



## West Virginia Legislative Session 2021 Final Report

### *Executive Summary*

The first session of the 85<sup>th</sup> West Virginia Legislature ended April 10 following 60 days of debate on hot button issues such as the elimination of the personal income tax. Although a tax proposal was not adopted by the legislature this session, more work appears to be in store during a possible special session later in the year.

Limited access to the Capitol due to the ongoing COVID-19 pandemic made for a challenging session. Even with limited access and a radical change from traditional efforts, such as moving to a virtual *Hospital Advocacy Week*, WVHA saw positive outcomes based on its legislative agenda. This included passage of a bill to place a moratorium on the expansion of PEIA by non-state agencies (*effective upon passage, April 10, 2021*) and continuation of two Medicaid supplemental payments (*hospital Directed Payment and hospital employed Physician Payment Improvement programs*).

In addition to successfully advancing the WVHA legislative agenda, the hospital community also prevented negative legislation from moving forward. Once again, we defeated legislation to modify and repeal the Certificate of Need (CON) Program for hospitals, blocked efforts prohibiting non-compete contracts for physicians and prevented efforts to undermine the state's strong child immunization laws, among other burdensome legislation.

The success in advancing the WVHA legislative agenda began well in advance of the session. WVHA launched a campaign to expand policymakers' knowledge of the financial challenges faced by West Virginia hospitals, further exacerbated by COVID-19. As part of the overall WVHA advocacy strategy, efforts ranged from working with an external media consultant to expand public awareness of hospital challenges to the use of detailed reimbursement examples by government payers such as PEIA to show the underpayment by 75 percent of the average West Virginia hospital payer mix.

Advocacy is at the core of the WVHA mission to support hospitals to achieve a strong, healthy West Virginia. While most of the attention on advocacy is focused on the State Capitol during session, the reality is most of the work occurs outside the confines of the 60-day legislative session. Those efforts will continue as hospitals and WVHA will be active throughout the year continuing to build solid relationships with Administration officials, legislators, and their staff, as we advocate on behalf of hospitals during interim committee meetings. One area of particular focus this year will be the legislative interim study of provider reimbursement rates associated with PEIA.

The pages that follow in this *Final Report* comprise detailed summaries of the WVHA priority bills that were enacted, including COVID-19 liability protections and Telehealth Pay Parity. The *Report* also features other major bills of interest to the hospital community and a review of the FY 2022 State Budget - which once again includes no payment cuts to hospitals. We also look ahead to the 2021 Legislative Interim Period.

## WVHA Legislative Agenda Priority Bills

### **SB 277**

#### **Creating COVID-19 Jobs Protection Act (COVID Liability Protection)**

*EFFECTIVE DATE: From Passage - March 11, 2021*

This bill was a top priority of WVHA, other healthcare provider groups and the business community. The legislation establishes a legal structure related to COVID-19 liability. The new law is applicable to individuals, health care providers, health care facilities, institutions of higher education, businesses, manufacturers, and others from claims related to COVID-19. It applies retroactively from January 1, 2020 and will apply to any cause of action accruing on or after that date.

SB 277 prohibits claims “against any person, essential business, business, entity, health care facility, health care provider, first responder, or volunteer for loss, damage, physical injury, or death arising from COVID-19, COVID-19 care, or impacted care.” The new law also protects against claims arising from “COVID-19,” “COVID-19 care,” and “impacted care.” Under the Act, claims “arise” from COVID-19 if the claims are caused by “actual alleged, or possible exposure to or contraction of COVID-19,” or if they result from services, treatment, or other actions in response to COVID-19. The Act provides a list of examples, including implementing policies and procedures, testing, delay or modification of scheduling or performing a medical procedure, and actions taken in response to governmental recommendations and guidelines.

A section of the bill emphasizes the need to protect health care providers and health care facilities from liability because the diagnosis and treatment of COVID-19 evolved rapidly and without the opportunity for the medical community to develop definitive, evidence-based medical guidelines. Therefore, the Act prohibits claims related to the diagnosis and treatment of COVID-19, as well as for non-COVID-19 care that was adversely affected by the COVID-19 emergency. However, the “impacted care” protections will not prevent individuals from bringing claims pursuant to current medical professional liability law that arose during the COVID-19 emergency, provided that the claims are unrelated to COVID-19 or the COVID-19 emergency. If such claims appear to touch on “impacted care” as defined under § 55-19-4, then defendants can raise the issue of “impacted care” and have an affirmative defense to such claims.

The bill provides businesses assurance that reopening will not expose them to undue liability for a person’s exposure to COVID-19.

Other provisions deal with products liability protections for those who design, manufacture, label, sell, distribute, or donate products in response to COVID-19, and workers’ compensation claims.

## **SB 398**

### **Limiting eligibility of certain employers to participate in PEIA plans**

*EFFECTIVE DATE: From Passage - April 10, 2021*

This legislation was a top priority of the WVHA to address the growth in enrollment in the Public Employees Insurance Agency (PEIA) state health insurance program.

The bill limits the eligibility to participate in Public Employee Insurance Agency (PEIA) plans by placing a moratorium on the further expansion of PEIA by non-state agencies such as municipalities and towns in West Virginia. This bill does not apply to mandatory participants including state agencies, boards, agencies, commissions, departments, institutions, or spending units. It also does not apply to county boards of education or public charter schools or those that are participating in PEIA prior to April 10, 2021.

## **SB 437**

### **Extending the Directed Payment Program (DPP)**

*EFFECTIVE DATE: From Passage - April 5, 2021*

This bill continues the existing Medicaid supplemental payment program known as the Directed Payment Program (DPP). This program applies to 21 eligible acute care hospitals and is supported by a special tax they pay of 0.75% (75 basis points) on gross receipts. This tax rate is unchanged in the bill. The bill further clarifies that Critical Access Hospitals (CAHs) designated as community outpatient medical centers as authorized in [SB 593](#) from the 2019 legislative session – are exempt from having to pay the tax to support the Program.

Rather than having to seek regular reauthorization of the Program by the Legislature, this bill removes the sunset date, essentially maintaining the program until other actions by the Legislature.

## **SB 397**

### **Extending the Employed Physician Payment Program (EPP)**

*EFFECTIVE DATE: From Passage - April 7, 2021*

This bill continues the existing Medicaid supplemental program for employed physicians of hospitals known as the Employed Physician Payment Program (EPP). This program applies to the 21 eligible acute care hospitals of the DPP (see [SB 437](#) above) and is supported by a special tax they pay of 0.13% (13 basis points). This tax rate is unchanged in the bill. The bill also clarifies that Critical Access Hospitals (CAHs) designated as community outpatient medical centers as authorized in [SB 593](#) from the 2019 legislative session – are exempt from having to pay the tax to support the Program.

Like [SB 437](#), rather than having to seek regular reauthorization of the Program by the Legislature, this bill removes the sunset date, essentially maintaining the program until other actions by the Legislature.

## **HB 2024**

### **Expand use of telemedicine to all medical personnel and pay parity**

*EFFECTIVE DATE: From Passage - March 30, 2021*

This bill aims to promote the use of telehealth in West Virginia through several important provisions including the authorization of telehealth pay parity for “established patients.”

“Established patient” means: "a patient who has received professional services, face-to-face, from the physician, qualified health care professional, or another physician or qualified health care professional of the exact same specialty and subspecialty who belongs to the same group practice, within the past three years."

This bill applies to: PEIA, Medicaid and Commercial Insurers “who shall provide reimbursement for a telehealth service for care rendered to a patient located in an acute care facility whether inpatient or outpatient on the same basis and at the same rate under a contract, plan, agreement, or policy as if the service is provided through an in-person encounter.”

In terms of healthcare practitioners - the use of telehealth applies to virtually every practitioner licensed under Chapter 30 of the *WV Code*. The bill states that the healthcare practitioner must be licensed in good standing in all states in which he or she is licensed and not currently under investigation or subject to an administrative complaint.

This bill requires West Virginia registration of the out-of-state healthcare practitioner and the fee does not exceed the cost for an in-state practitioner.

The definition of telehealth services is modified to include “audio only” telephone calls. This term is used throughout the bill.

Further, there is a requirement that the established patient shall visit an in-person health care practitioner within 12 months of using the initial telemedicine service or the telemedicine service shall no longer be available to the patient until an in-person visit is obtained. This requirement may be suspended, in the discretion of the health care practitioner, on a case-by-case basis, and it does not apply to the following services: acute inpatient care, post-operative follow-up checks, behavioral medicine, addiction medicine, or palliative care.

## Other Important Hospital Related Bills

### HB 2005

**Relating to health care costs and surprise billing**

*EFFECTIVE DATE: 90 Days from Passage – July 7, 2021*

This bill gives authority to the state Insurance Commissioner to enforce the federal No Surprises Act (*H.R. 133, Public Law 116-260*) that was enacted in December 2020. This applies to health insurers, medical providers, and health care facilities.

There are certain enforcement and penalty provisions spelled out in the bill stating that whenever the state Insurance Commissioner believes, from satisfactory evidence that any insurer, medical provider, or health care facility is violating the applicable provisions of the No Surprises Act, the Commissioner may assess a fine, not to exceed \$10,000 per violation. The Commissioner may seek assistance from any other state government agency regarding regulatory enforcement and may also call upon the state Attorney General for legal assistance and representation.

There are rule-making provisions that authorize the Insurance Commissioner to propose legislative rules for approval to implement the provisions of the bill - which shall become effective January 1, 2022.

### HB 2368

**Mylissa Smith's Law, creating patient visitation privileges**

*EFFECTIVE DATE: From Passage – April 10, 2021*

This bill establishes patient visitation rights during the COVID-19 pandemic or declared public health state of emergency for a contagious disease. The bill applies to hospitals, nursing homes, assisted living residences and hospice facilities.

The bill states if the patient's death is imminent, the health care facility shall allow visitation upon request at any time and frequency. In all other instances, the health care facility shall allow visitation not less than once every five days. Visitation permitted by any health care entity may not be inconsistent with any applicable federal law, rule, policy, or guidance in effect for the same emergency.

There are provisions requiring the visitor to comply with the applicable procedures established by the health care facility. Further, the facility may deny a visitor entry to the health care facility, may subject a visitor to expulsion from the facility, or may permanently revoke visitation rights to a visitor who does not comply with the applicable procedures established by the health care facility.

A final provision in the bill provides liability protection to the health care facility for any civil damages for injury or death resulting from or related to actual or alleged exposure during, or through the performance of, the visitation in compliance with this section, unless the health care facility failed to substantially comply with the applicable health and safety procedures established by the health care facility.

## HB 2427

### **Amendments to the Hospital Licensure Rule pertaining to posting safety signage in hospitals**

*EFFECTIVE DATE: 90 Days from filing of modified Hospital Licensure Rule*

This bill amends the Hospital Licensure Rule by adding a new section requiring the posting of safety information in hospitals. Hospital Licensure is regulated by the state Office of Health Facilities and Licensure Certification (OHFLAC) which will have oversight of the new regulation.

This bill requires a hospital to post signage in every patient room, patient care area/department, and staff rest area information outlining the process for reporting patient safety concerns via the facility's designated internal reporting mechanism and the process for reporting unresolved patient safety concerns or complaints to the WV OHFLAC. Requirements regarding posting of the signage are as follows:

- The posting shall include the address and telephone number for OHLFAC.
- Signage color and text shall conform to the Office of Safety and Health Administration regulations for safety instruction signs as provided in standard §1910.145.

Implementation:

- OHFLAC must file the modified Hospital Licensure Rule with the Secretary of State's Office.
- The modified rule will then become effective 90 days from the filing date.
- OHFLAC intends to provide implementation guidance to facilities for compliance.

## HB 3311

### **Corrections to the medical records law relating to reasonable expenses to be reimbursed.**

*EFFECTIVE DATE: 90 Days from Passage – July 8, 2021*

This bill makes minor technical corrections to the medical records law relating to reasonable expenses. The bill clarifies that a provider may charge a patient or the patient's personal representative no more than a fee consistent with HIPAA, and any rules promulgated pursuant to HIPAA, plus any applicable taxes.

## HB 2776

### **Creating the Air Ambulance Patient Protection Act**

*EFFECTIVE DATE: 90 Days from Passage – July 9, 2021*

This bill creates the West Virginia Air Ambulance Patient Protection Act and declares that an air ambulance service provider or affiliated entity who solicits air ambulance membership subscriptions, accepts membership applications, or charges membership fees, is engaged in the business of insurance to the extent that it promises to pay, reimburse, or indemnify the copayments, deductibles, cost-sharing amounts, or post-service payments of a patient related to air ambulance transport as set by the patient's health insurance provider, health care provider, or other third parties.

The bill provides that air ambulance membership agreements or subscriptions shall be regulated by the Insurance Commissioner, among other regulatory steps.

## Other Bills of Interest by Topic

### Broadband

[HB 2002](#) – This bill creates a statutory framework to support, encourage and expedite the expansion of broadband throughout West Virginia. It also creates additional consumer protections for reporting sub-par internet service.

### Insurance

[SB 160](#) – This Department of Revenue rules bill authorizes the Insurance Commissioner to promulgate two relevant legislative rules: 1) related to health benefit plan network access and adequacy; and 2) mental health parity.

[HB 2266](#) – This bill extends Medicaid coverage to pregnant women and their newborn infants to 185% of the federal poverty level and provides coverage up to 1-year postpartum care, effective July 1, 2021 or as soon as federal approval has occurred.

[HB 2877](#) - This bill expands direct health care agreements beyond primary care to include more medical services. Direct medical care membership agreements are a written contractual agreement between a health care provider and a person, or the person's legal representative.

### Involuntary Hospitalization

[SB 702](#) – This bill relates to aspects of the involuntary hospitalization process. Primary provisions relate to criminal competency and criminal responsibility of persons charged with, or found not guilty of, a crime by reason of mental illness. Other provisions allow for an initial forensic evaluation of a defendant at a state mental health facility or state hospital under certain circumstances and it adds criteria for evaluation or report by a qualified forensic evaluator. The bill also establishes the Dangerousness Assessment Review Board.

### Licensing Boards and Professions

[SB 182](#) – This bill authorizes several professional licensing boards to promulgate legislative rules including those involving the Board of Medicine, the Board of Osteopathic Medicine and Board of Pharmacy, to name a few.

[SB 372](#) – This bill provides greater discretion to the WV Board of Medicine to approve graduate clinical training. There are provisions related to the Board granting a temporary license in certain circumstances and rule-making authority by the Board to implement the provisions of the bill.

[SB 472](#) – This bill updates the criteria used by the Legislature's Performance Evaluation and Research Division (PERD) when it assesses occupational and professional licensing regulations.

[SB 644](#) – This bill exempts certain persons pursuing a degree in speech pathology and audiology from licensing requirements.

[SB 668](#) – This bill creates the Psychology Interjurisdictional Compact in West Virginia and provides for increased public access to professional psychological services by permitted psychologists to practice across state lines.



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[SB 714](#) – This bill expands the scope of practice for physician assistants, allowing them more freedom to work with their collaborating physician to provide care in line with their education, training, and experience. The bill also contains provisions for physician assistants to be reimbursed by insurers and health plans.

[HB 2962](#) – This bill updates licensure requirements for dentist and dental hygienist under the Dental Practice Act. The bill updates the criteria used by the WV Board of Dentistry for licensure and clarifies that a student enrolled in an accredited dental program may, under the supervision of a licensed dentist or dental hygienist perform certain tasks under certain conditions without necessitating a license.

[HB 3107](#) – This bill recognizes post-traumatic disorder for first responders as an occupational disease when specified circumstances are satisfied. First responders are identified in the bill as: law enforcement officers, firefighters, emergency medical technicians, paramedics, and emergency dispatchers.

### Pharmacy Benefit Managers

[HB 2263](#) – This bill updates the *Pharmacy Audit Integrity Act*. Among the provisions: blocks pharmacy benefit managers (PBMs) from imposing monetary advantages/ disadvantages to steer patients to pharmacies; establishes fair reimbursement for pharmacies so prescriptions are not filled at a great financial loss; and prevents a PBM from reimbursing pharmacies less than itself or its own affiliate pharmacies and applies these rules consistently to a variety of health plans.

### Public Health

[SB 12](#) – This bill provides local oversight of rules promulgated by health boards. The law requires a 30-day public comment period for new or amended rules and authorizes county commissions to approve, disapprove, and amend such health rules, among other provisions. The law does not apply to existing rules unless they are amended by the health department. The bill provides that local health departments would come under the control of the state health officer during any state of emergency in that county.

[SB 334](#) – This bill establishes a licensing requirement for syringe exchange programs and establishes a goal of one-to-one exchange of needles. The bill includes immunity for providers and civil penalties for non-compliance, from \$500 up to \$10,000. There are provisions requiring local government support as well as an identification requirement for individuals seeking syringe exchange. Other provisions require syringes to be marked with the program passing them out while other provisions require any existing provider not offering a full array of harm reduction services to cease offering a syringe exchange program. This would include wellness checks, wound treatment from needle sticks, screening from communicable diseases, vaccination availability and counseling.

### State Government Organization/State Operations

[SB 67](#) – This bill deals with the Emergency Medical Services Advisory Council, of which WVHA is a member. The bill requires the Council to review any legislative rule being proposed by the Commissioner of the Bureau of Public Health for legislative approval.



## [2021 WVHA Legislative Summary](#)

[SB 275](#) – This bill creates a three-judge intermediate court of appeals in West Virginia to review civil cases between the circuit court and the Supreme Court levels. The first judges will be appointed by the Governor after the Judicial Vacancy Advisory Commission makes recommendations, then elected on a non-partisan basis in staggered 10-year terms. The new court will hear non-criminal appeals of circuit court cases, family court cases and guardianships and conservatorships; appeals of administrative law judge decisions and final orders and decisions by the West Virginia Health Care Authority. The bill also replaces the Workers’ Compensation Office of Administrative Judges with a Workers’ Compensation Board of Review, from where decisions can be appealed to the intermediate court.

[SB 390](#) – The purpose of this bill is to clearly describe the respective roles of DHHR and the state Insurance Commission as it relates to the development of an all-payer claims database.

[SB 671](#) – This bill deals with the appointment of the Director of the Office of Emergency Medical Services by DHHR Secretary. The bill states that the director shall have experience in the delivery and administration of emergency medical services and related pre-hospital care.

[HB 2616](#) – This bill relates to reporting requirements to OHFLAC as it pertains to residential care communities in West Virginia.

### [Miscellaneous](#)

[SB 387](#) – This bill extends a three-year pilot program through DHHR which drug screens applicants of West Virginia’s Temporary Assistance for Needy Families (TANF) program.

[SB 634](#) - This bill requires law enforcement and correctional officers to be trained on the best ways to interact with those with autism spectrum disorders.

[HB 2093](#) – The purpose of the bill is to allow West Virginia veterans to utilize the services of medical foster homes approved by the US Department of Veteran’s Affairs and to exempt medical foster home caregivers from duplicative background examination requirements of the WV CARES program.

[HB 2982](#) – This bill requires that information about the process of a chemical abortion be provided to a woman by a physician when a chemical abortion process is initiated, and a second drug is contemplated to be used at a later time.

[HB 3293](#) – This bill requires county school districts to confirm the sex of students at birth prior to their participation in single-sex interscholastic sports events. That confirmation may take place through submission of an original birth certificate or by a signed physician’s statement of the student’s “unaltered internal and external reproductive anatomy.”

## Features of the FY 2022 State Budget

Following a back and forth volley of the budget bill that was largely structured this session on a failed attempt to phase out the personal income tax ([HB 3300](#)), the Legislature passed and sent to the governor a \$4.5 billion Fiscal Year (FY) 2022 State Budget ([HB 2022](#)). The budget is about \$74 million less than what was originally proposed by the governor. The Legislature, through bills passed, approved an additional \$1.85 million in new spending.

Once again legislators fulfilled their promise of approving the state budget before the conclusion of the session. A major component for hospitals, considering competing proposals to eliminate the personal income tax and other budget measures impacting state government - was *no payment cuts*. Also, key hospital-specific line items supporting Medicaid including targeted line items supporting safety net urban and rural hospitals were fully funded in the budget as were several other important health related items such as the DSH funding and waiver programs to name a few. One notable feature of the Medicaid budget: \$2.5 million was cut from general revenue funding for Medicaid and replaced with a one-time transfer from the Attorney General's Consumer Protection Fund.

With the leadership of Senate President Craig Blair and the support of the West Virginia Legislature, the state's Telestroke Program once again was fully funded at \$1 million in the FY 2022 budget. In 2019, the legislature provided funding for hospitals to enhance their telestroke services and to consult with neurologists at Charleston Area Medical Center (CAMC), Mountain Health Network and WVU Medicine. West Virginians throughout the state are benefiting from neurological specialty consults, with close to 30 West Virginia hospitals now participating in the program.

A few areas of the budget saw minor increases. For example, under DHHR, the legislature increased funding for sexual assault response and prevention programs by \$550,000 and increased funding for Health Right Free Clinics by \$500,000.

The biggest changes from the governor's proposed budget apply mostly to higher education. \$30.2 million was cut from higher education, including two- and four-year institutions. The cuts to higher education include a 1.5 percent across the board cut that is due to be replaced with anticipated surplus funding. \$18 million would be cut from West Virginia University's general revenue budget, unless the state continues to post revenue surpluses, allowing \$16.6 million to be clawed back. Marshall University likewise saw a \$10 million cut to its general revenue budget but could gain \$9.7 million back from surpluses.

With all the cuts, the final budget leaves \$72.7 million unappropriated which could serve as a buffer for the legislature going into the 2022/2023 budget plan. Notably, both the House and Senate versions of the income tax elimination plans relied on unappropriated surpluses to trigger tax cuts. Since neither plan survived the legislative process and a special session is likely later in the year to address this issue, the legislature may be building surpluses to pay for future tax cuts.

In total, it has been reported that state government is currently running a financial surplus of more than \$200 million.

## 2021 Legislative Interim Period and Studies

The Legislature announced its 2021 Interim Schedule for this year, and we expect a busy interim period for hospitals thru December. The full interim schedule is below:

- May: 10 (Limited schedule)
- June: 6, 7, 8
- July, August: None
- September: 12, 13, 14
- October: 10, 11, 12
- November: 14, 15, 16
- December: 5, 6, 7
- January (2022): 9, 10, 11

Of importance to hospitals is [HCR 98](#) calling on the PEIA Finance Board to examine how they can enhance reimbursement rates to providers. Both the House and Senate adopted the resolution. This is a nod to two PEIA related bills that WVHA helped initiate this session but did not advance: [SB 516](#) relating to PEIA reimbursement rates; and [SB 395](#), relating to the composition of the PEIA Finance Board. The full legislature acknowledged the importance of these issues with the approval of the resolution. With member support, we will be heavily engaged on this topic during the upcoming interim period.

Other study resolutions impacting hospitals that we expect will receive attention during the interim period include, among others:

- [HCR 86](#) – Study the recruitment and retention of Health Care Workers in West Virginia
- [SCR 53](#) – Encouraging certain facilities improve palliative care programs

Our advocacy efforts on these and other issues of importance to hospitals and health care will continue throughout the year during this interim period. We will utilize this time to continue building solid relationships with Administration officials, legislators, and their staff, as we advocate for stronger hospitals and stronger communities in West Virginia.

### ***Interim Period Hospital Visits***

We encourage you during this interim period to invite legislators to your hospital to showcase the good things you are doing to care for West Virginians across the state. To support your efforts, the WVHA legislative team will be helping facilitate legislator and staff visits throughout the interim period. Our goal is to solidify our relationships at the Capitol and build upon the great momentum that the hospital community generated during the 2021 legislative session.