

Client Alert

Testing, Testing - Doors Open at Nursing Homes? CMS Offers Guidance on How and When

June 1, 2020

On May 18, 2020, CMS published new [guidance](#) to assist with efforts to safely “reopen” nursing homes nationwide. In the context of nursing homes, “reopening” means permitting visitors and other non-essential personnel to enter the nursing facility. For much of the coronavirus pandemic, residents have been separated from family and friends—who often are a source of comfort to residents and integral to their quality of life and psychological well-being. Some facilities have improvised opportunities for connection remotely via social media and other technology platforms. Given the heightened risks COVID-19 presents to frail elderly, however, reopening nursing homes does not appear on the horizon.

As numerous states begin to ease social distancing and other protective measures against the recommendation of health officials, efforts to prevent the further spread of COVID-19, especially to nursing homes residents and workers, remain a priority. As [CMS acknowledged](#), the “vulnerable nature of the nursing home population combined with the inherent risks of congregate living in a healthcare setting, requires aggressive efforts to limit COVID-19 exposure and to prevent the spread of COVID-19 within nursing homes.”

Resident and Staff Testing is Paramount. To that end, CMS detailed a list of factors for state and local officials to carefully consider before relaxing any current nursing home restrictions, including:

- The capacity for all nursing home residents and staff to receive a baseline COVID-19 test, as well as weekly tests thereafter;
- Whether a nursing home is experiencing any staffing shortages;
- Whether all nursing home staff have access to appropriate PPE;
- Whether the number of new cases, hospitalizations, and deaths have declined state-wide;
- That all residents and visitors be required to wear a face covering or facemask, maintain social distancing, and wash hands or sanitize upon entry to the facility; and
- The ability of local hospitals to accept transfers from nursing homes.

CMS explained that because the pandemic is affecting communities in different ways, state and local leaders should regularly monitor the factors for reopening and adjust their plans accordingly. Notably, however, aggressive testing of nursing home residents and staff remains the cornerstone among all CMS guidance relating to the implementation of rigorous infection prevention, control, and surveillance measures. At the same time, the CMS guidance does not address or recommend to states how the cost of resident or staff testing should be paid for.

The New York Experience. New York officials recently adopted a similar approach in efforts to prevent the transmission of COVID-19 in nursing homes and alleviate its rising infections and deaths, as the virus had swiftly established the Empire State as the epicenter of the pandemic within the U.S. While officials are largely in agreement that more testing must be done, it is not always clear who will be expected to bear the burden of subsidizing the associated costs.

For example, on May 10th, Governor Cuomo signed [New York Executive Order 202.30](#), mandating that all nursing homes and adult care facilities in New York test their staff members for COVID-19 twice a week and report any positive results to the State Department of Health (DOH) by the next day. The order grants the State Commissioner of Health the authority to suspend or revoke the license of any facility that does not comply, and further provides that such facilities may face a penalty of \$2,000 per day with any subsequent violation subject to a penalty of \$10,000 per day, for noncompliance. The order, however, provides no funding for the testing nor the supplies and other resources needed to conduct testing on such an unprecedented scale.

The Governor has since stated that 320,000 test kits would be delivered to nursing homes with assistance from the MTA, while private labs would set aside capacity to process 35,000 tests a day to help facilities comply with these heightened testing requirements. Nonetheless, DOH reported that some facilities have still been unable to meet the biweekly staff testing requirement due to financial considerations, and are encouraging those facilities to contact DOH's Nursing Home Assistance and Coordination Center for help.

In the shadow of the executive order, New York City Mayor Bill de Blasio announced that beginning the last week of May, all New York City nursing homes would be provided with free on-site coronavirus tests for their staff upon request, as well as substitute staff to fill in for workers who test positive. Approximately 240 temporary nurses, aides, and other staff have already been supplied across the city.

With widespread agreement among New York leadership that statewide testing for coronavirus is needed in order to effectively contain the virus and safely reopen nursing homes, the question remains – who will pay? On May 22nd, the New York State Department of Financial Services (DFS) issued a [circular letter](#) stating that New York health insurers must provide coverage of COVID-19 infection and antibody tests without cost-sharing. DFS continued: “Health insurers are reminded that diagnostic testing, including laboratory tests, is an essential health benefit, and as such, must be covered under individual and small group comprehensive health insurance policies and contracts.”

It is uncertain whether insurers and employee health benefit plans will cover the cost of employee testing or contest the authority of the State's directive in the courts. Notably, the federal Families First Coronavirus Response Act, signed into law in March 2020, requires group health plans to provide coverage for COVID-19 testing, without any cost-sharing amounts to plan participants. However, as we understand, health insurers have argued that the employee tests mandated by the State need not be covered under the health plans because they are not ordered by the employees' physicians and are not otherwise medically necessary. Other possible sources of funding for the cost of employee testing include grants from the Federal Emergency Management Agency, or FEMA.

Regarding resident testing, DOH, consistent with CDC's goals, hopes to complete testing of all nursing home residents by June 7th – and has signaled that this testing will be done at no cost to facilities. To that end, DOH has been delivering testing supplies and other assistance to nursing facilities.

The Last to Reopen. CMS ultimately advises that nursing homes should be among the last entities to reopen, and should only consider permitting visitors once all “phase 3 criteria,” delineated in this attachment, are met. Even then, states may determine to wait even longer before lifting visitation restrictions, especially for facilities that: have suffered significant outbreaks of COVID-19 cases; have histories of noncompliance with infection control requirements; or have been unable to maintain adequate staffing levels. Particularly as communities begin to enter phase 1 of reopening, nursing homes are cautioned to remain at their highest level of vigilance and mitigation.

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If you have any questions or health care needs, please contact a Crowell attorney. For further guidance on the legal and business implications of the COVID-19 pandemic, please visit our [Coronavirus Resource Center](#).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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