



D 2021 138

EXECUTIVE ORDER

Amending and Extending Executive Order D 2021 135 Authorizing the Colorado Department of Public Health and Environment to Order Hospitals and Freestanding Emergency Departments to Transfer or Cease the Admission of Patients to Respond to the Current COVID-19 Disaster Emergency in Colorado

Pursuant to the authority vested in the Governor of the State of Colorado and, in particular, pursuant to Article IV, Section 2 of the Colorado Constitution and the relevant portions of the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, including C.R.S. § 24-33.5-704.5(1)(e)(II), I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order amending and extending Executive Order D 2021 135, authorizing the Colorado Department of Public Health and Environment (CDPHE) to order hospitals and freestanding emergency departments to transfer or cease the admission of patients to respond to the current disaster emergency due to coronavirus disease 2019 (COVID-19) in Colorado.

I. Background and Purpose

On March 5, 2020, CDPHE's public health laboratory confirmed the first presumptive positive COVID-19 test result in Colorado. I verbally declared a disaster emergency on March 10, 2020, and on March 11, 2020, I issued the corresponding Executive Order D 2020 003, as amended and extended. On March 25, 2020, I requested that the President of the United States declare a Major Disaster for the State of Colorado, pursuant to the Stafford Act. The President approved that request on March 28, 2020. On July 8, 2021, I rescinded Executive Order D 2020 003, as amended and extended, and issued Executive Order D 2021 122, the Colorado COVID-19 Disaster Recovery Order, which memorialized and continued the declaration of disaster, pursuant to C.R.S. § 24-33.5-704(4), from Executive Order D 2020 003, as amended and extended.

My administration, along with other State, local, and federal authorities, has taken a wide array of actions to mitigate the effects of the pandemic, prevent further spread, and protect against overwhelming our health care resources. Despite significant progress, there has been an increase in COVID-19 cases, largely due to the highly contagious Delta variant and the twenty percent of Coloradans who have yet to get the highly effective, safe vaccine. As a result, the number of persons seeking medical treatment at hospitals may exceed the capacity of any given hospital. The State faced this same scenario in November 2020, when I first issued this Executive Order. CDPHE may once again need to order hospitals who have reached capacity or are reasonably anticipated to reach capacity during the duration of this Executive Order to cease admitting patients and may also need to transfer patients to a separate facility without first obtaining the individual's or the separate facility's written or informed consent for such transfer.

The transfer of patients from hospitals that have reached capacity or are reasonably anticipated to reach capacity to other specified care facilities will help to ensure that Coloradans have adequate care as we continue to combat COVID-19 and promote public health and protect the ability of hospitals to serve those with COVID-19 and other conditions. This is particularly urgent at this moment in the pandemic, as statewide hospital capacity is less than ten percent and statewide intensive care unit capacity is less than five percent throughout the state.

C.R.S. § 24-33.5-704.5(1)(e)(II) specifically empowers the Governor, in the event of an emergency epidemic that has been declared a disaster emergency, to act by Executive Order to order hospitals “to transfer or cease admission of patients or perform medical examinations of persons.”

The federal Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd, requires hospitals receiving Medicare funds to provide appropriate medical screening to determine whether a patient has an emergency medical condition. EMTALA prohibits a hospital from transferring a patient with an emergency medical condition unless and until that condition has been stabilized. One of the purposes of EMTALA is to prevent hospital emergency departments from “dumping” patients who are unable to pay. EMTALA also states: “The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.”

42 U.S.C. § 1395dd(f). The Secretary of Health and Human Services and the Centers for Medicare and Medicaid Services (CMS) waived 42 U.S.C. § 1395dd(a) to give hospitals the ability to screen patients at a location offsite from the hospital’s campus to prevent the spread of COVID-19. This Executive Order is not intended to conflict with EMTALA, and hospitals must still comply with all non-waived sections of EMTALA.

This Executive Order amends and extends Executive Order D 2021 135, authorizing CDPHE to order hospitals and freestanding emergency departments to transfer or cease the admission of patients to respond to the current rise in cases due to COVID-19 in Colorado within the requirements of federal law. This Executive Order does not authorize CDPHE to make transfer or admission decisions based on vaccination status. The amendments to this Executive Order extend its applicability to allow for the transfer of patients among facilities and subsequent treatment at the receiving facility to help address the hospital capacity issues throughout the State, and direct the Division of Insurance (DOI) to promulgate any regulations necessary to implement this Executive Order.

II. Amendments

Executive Order D 2021 135 is amended as follows:

1. Include the following as Section II.H:

I declare that as a result of the limited intensive care unit capacity and limited general hospital capacity caused by the current surge of the highly contagious Delta variant and the twenty percent of Coloradans who have yet to get the highly

effective and safe vaccine, both the fully-insured and self-funded commercial insurance hospital provider networks are inadequate to allow for the transfer and subsequent treatment of patients in order to ensure Coloradans receive care during this stage of the COVID-19 pandemic. Furthermore, these commercial hospital provider networks fail to satisfy C.R.S. §§ 10-16-704(1) and (6) as a result, and must comply with C.R.S. § 10-16-704(2).

2. Include the following as Section II.I:

I direct DOI, within the Department of Regulatory Agencies, to promulgate any regulations necessary to implement this Executive Order.

3. Section II.E is amended to read as follows:

A person receiving care in a hospital or freestanding emergency department who is transferred to another hospital or facility, including but not limited to skilled nursing and rehabilitation facilities, pursuant to this Executive Order is deemed to have an emergency medical condition, and all services for the transfer and treatment at the receiving facility are considered to be emergency services for purposes of C.R.S. § 10-16-704(5.5), including the in network cost sharing benefits and consumer protections prohibiting balance billing and prior authorization. The rate methodology set forth in C.R.S. § 10-16-704(5.5) applies to any service or treatment provided to any person transferred to an out of network facility during the pendency of this Executive Order, including those persons covered by employers and third party administrators for self-funded health insurance programs.

4. Section II.G is amended to read as follows:

Employers and third party administrators of self-funded health insurance programs that are governed under the Federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, are directed to take all necessary and proper steps to comply with this Executive Order.

III. Duration

Executive Order D 2021 135, as amended and extended by this Executive Order, shall expire thirty (30) days from November 29, 2021, unless extended further by Executive Order. In all other respects, Executive Order D 2021 135, as amended and extended by this Executive Order, shall remain in full force and effect as originally promulgated.



GIVEN under my hand and
the Executive Seal of the
State of Colorado, this
twenty-ninth day of
November 2021.

A handwritten signature in blue ink that reads "Jared Polis". The signature is written in a cursive, flowing style.

Jared Polis
Governor