VA | U.S. Department of Veterans Affairs

Office of the Secretary
Washington DC 20420

In Reply Refer To: **00REG**

November 9, 2020

Subj: Economic Regulatory Impact Analysis for RIN 2900-AQ94(IF), Authority of VA Professionals to Practice Health Care

I have reviewed the attached Regulatory Impact Analysis and determined the following:

1. VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action and determined that the action is a significant regulatory action under Executive Order 12866.

2. This rulemaking will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601-612.

3. This rulemaking is not likely to result in the expenditure of $100 million or more by State, local, and tribal governments, in the aggregate, or by the private sector, in any one year, under the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532.

4. Attached please find the relevant Regulatory Impact Analysis document, dated November 9, 2020

Approved by:
Nicole Korkos
Chief Economist
Office of Regulation Policy & Management (00REG)
Office of the Secretary

Regulatory Impact Analysis for RIN 2900-AQ94(IF)

Title of Regulation: Authority of VA Professionals to Practice Health Care

Purpose: To determine the economic impact of this rulemaking.

Statement of Need: The Department of Veterans Affairs is issuing this interim final rule to confirm that its health care professionals may practice their health care profession consistent with the scope and requirements of their VA employment, notwithstanding any State license, registration, certification, or other State requirements that unduly interfere with their practice. Specifically, this rulemaking confirms VA's current practice of allowing VA health care professionals to deliver health care services in a State other than the health care professional's State of licensure, registration, certification, or other State requirement, thereby enhancing beneficiaries' access to critical VA health care services. This rulemaking also confirms VA's authority to establish national standards of practice for health care professionals which will standardize a health care professional's practice in all VA medical facilities.

Summary: On January 30, 2020, the World Health Organization (WHO) declared the COVID-19 outbreak to be a Public Health Emergency of International Concern. On January 31, 2020, the Secretary of the Department of Health and Human Services declared a Public Health Emergency pursuant to 42 United States Code (U.S.C.) 247d, for the entire United States to aid in the nation's health care community response to the COVID-19 outbreak. On March 11, 2020, in light of new data and the rapid spread in Europe, WHO declared COVID-19 to be a pandemic. On March 13, 2020, the President declared a National Emergency due to COVID-19. As a result of responding to the needs of our veteran population and other non-veteran beneficiaries during the COVID-19 National Emergency, where VA has had to shift health care professionals to other locations or duties to assist in the care of those affected by this pandemic, VA has become acutely aware of the need to promulgate this rule to clarify VA's provision of health care. This rule is intended to confirm that VA health care professionals may practice their health care profession consistent with the scope and requirements of their VA employment, notwithstanding any State license, registration, certification, or other State requirements that unduly interfere with their practice. In particular, it will confirm (1) VA's continuing practice of authorizing VA health care professionals to deliver health care services in a State other than the health care professional's State of licensure, registration, certification, or other State requirement; and (2) VA's authority to establish national standards of practice for health care professions via policy, which will govern their employment, subject only to State laws that do not unduly conflict with those duties. A conflicting State law is one that would unduly interfere with the fulfillment of a VA health care professional's Federal duties. We note that the policies and practices confirmed in this rule only apply to VA health care professionals appointed under 38 U.S.C. 7306, 7401, 7405, 7406, or 7408 or title 5 U.S.C., which does not include contractors working in VA medical facilities or those working in the community.

Benefits: This rulemaking provides innumerable benefits across the VA health care system. Although it confirms our current authority and largely codifies existing practice, this rulemaking is necessary to ensure that there is a strong legal defense for VA health care professionals if any State proposes an action against them when practicing at the direction of VA in a manner that is inconsistent with a conflicting State requirement. As a general matter, a State's authority to regulate Federal facilities is limited by the Supremacy Clause. *Hancock v. Train*, 426 U.S. 167, 178–79 (1976). While Congress did authorize some limited regulation by States when it required some health care providers to be licensed by a State, such conditions cannot be "inconsistent with the requirements or exigencies of Federal employment." State Bar Disciplinary Rules as Applied to Federal Government Attorneys, 9 Op. O.L.C. 71, 72 (1985) (remaining citation omitted). As such, we believe that this rulemaking would build a record supporting VA's position that conflicting States' laws cannot interfere with the performance of Federal duties. A court will be more likely to defer to VA's interpretation of VA's legal authority via regulation rather than via a subregulatory policy document because courts would likely consider the policy document to lack the requisite formality to carry the force of law, and mere interpretative rules generally "enjoy no Chevron status as a class." *United States v. Mead*, 553 U.S. 218, 232 (2001). By promulgating VA's statutory interpretation via rulemaking, VA's interpretation could be entitled to deference by a court.

Bolstering the legal deference to VA is important for continued operations as well as active participation in the Electronic Health Record (EHR) so that VA health care professionals are comfortable performing tasks that may conflict with their State requirements. There have been a few instances where States have proposed or taken adverse actions against VA health care professionals, such as fines or sanctions, as a result of not complying with State requirements that are inconsistent with their Federal duties. In one instance, a VA psychologist was licensed in California but was employed and providing supervision of a trainee at the VA Medical Center (VAMC) in Nashville, Tennessee. California psychology licensing laws require supervisors to hold a license from the State where they are practicing and do not allow for California licensed psychologists to provide supervision to trainees or unlicensed psychologists outside the State of California. The California State Psychology Licensing Board proposed sanctions and fines of $1,000 for violating section 1387.4(a) of the CA Code of Regulations (CCR). The VA system did not qualify for the exemption of out of State supervision requirements listed in CCR section 1387.4. We note that, in the above instance, VA was able to resolve the issue with the State of California and no actions were ultimately taken against the health care professional. VA strongly supports its health care professionals and is striving to ensure their licenses, registrations, and certifications are protected.

VA, as a national health care organization, simply cannot adequately function without the authority to direct its health care professionals to act irrespective of conflicting State requirements. Two pressing examples include the ability for VA health care

professionals to practice across State lines and the ability for VA to create national standards of practice for its health care specialties.

Since the start of the pandemic, in furtherance of VA's Fourth Mission, VA has rapidly utilized its resources to assist parts of the country that are undergoing serious and critical shortages of health care resources. VA has deployed personnel to support other VA medical facilities that have been impacted by COVID-19 as well as provided support to State and community nursing homes. As of July 2020, VA has deployed personnel to more than 45 States. VA utilized the Disaster Emergency Medical Personnel System (DEMPS), VA's main deployment program, for VA health care professionals to travel to locations deemed as national emergency or disaster areas, to help provide health care services in places such as New Orleans, Louisiana, and New York City, New York. As of June 2020, a total of 1,893 staff have been mobilized to meet the needs of our facilities and Fourth Mission requests during the pandemic. VA deployed 877 staff to meet Federal Emergency Management Agency (FEMA) Mission requests, 420 health care professionals were deployed as DEMPS response, 414 employees were mobilized to cross level staffing needs within their Veterans Integrated Service Networks (VISN), 69 employees were mobilized to support needs in another VISN, and 113 Travel Nurse Corps staff responded specifically for COVID-19 staffing support. In light of the rapidly changing landscape of the pandemic, it is crucial for VA to be able to move its providers quickly across the country to assist when a new hot spot emerges without fear of any adverse action from a State be proposed or taken against a VA health care professional. VA continues to provide health care services via the DEMPS program in response to the pandemic.

Beyond the current need to mobilize health care resources quickly to different parts of the country, this practice of allowing VA health care professionals to practice across State lines optimizes the VA health care workforce to meet the needs of all VA beneficiaries year-round. It is common practice within the VA health care system to have primary and specialty health care professionals routinely travel to smaller VA medical facilities or rural locations in nearby States to provide care that may be difficult to obtain or unavailable in that community. As of January 14, 2020, out of 182,100 licensed health care professionals who are employed by VA, 25,313 or 14 percent do not hold a State license, registration, or certification in the same State as their main VA medical facility. This number does not include the VA health care professionals who practice at a main VA medical facility in one State where they are licensed, registered, certified, or hold some other State requirement, but also practice at a nearby Community Based Outpatient Clinic (CBOC) in a neighboring State where they do not hold such credentials. Indeed, 49 out of the 140 VA medical facilities nationwide have one or more sites of care in a different State than the main VA medical facility.

In addition, the practice of health care professionals of providing health care across State lines also gives VA the flexibility to hire qualified health care professionals from any State to meet the staffing needs of a VA health care facility where recruitment or retention is difficult. As of December 31, 2019, VA had over 13,000 vacancies for health care professions across the country, including approximately 7,500 vacancies for registered

nurses, 2,700 vacancies for physicians, and 2,000 vacancies for social workers. As a national health care system, it is imperative for VA to be able to recruit and retain health care professionals, where recruitment and retention is difficult, to ensure there is access to health care regardless of where the VA beneficiary resides. Permitting VA health care professionals to practice across State lines is an important incentive when trying to recruit for these vacancies. This is also especially beneficial in recruiting spouses of active service members who frequently move across the country.

In addition to practice across State lines, the need for national standards of practice have been highlighted by VA's large-scale initiative regarding the new electronic health record (EHR). VA's health care system is currently undergoing a transformational initiative to modernize the system by replacing its current EHR with a joint EHR with Department of Defense (DoD) to promote interoperability of medical data between VA and DoD. VA's new EHR system will provide VA and DoD health care professionals with quick and efficient access to the complete picture of a veteran's health information, improving VA's delivery of health care to our nation's veterans.

For this endeavor, DoD and VA established a joint governance over the EHR system. In order to be successful, VA must standardize clinical processes with DoD. This means that all health care professionals in DoD and VA who practice in a certain health care profession must be able to carry out the same duties and tasks irrespective of State requirements. The reason why this is important is because each health care profession is designated a role in the EHR system that sets forth specific privileges within the EHR that dictate allowed tasks for such profession. These tasks include, but are not limited to, dispensing and administrating medications; prescriptive practices; ordering of procedures and diagnostic imaging; and required level of oversight. VA has the ability to modify these privileges within EHR, however, VA cannot do so on an individual user level, but rather at the role level for each health care profession. In other words, VA cannot modify the privileges for all health care professionals in one State to be consistent with that State's requirements; instead, the privileges can only be modified for every health care professional in that role across all States. Therefore, the privileges established within EHR cannot be made facility or State specific. Absent standardized practices, it will be incredibly difficult for VA to achieve its goal of being an active participant in EHR modernization because either some VA health care professionals would fear potential adverse State actions because they would be authorized to perform tasks that may be inconsistent with their State requirements or DoD and VA would need to agree upon roles that are consistent with the most restrictive States' requirements to ensure that all health care professionals are acting within the scope of their State requirements. We note that VA would only authorize VA health care professionals to perform tasks and duties that are within the scope of their education, training, and skill.

Estimated Impact: As previously explained, VA has historically authorized its VA health care professionals to practice in accordance with their VA duties, to include practicing across State lines or following a national standard of practice. Therefore,

there will be no costs or transfers associated with the implementation of this rule. Moreover, VA is only aware of a few instances in recent years where a State has proposed or taken adverse actions against a VA health care professional for adhering to their VA duties that are inconsistent with their State requirements. VA acknowledges that we may not be aware of every instance; however, VA does not believe that that States are routinely taking adverse actions against VA health care professionals under these circumstances. VA notes that, despite the low numbers of adverse actions, even one instance where a State proposes or takes adverse action against a VA health care professional could have wide reaching consequences that could deter VA health care professionals from practicing in accordance with their VA duties or other professionals from seeking employment in VA. As a result, VA's mission of providing quality health care to our Nation's veterans would be jeopardized and access to such care would be significantly decreased.

Alternative Policy Approaches: VA could issue a policy instead of a rulemaking; however, as discussed above, the policy would not provide VA as much deference if challenged in court as a regulation. In addition, VA could propose to Congress that Congress pass legislation to be signed by the President of the United States that provides this specific authority. However, there is no assurance that the legislation would be proposed, passed, or signed. A rulemaking, outside of legislation, creates the strongest legal defense for Agency interpretation of its statutes. In light of the fact that VA is preempting State law, rule, or guidance, a rulemaking is the only feasible option if challenged in court. A rulemaking is essential in notifying the public and interested stakeholders of VA's authority and would provide the opportunity for notice and comment from interested parties.

Assumptions and Methodology of the Analysis: VA will not have any displacement of existing VA health care providers and will not change its hiring practices. VA health care providers will continue to perform their current duties by providing health care services notwithstanding the health care provider's State of licensure, registration, or certification and would grant VA the authority to establish the scope of practice and privileges for all health care providers. This rule confirms VA's statutory authority and current VA practice. There is no implementation cost associated with this rulemaking.

Submitted by: Beth Taylor, Chief Nursing Officer.
November 9, 2020