



## States Implement Covid-19-Related Legal Protections for Healthcare Facilities and Personnel

The novel Coronavirus (COVID-19) pandemic continues to have devastating effects on healthcare providers of all types, with particularly devastating effects on nursing facility providers. On March 24, 2020 the U.S. Secretary of Health and Human Services, Alex Azar, issued a [letter](#) (PDF) urging all state governors to take a number of actions, including providing civil immunity from medical liability for healthcare professionals treating COVID-19. Indeed, the CDC estimates that more than 30% of all COVID-19-related fatalities in the United States have been traced to long-term care and skilled nursing facilities.<sup>1</sup> In response, several states have enacted statutes and Executive Orders to limit legal exposure to healthcare providers, including nursing facilities exposure, by providing immunity<sup>2</sup> from certain types of patient claims arising from certain COVID-19-related claims arising out of the pandemic. Specifically, these laws protect certain legally compliant providers from civil damages actions brought by residents/patients of such facilities, as has been widely reported in industry publications and other media.<sup>3</sup>

In support of affording long-term care and skilled nursing facilities certain legal protections, Mark Parkinson, the President and CEO of the American Health Care Association, recently commented that, “[l]ong term care workers and centers are on the frontline of this pandemic response and it is critical that states provide the necessary liability protection staff and providers need to provide care during this difficult time without fear of reprisal.”<sup>4</sup> The long-term care industry’s rationale for such protections is simple: nursing homes that follow authoritative regulatory guidance should not be held liable for events beyond their control (e.g., shortages of protective equipment, staffing and testing), and the constantly changing, and sometimes inconsistent, health directives from healthcare regulators have made it difficult for facilities to stay the course and provide consistent treatment.

[Alabama](#), [Alaska](#), [Arizona](#), [Arkansas](#), [Connecticut](#), [District of Columbia](#), [Georgia](#), [Hawaii](#), [Illinois](#), [Iowa](#), [Kansas](#), [Kentucky](#), [Massachusetts](#), [Michigan](#), [Mississippi](#), [Nevada](#), [New Jersey](#), [New York](#), [North Carolina](#), [Oklahoma](#), [Pennsylvania](#), [Rhode Island](#), [Utah](#), [Vermont](#), [Virginia](#), and [Wisconsin](#) are among the states that have granted various types of healthcare providers or facilities some form of immunity from patient claims arising

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<sup>1</sup> As stated by the CDC, “[g]iven [nursing homes] congregate nature and resident population served (e.g., older adults often with underlying chronic medical conditions), nursing home populations are at high risk of being affected by respiratory pathogens like COVID-19 . . . .” See <https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html>.

<sup>2</sup> Immunity is a legal status wherein an individual/entity cannot be held legally responsible for an alleged violation of the law. Immunity in the context discussed within this publication is the release of long-term care and skilled nursing facilities from certain legal responsibilities for care provided during the COVID-19 pandemic.

<sup>3</sup>See, e.g., <https://time.com/5835228/nursing-homes-legal-immunity-coronavirus/>; <https://www.abajournal.com/news/article/at-least-15-states-grant-lawsuit-protection-to-long-term-care-facilities-during-pandemic>; <https://www.npr.org/sections/coronavirus-live-updates/2020/04/23/842153768/nursing-homes-ask-states-for-immunity-from-civil-suits-amid-covid-19>; <https://www.nbcnews.com/health/health-care/nursing-home-industry-pushes-immunity-lawsuits-during-coronavirus-emergency-n1192001>; <https://www.law360.com/articles/1264964/6-states-with-covid-19-medical-immunity-and-2-without>

<sup>4</sup><https://news.bloomberglaw.com/health-law-and-business/covid-pits-nursing-homes-against-seniors-groups-over-liability>

out of the pandemic.<sup>5</sup> Notably, such immunity does not extend to criminal conduct or gross negligence or if non-compliance with enumerated COVID-19 directives can be established. Each state's immunity provision is unique and should be carefully consulted because the provisions provide protection to specified types of providers, under specified conditions, for certain types of claims. As of this writing, these immunity provisions have been largely untested in or interpreted by the courts.<sup>6</sup>

New York, one of the first to grant certain healthcare facilities limited civil immunity, instituted [Executive Order No. 202.10](#) on March 7, 2020. That Order provides, in part, the following:

[A]ll physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered professional nurses and licensed practical nurses shall be immune from civil liability for any injury or death alleged to have been sustained directly as a result of an act or omission by such medical professional in the course of providing medical services in support of the State's response to the COVID-19 outbreak, unless it is established that such injury or death was caused by the gross negligence of such medical professional.

Following New York's lead, other states have begun to explicitly identify protected healthcare providers as being protected from civil liability for care provided during the COVID-19 pandemic. For example, on March 23, 2020, by executive order, Arizona has afforded any "person or health care provider undertaking any activity required by [A.R.S. Title 36, Chapter 6, Article 9](#), including reporting, is immune from civil or criminal liability if the person or health care provider acted in good faith." Included in A.R.S. Title 36, Chapter 6, Article 9's definition of "health care provider" is "nursing care institution" and "assisted living home." The Order provides further that COVID-19 represents "a serious threat to public health," including its known impact on respiratory illness, "which can result in severe disease complications and death."

Illinois Governor JB Pritzker signed [Executive Order No. 17](#) on April 1, 2020 following the declaration of "all counties in the State of Illinois as a disaster area on March 9, 2020 in response to the outbreak of Coronavirus Disease 2019 (COVID-19)" again declaring the counties a disaster area and providing healthcare facilities and professionals with immunity, subject to exceptions for gross negligence and willful misconduct, when "engaged in the course of rendering assistance to the State by providing health care services in response to the COVID-19 outbreak." Under Executive Order 2020-19, the Governor declared that, during the pendency of the Governor's Disaster Proclamation, designated healthcare facilities, professionals, volunteers and others:

shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by the [designated facility], which injury or death occurred at a time when a [designated facility] was engaged in the course of rendering assistance to the State 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 of such Health Care Facility, if 20 ILCS 3305/15 is applicable, or by willful misconduct, if 20 ILCS 3305/21 is applicable.

On April 9, 2020 the Iowa Department of Public Health issued a [Pre-Shortage Order](#), which states, in part:

A health care provider, hospital, health care facility, and any other person, corporation, or other legal entity or employee of all such entities acting in compliance with this Order, or other guidance issued by the Iowa Department of Public Health or the Centers for Disease Control

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<sup>5</sup> Kutak Rock has offices in Arizona, Arkansas, California, Colorado, District of Columbia, Georgia, Illinois, Kansas, Minnesota, Missouri, Nebraska, Pennsylvania, Virginia, and Washington. Additionally, Kutak Rock has attorneys located across the country as well as attorneys licensed to practice in multiple jurisdictions.

<sup>6</sup> Many states, such as California, Colorado, Delaware, Louisiana, and Minnesota, already had existing legislation that provides some form of immunity to providers during public health emergencies. A full discussion of these laws is beyond the scope of this note.

and Prevention related to optimizing PPE supply, in good faith is acting at the request of and under the direction of the Iowa Department of Public Health for purposes of the immunity provisions of [Iowa Code section 135.147](#).<sup>7</sup>

On April 13, 2020, Arkansas Governor Asa Hutchinson signed [Executive Order No. 20-18](#) amending Executive Order No. 20-03. Executive Order 20-18 was signed following the Governor's proclamation of COVID-19 as "threatening the public safety of the citizens of Arkansas" and bringing "[g]reat hardship . . . to bear upon the citizens of [Arkansas]." Executive Order 20-18 suspends [Ark. Code. Ann. 12-75-103\(7\)\(C\)](#) "to the extent necessary to provide immunity from liability . . . for any injury or death alleged to have been sustained directly as a result of an act or omission by such medical professional in the course of providing medical services in support of the State's response to the COVID-19 outbreak." Executive Order 20-18 provides immunity to physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered nurses, and licensed practical nurses.

Kansas Governor Laura Kelly signed [Executive Order No. 20-26](#) on April 22, 2020 due to the crisis Kansas is facing as a result of "the pandemic and public health emergency of COVID-19." Under such Executive Order, the Governor declared:

health care providers . . . rendering assistance, testing, care or advice in the care of patients reasonably suspected or confirmed to be infected with COVID-19 . . . shall be deemed immune from suit pursuant to K.S.A. 48-915, unless it is established that any adverse event or injury was caused by the willful misconduct, gross negligence, recklessness, or bad faith of such facility or health care provider.<sup>8</sup>

In the states where these protections have become law, designated facilities and persons will receive limited protections from civil and, in some instances, criminal liability so long as they comply with the specific direction provided by federal, state, or local officials (as referenced in the statute or executive order), which generally include, but are not necessarily limited to, the state's department of health, the federal Department of Health and Human Services, and/or the Centers for Disease Control and Prevention. It is imperative that providers follow, and be able to demonstrate their compliance with, state and federal directives so as to be insulated from liability and develop policies and procedures to ensure full compliance.<sup>9</sup>

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<sup>7</sup> Iowa Code Section 135.147 provides immunity for civil damages to any "person, corporation, or other legal entity, or an employee or agent of such person, corporation, or entity, who, during a public health disaster, in good faith and at the request of or under the direction of the department or the department of public defense renders emergency care or assistance to a victim of the public health disaster . . ."

<sup>8</sup> Executive Order No. 20-26 lasts until May 31, 2020 or until the state of emergency ends. On June 2, 2020, Governor Kelly vetoed a sweeping coronavirus measure passed by the Republican-controlled Legislature, which included a bill meant to shield businesses and healthcare providers from coronavirus-related lawsuits. Kelly has signed a new state disaster declaration to ensure that Kansas can effectively respond to the current emergency situation. <https://governor.kansas.gov/governor-signs-disaster-declaration-calls-for-special-session-warns-of-grave-consequences-to-state-without-legislative-action/>

<sup>9</sup> Existing federal protections are more limited than many of the state measures. Section 3215 of the CARES Act includes provisions that can potentially limit or immunize specific healthcare providers from liability during the COVID-19 pandemic, but immunity is limited to "volunteer" healthcare providers during the COVID-19 emergency declaration. <https://www.congress.gov/bill/116th-congress/house-bill/748/text#toc-H16DA8E9326B14CE8B59468B2CC20C7FE>. The 2005 Public Readiness and Emergency Preparedness (PREP) Act, [42 U.S.C. 247d-6d](#) empowers the Secretary of Health and Human Services (HHS), through written Declaration, to provide that a "covered person," including a qualified person who prescribes, administers, or dispenses "pandemic countermeasures," "shall be immune from suit and liability under Federal and State law with respect to all claims for loss covered by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure" during a declared disease-related public health emergency. <https://www.law.cornell.edu/uscode/text/42/247d-6d>. In an effort to mirror the broader state efforts, Sen. Ben Sasse (R-Nebraska) introduced a bill that would grant immunities to healthcare providers, titled the Facilitating Innovation to Fight Coronavirus Act. <https://www.law360.com/articles/1258473/attachments/0>.

## Key Takeaways:

- States have enacted limited immunity provisions for specified healthcare providers, including long-term care and skilled nursing facilities, which have been severely affected by the COVID-19 crisis.
- These immunity provisions do not extend to acts or omissions that are proven to be criminal in nature or to arise out of gross negligence or noncompliance with specific regulatory guidance.
- We anticipate additional states will enact, by legislation or executive order, limited protections against COVID-19-related patient claims.
- To best take advantage of these provisions, it is critical to closely adhere to applicable state and federal guidance, to examine the specific operative language of the provision in your state, to ensure compliance with same (and to document these compliance policies and such adherence).
- While the provisions addressed here focus on immunity from patient claims, healthcare providers must be attuned to potential employment claims, and should [develop policies and procedures](#) to attempt to void such claims.
- In the event of a [COVID-19-related incident](#), the facility should conduct an immediate assessment or internal investigation of its compliance with regulatory directives, develop an appropriate response to regulators and/or other stakeholders, and, in addition, determine potential insurance coverage.

If your facility seeks assistance in evaluating and handling these and other related matters, or attempts to enact COVID-19-related protections in your state, please contact one of the authors below or any member of our [Government Solutions](#), [Government Relations](#) or [Healthcare Practice Group](#). For more information regarding our COVID-19 resources, please visit our [COVID-19 Legal Resources Portal](#).

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