Defense and Education Fund, and the National Women’s Law Center all plan to challenge the rule. The Human Rights Campaign has alleged that this rule exceeds the administration’s authority in defining sex discrimination under the ACA and undermines the ACA’s goals of expanding access and eliminating barriers to care. In finalizing this policy, the administration has not actually changed the law, but instead has created an HHS rule, but its impact has and will continue to cause a lot of confusion and hurt in LGBTQ communities.

Shira Stein, <https://news.bloomberglaw.com/health-law-and-business/hhs-moves-to-curtail-abortion-transgender-health-protections>, June 12, 2020.

IF YOU’VE LOST YOUR HEALTH PLAN IN THE COVID CRISIS, YOU’VE GOT OPTIONS

The loss of employment for over 21 million Americans has come with many challenges. However, one of the biggest problems is that it also means the loss of insurance during this pandemic, an obviously important time to be covered. Many people do not know of their insurance options when they lose their

employer-sponsored insurance. The Affordable Care Act is an important safety net to people who have been recently let go from their jobs. Under this law, people who are experiencing certain “life events” like moving, getting married, having a baby, or losing their job and health insurance qualify for a special enrollment period. While the Trump administration increased scrutiny of people trying to prove they qualify, these requirements have been loosened because of COVID-19. However, it is important to note that people only have 60 days after they lose their coverage to qualify under the ACA special enrollment. Finally, if someone missed the 60-day window, they may still qualify for extended time if they were sick or caring with someone who was ill. Another option is for people who have lost their jobs to

apply for coverage under Medicaid. Medicaid doesn’t require a special enrollment period and eligibility is based largely on income. Maximum income levels vary, but the weekly \$600 unemployment benefits do not count toward the Medicaid income calculus.

Finally, staying on a former employer’s plan is a possibility for some under the federal COBRA law. However, this could be expensive because people must pay the full cost of the premium unless their employers agree to share the cost.

Julie Appleby,
<https://khn.org/news/if-youve-lost-your-health-plan-in-the-covid-crisis-youve-got-options/>,
June 12, 2020.