States Acting to Limit Legal Liability of Healthcare Providers, Physicians and Healthcare Professionals for Care Provided During COVID-19 Pandemic

Insights 05.11.20

PROFESSIONAL



ARTHUR E. PEABODY, JR.
Of Counsel
Washington, D.C.



EMILY L. BRINKMAN
Partner
San Francisco

Hooper, Lundy & Bookman, PC, (HLB) wants to advise providers of recent legal developments regarding the potential civil liability of providers, physicians, and other healthcare professionals for care afforded to patients during the present COVID-19 pandemic. Providers have faced challenges posed by limited resources, including widespread lack of personal protective equipment (PPE) and ventilators, strained staffing resources, and use of "novel approaches" to care or practices that may depart from generally accepted standards of care. While the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act")[1] provides protection from potential liability for care afforded to COVID-19 patients by "volunteers," and the Public Readiness and Emergency Preparedness Act (PREP)[2] affords protection from liability for providers, physicians, and other healthcare professionals for use of drugs and medical devices in the care of COVID-19 patients during the emergency, there is no broad-based immunity from civil liability or malpractice claims for patient care afforded by federal law.

A number of states have acted to provide increased protections from potential liability of providers and health care professionals for "good faith" acts in providing care to COVID-19 patients. Others have not addressed the question or appear to be relying on current statutes that address the liability of healthcare professionals during an "emergency" or "disaster." Yet, in other states, professional medical organizations are advocating for such protections.

The summaries below addressing civil liability focus on states where HLB currently has offices, including California, Colorado, Massachusetts, and the District of Columbia (including Maryland and Virginia) and legal developments in Connecticut, Michigan, Illinois, New York, and New Jersey.

Massachusetts

On April 17, 2020, Massachusetts Governor Charles (Charlie) Baker signed legislation extending protection from civil liability to healthcare professionals caring for patients with COVID-19 for errors made in good faith. [3] Acts or omissions constituting gross negligence, recklessness or conduct with an intent to harm or to discriminate are exempt from the immunity protection afforded by the statute.

Section one of the statute defines "healthcare professional" broadly to include individuals who are a (1) healthcare professional licensed or certified by a state board; (2) student or trainee in their approved medical academic training program; (3) nursing attendant or certified nursing aide; (4) home health aide; (5) administrator or supervisor; and (6) those authorized to conduct health care activities authorized by a COVID-19 emergency rule. As such, the immunity protection has general application to individuals caring for COVID-19 patients.

Earlier on April 8, 2020, Governor Baker issued a directive (retroactive to March 10, 2020) designating certain healthcare activities to which immunity, absent willful misconduct, afforded by the federal Public Readiness and Emergency Preparedness Act (PREP) apply in Massachusetts.[4] The directive is designed to ensure that healthcare workers and facilities that distribute and administer testing, drugs and medical devices for the diagnosis and treatment of COVID-19 are protected from civil liability when exercising good faith in caring for patients during the emergency. The directive has broad coverage of healthcare facilities, including hospitals, skilled nursing homes, assisted living facilities, and home health agencies participating in Medicare, and licensed, registered, or certified health care workers.

Virginia

On April 28, 2020, Virginia Governor Ralph Northam, citing critical shortages of PPE and other supplies, the need to use equipment in unconventional ways, *e.g.*, two patients on a single ventilator, and strained staffing levels, signed an Executive Order[5] affording healthcare providers protection against liability for "good faith actions or omissions" in the provision of care during the state of emergency. Healthcare providers is defined broadly to include any person, corporation, facility or institution licensed to provide healthcare in Virginia.[6]

In furtherance of his earlier Executive Order declaring a state of emergency due to the COVID-19 pandemic,[7] the Governor declared and COVID-19 to be a "communicable disease of public health threat" constituting a "disaster" within the meaning of Virginia statutes.[8] More specifically, he "clarified" a number of circumstances to be covered by current statutes protecting providers from civil liability during a state of emergency[9] including delay of treatment, *e.g.*, elective surgeries; the inability of providers to provide the level of care that would otherwise be required as a result of the lack of PPE, reuse of PPE, dearth of needed supplies; professionals preforming tasks outside their credentials; use of "triage protocols" necessitated by the crisis to prioritize treatment, if necessary; and employing equipment in "innovative ways" different from "normal practices." Absent gross negligence or willful misconduct, the Executive Order, in effect, bars civil liability of healthcare providers in delivering care to COVID-19 patients.

Maryland

In a broad grant of immunity, Maryland statutes provide that a "health care practitioner" is immune from civil or criminal liability if the health care provider acts in good faith and under a "emergency proclamation."[10] Again, a health care practitioner is broadly defined to include any individual who is licensed, certified, or otherwise authorized to provide health care services by the State of Maryland.[11]

Governor Larry Hogan issued the requisite proclamation declaring a public health emergency in Maryland on March 5, 2020.[12] Therefore, the protections of the statute apply. Maryland has also addressed the issue of a potential shortage of ventilators. A Maryland Attorney General opinion immunizes a provider who acts in accordance with mandatory ventilator allocation protocols established by the state.[13] The Governor's recent executive orders addressing the COVID-19 pandemic do not specifically address the issue of liability of providers and healthcare professionals for acts and omissions in delivering care to COVID-19 patients. Providers in Maryland, however, can rely on immunity protections afforded by current statutes as a result of the Governor's emergency proclamation for "acts of good faith" in caring for COVID-19 patients.

District of Columbia

D.C. Code § 7-2304.01(d)(3), re-enacted March 10, 2020 by the District's Council, provides that a public health emergency executive order may include terms that exempt licensed health care providers, either from the District of Columbia or from

other jurisdictions, from civil liability for actions taken within the scope of the provider's employment or voluntary service to implement the provisions of the District of Columbia response plan that address, *inter alia*, a pandemic.

On March 11, 2020, Mayor Muriel Bowser issued proclamations [14] declaring a public health emergency as a result of the COVID-19 pandemic. Although the public health emergency proclamation does not reference the District's emergency response plan, on April 10, 2020, the District's Council enacted D.C. Act 23-286 amending D.C. Code 7-2301 to provide immunity

from civil liability, absent gross negligence, to "any person, employee of the District of Columbia ..., or contractor" [15] implementing D.C. response plan [16] during the emergency.[17] The current response plan includes provisions for D.C.'s agencies as well as roles for private hospitals. As such, the immunity from liability provisions of the D.C. Code may cover providers and healthcare professionals who are engaged in providing care to COVID-19 patients in hospitals and other healthcare facilities addressing the pandemic as part of D.C. overall plan to address the COVID-19 emergency.

Colorado

There is no specific COVID-19 pending legislation or executive order addressing immunity from liability for good faith acts in the provision of care to patients during an emergency or the COVID-19 pandemic. Since Colorado's grants of immunity are limited to "Good Samaritans,"[18] volunteers,[19] and individuals trained to perform cardiopulmonary resuscitation and apply external defibrillators,[20] advocacy groups such as the Colorado Medical Society are requesting the Governor to take steps to ensure immunity for hospitals and healthcare professionals for good faith acts in caring for COVID-19 patients. [21]

California

Existing California law specifies that hospitals and healthcare professions have no liability, absent willful act or omission, for any injury resulting from their services at the express or implied request of any state or local official or agency during a "state of emergency."[22] On March 4, 2020, Governor Gavin Newsom declared such a health care emergency in light of the COVID-19 pandemic[23] and, as a result, the statute may apply. The statute applies to hospital, physicians, pharmacists, nurses, respiratory care practitioners, and dentists.

California also has a broad "Good Samaritan" law [24] that protects "licensees" who render emergency care from civil damages for departures from the standard of care, absent willful acts or omissions, at the scene of an emergency defined to include, but not be limited to, an emergency room in the event of a medical disaster, defined as a state proclaimed medical emergency. Although the precise reach of the statute is unclear, this statute may afford some protection to healthcare professionals in emergency rooms addressing the needs of patients afflicted with COVID-19.

There is no specific COVID-19 pending legislation or executive order in California addressing immunity from liability for good faith acts in the provision of care to patients during an emergency or the COVID-19 pandemic.

Connecticut

On April 5, 2020, Connecticut's Governor Ned Lamont issued Executive Order No. 7U. [25] This order declares that all health care professionals and health care facilities will be immune from civil lawsuits for injuries or death alleged to have been as a result of the good faith actions taken to treat COVID-19 patients. This order also includes acts or omissions that were taken because of the lack of resources due to the COVID-19 pandemic. The order does not extend to acts or omissions that constitute a crime, fraud, malice, gross negligence, willful misconduct, or otherwise constitute a false claims or prohibited acts under Connecticut General Statute 4-275 or 31 U.S.C. §§3729 et seq.

The Order broadly defines both what a health care professional and a health care facility are. A health care professional includes: 1) any individual licensed, registered, permitted, or certified in any state of the United States; 2) any retired professional; 3) any professional with an inactive license; or 4) any volunteer approved by the Commissioner of the Department of Public Health. A health care facility means: 1) a licensed or state approved hospital or clinic; 2) nursing home,

3) field hospital; 4) or other facility designated by the Commissioner of the Department of Public Health for the temporary use for providing essential services in response to COVID-19. The Order retroactively applies the civil immunity provision to March 10, 2020, when the Governor declared the State of Emergency.

Michigan

On March 29, 2020, Governor Gretchen Whitmer issued Executive Order 2020-30 [26] setting forth several restrictions and requirements to address the COVID-19 response in Michigan, which includes limiting the liability of any health care professional or designated health facility providing COVID-19 response services. The immunity extends to any injury sustained by a person receiving COVID-19 services, unless the injury or death was caused by gross negligence. [27]

Illinois

Illinois Governor JB Pritzker issued Executive Order 2020-19 [28] on April 1, 2020 limiting civil liability for COVID-19 response recognizing the rapid spread and need to preserve public health and safety.[29] Specifically, the Order provides civil immunity to "Health Care Facilities," "Health Care Professionals," and "Health Care Volunteer" for any death or injury caused by any act or omissions "in the course of rendering assistance" to patients in response to the COVID-19 outbreak. Immunity does not apply if the death or injury was caused by gross negligence or willful misconduct by the "Health Care Facility." A "Health Care Facility includes: 1) facilities licensed, certified, or approved by any state agency; 2) state-operated Developmental Centers certified by the Centers for Medicare and Medicaid Services and licensed by state-operated Mental Health Centers; 3) licensed community-integrated living arrangements; 4) licensed community mental health centers; 5) federally qualified health centers; and 6) any government-operated site providing health care services established for the purpose of responding to COVID-19.

"Health Care Professionals" are defined as "any licensed or certified health care or emergency medical service worker who (i) are providing health care services at a Health Care Facility in response to the COVID-19 outbreak and are authorized to do so; or (ii) are working under the direction of the Illinois Emergency Management Agency (IEMA) or DPH in response to the Gubernatorial Disaster Proclamations."

A "Health Care Volunteer" is defined as "all volunteers or medical or nursing students who do not have licensure who (i) are providing services, assistance, or support at a Health Care Facility in response to the COVID-19 outbreak and are authorized to do so; or (ii) are working under the direction of IEMA or DPH in response to the Gubernatorial Disaster Proclamations."

On April 30, 2020, Governor Pritzker re-issued several Executive Orders relating to the COVID-19 response, including 2020-19. [30] Executive 2020-19 was reissued in its entirety with several additions. A health Care Facility now includes all previously defined facilities but also includes: 1) supportive living facilities, and 2) assisted living facilities. The revised order also includes language requiring the acceptance of a COVID-19 patient transfer if the receiving hospital has sufficient capacity and capability to treat the patient. In determining whether a hospital has sufficient capacity, hospitals may consider its ability to provide safe and effective treatment consistent with public health recommendations, available supplies, staffing, and bed capacity.

New York

The State of New York passed the Emergency Disaster Treatment Protection Act on April 2, 2020 to protect health care professionals and health care facilities from liability caused by COVID-19 treatment. [31] Specifically, health care professionals and facilities are immune from civil and criminal liability for any harm or damage caused as a result of any act or omission if: 1) the provider or facility is arranging for or providing care pursuant to a COVID-19 emergency rule; 2) the act or omissions in the course of arranging or providing treatment is impacted by the facility's or provider's decision or activities in response to COVID-19 treatment; and 3) the facility and professional is arranging for or providing services in good faith. Criminal and civil liability immunity does not extend to conduct that is willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm. [32]

Additionally, the Act extends the immunity protections to volunteer organizations that are providing COVID-19 response activities as long as the harm or damages caused was not the result of willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm.

Earlier, on March 23, 2020, Governor Andrew Cuomo issued Executive Order 202.10 granting immunity from civil liability for acts and omissions to physicians and healthcare professionals resulting in injury or death of COVID-19 patients except where such injury or death was caused by gross negligence. [33]

New Jersey

The New Jersey Legislature pass SB 2333 [34] on April 12, 2020 (retroactive to March 9, 2020) grants civil immunity to all physicians and healthcare workers for civil damages for any injury or death that resulted from any act or omissions by that healthcare provider in the course of providing COVID-19 emergency medical services. Additionally, the bill provides civil immunity to health care facilities and healthcare systems that own or operate more than one facility for any injury or death sustained if the act or omission was done by a covered physician or healthcare worker.

The bill also provides immunity for any act or omission taken in good faith by a healthcare worker of a healthcare facility to support the state's COVID-19 emergency response efforts. This extends to healthcare providers using telemedicine is diagnosing and treating patients outside their normal scope of practice as long as the act or omissions is not a crime, actual fraud, actual malice, gross negligence, recklessness, or willful misconduct.

Finally, the bill provides immunity from civil and criminal liability to health care facilities or systems that own and operate more than one facility for any death or injury sustained during the emergency due to a lack of or allocation of mechanical ventilators or other scare resources. The healthcare facilities are required to have in place a scarce critical resource allocation policy that comports with the requirements issued by the Commissioner of Health.

Earlier, on April 1, 2020, New Jersey Governor Philip Murphy issued Executive Order 112 (corrected version) using his authority to grant physicians and healthcare professionals immunity for good faith acts or omissions in providing care and treatment to COVID-19 patients. [35]

HLB is prepared to assist hospitals, physicians, and other healthcare professionals and entities who may be faced with issues of liability stemming from care afforded to COVID-19 pandemic, including litigation. Please contact Arthur Peabody in Washington D.C., Emily L. Brinkman in San Francisco, Katherine Dru in Los Angeles and Denver, or your regular HLB contact for advice and assistance. HLB also has a COVID-19 Resource Center for evolving issues which can be found here.

[1] Pub. L. 116-136 (Apr. 16, 2020).

[2] In invoking the immunity protections of the Public Readiness and Emergency Preparedness Act (PREP), 42 U.S.C. 243 et seq., the Secretary of Health and Human Services shielded manufacturers, distributors, and healthcare providers from claims arising from the use of drugs and devices (*e.g.*, ventilators) used during the pandemic to treat patients. For proclamation, see, https://www.phe.gov/Preparedness/legal/prepact/Pages/COVID19.aspx

[3] Approved Massachusetts Bill S. 2460 available here.

[4] Directive available here.

[5] Executive Order available here.

[6] Code of Virginia 801.581.1 (definitions).

[7] Executive Order Number 51 (March 12, 2020) is available here.

[8] Code of Virginia § 44-146.16.

[9] Code of Virginia §§ 8.01-225.01-.02 (immunity of healthcare provider during a disaster absent gross negligence or willful misconduct).

[10] Maryland Code Ann, Public Safety, §14-3A-06.

[11] Maryland Code Ann., Health, § 19-114(e).

[12] Governor's Proclamation available here.

[13] 100 Op. Atty. Gen. 160 (Dec. 28, 2015), 2015 WL 9704095; also available here.

[14] Proclamations available here.

[15] D.C. Act 28-236, 401(b)(3A).

[16] D.C.'s Emergency Response Plan is available here. Although much of the language in the plan reflects actions to be taken to address natural disasters (e.g., hurricanes), oil spills or terrorist attacks, the plan is designed to address "the outbreak of communicable disease that threatens or causes damage to life, health, or property." Plan at 9.

[17] "District of Columbia response plan" means the District of Columbia's state plan for public emergency preparedness and prevention prepared pursuant to §201 of the Disaster Relief Act of 1974 (42 U.S.C. § 5121) and D.C. Code § 7-2302.

[18] Col. R. S. 13-21-108.

[19] Col. R. S. 12-29.3-104.

[20] Col. R.S. 52.557(b).

[21] Letter dated April 4, 2020 is available here.

[22] Cal. Gov't. Code § 8659.

[23] Proclamation available at here.

[24] California Business & Professions Code §2395.

[25] The Executive Order is available at here.

[26] The Executive Order is available at here.

[27] MCL 30.411(9).

[28] The Executive Order is available at here.

[29] Governor Pritzker issued three Disaster Proclamations in response to the COVID-19 pandemic on March 12, 2020, April 2, 2020, and April 30, 2020. The Proclamations and all Executive Orders can be found here.

[30] Executive Order 2020-33 is available at here.

[31] New York Public Health Law, Article 30-D, §3080.

[32] New York Public Health Law, Article 30-D, §3082.

[33] Executive Order

[34] https://legiscan.com/NJ/text/S2333/2020

[35] Executive Order

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