



CALIFORNIA ORDERS MEDICAL MALPRACTICE INSURANCE COMPANIES TO REFUND PREMIUMS AFFECTED BY THE COVID-19 PANDEMIC

California Insurance Commissioner Ricardo Lara ordered insurance companies to return insurance premiums to consumers and businesses affected by the COVID-19 pandemic in a bulletin published on April 13.

“The COVID-19 pandemic has severely curtailed activities of policyholders in both personal and commercial lines,” Lara wrote in the Bulletin. “As a result, projected loss exposures of many insurance policies have become overstated or misclassified. This is especially true for policies where premiums are based partly on measures of risk ... which have all dropped significantly because of COVID-19.”

The commissioner’s bulletin covers

premiums paid for at least the months of March and April — including the month of May if “shelter-in-place” restrictions continue — in at least six different insurance lines: private passenger automobile, commercial automobile, workers’ compensation, commercial multi-peril, commercial liability, medical malpractice and any other insurance line in which the risk of loss has fallen substantially as a result of the COVID-19 pandemic.

The bulletin requires insurance companies to provide a premium credit, reduction, return of premium or other appropriate premium adjustment as soon as possible, and no later than August 2020.

A premium refund does not require prior

approval by the Department of Insurance if an insurance company follows certain methods outlined in the commissioner’s bulletin, such as using an average percentage based on estimated change in risk or exposure. Consumers will also have the opportunity to provide their individual actual or estimated experience to their insurance company.

Lara further ordered insurance companies to report back to the Department of Insurance all premium refunds they have issued or expect to issue within 60 days. This measure is designed to provide oversight and ensure companies are complying with the bulletin.

If the COVID-19 pandemic continues

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EVALUATING THE RISKS OF ELECTIVE PROCEDURES DURING THE COVID-19 PANDEMIC

by Jason Greis and Nathan Sargent, Esqs.

On March 18, the Centers for Medicare & Medicaid Services (CMS) issued a recommendation that healthcare providers postpone all non-essential medical, surgical and dental procedures in an effort to combat the spread of COVID-19.

Many states have also issued emergency declarations discouraging or prohibiting providers from performing elective procedures during the pandemic. Still, a number of providers have continued performing elective procedures for a range of reasons.

Federal and state proclamations have injected significant uncertainty into clinical decision-making as to whether a procedure should be classified as medically necessary or elective under a particular set of circumstances. Clinical decision-making ultimately rests with the physician in consultation with his or her patient. However, current circumstances have subjected that decision-making process to greater scrutiny and potential legal risk.

Healthcare providers — especially those practicing in cosmetic surgery, dermatology, optometry, dentistry and other specialties generally considered elective — should first determine whether a procedure is considered an essential medical service. In doing so, a physician should evaluate the potential harm in delaying a patient procedure against the scarcity of medical resources and the risk of COVID-19 infection.

CMS recommends providers keep in

mind current and projected COVID-19 cases in the local health system and surrounding area; supply and availability of personal protective equipment; provider and staff availability; bed availability, especially of ICU beds; ventilator availability; health and age of the patient; and urgency of the procedure.

The CMS guidance is instructive, but depending on the state(s) in which a healthcare provider practices, he or she may be required to comply with a patchwork of quickly adopted and broadly interpreted state-specific rules that could impact their ability to perform certain types of procedures.

EMERGENCY RULES TO CURB ELECTIVE PROCEDURES

As of April 8, as many as 35 states and the District of Columbia have issued emergency orders related to elective procedures during the COVID-19 emergency. The scope and source of these state-level proclamations vary significantly.

Penalties for violations also vary dramatically by state. While some states may only levy small fines for non-compliance, the medical boards and departments of health in other states may take action to revoke or suspend a healthcare provider’s license. In light of these considerations and risks, providers should engage in the following diligence before performing certain types of procedures:

1. Consider CMS recommendations and any state-specific guidance related to elective procedures. Further, consider any state-

specific definitions of what should be considered “elective.”

2. Understand potential penalties at the state level for violating applicable emergency orders or prohibitions.

3. Document your decision-making process. While some procedures will almost always be classified as elective, others will likely be close calls. In those instances, it is important to thoroughly document the decision-making process should it later be the subject of scrutiny.

4. Be aware of potential lawsuits. In addition to malpractice lawsuits, the potential exists that a patient or staff member takes legal action against you for performing an elective procedure in violation of official guidance, especially if staff members or patients become ill with COVID-19 as the result of attending elective procedures.

5. Confirm that your medical professional liability insurance will provide coverage if you perform elective procedures in violation of a government proclamation.

6. Consider reputational harm. Even in states where there are few, if any, repercussions for performing elective procedures, it is important to keep in mind that supplies and equipment are scarce. Performing elective procedures during the crisis may result in reputational harm both during and after the COVID-19 emergency.

Jason Greis is a partner, and Nathan Sargent is an associate, at the Benesch law firm. They can be contacted at jgreis@beneschlaw.com and nsargent@beneschlaw.com, respectively.