

UPDATE CORONAVIRUS (COVID-19)



Stay informed. Take precautions. Stay safe.

Dear Members,

On April 2, 2020, DPH issued an Order applicable to all ALRs that are certified by EOEA. This Order is effective for the duration of the State of Emergency. This Order states:

". . . a nurse employed by an ALR may provide skilled nursing care in accordance with valid medical orders, provided the nurse holds a valid license to provide such care, notwithstanding the provisions of M.G.L. c. 19D, § 11. The following conditions apply to the provision of skilled care:

1. A nurse providing skilled care must be employed or contracted by the ALR.
2. Before skilled care may be provided, the Resident must be evaluated by the nurse and any skilled care to be provided must be authorized by a physician or relevant medical professional. Documentation of such authorization must be included in the Resident's record.
3. Skilled care may only be provided if the setting is medically appropriate for such care and the proper equipment, medication, and supplies are readily available.
4. The skilled care to be provided, subject to the preceding conditions, may include, but is not necessarily limited to, the application or replacement of simple nonsterile dressings, the application of eye drops, the application of ointments, the management of oxygen on a regular and continuing basis, and injections.
5. Prior to the provision of skilled care, the ALR must obtain the consent of the Resident, the Resident Representative, or Legal Representative. Any charges that may result from the provision of skilled care must be disclosed and accepted by the Resident, the Resident Representative, or Legal Representative.

Notwithstanding the guidance provided, ALRs must continue to comply with all applicable statutes, regulations, and guidance not inconsistent with the Order."

Since the Order was issued, Mass ALA received a variety of questions

regarding the implementation of this order. We consulted with our legal counsel and nurses serving on the Resident Care Committee to address the questions. Please note that these responses are a compilation of these professionals' responses without the benefit of having explicit formal guidance on the issues from EOEA or the Massachusetts Board of Registration in Nursing ("BORN"). This advisory is intended as general guidance and is not intended as specific legal advice. ALRs are advised to contact their own attorney(s) with any questions they may have and to secure any guidance needed to implement this Order.

Who May Provide Skilled Nursing Care Services?

Many questions related to which staff may perform the skilled care. Both the Order and the practice responsibilities and functions set forth by BORN at 244 CMR 3.00 et al provide that a "nurse may perform treatment pursuant to a practitioner's order. The term "nurse" under both BORN regulations and 651 CMR 12.00 et al is either a registered nurse or a licensed practical nurse. The one caveat is that 244 CMR 3.01 states that the "Registered Nurse is the designation given to an individual who is licensed to practice professional nursing, holds ultimate responsibility for direct and indirect nursing care . . .", implying that a RN is required in some manner to have oversight of the skilled care services to the extent that such a person would hold ultimate responsibility for the provision of such nursing care. How such "ultimate responsibility" is achieved is not prescribed by regulations, so by default, it is left to the judgement of the nurse who assumes the responsibility.

Related to the question of who may provide the skilled nursing care services is whether the nurse may delegate the performance of such services to unlicensed personnel (i.e. those who are not nurses). Absent a facility policy that the only nurses will provide the skilled care nursing services under the Order, this question must be answered by each nurse using the practice guidance set forth in the BORN Advisory Ruling 9803 entitled Delegation to Unlicensed Assistive Personnel. This policy provides decision-making guidance for a nurse on this issue and requires the delegating nurse to be held accountable for all aspects of the delegation, including supervision of the activities delegated. Furthermore, Board regulations prohibit nurses from delegating nursing activities that require ongoing nursing assessment and judgment.

What Steps Should an ALR Take to Implement These New Services?

It is generally recommended that ALRs take the following steps in order to appropriately implement the services permitted under the Order. The steps are:

(1) Determine with your nurses those skilled care services the ALR

wants to provide, if any;

(2) Establish policies and procedures for the nurses providing the services, including documentation requirements for services provided;

(3) Secure any training that the nurses feel they require prior to performing the services;

(4) Develop an informed consent to be signed by the resident or his or her legal representative permitting the services to be provided;

(5) Make any modifications to fee schedules if necessary, to include charges for the skilled care nursing services, obtain signature consenting to such charges, and provide copy to resident; and

(6) Revise job descriptions as may be necessary.

As this is a temporary order for the duration of the COVID 19 public health emergency and as the actions are permitted under the order, there does not seem to be an expectation that disclosure statements or residency agreements be amended and submitted to EOEA with 30 days advance notice of such changes. The legal protection covering the provision of the services to residents may be achieved through the informed consent process and the acceptance or acknowledgement of the ALR's additional fees by the resident and his or her legal representative.

Another issue raised was whether skilled nursing care services may be provided in the resident's dwelling unit or if specific facilities, such as a dedicated room, are to be used to provide such services. Nothing in ALR regulations, the Order or BORN regulations prohibit skilled nursing care services from being provided in a resident's unit. This is consistent with the provision of such services by home health agencies in a resident's home. The exception is if in the professional judgement of the nurse, the resident's unit is not a safe or appropriate location to provide the skilled care nursing services. In such cases, an ALR may decide it is not able to provide the services if it does not have the physical facilities the nurse determines is necessary.

A related issue is determining what skilled care nursing services an ALR will provide, if any. The Order permits the performance of such services, but does not require an ALR to provide skilled care nursing services. An ALR may decide to perform any and all skilled care nursing services, select certain services to provide, or decide not to offer any skilled care nursing services. It also can assess whether to provide such services on a case-by-case basis, consulting with its nursing staff to see what services can be safely performed in that particular setting and for a particular resident.

Operational Issues That May Arise Related to the Provision of the Services

It is most difficult to predict in advance the issues that may arise related to the provision of skilled nursing services. We attempted to look at the service and identify some of the more difficult problems

that might occur. The following comments address these issues.

We expect that one of the most difficult areas will be obtaining a proper and complete order from a physician or relevant medical professional. The order must contain all required details or directions; it cannot just say “dressing change”. The frequency must be specified and any particular required elements or directions (such as, “the dressing is a sterile dressing”) must be included. If orders do not specify how long the skilled nursing care service is to be provided, then it is advisable for the ALR to have prescribed periods of time for verification or renewal of the order. When abbreviations are used, special care should be taken to make sure that such abbreviations are understood by all involved. Verbal orders and any clarifications to medical orders must be ultimately signed by the ordering practitioner within the timeframe established by the ALR. A helpful resource for determining what is an acceptable medical order is BORN Advisory Ruling Number: 9324, Accepting, Verifying, Transcribing and Implementing Prescriber Orders.

Other issues that may arise are related to any liability associated with providing such services. Each ALR should make sure that its liability insurance covers such professional services by its employees. Most often in such lawsuits, both the ALR and the individual nurses are sued. Often ALRs will need to communicate to the nurses involved that their individual liability is covered under the ALR’s liability policy, with the exception of a grossly negligent act or a willful or intentional act (one that is known to have adverse implications). Sometime nurses will ask for the employer to include, in addition to direct claims, any investigations by a regulatory agency such as the BORN.

Another issue that may need to be addressed is the type of education an ALR should provide to its nursing staff prior to the nurse performing skilled care nursing services. Training regarding the ALRs policies and procedures governing such services is required. Each nurse is responsible for determining if he or she can perform assigned tasks and if he or she needs additional training in order to perform the assigned task or duty. BORN provides a framework for nurses to use to determine if an activity is considered to be a nursing practice. It can be found at <https://www.mass.gov/doc/framework-for-decision-making-nursing-practice-activities/download>

Lastly, as the ability to provide skilled care nursing services is only permitted “during the State of Emergency”, plans must be made for the cessation of such services when the State of Emergency ends. As there is no concrete information on when or how this will be done or how much advance notice will be available, residents and their legal representatives should be informed that the services will cease at this time. Also, there should be a plan in place for how services will be terminated and the services taken over by an approved party (home health agency, hospice or family).

**The information provided in this COVID 19 update is solely for general informational purposes to assist in understanding the evolving guidance regarding the current COVID 19 public health threat. It is not intended to be a primary public health or medical resource, but is provided as a clearinghouse for or compilation of various guidance issued by official and related sources.*

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