PUBLICATION

COVID-19 Health Care Provider Immunity Update

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As the COVID-19 pandemic continues to dominate the legal landscape, approaches to establishing immunities for health care providers have rapidly evolved. Since mid-March, 23 states, through executive orders and/or legislation, have given health care providers limited grants of immunity for care provided to patients during the pandemic. When combining these new state actions with existing laws protecting health care providers from liability during states of public emergency, at least 33 states[1] currently offer some level of immunity with respect to care provided during the pandemic.

In our April 7, 2020 Alert on this topic, Health Care Provider Liability During the COVID-19 Pandemic: Ways to Ensure Protection, we analyzed existing federal and state immunity protections for health care providers and facilities. We offered practical tips to providers facing this crisis and warned against the mistaken assumption that immunity protections, such as they may exist, are absolute. In this Alert, we update and expand our analysis of state and federal liability protections.

State governments, through executive orders and/or legislation, have approached grants of immunity to health care providers and facilities in a multitude of different ways. A full state survey, with descriptions of and links to specific actions taken in each state and the District of Columbia, can be found here. As described in the chart, 23 states[2] have taken specific action to provide immunity protections to health care providers and facilities as a result of the COVID-19 pandemic.[3] The scope of immunity protections provided by these actions, both in terms of the categories of providers protected and the types of services protected, varies from state to state.

In the last two months, 16 states have issued executive orders on the topic of health care provider immunities,[4] three states have enacted legislation,[5] and four states have done both.[6] In some states, the immunity protections provided by these enactments are quite broad, extending to a wide range of providers and facilities, and potentially extending to care provided to non-COVID-19 patients. In states such as Wisconsin, the protections are broadly applicable to health care professionals and health care providers, who are expansively defined as including employees, agents, or contractors thereof.[7] Other state protections, such as those issued or enacted by Georgia and Michigan, among other states, specifically extend protections to long term care facilities as providers.[8] In addition, in Connecticut, Mississippi, North Carolina, Vermont, and Virginia, the state enactments specifically protect providers from liability when care for coronavirus patients as well as other patients has been impacted by a lack of resources.

In other states, the immunity protections are more limited. In Arkansas, only specifically-identified categories of providers are shielded from liability, which leaves many providers, such as certified nurse aides who work in long term care facilities, without protections. The protections issued in Arkansas, among other states, do not extend to immunize long term care providers, even though these facilities, which are already challenged with inadequate supplies of personal protective equipment and testing availability, face increasing levels of federal reporting requirements and oversight.[9] In Pennsylvania, providers are only immunized under specific circumstances specified as "disaster recovery services." In Kansas, Rhode Island, and Utah, protections only apply to providers caring for patients who are reasonably suspected or confirmed to have coronavirus.

Some states have executive orders or legislation which appear, at first glance, to be expansive; however, they contain ambiguous language regarding the scope of protections that are actually provided. Because of this, particularly when language in the applicable law or executive order is unclear, health care providers and facilities can expect to see future litigation related to the scope of these protections. In Massachusetts, for example, the immunity only applies when care is provided "in accordance with otherwise applicable law." In Kentucky, conduct is only immunized to the extent that the provider "acts as an ordinary, reasonable, and prudent health care provider would have acted under the same or similar circumstances." Future litigation may clarify whether the generally-recognized standard of care *preceding* the pandemic applies in these states, despite the "immunity" referenced in the orders and legislation on the subject.

State liability protections further differ with respect to the impact of "good faith" on the immunity issue. At least 16 states specifically mention "good faith" as a requirement for the immunity shield to apply.[10] Most states require that good faith be established by the provider; in others, such as Arizona, a rebuttable presumption in favor of the provider or facility exists.

In addition to these newly-issued executive orders and/or newly-enacted legislation, at least ten states[11] have existing legislation that offers some form of protection from liability during general public health emergencies.[12] As is the case with the new state enactments specific to COVID-19, these existing laws also vary greatly.

Some existing legislation, like that in California, Delaware, Idaho, Louisiana, Maryland, Montana, and New Hampshire, is immediately and automatically effective upon the state's declaration of a state of emergency. Other existing legislation, like that in Maine, Minnesota, Oregon, South Carolina, Tennessee, and Wyoming, requires additional action to be taken by the state (generally by the governor or his/her designee) before the liability protections are effective.[13]

Some states have specifically confirmed that pre-existing statutory immunities are applicable to protect providers from liability for care rendered in connection with the COVID-19 pandemic. For instance, in Virginia, Governor Ralph Northam recently confirmed through executive order that pre-existing statutory immunities applicable during public health emergencies are specifically intended to apply to care provided during the COVID-19 public health emergency. In Delaware, an administrative order issued jointly by the state Department of Health and Social Services and the Emergency Management Agency establishes that health care providers who provide health care services during the public health emergency are protected by existing statutory protections for public employees. In Indiana, formal guidance issued by the Indiana State Department of Health and the Governor indicates that health care providers and facilities offering health care services during the COVID-19 emergency declaration are protected by the immunities provided in pre-existing state law. Similarly, in Louisiana, the State Attorney General opined that the liability protections provided in existing Louisiana law are even more broad than the protections given in the newly-issued and COVID-19-specific executive order issued in New York.

While the scope of immunities granted by state governments varies across the board, a common theme among them is that none immunize health care providers or facilities from heightened levels of misconduct, such as gross negligence, recklessness, or willful misconduct. There is no protection that exists in any state that would serve to immunize a health care provider or facility for actions proven to involve these heightened levels of misconduct.

Since our April 7 Alert on this topic, there has been no significant advancement of any additional federal legislation to immunize health care providers and facilities from liability during the COVID-19 pandemic. Recently, Senate Republican leaders have emphasized the importance of extending liability protections in the next round of federal legislation addressing the pandemic. Senator John Cornyn (R-Texas) is reportedly circulating proposed legislation that would immunize people and entities, including health care providers, who

are providing "business services," including health care services, from liability for personal injury resulting from or related to the actual or alleged exposure to coronavirus. The legislation, reportedly, would preempt state laws providing fewer immunity protections. Even these protections, however, would not apply if the actual or alleged exposure to COVID-19 is shown, by clear and convincing evidence, to be the result of gross negligence, willful misconduct, intentional criminal conduct, or intentional infliction of harm.[14]

With all of these varying and pending protections in both state and federal laws, health care providers and facilities who operate in different states need to pay very close attention to each state's applicable executive orders and legislation during the COVID-19 pandemic. Busy practitioners and health care administrators will understandably have neither the time nor the inclination to immerse themselves in the details of the evolving spectrum of liability immunity protections in their states. Accordingly, while detailed analysis for each state is recommended, it may be helpful to keep in mind the following considerations that make up the core objectives underlying all federal and state enactments on immunity as it concerns health care providers:

- Policymakers recognize that the sense of urgency and potentially scarce resources available to providers warrants a more flexible, and forgiving, standard of care *during the period of time of the crisis*.
- "Good faith" efforts to provide care in the face of the pandemic are particularly important and can invoke protections, even in situations that might not otherwise be protected.
- In many states, policymakers anticipate that the focus of time, attention, and resources on coronavirus patients may impact the care and treatment of non-coronavirus patients.
- Acts or omissions that involve heightened levels of misconduct, such as gross negligence, recklessness, or willful misconduct, will not be immunized from liability.

If you would like updated information about any specific state or federal actions, or if you have questions about the scope of protections applicable to providers, contact Buckner Wellford or a member of Baker Donelson's Health Care Litigation Team. Also, please visit our Coronavirus (COVID-19): What You Need to Know information page on our website.

[1] The 33 states that currently offer some level of immunity with respect to care provided during the pandemic are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, and Wisconsin.

[2] The 23 states that have taken specific action to provide immunity protections to health care providers and facilities as a result of the COVID-19 pandemic are Alabama, Arizona, Arkansas, Connecticut, Georgia, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, and Wisconsin.

[3] Two additional two states, Alaska and Hawaii, and the District of Columbia have issued executive orders or enacted legislation to shield providers from liability; however, these actions are not self-effectuating, as they require additional action before the protections apply. Because these provisions require an additional step to

be taken before immunities apply, they are not counted in the total number of states noted herein that have taken recent specific action to provide liability protections. As of the date of this publication, it does not appear that any actions have been taken in Alaska, the District of Columbia, or Hawaii that would trigger the implementation of liability protections.

[4] The 16 states that have issued executive orders specific to the COVID-19 pandemic are Alabama, Arizona, Arkansas, Connecticut, Georgia, Illinois, Iowa, Kansas, Michigan, Mississippi, Nevada, Oklahoma, Pennsylvania, Rhode Island, Virginia, and Vermont.

[5] The three states that have enacted legislation specific to the COVID-19 pandemic are Kentucky, Utah, and Wisconsin.

[6] The four states that have both issued executive orders and enacted legislation specific to the COVID-19 pandemic are Massachusetts, New Jersey, New York, and North Carolina.

[7] For all state-specific references in this Alert, see the chart as linked herein.

[8] As of this date, the 24 states providing some form of immunity to long term care providers and/or facilities are Alabama, Arizona, Connecticut, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, Utah, Vermont, Virginia and Wisconsin.

[9] *See* "Coronavirus Commission for Safety and Quality in Nursing Homes," April 30, 2020, by the Centers for Medicare and Medicaid Services (CMS); *see* CMS Interim Final Rule Updating Requirements for Notification of Confirmed and Suspected COVID-19 Cases Among Residents and Staff in Nursing Homes, issued May 6, 2020; *see* "Department of Justice Launches a National Nursing Home Initiative," March 3, 2020, by the Department of Justice; *and see* "Coronavirus at Work: Safety Inspectors Reviewing Scores of Employee Hospitalizations, Deaths," May 1, 2020, *USA Today*.

[10] The 16 states that specifically mention "good faith" as a requirement for the immunity shield to apply are Arizona, Connecticut, Hawaii, Idaho, Iowa, Kentucky, Maryland, Massachusetts, Missouri, Montana, New Jersey, New York, North Carolina, Utah, Wisconsin, and Wyoming.

[11] The ten states with existing legislation that offers some form of protection from liability during general public health emergencies are California, Colorado, Delaware, Idaho, Indiana, Louisiana, Maryland, Montana, New Hampshire, and Ohio.

[12] Other states, including Maine, Minnesota, Oregon, South Carolina, Tennessee, and Wyoming, also have existing legislation that shields providers from liability during states of emergency; however, for these states, the legislation is not self-effectuating, as they require additional state action before the protections apply. Because these state provisions require an additional step to be taken before immunities apply, they are not counted in the total number of states noted herein that have existing legislation that shields providers from liability during states of emergency.

[13] As of the date of this publication, it does not appear that any actions have been taken that would trigger the implementation of liability protections in these states.

[14] Federal legislation, if passed, which preempts state laws on the subject unless they are even more expansive, raises the interesting question of whether state immunity laws which do not require "clear and

convincing evidence" of heightened levels of negligence would be applicable instead of the more difficult "clear and convincing evidence" standard of proof.