

LEGAL UPDATES

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## Service

Healthcare  
Regulatory &  
Compliance  
Counseling

## Industry

Healthcare

## Professionals

KELSEY TOLEDO  
MILWAUKEE:  
414.978.5389  
KELSEY.TOLEDO@  
HUSCHBLACKWELL.COM

THOMAS N. SHORTER  
MADISON:  
608.234.6015  
MINNEAPOLIS:  
612.852.2700  
PHOENIX:  
480.824.7890  
TOM.SHORTER@  
HUSCHBLACKWELL.COM

# 2019 Wisconsin Act 185: Healthcare Regulatory Provisions

On April 15, 2020, Governor Evers signed into law the 2019 Wisconsin Act 185 with bipartisan support, a state response to the COVID-19 pandemic enacting certain provisions implemented in previously issued emergency orders. Several of the provisions focus on easing burdens imposed on healthcare providers and accessing federal funding impacting the healthcare industry. Key provisions relate to healthcare regulatory, health insurance, unemployment, K-12 education, food and personal care return, and property tax.

The Act contains several items affecting healthcare regulatory matters in Wisconsin.

### Licensure issues

Emergency Order #16 (March 27, 2020) eased various requirements for healthcare provider licensure during the duration of the public health emergency that was declared by the Governor on March 12, 2020. Act 185 expands on some of these provisions and makes others permanent. Not all healthcare professions are covered by the new law, so providers desiring to take advantage of them should contact their Husch Blackwell attorney to ensure they are covered. Relevant provisions include the following:

**A. Temporary credentials for former licensees and interstate reciprocity:** Healthcare providers, including, but not limited to, physicians, nurses, midlevel providers, dentists and physical therapists, who do not currently hold an active license in Wisconsin, but who held such a license in good standing within the past 5 years, may provide services in Wisconsin within the scope of their former credential. Similarly, providers holding a valid, unexpired credential granted by another state or territory may practice in Wisconsin on a temporary basis. In either case, such services must be

provided on behalf of an identified facility, whose needs reasonably prevented the provider from obtaining a credential prior to commencing services. The facility must notify the Department of Safety and Professional Services (DSPS) within 5 days of the provider commencing services, and the provider must apply for a temporary or permanent credential with DSPS within 10 days of commencement services. The provider must maintain malpractice coverage satisfying state law requirements. These provisions expand the scope of professions covered by the emergency order and are effective for the duration of the public health emergency and 30 days thereafter.

- B. Temporary suspension of renewal requirements:** Certain healthcare credentials issued by DSPS are not subject to renewal during the duration of the public health emergency and for 60 days thereafter. The affected categories of providers generally match those subject to the temporary credentialing requirements with a few notable exceptions, including optometrists, social workers and professional counselors. These renewal provisions also apply to radiographers and limited x-ray machine operators. Additionally, renewal requirements are suspended for ambulance service providers, emergency medical service practitioners and emergency medical responders holding a license, permit or certificate issued by the Wisconsin Department of Health Services (DHS).
- C. Licensure application fee waivers:** Act 185 permits DSPS to waive initial and renewal credential application fees for certain limited categories of healthcare providers during the duration of the public health emergency.

In addition to the temporary ease of certain licensure requirements, Act 185 also permanently caps the number of total training hours or minimum hours of supervised practical training for nurse aides at the minimum required for Medicare certification of nurse aide training programs.

While the emergency order instructed the Office of the Commissioner of Insurance to work with healthcare providers with temporary licensure or privileges to ensure they have proper liability insurance coverage, Act 185 specifies that physicians and nurse anesthetists may fulfill the proof of coverage requirement by filing a certificate of insurance for a policy issued by an insurer authorized in any jurisdiction accredited by the National Association of Insurance Commissioners. They may also elect to be subject to the Injured Patients and Families Compensation Fund.

Act 185 also permits pharmacists to extend certain existing prescription orders and dispense the prescribed drug to the patient if the pharmacist does not have notice of contrary written or oral instructions from the prescribing practitioner. Such extensions are generally limited to a 30-day supply and are not available for controlled substances. The pharmacist must promptly notify the prescribing practitioner after extending a prescription under this section. Only one extension may be

issued during the duration of the public health emergency. These provisions are applicable for the duration of the public health emergency and for 30 days thereafter.

## **Civil immunity**

Act 185 goes beyond removing barriers to providing care and extends protections to a laundry list of healthcare professionals and providers, as well as their employees, agents and contractors, through civil immunity. These providers will receive civil immunity for the death or injury of any individual or damages caused as a result, for acts or omissions that are:

1. Committed while providing services during the state of the public health emergency or the 60 days following its termination;
2. Related to health services provided (or not provided) in good faith, or are “substantially consistent” with (a) any direction, guidance, recommendation or other statement made by a federal, state or local official to address or in response to the public health emergency; or (b) any guidance published by Wisconsin DHS or any divisions or agencies of the U.S. Department of Health and Human Services (HHS) relied upon in good faith; and are
3. Absent of reckless or wanton conduct or intentional misconduct.

The immunity provided under Act 185 does not apply if certain current Wisconsin law provisions already provide indemnification or immunity (e.g. emergency healthcare practitioners covered under Wis. Stats. Ch. 257).

In addition to providing immunity to those providing care, Act 185 extends civil immunity to persons engaged in the manufacturing, distribution or sale of emergency medical supplies in response to the national public health emergency (as defined below). Specifically, those who donate or sell emergency medical supplies at a price not to exceed the cost of production (inputs, wages, operations, transportation) to charitable organizations or governmental units and charitable organizations that distribute emergency medical supplies free of charge are immune from civil liability for the death of or injury to an individual caused by such emergency medical supplies.

The period covered by this section of Act 185 is different from that of the provisions relating to healthcare provider immunity. Specifically, immunity extends from the period covered by the public health emergency declared by HHS on January 31, 2020, or the national public health emergency declared by President Trump on March 13, 2020 in response to the novel coronavirus. Moreover, supplies covered by Act 185 include any medical equipment or supplies necessary to limit the spread of, or provide treatment for, a disease associated with the national public health emergency, such as life support devices, personal protective equipment and cleaning supplies.

## **Medicaid Program provisions**

Other significant provisions of Act 185 relate to the Wisconsin Medicaid Program. The Act provides DHS with authority to delay or suspend certain Medicaid requirements to satisfy criteria to qualify for enhanced federal medical assistance percentage during an emergency period declared in response to the coronavirus pandemic. Specifically, DHS may delay or suspend the requirements of the Childless Adults Demonstration Project under the Medicaid Program, which imposes minimum work and/or community engagement obligations, premiums and health assessments to obtain benefits under the Medicaid Program.

Additionally, the legislative oversight requirements imposed under Wis. Stat. § 20.940 for certain requests made under the Medicaid Program to the federal government are waived to the extent these requests are made during the public health emergency declared by HHS on January 31, 2020. Act 185 enumerates 37 different requests that cover conduct by hospitals, nursing homes, home health agencies and managed care organizations amongst others. Examples include allowing hospitals who hold a state license but have not yet received accreditation from the Joint Commission to bill the Medicaid Program during the public health emergency declared by HHS, waiving certain equipment requirements in hospitals, and waiving life safety codes for certain intermediate care facilities, hospitals (including critical access hospitals), hospices and nursing homes.

Act 185 further expands the Medicaid Program to incorporate and develop the pay-for-performance payment system incentivizing participation in health information sharing to facilitate quality care, reduce costs and increase access to patient information. To effectuate this program, Act 185 allows DHS to seek any available federal moneys, including any moneys available for its purpose under the Coronavirus Aid, Relief, and Economic Security (CARES) Act to assist small, rural providers with the costs of information technology setup to participate in the program.

## **Comprehensive CARES Act and COVID-19 guidance**

Husch Blackwell's CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly changing orders on a state-by-state basis. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.