

Health Care in Motion

Timely, Substantive Updates on Policy Shifts · Actionable Advocacy to Protect Health Care

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Extraordinary Measures in Extraordinary Times

Coronavirus Disease 2019 (COVID-19) – now [officially declared a pandemic](#) -- continues to dominate attention of the American public, causing widespread [disruption](#), roiling [Wall Street](#) and building a slow crescendo toward [panic](#). [Last week](#), *Health Care in Motion* offered a series of common-sense tips for advocates who work with chronic illness communities. With COVID-19's spread continuing unabated, this week's *Health Care in Motion* turns its attention to the legal and policy measures that are and could be employed by government actors at all levels to mitigate the crisis. Disaster response of this magnitude demands that federal, state and local governments work in concert with each other to execute an organized effort to minimize harm. More than just underscoring our interconnectedness across society, such circumstances invoke the highest calling of government to overcome partisan divisions in the name of public health, welfare, and safety. The coronavirus knows no political party.

While the universe of responses a government can undertake in the face of a new pandemic is vast, this edition of *Health Care in Motion* gives a sampling of key areas where the rubber hits the road. **This is not meant to be an exhaustive resource; the policy landscape is evolving at a rapid pace. This is a jump-start guide to considerations based on emerging trends and lessons learned from the past.**

Governmental response to the current crisis can be grouped into four main categories. First, the government has an important role to play in disseminating accurate and actionable information for the public to organize around. Second, government actors have a role to play in containing the spread of the disease and mitigating the harm that accompanies the measures necessary for effective containment. Third, government has an important role to play in promoting access to care – whether it be ensuring the availability of tests and treatment or ensuring the affordability of those services. Last, public officials must do all they can to promote, approve and distribute a vaccine for the coronavirus once it becomes available.

1. Information Dissemination

Most basic of all government functions in the midst of a public health emergency is the provision of timely, reliable information that the public can use. In addition to constant (and clever) reminders of how to execute proper [hand washing](#) and the benefits of [social distancing](#), government officials at the [local](#), [state](#), and [federal](#) levels must cooperate to provide coordinated and accurate information to the public in a manner that promotes socially beneficial behavior and prevents half-truths and outright panic. Official pronouncements that either unduly [downplay risk](#) or [provide conflicting information](#) constitute [basic betrayals](#) of this most fundamental role. In addition, the [Trump Administration](#) must abandon its [treatment of top-level coronavirus meetings as classified](#), as this undermines the important role that reliable, centralized information dissemination

See if your state has declared a public health emergency or a state of emergency [here](#).

plays in addressing a public health crisis. Never has it been more important for the information coming from government officials to convey a sense of leadership that we will navigate the crisis together.

2. Prevention

The role of government in preventing the spread of an infectious disease is core to its public health responsibilities. In the face of the COVID-19 outbreak, federal, state, and local governments' prevention roles should be understood both as taking affirmative steps to contain the virus, as well as mitigating the harm associated with those measures.

A. Containment

The most straightforward containment measures available to local, state, and federal governments involve direct control over their own institutions. Whether it is implementation of a [policy for hundreds of thousands of federal workers to telecommute](#) rather than congregating in workplaces, the [cancellation of classes and transition to remote learning for a state university](#), or [excusing absences from public schools](#), each level of government can dictate policy for institutions within their direct control and management. The risk is especially acute in public institutions – such as [prisons](#), [behavioral health facilities](#), or other large [public buildings](#) – where large groups of individuals are regularly in close proximity with each other

Beyond the institutions that are directly within public control, federal, state, and local authorities have an expansive role in regulating private behavior that will also be called into action. Limits on this category are difficult to imagine – [history shows](#) that legal systems can bend hard and fast rules in the face of emergency circumstances. A first step is the declaration of a public health emergency – [a power that exists at local, state, and federal government levels, yet remains largely untested](#). More specifically, the most immediate examples include the permitting of public events – like the [cancellation of the St. Patrick's Day parade in South Boston](#); the regulation of private industries, like the State of Washington's decision [to limit the ability of private nursing homes to allow visitors](#); and control of public facilities by private entities, such as the [decision to prevent a private cruise ship from allowing its passengers to disembark in California](#) until mandatory quarantine facilities are in place.

Even more sweeping measures are now on the horizon. At the local level, Santa Clara County, California has [banned mass gatherings](#) of more than 1,000 people, with criminal penalties for non-compliance. New York State is now imposing a "[containment area](#)" with a one mile radius around a synagogue in New Rochelle, New York where an outbreak has occurred. As significant as the real-life impact of such maneuvers are, the legal implications of the state's decision are even more groundbreaking. Referring to the current situation as "[uncharted territories](#)," Governor Cuomo signed a new law last week both [appropriating \\$40 million in funding and granting broad new authorities](#). Although the governor of New York already had the authority to suspend any state or local law for the purposes of dealing with an emergency or natural disaster, the new provision significantly broadens the definition of "disaster" to include not just past events but also imminent events, including "disease outbreak." Governor Cuomo indicated that the new authority supports his ability to order mandatory quarantines, hygiene protocols, and school closures. Although the New York Legislature passed the new law on a bipartisan basis, external reaction was not universally positive, with the New York Civil Liberties Union, among others, [questioning](#) why such broad executive powers were necessary. It remains vitally important to [balance public health and welfare against civil liberties](#) when taking these steps.

These examples may just be a canary in the coal mine for other governments – from municipalities up to the federal government – to assert extraordinary powers in the name of preventing the spread of COVID-19. Federal law certainly contains a [number of provisions](#) that allow for broadened action in the face of emergency circumstances.

B. Harm Mitigation

Just as important as the question of containment is asking how government can take steps to mitigate the harm occasioned by the response to COVID-19. While the shuttering of businesses may have the beneficial effect of limiting the spread of the virus, each decision is fraught – with officials having to weigh the benefit of preventing additional infections against the very real cost of such measures on people’s lives. Officials deciding whether to close public schools, for example, must consider the impact on students living in poverty who [rely on their school](#) for nutritious meals, shelter, medical care and more. For every conference postponed, school shuttered, or shift canceled, the effects – [lost wages](#), [child care needed](#), and opportunities lost – must also be taken into account.

Government has a role to play here, and best practices should be replicated across the country. In San Jose, California, the Mayor imposed a [temporary ban on evictions](#) in order to protect vulnerable tenants who may be affected. Washington will now allow “[workers to receive unemployment benefits and employers \[to\] get relief of benefit charges if an employer needs to shut down operations temporarily](#)” because of COVID-19. [Other states should follow suit](#). Following up on a proposal made last month in his State of the State Address, Governor Cuomo is [now proposing that paid sick leave](#) be made available by all employers in the state, protecting employees who must miss work as a result of COVID-19. A [similar effort has stalled in Congress](#). Industry-specific bailouts can be targeted where beneficial effects are most likely to compound through the economy – [child care is a leading example](#). Targeted support to the childcare industry at all levels would not only support those workers, but also allow working parents to continue being productive in their own working lives. Rather than invest in a payroll tax cut that amounts to an [echo to nowhere](#), government can take affirmative steps to reduce the harm that COVID-19 prevention measures have already begun to cause. The coming weeks and months [hold little promise](#) of these effects abating on their own.

3. Access to Care

Effective governance is central to access to health care in normal times, and it is certainly no less so in the face of this expanding threat. Access to care should be considered in two parts. First, what governmental resources can be brought to bear to ensure the *availability* of health care providers, services, and the materials necessary to perform them? Second, what governmental measures can be implemented to require third-party payor *coverage* of such care, and to limit the patient’s *costs*?

A. Availability

Most health care in the United States is directly administered by private providers. Nevertheless, governmental actors play a pivotal role in making sure that health care services are made available to those who need it. The efficacy of the prevention measures discussed above will have downstream consequences for availability. If the [initial impact is both lessened in quantity and stretched out in time](#), available resources will be preserved. This will not only facilitate the health care system’s ability to deal with the current crisis, it will also maintain the capacity of providers to handle the normal volume of health care needs that of course does not stop just because of the COVID-19 outbreak.

How do governmental actors more directly ensure the availability of health care testing? At the federal level, a big part of the answer has to do with money. After significant wrangling last week, Congress passed an \$8.3 billion spending package that President Trump signed, directing significant sums across the system. [Appropriations](#) included \$1.3 billion to the Department of Health & Human Services for treatment and supplies, as well as nearly \$1 billion to the Centers for Disease Control to be disbursed to state and local governments. Whether these funds address the [longstanding underinvestment in public health labs](#) remains to be seen. Similarly, [a bill has been introduced in Congress](#) that would enhance the federal share of Medicaid spending by 8%, in an effort to get more money to all states for the purpose of fighting the effects of the pandemic.

As we still sit at a relatively early stage of the outbreak in the U.S., much of the focus has been [on governmental failure](#) of effective coronavirus testing. Last week, a localized outbreak at a [biomedical conference in Boston was significantly worsened](#) because some sick individuals were turned away for testing from a local hospital on the basis that they did not meet official government criteria. The lack of availability of testing kits more generally across the country in these early days has shone a particularly bright light on the importance of coordinated governmental response. Despite the President’s [proclamation that anyone who needs a test “gets a test”](#), [New York City officials had to repeatedly reiterate the urgency and importance of federal authorities](#) providing their laboratories with materials necessary for increased testing capacity. State officials [across the country](#) have [echoed this frustration](#), with “chaos” a predictable result. The shortage was only made worse by the initial rollout of testing kits that were [found to be flawed](#).

Other measures are available to governmental agencies seeking to promote the availability of health care services in the face of this crisis. Regulations concerning [provider networks](#) can be changed to widen the options available to patients seeking testing or treatment. Congress could pass the bipartisan [Connect for Health Act](#), which as part of its [promotion of telehealth](#) generally allows low-severity patients to remain at home and still access specialists efficiently, reserving brick and mortar facilities to those most in need. [Licensing requirements](#) related to both health care professionals and facilities – can be temporarily relaxed or waived to increase the system’s bandwidth. Government at all levels can take steps in this crisis to increase the availability of health care providers and services by using legal authority to both increase supply and appropriately manage demand.

B. Coverage and Cost

Convenient and affordable insurance coverage of COVID-19 testing and treatment is a goal that lends itself to universal support. The more individuals are encouraged to seek testing and treatment, the less harmful the spread and ultimate impact of the disease. Federal, state, and local governments each have their own role to play in the regulation of third-party payment that lies at the heart of questions of health care access. Because of the complex, fragmented nature of the American health care system, these authorities are sometimes specialized and sometimes overlapping. Promoting access to health care via the regulation of third-party payors (like Medicaid, Medicare, the Veterans Administration, employer-sponsored insurance and individual Marketplace plans, to name a few) does *not* lend itself to easy, one-size-fits-all solutions.

Nevertheless, there are significant tools available to governmental actors to support individuals seeking testing and treatment for COVID-19. Medicaid is the most important safety net program well positioned to facilitate meaningful government response. As a joint federal-state entitlement program with the promise of an open-ended funding mechanism, Medicaid holds the potential to be a powerful tool in blunting the effects of the pandemic in the U.S. As a legal matter, the Medicaid program is endowed with extraordinary flexibility to adapt to new circumstances. Indeed, [following the September 11 tragedy and Hurricane Katrina, among other examples](#), state and federal officials worked closely together to waive normal eligibility requirements and enroll affected populations in Medicaid coverage. In such circumstances, Medicaid programs can institute “presumptive eligibility” that shortens the application process, can utilize retroactive coverage, can extend coverage to persons and services not normally covered, can waive the requirement that a physician be licensed in a particular state, exempt providers from sanctions, and even waive normal requirements related to budget neutrality for new programs.

The federal government should do all that it can immediately to amplify the potential of Medicaid. As of March 10, the Centers for Medicare and Medicaid Services has done little more than [publish a simple fact sheet](#) on COVID-19 restating existing coverage related to infectious disease. So much more is called for. There are bills pending in both the [U.S. Senate](#) and the [House](#) that would make Medicaid even more flexible and supportive in times of disaster. [CMS should immediately publish sub-regulatory guidance](#) promoting the use of the Medicaid program to the full extent of its flexibility and invite states to submit creative proposals to modify their programs to meet immediate needs. More

immediately, states need the Trump Administration to declare a national emergency or disaster under the Stafford Act. Under Section 1135 of the Medicaid Act, such a declaration is necessary for state Medicaid programs to modify the program's normal requirements. Without it, the states that are hardest hit are [increasingly frustrated](#) that an available tool in their policy arsenal is being withheld.

Other measures are available to promote coverage and [limit costs](#) associated with COVID-19 testing and treatment. This week, Vice President Pence convened a group of insurance executives at the White House, [extracting a promise](#) that co-pays would be waived for coronavirus testing, and coverage would be extended for coronavirus treatment in some unspecified group of plans under their control. Where testing returns positive results, it [remains unclear what the financial impact of COVID-19 treatment](#) will be, even where individuals have insurance coverage. It is worth noting that [whatever the specific ambiguity of these promises](#), the majority of Americans with health insurance are enrolled in employer-sponsored plans, and of those individuals, [over 60 percent](#) are enrolled in so-called "self-funded" plans where the plan's contours are determined by the employer, rather than the insurance company that administers it. While some private companies' announcements include reference to "[employer-sponsored plans](#)," the Vice-President's recitation of this promise should be [understood in that context](#). The federal government has limited regulatory authority over some other types of plans as well, such as [high-deductible health plans](#), and has taken steps in recent days to ensure coverage and cost-sharing limits related to COVID-19.

[Government officials](#) have tried to limit cost-sharing and ensure coverage in other ways as well. As part of New York's COVID-19 response, [the Superintendent of Financial Services is in the process of issuing an emergency regulation](#) that will waive cost-sharing associated with COVID-19 testing, including the cost-sharing associated with the test itself as well as the visit in an in-network or emergency room setting. California Governor Gavin Newsom echoed this sentiment, indicating that the coronavirus tests should be considered an "[essential health benefit](#)," referring to the package of mandatory benefits that some private insurance plans must include. State insurance regulators have limited authority to dictate the content of private insurance plans, but these are certainly steps in the right direction.

It is furthermore imperative that we act swiftly to strengthen the safety net for uninsured individuals. Federal programs such as the [Emergency Prescription Assistance Program](#) and the [National Disaster Medical System Definitive Care Reimbursement Program](#) are examples of federally-run initiatives that support the medical needs of uninsured individuals during a national disaster.

Finally, as we wrote in our previous [Health Care in Motion](#), government has an important role to play in the context of promoting access to other health care services, beyond those related to COVID-19, in furtherance of emergency preparedness and harm reduction. For example, governments can require flexibilities such as a supplemental 30-day supply of prescription medications *before* individuals may be advised to stay home or are otherwise unable to access their medications. They can relax out-of-network restrictions to facilitate continuity of care for people forced to relocate because of the emergency. Federal regulators have numerous policy levers available to them to ensure that public payors, such as Medicare, are ensuring access to prescription drugs before an impending outbreak. This week, the Centers for Medicare and Medicaid Services (CMS) released [guidance](#) to Medicare Part D plans, stating that plan sponsors have the *option* at this time to relax their "refill-too-soon" limits "if circumstances are reasonably expected to result in a disruption in access to drugs." However, this guidance does not go as far as it ought to and is out of line with historical responses to emergency situations. For example, following Hurricane Harvey, CMS issued similar, but far more directive [guidance](#), stating that part D plan sponsors were *expected* to lift their restrictions on early refills for the duration of the emergency declaration. As we noted previously, if the President declares a disaster or emergency, or the Secretary of Health and Human Services [declares](#) a public health emergency, this should trigger the *requirement* that Part D plans allow access to early refills. As COVID-19 has been declared a public health emergency by the Secretary effective January 27, 2020, CMS should act swiftly to require Part D plans to lift restrictions on early prescription refills.

Universal coverage remains a long-term goal for health care advocates, and the COVID-19 crisis [highlights just how critical coverage is](#). It is fair to say that the federal government has thus far failed to make the most of the coverage and cost-limiting tools available to it. In the meantime, there are immediate, concrete steps that advocates can take to ask government officials to make better use of existing tools and legal authority in the face of this crisis. We have distilled a list of recommended steps at the end of this *Health Care in Motion*.

4. Vaccine Development and Promotion

It goes without saying that the federal government has a pivotal role to play in promoting the development of a coronavirus vaccine and distributing it once it is deemed safe and effective. Dr. [Anthony Fauci](#) – Director of the National Institute of Allergy and Infectious Disease -- has [repeatedly made it known](#) that the widespread release of a vaccine could be 12-18 months away. Given President Trump’s [increased interest](#) in vaccines, the Food and Drug Administration must do all it can to ensure that vaccine development is done as safely and effectively as it is done quickly.

Moving Recommendations into Action

A competent and comprehensive response to a public health epidemic relies on a robust engagement by multiple levels of government. While it may seem as if you have no role to play apart from individual actions like hand washing and social distancing, advocates of access to care for people living with chronic illness and disabilities can and should demand a comprehensive response from their government representatives. Individuals with chronic conditions need access to health care services that are likely to be disrupted in the coming weeks, and thus will disproportionately bear the burden of systemic containment measures. Advocates for these communities should be sure to make federal, state, and local officials aware of the need to proactively protect these individuals with comprehensive policy responses.

While the universe of COVID-19 responses reaches far beyond health care into all areas of society, CHLPI is focusing its response on ensuring access to care for vulnerable individuals, including those with chronic health conditions. As we develop additional resources on the COVID-19 response, we will continue to make them available through *Health Care in Motion* and other platforms. **Coming editions will contain template letters directed at key government officials that should quickly undertake the actions described above.** Key asks will include:

CMS should immediately publish sub-regulatory guidance promoting the use of the Medicaid program to the full extent of its flexibility and invite states to submit creative proposals to modify their programs to meet immediate needs
The Administration should declare a national emergency or disaster under the Stafford Act, thus authorizing states to submit waivers for emergency flexibilities under Section 1135 of the Medicaid Act
Payors, both public and private, must be required to provide access to early prescription refills. In particular, CMS should act swiftly to require Part D plans to lift restrictions on early fills.
Federal programs that support the medical needs of uninsured individuals during a national disaster, such as the Emergency Prescription Assistance Program and the National Disaster Medical System Definitive Care Reimbursement Program , should be fully utilized.
Advocates should demand specific clarity from state and federal government officials and insurers as promises related to the financial impact of testing and treatment are offered. What, exactly, will be covered - the cost of the test, the cost of treatment, the visits associated with those services, consultation of specialists and other affiliated health care professionals? What cost-sharing, if any, will be associated with that coverage? Will normal network and prior authorization rules apply? What other barriers should patients expect if they seek out health care during this time?
Congress must ensure robust appropriations to federal and state agencies to pay for treatment and supplies. While

appropriations are needed in many areas, federal programs like Medicare and Medicaid need increased support. Yesterday, the House released a spending [package](#), including an 8% increase in the federal matching assistance percentage for all Medicaid programs.

In time, the COVID-19 pandemic will pass. As we navigate these difficulties together, demanding the very highest level of execution of federal, state and local government performance is not too much to ask.

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