

## Coronavirus Response and Medical Liability

### Main Message Points

- As the coronavirus outbreak continues in the United States, our frontline healthcare professionals are straining under an increasingly difficult burden. We are hearing from our physician community about the ever-growing threats they face—from the constant concern about the risks to their own health to the regulatory and judicial hazards that lie in wait in the weeks and months ahead.
- It is important for federal, state, and local agencies to work together and with the U.S. Congress to alleviate these threats to the greatest extent possible in order to allow our healthcare professionals to focus their time and attention on meeting patients' needs.
- The threat of liability lawsuits could dramatically increase under the current circumstances as this situation continues to unfold. Specifically,
  - Physicians are being asked to provide treatments or care outside their general practice areas and for which they may not have the most up-to-date knowledge;
  - Healthcare professionals, and the facilities in which they practice, have inadequate safety equipment that could result in the transmission of the virus from patient to provider and then to additional patients, or directly from one patient to another;
  - Facilities face shortages of equipment, such as ventilators, and may be forced to ration care;
  - Physicians may face liability related to “elective” surgeries and procedures being delayed because of the additional capacity needed to treat coronavirus patients;
  - Inadequate testing that could lead to delayed or flawed diagnosis; and
  - Patients with issues other than coronavirus having to wait substantial periods of time and receive delayed treatment.

### State and Federal Considerations

- Numerous states have put in place liability immunity for health professionals and/or facilities through executive orders or legislative enactments. These are important steps in providing liability protections for front line healthcare providers.
- Unfortunately, the various protections among the states is resulting in a patchwork of protections that leave those responding to this national emergency on unequal footing depending on where they provide care.
- In addition, some state laws may be insufficient to actually protect health professionals or facilities because they have significant limitations in how the protections will be applied.
- Also, too many of the executive orders are either riddled with loopholes, effectively rendering them meaningless, or are based on questionable claims of gubernatorial authority that will likely result in legal

challenges down the road. In both cases, the protections health professionals and facilities rely on today may not exist when they are needed in the future.

- The federal Public Readiness and Emergency Preparedness Act (PREP Act), contrary to some claims, does not address the vast majority of care provided during the COVID-19 outbreak.
- Federal liability protections that are narrowly tailored and limited in scope would address these problems by creating a uniform set of protections for all healthcare professionals and facilities across the nation. Furthermore, such protections would not infringe upon principles of federalism because the declaration of a national public health emergency warrants a national response.
- To be most effective, federal liability protections must
  - Apply to the array of healthcare providers (including facilities);
  - Apply retroactively to the date of the initial disaster declaration and run for a time period after the emergency is lifted;
  - Cover care provided during that time without regard to whether a patient was being treated for COVID-19 or its symptoms;
  - Apply to care provided within the scope of licensure or certification (but not be limited to the usual scope of practice); and,
  - Cover care provided (or not provided) in accordance with governmental directives.
- In order to protect patients' interests, protections should not apply immunity to acts of gross negligence or willful misconduct, or acts performed while under the influence.

Healthcare professionals and facilities will make every effort to provide the best care possible to the most patients. Under these circumstances, it only makes sense to protect clinicians by limiting the threat of liability so that they can make critical decisions based on not what choice will be least likely to result in a lawsuit, but on which choice does the broadest possible good for the communities in which they serve.

**For additional information,  
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