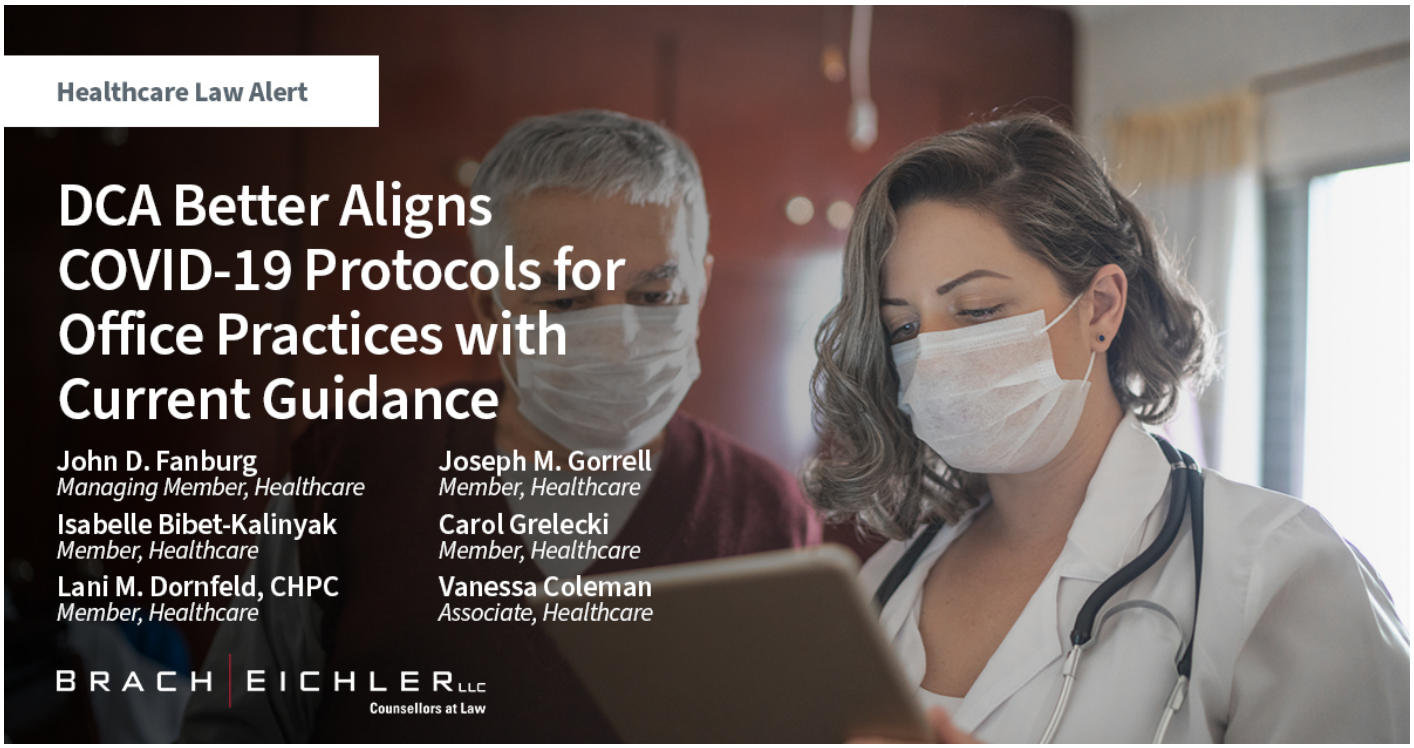
DCA Better Aligns COVID-19 Protocols for Office Practices with Current Guidance



August 19, 2022

On July 22, 2022, the Acting Director of the New Jersey Division of Consumer Affairs (DCA) issued Administrative Order No. 2022-01 (AO 2022-01) setting forth modified requirements for health care professionals working in settings not requiring licensure by the New Jersey Department of Health (NJDOH), to practice in a manner that is consistent with current guidance issued by the Centers for Disease Control and Prevention (CDC), NJDOH, the federal Occupational Safety and Health Administration (OSHA), and the health care professionals' respective local health department. AO 2022-01 explicitly modifies Administrative Order No. 2021-11 (AO 2021-11).

Outdated COVID-19 Protocols

AO 2021-11 (superseding DCA Administrative Order No. 2020-07) was entered on May 6 2021, when the Public Health Emergency and State of Emergency, initially declared on March 9, 2020 pursuant to Executive Order 103, were both still in effect. When AO 2021-11 was entered, it included enforceable provisions for the delivery of health care in office-based settings not licensed by NJDOH, which were consistent with the then-current guidance from the CDC, NJDOH, and OSHA. AO 2021-11 mandated, among other things, that health care professionals utilize telemedicine to the greatest extent possible; screen and check temperatures of patient, companions, and staff before permitting entry into the office; require patients, companions, and staff to wear face coverings or face masks, facilitate social distancing to minimize person to person contact, adopt enhanced protocols for office cleaning and disinfection, and establish rigorous protections for staff.

Pursuant to Executive Order 292 (EO 292), issued on March 9, 2022, the Public Health Emergency has terminated, but the State of Emergency is still in effect. EO 292 left in full force and effect various Administrative Orders, Directives, and Waivers taken by the Executive Branch departments and agencies in response to the pandemic to ensure an orderly transition to the next phase of New Jersey's recovery from the pandemic, including AO 2021-11.

Reasons for Modifying COVID-19 Protocols

While AO 2021-11 remains effective, DCA recognizes that some of the provisions within AO 2021-11 are no longer consistent with now-current and potential future CDC, NJDOH, OSHA, and local health department guidance and standards, and, as such it is necessary to modify COVID-19 related mandates for health care professionals in office settings. In response to the ever-emerging guidance from CDC, NJDOH, OSHA, and local health departments, DCA has removed many of the specific, static requirements within AO 2021-11 and has chosen instead to mandate full compliance with all now-current (and future) guidance from CDC, NJDOH, OSHA, and local health departments. DCA also acknowledged that there is a need for continuing enforcement of conditions on health care professionals to protect the public health, safety, and welfare.

Key Definitions

Under AO 2022-01:

"Health care professionals" shall include licensees of the following New Jersey State Boards and Committees: Board of Dentistry, Board of Medical Examiners, Board of Nursing, Board of Optometrists, Board of Ophthalmic Dispensers and Ophthalmic Technicians, Board of Respiratory Care, Board of Pharmacy, Acupuncture Examining Board, Board of Chiropractic Examiners, Occupational Therapy Advisory Council, Board of Physical Therapy Examiners, Orthotics and Prosthetics Board of Examiners, Board of Polysomnography, Athletic Training Advisory Committee, and Audiology and Speech-Language Pathology Advisory Committee.

"Office" means a health care practice setting not licensed by NJDOH, including but not limited to health care professional offices, private practices, clinics, urgent care centers, and community medical centers.

Modified Standards for Office Settings

The modified standards require that all health care professionals practicing in office-based settings do the following:

- Provide in-person adult and pediatric services in an office and practice consistent with their scope of practice as well as applicable statutes and regulations except where conditions of practice have been and remain waived in connection with the State of Emergency;
- Practice in a manner consistent with all applicable COVID-19 related guidance from the CDC, NJDOH, OSHA, and local health department guidance;
- Stay informed about applicable CDC, NJDOH, OSHA, and local health department guidance;
- Monitor the community spread of COVID-19 via the NJDOH's Statewide Weekly COVID-19 Variant Surveillance Reports and the CDC Community Levels* and adjust office practices in a manner consistent with CDC and NJDOH recommendations based on the level of community spread;
- Protect staff from retaliation for engaging in conduct recommended by CDC, NJDOH, OSHA and their respective local health department; and
- Ensure that health care practices in registered surgical practices required to be licensed as ambulatory surgery centers (ASCs) by NJDOH, but not yet licensed, perform in a manner consistent with all NJDOH imposed requirements for ASCs

*The CDC and NJDOH recommend use of Community Transmission Levels of COVID-19, not Community Levels of COVID-19, for healthcare settings to assess risk of COVID-19 transmission and to inform mitigation measures.

DCA now requires that health care professionals comply with the current, ongoing CDC, NJDOH, OSHA, and local health department guidance and requires that all healthcare professionals practicing in office-based settings, do the following[1]:

Screening Patients and Staff

Identify everyone, including patients, non-Heath Care Personnel (non-HCP), and Health Care Personnel (HCP), entering the facility, regardless of their vaccination status, who have had any of the following, so that they can be properly managed: (1) a positive viral test for SARS-CoV-2; (2) symptoms of COVID-19; or (3) close contact with someone with COVID-19 infection (for patients and visitors).[2]

- Low to Moderate Community Transmission Rates – actively evaluate patients for fever and other signs of COVID-19 or acute respiratory infection at least daily.[2]
- Substantial to High Community Transmission Rates – consider increasing the frequency of evaluation of patients for fever and other signs of COVID-19 or acute respiratory infection.

Masking

- Low to Moderate Community Transmission Rates – Under some circumstances patients and non-HCP may forgo masking, but HCP are required to wear masks when they are in areas where patient encounters occur.
- Substantial to High Community Transmission Rates – Masking is required for patients, non-HCP and HCP in all healthcare settings.

Social Distancing

- Low to Moderate Community Transmission Rates – Under some circumstances patients, non-HCP and HCP may forgo social distancing.
- Substantial to High Community Transmission Rates – Physical distancing (when physical distancing is feasible and will not interfere with provision of care) is required for everyone in all healthcare settings. In situations when unvaccinated patients could be in the same space arrange seating so that patients can sit at least 6 feet apart, especially in counties with substantial or high community transmission rates. This might require scheduling appointments to limit the number of patients in waiting rooms, treatment areas or participating in group activities.

Protections for Staff

The Division on Civil Rights provides that an employer cannot discriminate against staff because of actual or perceived race, national origin, religion, disability, or other Law Against Discrimination (LAD) – protected characteristic. The LAD also prohibits bias-based harassment that creates a hostile work environment. These protections apply even if the conduct at issue stems from concerns related to COVID-19. LAD's Protections Related to COVID-19 in Employment.

Surgical Practices Not Yet Licensed as Ambulatory Surgery Centers

AO 2022-01 also requires that registered surgical practices required to be licensed as ambulatory surgery centers (ASCs) by NJDOH, but not yet licensed, comply with the requirements for ASCs, which are as follows:

- Comply with NJ, Centers for Medicare and Medicaid Services (CMS), and CDC guidance regarding COVID-19;
- Comply with the above recommendations for screening, masking, and PPE planning;
- Implement cleaning and disinfection policies; clean prior to serving non-COVID-19 patients
- Modify resumption of clinical services in conjunction with surge status;
- Resume procedures based on capacity data, on the date of each procedure, from at least one hospital for which the facility has a transfer agreement, provided that at least one such transfer hospital is not diverted and is located in a region with a downward or horizontal trajectory in hospitalization;
- Encourage gradual resumption of the full scope of services when possible, if the physical layout and flow of care delivery areas are configured so that social distancing is maintained
- Establish a prioritization policy for providing care and scheduling;
- Staff trained and educated personnel as appropriate for planned surgical procedures, patient population and facility resources;
- Use available testing and implement guidance for patient and staff COVID-19 testing;
- Staff qualified personnel to perform procedures and provide care and follow-up;
- Confirm that a transfer agreement is in place with an acute healthcare facility partner (AHFP) and confirm and document before each surgery day that the AHFP has sufficient intensive care unit (ICU) and non-ICU beds to support emergency transfers;
- Perform procedures on COVID-19 positive patients only in emergencies as established by Executive Order 109; cohort COVID-19 patients and non-COVID-19 patients separately;
- Require that patients undergo testing, self-quarantine, and other preventive measures;
- Permit support persons for patients undergoing same-day surgery or procedures;
- Prohibit visitors;
- Note that ASC discharge policies are unchanged; and
- Report metrics regarding the resumption of these procedures

Executive Directive 20-016 (Revised) COVID-19 Protocols for Ambulatory Surgery Centers Resuming Elective Surgery and Invasive Diagnostic Procedures Pursuant to Executive Order No. 145

For more information, contact:

John D. Fanburg, Managing Member and Chair, Healthcare Law, at 973-403-3107 or jfanburg@bracheichler.com
Isabelle Bibet-Kalinyak, Member, Healthcare Law, at 973-403-3131 or ibibetkalinyak@bracheichler.com
Lani M. Dornfeld, CHPC, Member, Healthcare Law, at 973-403-3136 or ldornfeld@bracheichler.com
Joseph M. Gorrell, Member, Healthcare Law, at 973-403-3112 or jgorrell@bracheichler.com
Carol Grelecki, Member, Healthcare Law, at 973-403-3140 or cgrelecki@bracheichler.com
Vanessa Coleman, Associate, Healthcare Law, at 973-364-5208 or vcoleman@bracheichler.com

[1]CDC, NJDOH, OSHA, and local health department guidance is subject to change. As such, COVID-19 related protocols imposed upon healthcare professionals may continue to evolve.[2]https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html[2]Rely upon NJDOH COVID-19 Weekly Surveillance Report to inform decision-making - related to patient and staff screening, masking, and social distancing - based on the CDC's community transmission rates, which range from low to high, in the county in which the practice is located.