



Health Law Diagnosis

Monitoring the Pulse of Health Care and Life Sciences

November 6, 2023

The Robinson+Cole Health Law Group is committed to examining and reporting on issues important to the health care and life sciences industries. For more updates on news and developments for the health care and life sciences industries, we invite you to [subscribe to our Health Law Diagnosis blog](#).

[New York Implements Health Equity Impact Assessment as New Requirement for Certificate of Need Process](#)

Authored by: [Leslie J. Levinson](#), [Danielle H. Tangorre](#), and Ivy Miller*

On June 22, 2023, [New York State Public Health Law § 2802-b](#), added a Health Equity Impact Assessment (HEIA) to the Certificate of Need (CON) process for certain health care facilities. The new requirement comes as part of larger legislative changes to the Public Health Laws passed in 2021. The new HEIA requirement applies to any CON applications submitted on or after June 22, 2023, except there is a partial carve out for Diagnostic and Treatment Centers whose patient population is 50 percent or more Medicaid eligible or uninsured. The Department of Health also issued regulations on June 29, 2023 (10 NYCRR 400.26). The purpose of the HEIA is to understand the health equity impact on a specific project, the impact it may have on medically underserved groups and to ensure community input and assessment are considered. The Department of Health has expressed that their vision is “to have health equity considerations meaningfully impact the planning and execution of health care facility projects.” (NYSDOH, Health Equity Impact Assessment, Webinar Series: Program Documents, September 14, 2023.)

Independent Entity

Under the new law, the HEIA must be prepared by an independent entity. This individual or organization must have expertise and experience in health equity, anti-racism, and community and stakeholder engagement. The independent entity is also required to have expertise and experience in either health care access or delivery of health care services.

While the Department of Health has refrained from listing pre-approved independent entities, they have set forth certain prohibitions on who can act as an independent entity for a given project. The independent entity must not be involved in compiling any portion of the project’s CON other than the HEIA. The independent entity also must not have any financial interest in the outcome of the CON application, nor are they permitted to receive any financial gift or incentive for performing the HEIA beyond fair market value compensation for their services. The Department of Health notes that the market value or cost of performing an HEIA is not currently regulated.

The Department of Health has published a conflict-of-interest form to help CON applicants assess whether their prospective independent entity has a financial interest in the outcome of the CON, which would bar them from being able to perform the HEIA. The form must be submitted alongside the completed HEIA.

Meaningful Engagement

The new HEIA requirement stipulates that the HEIA process must “include the meaningful engagement of public health experts, organizations representing employees of the applicant, stakeholders, and community leaders and residents of the applicant’s service area.” While involving local health departments is not a requirement, the Department of Health strongly suggests collaboration with health departments by the independent entity. The

Department of Health has noted that the intent of the “meaningful engagement” requirement is to get direct feedback on the proposed project from a variety of affected parties, and that the methods used to obtain that feedback should be tailored to each type of stakeholder. This includes feedback that is reasonable and culturally competent.

As part of the required HEIA documentation, applicants must complete a data table (supplied by the Department of Health), in which they record each stakeholder that was contacted, method of engagement, and whether that stakeholder is supportive of the applicant’s project.

The new Office of Health Equity and Human Rights of the New York State Department of Health broadly defines health equity and health disparities, including focusing on the social determinants of health, i.e., economic stability, neighborhood and built environment, language access, social and community context, education and health, and healthcare.

Assessment Requirements

The Department of Health has published a template for independent entities to follow when completing and submitting the HEIA. The template breaks the assessment down into the following broad categories:

- **Scoping.** This section requires documentation of several demographic measurements of the facility’s service area. This section also assesses whether and how the proposed project will affect medically underserved groups, and if there are comparable services in the area that those groups may be able to access. The independent entity must describe here if the proposed project will affect care the applicant provides in relation to the Indigent Care Pool and any other statutory obligations the applicant may have. The independent entity must also include any civil rights access complaints filed against the applicant within the last 10 years.
- **Potential Impacts.** This section requires the independent entity to assess what impacts this project may have on health care access, health equity, and health disparities. The independent entity must also examine any unintended consequences of the proposed project, any effect that it may have on the applicant’s provision of indigent care, and any physical access barriers that the project may create (including access via transportation and access by individuals with mobility impairments). This section also includes the meaningful engagement assessment, as described above.
- **Mitigation.** In this section, the independent entity must suggest ways in which the potential negative impacts of the proposed project can be best mitigated by the applicant. The independent entity is required to suggest changes to the project, methods of communication with the community, and ways that the project could address systemic barriers to health care access.
- **Monitoring.** Here, the independent entity will suggest ways in which its recommendations might be adopted by the applicant on an ongoing basis to assess the impact of the proposed project over time. While the independent entity is not required to provide this monitoring (i.e. the HEIA requirements do not stipulate that the independent entity must remain contracted with the applicant), the independent entity can provide suggestions for best practices in this section.

Within one week of acknowledgement of the HEIA by the Department of Health, the applicant must disseminate the results (included as part of the CON) publicly on its website. This posting must also include a statement from the applicant as to how they intend to implement the mitigation measures suggested by the independent entity.

Entities should start early in identifying an independent entity to conduct the HEIA. It will be important to understand community feedback when submitting a CON. While community opposition may not completely derail a proposed CON, understanding objections and addressing considerations for the impact on medically underserved groups will be an important consideration.

*This post was co-authored by Ivy Miller, legal intern at Robinson+Cole. Ivy is not admitted to practice law.

[CMS Announces 0.8 Percent Aggregate Home Health Payment Increase in 2024](#)

Authored by: [Leslie J. Levinson](#), [Danielle H. Tangorre](#), and Ivy Miller*

On Wednesday, November 1, the Center for Medicare & Medicaid Services (CMS) released its [Home Health Prospective Payment System Rate Update final rule for CY 2024](#) (the Final Rule). The Rule estimates that the aggregate increase to Medicare home health payments for 2024 will be 0.8 percent, or \$140 million. This 0.8 percent increase results from the combined effects of three forecasted rate changes: (1) a 3.0 percent increase to home health payments, (2) a 2.6 percent decrease based on the permanent behavior assumption adjustment, and (3) a 0.4 percent increase resulting from an update to the fixed-dollar loss ratio, which is used to determine outlier payments. The 0.8 percent increase is a departure from the Proposed Rule, which estimated a cut in

payments of up to 3 percent.

The Final Rule also includes a permanent payment adjustment of -2.89 percent, just half of the -5.1 percent projected in the Proposed Rule. While CMS did reduce this adjustment in response to concerns that the adjustment would overburden home health agencies, the reduction still represents a significant decrease in payments on top of the -3.925 percent adjustment made in 2023.

Other changes contained in the final rule include:

- Rebasement and revising the market basket used to update home health payments
- Updating and implementing the revised labor-related share
- Codifying requirements for home health patients needing negative pressure wound therapy using a disposable device
- Recalibrating case-mix weight and LUPA threshold using updated utilization data

We will continue to monitor changes to home health payments as these updated estimates take effect.

*This post was co-authored by Ivy Miller, legal intern at Robinson+Cole. Ivy is not admitted to practice law.

If you have any questions, please contact any member of Robinson+Cole's [Health Law Group](#).

[Lisa M. Boyle \(Chair\)](#) | [Nathaniel T. Arden](#) | [Conor O. Duffy](#) | [Kathleen G. Healy](#) | [Leslie J. Levinson](#)
[Danielle H. Tangorre](#) | [Melissa \(Lisa\) Thompson](#) | [Theodore J. Tucci](#) | [Patricia D. Weitzman](#)
[Yelena Greenberg](#) | [Michael G. Lisitano](#) | [Peter H. Struzzi](#) | [Erin C. Turkis](#)

Visit Our Blog



Health Law **Diagnosis**

Above is a post from our [Health Law Diagnosis](#) blog, where we post on fraud and abuse, government enforcement, Medicare and Medicaid, reimbursement, hospitals and health systems, pharmaceuticals, medical devices, and other areas of interest.

For more updates on news and developments for the health care and life sciences industries, we invite you to [subscribe](#).

Boston | Hartford | New York | Washington, DC | Providence | Miami
Stamford | Wilmington | Philadelphia | Los Angeles | Albany | [rc.com](#)



© 2023 Robinson & Cole LLP. All rights reserved. No part of this document may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without prior written permission. This document should not be considered legal advice and does not create an attorney-client relationship between Robinson+Cole and you. Consult your attorney before acting on anything contained herein. The views expressed herein are those of the authors and not necessarily those of Robinson+Cole or any other individual attorney of Robinson+Cole. The contents of this communication may contain ATTORNEY ADVERTISING under the laws of various states. Prior results do not guarantee a similar outcome.

Robinson & Cole LLP | 280 Trumbull Street, Hartford, CT 06103 | [rc.com](#)