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**IN MEMORIAM**

*Michael E. Busch (January 4, 1947 – April 7, 2019)*

On Sunday, April 7<sup>th</sup>, Speaker of the House Mike Busch passed away. He represented Anne Arundel County and the City of Annapolis in the General Assembly since 1986. He became Chairman of the Economic Matters Committee in 1994, where he oversaw health insurance and other aspects of the health care industry. He was elected by his peers in 2003 to serve as the Speaker of the House. He was a friend to all members of our law firm, and always had an open-door policy. He will be missed as a legislator, but even more so as a good and decent man who was always ready with a smile and handshake. Please keep his family and friends in your prayers in the days ahead.

**SINE DIE REPORT – April 8, 2019**

The 439<sup>th</sup> Session of the Maryland General Assembly began at noon on Wednesday, January 9<sup>th</sup> and concluded at 11:30 PM on Monday, April 8<sup>th</sup> when it held a special joint session to honor Speaker Busch. This was the first year of the new term (2019-2023). With nearly 60 new legislators and new party leadership, especially in the Senate, this Session was marked by uncertainty. Typically, the first session of a term is relatively quiet. However, this was not the case this Session. Major policy issues were discussed this Session, including increasing minimum wage, implementing Kirwan recommendations (school funding), debating end-of-life options and much more.

The General Assembly considered 2,497 bills and resolutions this Session. As a comparison, the General Assembly considered 3,127 during the 2018 Session; 2,876 in 2017; and 2,832 in 2016. While there was almost 600 less bills this Session than last Session, the major difference this Session was that almost half of the bills were introduced the week of February 4<sup>th</sup>. Consequently, it was an extremely busy but successful Session for LifeSpan. LifeSpan is proud to report that, through strong advocacy, we successfully defeated bills that would have negatively targeted senior care providers. Our greatest victory was the ability to maintain a 3% Medicaid rate increase in the Governor's Fiscal Year 2020 budget as well as a 4% mandatory appropriation in Medicaid rates linked to future increases in minimum wage.

**A special thanks to those who participated on LifeSpan's Policy Committee this Session for their dedication to weekly conference calls and their thoughtful consideration of the bills.**

Below is a summary sheet of the bills being tracked by LifeSpan as well as a more detailed analysis of each bill, including the Fiscal Year 2020 budget and minimum wage.

## FISCAL YEAR 2020 BUDGET

- **Funding and Structural Deficit**

For the second consecutive year, the Fiscal Year 2020 budget contains a 3% increase in Medicaid rates for nursing homes, medical adult day care services, private duty nursing services, personal care services, home-and-community based services (HCBS) and services provided through the Community First Choice program. This increase will take effect July 1, 2019.

While LifeSpan is very pleased with the 3% increase, it is important to note that the Department of Legislative Services (DLS) has projected a structural deficit moving forward into Fiscal Year 2021. Specifically, the projection is as follows: Fiscal Year 2021 - \$829 million; Fiscal Year 2022 - \$988 million; Fiscal Year 2023 - \$1.16 billion; and Fiscal Year 2024 - \$1.22 billion. According to DLS, “the existing structural imbalance in the budget and costs added for Kirwan (school funding) will likely result in a need for additional revenues and/or existing programmatic change. Given the size of Medicaid, any programmatic changes could mean significant changes to how services are currently delivered.” **Consequently, it is extremely important for LifeSpan members to engage with their legislators over the interim to discuss the vital services provided by your organizations. This is pertinent to those members who rely on Medicaid funding and those who do not. Remember, with the number of new legislators, it is up to you to educate them on senior care issues.**

- **Budget Language**

Three other reports/actions were included in the Fiscal Year 2020 budget. The Maryland Department of Health (MDH) is required to develop:

- A five-year plan to align Medicaid rates for home-and-community based services (those providers listed above excluding nursing homes) with the cost of delivering services. The report is due by October 1, 2019. This is the result of a report from the 2018 Session which showed that home-and-community based services were significantly underfunded. To review the report, click [HERE](#).
- A plan to implement, beginning in fiscal 2021, a nursing home quality program valued at least at 1% of total nursing home provider reimbursements that is patient outcome-specific and includes a system of incentives and penalties. The report is due by October 30, 2019.
- A detailed plan to begin the implementation of a Duals Accountable Care Organization by July 1, 2020. A report is due by November 1, 2019. As you may recall, the MDH held several workgroups on this issue two years ago but failed to move it forward.

## MINIMUM WAGE

***House Bill 166/Senate Bill 280: Labor and Employment – Payment of Wages – Minimum Wage (“Fight for Fifteen”)*** passed the General Assembly. It was subsequently vetoed by the Governor but overridden by the General Assembly. **Due to the strong advocacy by LifeSpan and its members, LifeSpan was successful in securing a mandatory rate increase for Medicaid providers linked to increases in minimum wage.**

The bill --

- **Provides a 4% rate increase for Medicaid providers** (nursing home services; medical adult day services; private duty, personal care services, HCBS, and services provided through Community First Choice Program) beginning for Fiscal Year 2021 (July 1, 2020). The 4% rate increase will be given each fiscal year through Fiscal Year 2026 over the funding provided in the appropriation for the immediately preceding fiscal year.
- The phase up for minimum wage is below. However, there is a different phase up for small businesses (those with 14 or fewer employees)
  - January 1, 2020 = \$11.00/hour; small business - \$11.00/hour
  - January 1, 2021 = \$11.75/hour; small business - \$11.60/hour
  - January 1, 2022 = \$12.50/hour; small business - \$12.20/hour
  - January 1, 2023 = \$13.25/hour; small business - \$12.80/hour
  - January 1, 2024 = \$14.00/hour; small business - \$13.40/hour
  - January 1, 2025 = \$15.00/hour; small business - \$14.00/hour
  - Small business – January 1, 2026 \$14.60/hour
  - Small business – July 1, 2026 \$15.00/hour
  - There is no automatic cost of living escalator for minimum wage as originally included in the bill.
- Permits the Board of Public Works to temporarily suspend a scheduled increase in the minimum wage rate one-time, for a one-year period, if they determine that the seasonally-adjusted total employment figure (as determined by U.S. Department of Labor) has decreased.
- Lowers the maximum age, from 20 to 18, that an employer can pay a rate equal to 85 percent of the minimum wage, meaning this sub-minimum rate applies up to the age of 18.
- Maintains Maryland’s current law regarding tipped wages but requires the Department of Labor, Licensing and Regulation (DLLR) to adopt regulations to require restaurant employers that include a tip credit to provide tipped employees with a certain written or electronic wage statement showing the effective hourly tip rate.
- Leaves in place Maryland’s current law regarding enforcement and remedy provisions.

**BILL UPDATE**

Below is a breakdown of bills that either affect or would have affected senior care providers this Session. While many of the bills below failed, it is important to review them because failed bills often are re-introduced in subsequent sessions.

- **Labor and Employment**

In addition to minimum wage, several bills were introduced affecting labor and employment requirements. Because of the impact of minimum wage on businesses, only two other bills passed the General Assembly.

***Senate Bill 328: Labor and Employment – Noncompete and Conflict of Interest Clauses (passed).*** This bill establishes that a noncompete or conflict of interest provision in an employment contract or similar document that restricts the ability of an employee who earns \$15/hour or \$31,200/annually is null and void as being against the public policy of the State. The bill does not apply to an employment contract or a similar document or agreement with respect to the taking or use of a client list or other proprietary client-related information.

***House Bill 994/Senate Bill 839: Labor and Employment – Criminal Record Screening Practices (Ban the Box) (passed).*** Beginning January 1, 2020, this bill prohibits an employer with 15 or more full-time

employees from, at any time before the first in-person interview, requiring an applicant to disclose whether the applicant has a criminal record or has had criminal accusations brought against the applicant. An employer may require an applicant to disclose during the first in-person interview with the applicant whether the applicant has a criminal record or has had criminal accusations brought against the applicant. The bill does not apply to an employer that is expressly authorized to do so by another applicable federal or State law or if the employer provides programs, services, or direct care to minors or to vulnerable adults. **NOTE:** LifeSpan will seek clarification from DLLR that our members regarding the application of this bill to our membership given the exemption for providing services to “vulnerable adults.”

***House Bill 341/Senate Bill 500: Labor and Employment – Family and Medical Leave Insurance Program – Establishment (Time to Care Act of 2019) (failed).*** This bill would have established a Family and Medical Leave Insurance program administered by the Division of Unemployment Insurance. The program generally would have provided up to 12 weeks of benefits to an employee who is taking partially paid or unpaid leave from employment due to caring for specified family members, the employee’s own serious health condition, or a qualifying exigency arising out of a family member’s military deployment. The bills failed due to inaction in either chamber.

***House Bill 634/Senate Bill 738: Labor and Employment – Wage History and Wage Range (failed).*** Among other provisions, this bill would have required an employer to provide, on request to an applicant for employment, the wage range for the position for which the applicant applied. The bills failed due to inaction in either chamber.

***House Bill 686/Senate Bill 912: Maryland Healthy Working Families Act – Adverse Actions – Absence Control Policy (failed).*** This bill would have allowed an employer to institute an absence control policy that is not in violation of the Maryland Healthy Working Families Act if the employer would have provided at least 40 hours of paid leave in a year, excluding earned sick and safe leave. While the bill did fail, the House Economic Matters Committee referred it to interim study.

***House Bill 976: Labor and Employment – Minimum Wage – Establishment by Counties (failed).*** This bill would have authorized a county to establish a minimum wage rate for employees working in the county. The bill would have required employers in the State to pay the greater of the federal minimum wage or the minimum wage established by the county in which the employee is working. The House Economic Matters Committee voted the bill unfavorable.

***House Bill 1040: Labor and Employment Exemptions from Overtime Pay – Administrative, Executive, or Professional Capacity (Overtime Modernization Act of 2019) (failed).*** This bill would have altered an exemption for specified executive, administrative, or professional employees from the Maryland Wage and Hour Law, resulting in more workers being eligible for overtime pay. The House Economic Matters Committee voted the bill unfavorable. **NOTE:** On March 6, 2019, the Trump Administration released a proposed rule to raise the salaried workers entitled to overtime pay from \$23,660/year to \$35,308/year. In 2016, the Department of Labor tried to raise the threshold to \$47,000/year, which was struck down by a federal court for being too far sweeping by affecting “managerial employees.”

***House Bill 1107/Senate Bill 518: Discrimination in Employment – Pregnancy and Childbirth (failed).*** The bill would have prohibited an employer from: 1) requiring an employee to take leave, whether paid or unpaid, if the employer can provide another reasonable accommodation for the employee’s limitations caused or contributed to by pregnancy or childbirth; 2) denying employment opportunities to an employee based on the requirements of statutory provisions; and 3) requiring an employee to accept an

accommodation if the employee chooses not to, as specified. The bills failed due to inaction in either chamber.

***House Bill 1109: Employers – Health Crisis Hotline – Posting of Notice (failed).*** This bill would have required each employer to keep posted conspicuously in each place of employment the printed notice of the health crisis hotline, developed by the DLLR. The House Economic Matters Committee voted the bill unfavorable.

- **Health Facility Oversight or Regulation**

Only one bill passed this Session related to facility regulation that will have a direct affect on LifeSpan members. Because of the civil lawsuit filed against Neiswanger Management Services, LLC by the Attorney General’s Office, the Attorney General personally introduced and testified in support of ***House Bill 592: Health Care Facilities – Comprehensive and Extended Care Facilities – Discharges and Transfers.*** While, for the most part, the bill aligns with federal regulations on nursing home discharge and transfer, the bill does authorize a facility to petition the appropriate circuit court for an injunction directing the resident or agent of the resident to request a Medicaid determination. The bill also establishes that the court may, with either an order or an injunction, be petitioned to direct that the determination be pursued with due diligence. A facility may also petition the court to grant other appropriate relief to enforce the obligations.

***House Bill 228/Senate Bill 134: State Board of Nursing – Criminal History Records Checks – Revised Statement (passed).*** As introduced, LifeSpan supported the bill which would have required CMTs to undergo a criminal history records check through Criminal Justice Information System (CJIS) on initial licensure, like other health occupations. However, due to issues raised by the unions and by the providers caring for the developmentally disabled, the bill was amended to simply require CJIS to report any additional charges or convictions to the Board of Nursing after the date of the initial criminal history records check.

***House Bill 316: Public Health – Vaccination Reporting Requirements – ImmuNet (passed).*** As originally introduced, this bill would have required all health care providers to report any vaccines given to individuals to the State’s ImmuNet – Maryland’s Immunization Information System. LifeSpan successfully advocated for an exemption for nursing facilities, assisted living communities, continuing care retirement communities (CCRCs) and medical adult day providers from the mandatory reporting requirements. All other health care providers must comply with the reporting requirements.

***House Bill 588/Senate Bill 698: Continuing Care Retirement Communities – Mediation – Representation by Counsel (passed).*** This bill repeals the prohibition against a CCRC, a subscriber or a group of subscribers being represented by counsel during mediation. To support the residents, LifeSpan supported this bill. LifeSpan is unaware of any disputes being referred to mediation in the 10 years that the provision has been in existence.

***House Bill 738: Dental Hygienist – Scope of Practice – Practice Settings Under General Supervision (passed).*** This bill authorizes a dental hygienist practicing under the general supervision of a licensed dentist to practice in a “facility” rather than only in a long-term care facility and alters the requirements that a dental hygienist must follow when practicing under the general supervision of a dentist, both with and without the presence of the supervising dentist. “Facility” includes an adult day care center.

***House Bill 856/Senate Bill 953: Health Care Facilities – Hospital and Related Institutions – Discrimination Protections (failed).*** The bill would have prohibited discrimination in a hospital and related institution based on several additional protections, such as veteran status and genetic information. The bill would have also specified that a hospital or related institution may not discriminate in admitting or providing care for an individual because of the treatment or procedure sought by the individual, if the treatment or procedure is (1) capable of being executed by the hospital or related institution, and accompanied by a referral subject to specified limitations contained in the Health Occupations Article or (2) otherwise determined to be medically necessary. LifeSpan raised concerns regarding the latter being applied to related institutions given that a “referral” as specified under the Health Occupations Article does not apply to related institutions. The bills failed due to inaction in either chamber.

***House Bill 1225/Senate Bill 266: Parking for Individuals with Disabilities – Continuing Care Retirement Facility – Time Limitations (failed).*** This bill would have authorized an owner or operator of a CCRC to limit the amount of time that a motor vehicle may be parked in a space designated for the use of individuals with disabilities. However, the time limitation may not be less than 30 minutes. The bill was voted unfavorable by the Senate Judicial Proceedings Committee and then withdrawn by the House sponsor.

***Senate Bill 411: Election Law – Polling Places at Continuing Care Retirement Communities (failed).*** This bill requires that a separate precinct be established in a CCRC if the CCRC requests that a polling place be established on the community premises. The Board of Elections opposed the bill based on cost issues. The Senate Education, Health and Environmental Affairs Committee voted the bill unfavorable.

***House Bill 868/ Senate Bill 459: Medical Records – Compulsory Process Requests – Advisory Protocol and Voluntary Training (failed).*** This bill would have required the Office of the Attorney General by September 30, 2020, to develop an advisory protocol and voluntary training program for health care providers regarding how to respond to compulsory process requests for medical records. While the bill passed the Senate, it failed to move forward in the House. The Senate had amended the bill to require that the training be a webinar.

***House Bill 967: Maryland Department of Health – Residential Service Agencies – Regulation Requirements (failed).*** This bill would have required residential service agencies to conduct six hours of employee training in Alzheimer’s and dementia and would have required the development and use of a uniform skills assessment form. The bill failed for lack of action by the Committee. The sponsor has indicated that she would like to review the issues over the interim.

- **Health Policy**

***House Bill 571/Senate Bill 522: Virginia I. Jones Alzheimer’s Disease and Related Disorders Council – Revisions (passed).*** This bill alters the membership and duties of the Council to make it easier to appoint qualified individuals and requires the Council to submit a report to the Governor and the General Assembly on the activities and recommendations of the Council by September 1st of each year. The Council is also extended by another five years.

***House Bill 251/Senate Bill 279: Department of Aging – Grants for Aging-in-Place Programs (Nonprofits for our Aging Neighbors Act – “NANA”) (passed).*** This bill authorizes the Maryland Department of Aging to make grants to nonprofit organizations and area agencies on aging to expand and establish aging-in-place programs for seniors.

Two bills were introduced that sought to increase access to home- and community-based services. ***Senate Bill 699: Maryland Medical Assistance Program – Home- and Community-Based Waiver Services – Prohibition on Denial (passed)*** prohibits MDH from denying an individual access to a Medicaid home- and community-based services waiver due to lack of funding for the waiver if (1) the individual is living at home or in the community at the time of application; (2) the individual received home- and community- based services through Community First Choice for at least 30 consecutive days; (3) the individual will be or has been terminated from Medicaid due to becoming eligible for or enrolled in Medicare; and (4) the home- and community-based services provided for the individual would qualify for federal matching funds.

However, the companion bill, ***House Bill 1009/Senate Bill 700: Home- and Community-Based Services Waivers – Alterations (Laurie’s Law) (failed)***, which had a \$42 million fiscal note, failed to pass. Interestingly, the Senate bill was voted out of the Senate Finance Committee but was subsequently referred to the Senate Budget and Taxation Committee where it failed to move. The bill would have required MDH to apply to the federal Centers for Medicare and Medicaid Services to increase the current cap (7,500) on participation in the waiver and would have required the department to conduct specified outreach to individuals on the waiver waiting list or registry, screen specified individuals, and ensure that eligible individuals receive waiver services within a specified timeframe. MDH has committed to revising the waiting list.

***House Bill 485/Senate Bill 475: Office of the Attorney General – Senior and Vulnerable Adult Asset Recovery Unit (failed)***. This bill would have established the Senior and Vulnerable Adult Asset Recovery Unit in the Office of the Attorney General. It was voted unfavorable by both the House Economic Matters Committee and the Senate Judicial Proceedings Committee.

***House Bill 561: Criminal Law – Abuse or Neglect of a Vulnerable Adult – Psychological Abuse (failed)***. This bill would have added “psychological abuse” to the definition of “abuse” applicable to the prohibitions on abuse or neglect of a vulnerable adult in the first and second degrees. While the sponsor attempted to address advocates’ concerns regarding the bill language, the committee determined that the language was unclear and could have unintended consequences, and the bill was subsequently withdrawn by the sponsor.

***House Bill 1270: Maryland Elder Abuse Victims Resources Committee (failed)***. This bill would have established the Maryland Elder Abuse Victims Resources Committee. The purpose of the committee was to (1) determine ways to increase the availability of resources for older adults who do not lack capacity and are ineligible to be served by adult protective services; (2) establish a continuing report on the status of older adults in the State, including the costs of victimization and the calculation of the efficacy of resources used to prevent and mitigate elder abuse; and (3) establish effective statewide policies to prevent elder abuse. The bill failed for failure to act by the Committee.

- **Certificate of Need**

Three certificate of need (CON) bills were considered this Session. These bills were part of the discussions of the CON Modernization Workgroup that occurred this interim and were included in the recommendations put forth by the Workgroup.

***House Bill 931/Senate Bill 940: Health Care Facilities – Certificate of Need – Modification (passed).*** This bill changes the exemption for an ambulatory surgical facility regarding the number of emergency rooms but, more importantly, removes the capital threshold requirement for triggering a CON approval requirement. During the workgroup that occurred this past interim, LifeSpan supported removing the threshold requirement and thus supported the bill.

***House Bill 626: Health Care Facilities – Change in Bed Capacity – Certificate of Need Exemption (passed).*** This bill exempts from the CON an increase or decrease in bed size within an existing intermediate care facility or an existing general hospice program.

***House Bill 646/Senate Bill 597: Maryland Health Care Commission - State Health Plan and Certificate of Need for Hospital Capital Expenditures (passed).*** This bill requires evaluation of the State Health Plan for hospitals and increases the hospital capital expenditure threshold.

- **Medical Malpractice**

Several bills related to medical malpractice were introduced this Session, however, only two bills passed.

***Senate Bill 773: Health Care Malpractice – Qualified Expert – Qualification (passed).*** As you may recall, last Session, the trial attorneys attempted to remove the 20% Rule regarding the qualifications of a qualified expert in medical malpractice cases. The bill died in the final minutes on the last day of Session. This bill would have made similar changes to statute related to the qualification of an expert in a health care malpractice action. Early on, the Speaker of the House requested that the provider community and the trial attorneys work toward a compromise. Discussions occurred up until the final days of Session. As agreed by the parties, ***Senate Bill 773*** defines the term “professional activities”, increases the amount of time one can spend as an expert to 25%, provides for the time period during which the 25% is computed, establishes that once the expert is qualified in the case they remain qualified, and sets rules for when and whether the case can be re-filed if the expert is determined to not comply with the Rule.

The second bill that passed, ***Senate Bill 45: Health Care Provider Malpractice Insurance – Authorization in Settle – Clarification*** was introduced on behalf of the Maryland Insurance Administration to clarify an insurer’s right to settle cases of medical malpractice. The bill clarifies that an insurer may negotiate a settlement for any amount up to the liability limits of the policy.

Other bills that failed include: ***House Bill 1323/Senate Bill 784: Civil Actions – Health Care Malpractice Claims (Life Care Act 2019) (failed).*** This bill (1) would have specified the method by which an award or a verdict for future medical expenses must be calculated and (2) would have authorized a specified witness to testify in the form of an opinion or otherwise, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.

***Senate Bill 322: Medical Malpractice – Notice of Intent to File Claim (failed).*** This bill would have required a claimant to send a health care provider written notice of the claimant’s intent to file a medical injury claim against the health care provider at least 90 days before filing the claim.

***Senate Bill 323: Medical Malpractice – Discovery (failed).*** This bill sought to clarify that the discovery available as the basis of a certificate of a qualified expert in a health care malpractice action includes a deposition of the attesting expert.

***Senate Bill 813: Personal Injury or Wrongful Death – Noneconomic Damages (failed).*** This bill would have increased the maximum amount of noneconomic damages that may be recovered in a personal injury or wrongful death actions, including health care malpractice actions.

- **Prescription Drug Monitoring Program**

As you will recall, over the last several Sessions, numerous initiatives have been undertaken to address the opioid crisis. For prescribers and dispensers, there are specific requirements under Maryland’s Prescription Drug Monitoring Program (PDMP). In Maryland, prescribers, beginning in July 2018, must query the PDMP regarding a patient’s history of prescribed controlled dangerous substances (CDS) before prescribing a CDS. However, this does not apply when the prescription is used to treat a patient who resides in an assisted living facility or a long-term care facility or for a patient in a general hospice care program. Dispensers must report information on CDS to the PDMP within 24 hours of dispensing. While mandatory query is not required, it goes without saying that prescribers, including the medical directors in long-term care facilities, are still able to have their prescribing practices referred by the PDMP.

***House Bill 25/Senate Bill 195: Public Health – Prescription Drug Monitoring Program – Revisions (passed).*** This bill requires, rather than authorizes, the PDMP to review prescription monitoring data for indications of (1) possible misuse or abuse of a monitored prescription drug or (2) a possible violation of law or breach of professional standards by a prescriber or dispenser. If either is indicated, the PDMP must notify and provide education to the prescriber or dispenser. If there is a possible violation of law or breach of professional standards, the PDMP may provide prescription monitoring data to the Office of Controlled Substances Administration (OCSA) for further investigation under certain circumstances. Amendments were added to require the Technical Advisory Committee’s (TAC) involvement in all cases that the Program is considering for referral to OCSA for further investigation. The TAC is a committee comprised of clinicians.