

# PUBLICATION

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## Long Term Care Liability During the COVID-19 Pandemic: Ways State Governments Can Ensure Protection

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Long term care facilities and providers are bearing the brunt of caring for the nation's largest and most vulnerable populations of COVID-19 patients. And they're doing so in the face of considerable uncertainty, insufficient supplies, and staffing shortages. One of the most significant concerns of facilities and providers caring for long term care residents during the coronavirus pandemic is legal liability exposure. As matters now stand in most states, this risk will continue long after the virus curve flattens and the nation develops a "new normal" for post-pandemic life. Long term care facilities and providers can take practical steps to reduce, but not to fully eliminate, their significant exposure to risks in caring for this vulnerable patient population.<sup>1</sup> The most effective risk mitigation measures, of course, are federal and state protections.

### Limits of Existing Federal Liability Protections

As of this time, there is no comprehensive federal legislation that specifically protects all long term care facilities and providers.<sup>2</sup> The [Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#) immunizes only health care providers, and it contains significant limitations on the applicability of liability protections.

While the [Public Readiness and Emergency Preparedness \(PREP\) Act](#), and the subsequent Declaration and Amendment to the Declaration from the Secretary of Health and Human Services (HHS) that invokes the PREP Act, provide expansive immunities for "covered persons" who prescribe, administer, or dispense "covered countermeasures," such immunities are still fairly narrow.<sup>3</sup> The PREP Act does not explicitly include long term care facilities in its definition of covered persons, and it does not address the scarcity of resources related to the national emergency. On March 25, 2020, Katie Smith Sloan, the President and CEO of LeadingAge, sent a [letter](#) to HHS Secretary Alexander Azar requesting clarification of the legal immunities afforded by the PREP Act, specifically as related to long term care facilities. Sloan asked Secretary Azar for an express confirmation that long term care facilities qualify as "covered persons" under the Act. In addition, Sloan sought clarification that the immunities under the PREP Act also extend to situations in which covered countermeasures are scarce or unavailable, such that covered persons would be protected from liability for "claims alleging the failure to use a covered countermeasure, the shortage of a covered countermeasure, or the insufficient use of a covered countermeasure."

The PREP Act is further limited with respect to its application to state-level protections. Some individual state governors, including Governor Charlie Baker of Massachusetts, have issued specific [directives](#) to extend the authority of the federal PREP Act to the state.

On March 24, 2020, Secretary Azar sent a letter to all state governors, calling on them to act to develop a list of state liability protections available to health care providers. Secretary Azar stated, "All 50 states and the District of Columbia ... should issue guidance summarizing the statutory scope of protections offered under their laws and the process necessary to attach those protections to a health professional's service."

Federal-level liability protections are not sufficient. It is up to state governments to act to protect health care providers, including long term care facilities, who are on the front lines of the pandemic.

## State Liability Protections

Some state governments have established robust liability protections for long term care facilities and other providers by statute or executive order based on existing law. On April 1, 2020, Governor J.B. Pritzker of Illinois issued Executive Order 2020-19, which established that health care facilities and health care professionals, specifically including long term care facilities and providers, "shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission [of the facility or the professional] ... in the course of rendering assistance ... by providing health care services in response to the COVID-19 outbreak ... unless it is established that such injury or death was caused by gross negligence or willful misconduct ..."

On April 7, 2020, Governor Ned Lamont of Connecticut issued [Executive Order No. 7V](#), which provided that any health care facility, including nursing homes, and any health care professional "shall be immune from suit for civil liability for any injury or death alleged to have been sustained because of the individual's or health care facility's acts or omissions undertaken in good faith while providing health care services in support of the State's COVID-19 response...." This Executive Order specifically included immunity from liability for "acts or omissions undertaken because of a lack of resources, attributable to the COVID-19 pandemic, that renders the health care professional or health care facility unable to provide the level or manner of care that otherwise would have been required in the absence of the COVID-19 pandemic and which resulted in the damages at issue..."

As of now, at least 11 states, including Alabama,<sup>4</sup> Arizona,<sup>5</sup> Connecticut,<sup>6</sup> Georgia,<sup>7</sup> Illinois,<sup>8</sup> Michigan,<sup>9</sup> Mississippi,<sup>10</sup> Nevada,<sup>11</sup> New Jersey,<sup>12</sup> Rhode Island,<sup>13</sup> and Vermont,<sup>14</sup> have issued executive orders that specifically limit, to some extent, the liability of long term care facilities and their staffs for care provided during the coronavirus pandemic.

Provider organizations and associations have stepped up to pursue state action to immunize long term care facilities and providers from liability. On April 3, 2020, the Florida Health Care Association, through its Executive Director, J. Emmett Reed, sent a [letter](#) to Florida Governor Ron DeSantis asking for the enactment of immunity protections for acts or omissions of health care facilities, including skilled nursing facilities, and providers, including licensed providers, nursing attendants or certified nurse aides, and health care facility administrators, executives, and others, who are providing health care services, in good faith, pursuant to a COVID-19 emergency rule or otherwise during the COVID-19 public health emergency. Similarly, on April 8, 2020, the Pennsylvania Health Care Association and LeadingAge PA, through their respective Presidents and CEOs, Zachary Shamberg and Adam Marles, sent a letter to Pennsylvania Governor Tom Wolf seeking emergency funding and civil immunity protections, such as those enacted in New York,<sup>15</sup> New Jersey, and Connecticut, for nursing homes in Pennsylvania. On April 15, 2020, the Pennsylvania Medical Society put out a call to its 16,000 members to contact Governor Wolf and urge him to sign "an executive order granting medical liability immunity for care associated with COVID-19 during the emergency declaration" in Pennsylvania.

## Model Language for State Governments to Implement Liability Protections

Long term care facility representatives and provider organizations in all states that have not yet enacted sufficient liability protections must now reach out to their respective governors for engagement. To be most effective, liability protection provisions need to contain specific elements. The following model language can be used for state implementation:

### EXPANSION OF FACILITY CAPACITY AND BED CLASSIFICATIONS:

- All [health care/long term care] facility licensing statutes, rules, and regulations, including but not limited to certificate of need and facility bed moratoriums, are suspended with respect to all [health care/long term care] facilities, to the extent that services provided at said facilities are in response to

the State's emergency declaration, in order to permit facilities to add or convert any beds to long term care or rehabilitative beds in appropriate locations to care for COVID-19 patients who no longer require acute care support and to prepare for patients who require longer lengths of stay for supportive care. These statutes, rules, and regulations are to remain suspended for a period of 30 days after the State's emergency declaration has ended.<sup>16</sup>

- If, due to capacity, a [health care/long term care] facility considers itself unable to provide inpatient care for COVID-19 patients at a level of quality available at other [health care/long term care] facilities within the State, patients may be transferred to the nearest [health care/long term care] facility location of the appropriate care setting with the capacity to provide care at the community standard at the time, subject to patient choice. [Health care/Long term care] facilities shall cooperate with one another to transfer and accept patients to increase patient access to care and maximize the quality of care delivered during the period of time of the State's emergency declaration.<sup>17</sup>
- During the time period of the State's emergency declaration and for 30 days thereafter, [health care/long term care] facilities may add beds and services and/or operate alternative care sites, including quarantine step-down sites as defined by the [State governing body], to address the COVID-19 virus, and hospitals may also provide long term care facility services on their premises subject to the approval of the [State governing body].<sup>18</sup>

#### RELIEF OF FACILITY STAFFING RATIO, TRAINING, AND QUALIFICATION REQUIREMENTS:

- All [health care/long term care] facility staffing and training statutes, rules, and regulations, are suspended, provided that the facilities have sufficient staffing at all times to meet the needs of the residents, and provided that the facilities procure staff with adequate experience and provide on-the-job training to safely carry out their duties, insofar as patient needs may exceed staffing availability during this emergency. These statutes, rules, and regulations are to remain suspended for a period of 30 days after the State's emergency declaration has ended.<sup>19</sup>
- All [health care/long term care] facility licensing statutes, rules, and regulations regarding total numbers of beds under the licensure and limiting capacity for patient rooms and beds are suspended insofar as additional beds are available or could be added for use in treating COVID-19 or meeting the health care needs of non-COVID-19 patients and sufficient safety and comfort for patients and staff are provided. These statutes, rules, and regulations are to remain suspended for a period of 30 days after the State's emergency declaration has ended.<sup>20</sup>

#### EASE OF FACILITY RESIDENT TRANSFER RESTRICTIONS:

- [Health care/Long term care] facilities are not permitted to prohibit the admission or readmission of a resident based on COVID-19 status or testing requirements, unless doing so is consistent with guidance from the [State governing body]. When a resident who had temporary housing or was hospitalized outside the facility seeks readmission, if the facility can meet the medical needs of the resident and has capacity, the facility must readmit the resident. Nothing in this order abrogates the obligation to pay or right to receive payment due under an admission contract between a resident and a long term care facility.<sup>21</sup>
- All [health care/long term care] facility statutes, rules, and regulations regarding transfer restrictions are suspended, during the time of the State's emergency declaration, to the extent that such statutes, rules, and regulations prevent, hinder, or delay certain transfers or discharges of [health care/long term care] facility residents to other [health care/long term care] facilities that are necessary to

expedite the grouping or cohorting of residents to reduce the spread of COVID-19 among our most vulnerable populations and to relieve the stress on our health care system to meet the increased demand of addressing COVID-19 related illnesses.<sup>22</sup>

#### IMMUNITIES FOR LIABILITY OF HEALTH CARE PROVIDERS AND FACILITIES:

- All health care facilities and providers, including long term care facilities and providers, shall be immune from suit for civil liability for any injury or death alleged to have been sustained due to the facility's or provider's acts or omissions undertaken in good faith while providing health care services in support of the State's COVID-19 response, including but not limited to acts or omissions undertaken because of a lack of resources, such as cancellations, delays, or denials of care, attributable to the COVID-19 pandemic, that renders the health care facility or provider unable to provide the level or manner of care that would otherwise have been required in the absence of the public health emergency. Nothing in this provision shall remove or limit any immunity conferred by any provision of the State's statutes, rules, regulations, and common law. The immunity provided herein shall not extend to acts or omissions that constitute a crime, fraud, malice, gross negligence, willful misconduct, or would otherwise constitute a false claim or prohibited act pursuant to this State's statutes, rules, regulations, and common law.<sup>23, 24</sup>
- All health care facilities and providers, including long term care facilities and providers, shall be immune from adverse action from the [State medical and licensing boards or other State governing body] for an act or omission by such facility or provider in the course of providing medical services in support of the State's response to the COVID-19 outbreak or based on a facility or provider following a governmental or facility order, directive, guidance, policy, or procedure during the time of the State's emergency declaration.<sup>25</sup>
- All health care facilities and providers, including long term care facilities and providers, executing the [State's alternative or crisis standards of care plans] shall be immune from suit for civil liability for any injury or death alleged to have been sustained due to the facility's or provider's acts or omissions undertaken in good faith pursuant to the [State's alternative or crisis standards of care plans] or other governmental or facility order, directive, guidance, policy, or procedure during the time of the State's emergency declaration.<sup>26</sup>

By implementing provisions such as these, state governments can effectively put long term care facilities and providers in an optimal position to defend themselves against inevitable claims for care provided during these uniquely difficult circumstances. Baker Donelson also offers personalized presentations on this subject matter. If interested, please contact [Buck Wellford](#), Advocacy Chair and former Chair of Baker Donelson's Health Care Litigation Group, for more information.

<sup>1</sup> Baker Donelson's webinar, *Coronavirus in Long Term Care: Managing Risk in Uncertain Times*, provides practical perspectives from our experienced litigators and advocates about managing risks that need to be considered by long term care, post-acute care, and senior living facilities.

<sup>2</sup> On March 30, 2020, Senator Ben Sasse (R-Nebraska) introduced a [Federal Bill](#) that would grant limited immunities for all health care providers, including long term care facilities, for care related to testing, treating, or otherwise countering the effects of coronavirus during the duration of the COVID-19 National Emergency.

<sup>3</sup> On April 14, 2020, the Office of General Counsel of HHS issued an [Advisory Opinion](#) that extended coverage of the PREP Act with respect to defining "covered persons" and "covered countermeasures." The Advisory Opinion specified that an entity, individual, or person, who complies with all other requirements of the PREP Act, "will not lose PREP Act immunity—even if the medical product at issue is *not* a covered countermeasure [...and...] even if the person at issue is *not* a covered person—if the entity or individual reasonably could have believed that" the product was a covered countermeasure or the person was a covered person. The Advisory Opinion, which sets forth the current views of the Office of General Counsel of HHS, is not binding on HHS or federal courts, and it does not have the force or effect of law.

<sup>4</sup> [Alabama Proclamation, dated March 13, 2020.](#)

<sup>5</sup> [Arizona Executive Order 2020-13](#) and [Arizona Executive Order 2020-27.](#)

<sup>6</sup> [Connecticut Executive Order No. 7V.](#)

<sup>7</sup> [Georgia Executive Order 04.14.20.01.](#)

<sup>8</sup> [Illinois Executive Order 2020-19.](#)

<sup>9</sup> [Michigan Executive Order No. 2020-30.](#)

<sup>10</sup> [Mississippi Executive Order No. 1471.](#)

<sup>11</sup> [Nevada Executive Directive 011.](#)

<sup>12</sup> [New Jersey Executive Order No. 112.](#)

<sup>13</sup> [Rhode Island Executive Order 20-21.](#)

<sup>14</sup> [Vermont Addendum 9 to Executive Order 01-20.](#)

<sup>15</sup> On April 2, 2020, New York enacted legislation, at Sections 3080 and 3082, that establishes broad protections for facilities and providers caring for all patients during the public health emergency.

<sup>16</sup> See [Rhode Island Executive Order 20-21](#), at ¶ 1; see also [Connecticut Executive Order No. 7AA](#); see also [Nebraska Executive Order No. 20-12](#), at ¶ 18; see also [Washington Proclamation 20-38](#).

<sup>17</sup> See [Rhode Island Executive Order 20-21](#), at ¶ 4.

<sup>18</sup> See [Rhode Island Executive Order 20-21](#), at ¶ 7; see also [Connecticut Executive Order No. 7AA](#).

<sup>19</sup> See [Massachusetts Order of the Commissioner of Public Health, dated April 2, 2020](#); see also [Nebraska Executive Order No. 20-12](#), at ¶¶ 12-13 and 19-21; see also [Washington Proclamation 20-10](#); see also [Wisconsin Emergency Order 21](#).

<sup>20</sup> See [Nebraska Executive Order No. 20-12](#), at ¶¶ 8-9.

<sup>21</sup> [Connecticut Executive Order No. 7Y](#), at ¶ 1 (asserting that facilities shall only be required to readmit residents who have been placed in a different health care facility due to a COVID-19 infection when a bed is available and after it has been determined, by two separate laboratory tests at least 24 hours or more apart, that such resident has tested negative for COVID-19).

<sup>22</sup> [See Washington Proclamation 20-44.](#); *see also* [Massachusetts Order of the Commissioner of Public Health](#), dated March 28, 2020.

<sup>23</sup> [See Connecticut Executive Order No. 7V](#), at ¶ 6; *see also* [American Medical Association's COVID-19 Recommendations for Pursuing Liability Protections Through State Action](#).

<sup>24</sup> In comparison, some states have enacted executive orders or legislation that deem all health care facilities and health care providers to be "disaster response workers" or "auxiliary emergency management workers" of the state who are entitled to immunities as state actors and/or as being incorporated with the state's emergency powers statutory authority. *See, e.g., Rhode Island Executive Order 20-21*, at ¶¶ 9-10; *see also, e.g., Georgia Executive Order 04.14.20.01*, *see also, e.g., Vermont Addendum 9 to Executive Order 01-20*, at ¶ 6; *see also, e.g., Alabama Proclamation*, dated March 13, 2020, at Section I.

<sup>25</sup> [See American Medical Association's COVID-19 Recommendations for Pursuing Liability Protections Through State Action](#).

<sup>26</sup> [See Alabama Proclamation](#), dated March 13, 2020, at Section I.