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Relaxation of Certificate of Need Requirements for Ventilator Beds And DOH Model Policy for Allocation of Ventilation Resources

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As part of the response to COVID-19, on April 14, 2020 the Commissioner of the Department of Health (DOH) issued Executive Directive 20-008, which relaxes the existing statutory and regulatory requirements that limit ventilator beds to hospitals and long-term care facilities and provides the need to submit a Certificate of Need application to add ventilator beds to a facility's existing supply.

Long-term care facilities are authorized to temporarily add ventilator beds into service without going through the Certificate of Need process when necessary to treat COVID-19 patients. Information regarding the number and location of ventilator beds being placed into service is to be provided to the Director of Certificate of Need and Licensing. In addition, any licensed healthcare facility other than hospitals and long-term care facilities is authorized to add ventilator beds with approval of the Department of Health. Healthcare facilities are expected to maintain appropriate staffing in accordance with existing regulations and waivers.

At the conclusion of the COVID-19 public health emergency, healthcare facilities that had added ventilator beds pursuant to the Executive Directive are not to admit any additional ventilator-dependent patients to the temporary beds, and within 45 days the temporary ventilator beds are to be taken out of service.

Executive Directive 20-008 follows the April 11 pronouncement in Executive Directive 20-006 that all healthcare facilities possessing mechanical ventilators determine whether to adopt a written policy regarding allocation of mechanical ventilators during the COVID-19 public health emergency. That same day, the Department of Health released its model policy entitled *Allocation of Critical Care Resources During a Public*

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Health Emergency. Executive Directive 20-006 further provided that any healthcare facility that adopted the DOH's model policy was not to be civilly liable for any damages caused to a patient by any act or omission consistent with the model policy.

In conjunction with the DOH action, the Attorney General issued Law Enforcement Directive No. 2020-03 addressing potential criminal liability for triage decisions and indicating that no criminal prosecution was to be brought against any healthcare facility that adopted and acted in accordance with the DOH model policy. Similarly, no criminal prosecution was to be brought against any healthcare provider acting consistent with the policy. For acts or omissions in contravention of such policy, approval of the Attorney General was required for any criminal prosecution.

Please contact the author of this Alert, **John Zen Jackson** jjackson@greenbaumlaw.com | 732.476.3336 with questions or to discuss your specific circumstances. Mr. Jackson is Of Counsel to the firm's **Healthcare Department**.