

INDIANA'S NEW ADVANCE DIRECTIVES LAW

On April 15, 2021, Indiana Governor Eric Holcomb signed the [Senate Enrolled Act 204](#) into law ("SEA 204"), creating a new chapter in the Indiana Code, which will provide comprehensive requirements for individuals and health care providers on the issuance and effectiveness of, and exceptions to, health care advance directives. Whether a health care provider deals with advance directives regularly or infrequently, providers should make themselves aware of the requirements that may affect their practice prior to SEA 204's effective date on July 1, 2021.

The following provides a brief summary of the major provisions of SEA 204.

ADVANCE DIRECTIVES GENERALLY

An advance directive is a written declaration of an individual's instructions or preferences concerning any aspect of the individual's health care or health information. These documents help ensure that an individual's health care wishes are respected in the event the individual is unable to communicate them to a qualified health care practitioner. The new law defines an "advance directive" as:

"A written declaration of a declarant who...gives instructions or expresses preferences or desires concerning any aspect of the declarant's health care or health information, including the designation of a health care representative, a living will declaration made under IC 16-36-4-10, or an anatomical gift made under IC 29-2-16.1."

An advance directive issued pursuant to the terms of SEA 204 may do any of the following:

- (1) Designate one or more competent adult individuals as health care representatives for the declarant, with authority to make health care decisions for the declarant and/or receive health information on behalf of the declarant;
- (2) State specific health care decisions made by the declarant; and
- (3) State the declarant's preference or desire regarding the provision, continuation, termination or refusal of life-prolonging procedures, palliative care, comfort care or assistance with activities of daily living.

A declarant may modify, terminate or supersede a previously executed advance directive by creating new writing that satisfies the advance directive execution requirements, or by providing an oral statement to the declarant's health care provider, provided that the declarant is competent at the time such oral statement is made.

EXECUTION OF ADVANCE DIRECTIVES

According to SEA 204, advance directives are generally required to be executed by the declarant in the presence of either two witnesses or a notarial officer. Importantly, "presence" is defined broadly so as to permit an advance directive to be signed and witnessed using audiovisual technology, whereby the declarant and witness are able to interact with each other in real-time using a two-way, visual and auditory communication. In addition, an advance directive may be signed and witnessed through real-time telephonic interaction, even if one or more of the persons involved cannot see one another. If the advance directive is being witnessed through telephonic interaction, the advance directive must include a statement indicating that it is being witnessed in that manner.

If the execution of an advance directive is witnessed using audiovisual technology or telephonic interaction, each witness must be able to positively identify the declarant either by personally knowing the declarant, identifying the declarant by viewing photo identification or by receiving accurate answers from the declarant to authenticate the identity of the declarant and to establish sound mind of the declarant. Moreover, each witness must be able to interact with the declarant and the other witness in real-time in order to observe the declarant's expressions of intent to execute an advance directive, the declarant's actions in executing or directing the execution of the advance directive and the actions of each other witness in signing the advance directive.

In lieu of having two individuals witness an advance directive, a declarant and a notarial officer (i.e., a notary public) are also permitted to use technology to sign and witness the document, but may only do so through the use of audiovisual technology, in a manner which continues to satisfy the aforementioned requirements.

SEA 204 also permits an advance directive to be executed in two or more counterparts through tangible paper forms, so long as such counterparts are later assembled into one complete advance directive within ten business days after receipt of all counterparts. Note that if the advance directive is executed in multiple counterparts, there must be a statement on the advance directive to that effect.

EFFECT ON PROVIDERS

SEA 204 provides various requirements and protections for health care providers who follow the advance directives of their patients. As a general matter, the law provides that upon receipt of an advance directive, a health care provider shall place a copy of the advance directive in the declarant's medical record. Unless and until the health care provider has actual knowledge of a valid revocation of an advance directive, the provider may rely on health care decisions as stated in the advance directive or as provided by the declarant's health care representative(s) designated in the advance directive. Most importantly, a health care provider who acts in good faith reliance on either an advance directive or on a health care decision made by a health care representative with apparent authority is immune from liability to the declarant and to the declarant's heirs or other successors in interest to the same extent as if the health care provider had dealt directly with a competent declarant.

Additionally, SEA 204 outlines how and when a health care provider can refuse to follow an advance directive. Specifically, a health care provider may refuse to follow the directions of an advance directive, or the decision made by a properly designated health care representative, if the health care provider concludes that carrying out that health care decision would be medically inappropriate or contrary to the patient's best interest. If a health care provider is unwilling to comply with a health care decision made by the declarant or the declarant's health care representatives, the provider is required to notify the health care representative of the provider's unwillingness to comply with the decision, and promptly take all steps necessary to transfer the responsibility for the declarant's health care to another health care provider designated by the declarant's health care representative.

It is important for all providers to note that even if there is an advance directive in place, SEA 204 provides that health care decisions made and expressed by any competent patient to the patient's provider shall control over any advance directive, provided that the provider contemporaneously makes the competent patient's statement part of the patient's medical record.

PRACTICAL TAKEAWAYS

SEA 204 becomes effective July 1, 2021. Providers should therefore review the requirements of SEA 204 and consider taking the following additional steps:

- Health care facilities with policies regarding advance directives should update their policies to ensure compliance with the new advance directive requirements;
- Health care facilities may wish to consider providing their affiliated health care practitioners with brief advance directive education sessions to ensure that practitioners are aware of their rights, obligations and responsibilities related to advance directives;
- Health care facilities that provide their patients with sample advance directives should update their sample advance directive forms to comply with these new requirements; and
- Providers wishing to familiarize themselves with what a properly executed advance directive may look like should review the Indiana State Department of Health's list of advance directive resources, which can be found [here](#).

If you have questions regarding how SEA 204 may affect you, please contact:

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