

Health Care Providers and the State of Liability Protections in the Covid-19 Era

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Key Points:

- As the COVID-19 pandemic continues, the clamor for liability protections for the nation's health care providers continues.
- Although there are serious political divisions, the COVID Phase 4 relief legislation may include sweeping liability protections.
- Regardless of what happens in Congress, as detailed below, a large and growing number of states already have protections in place.

Introduction

At least 4.8 million cases of the novel coronavirus have been reported and more than 158,000 people have died in the United States since the COVID-19 pandemic began. Nowhere has the challenge been more difficult than in the nation's nursing homes and other long term care facilities where approximately 60,000 residents and staff have died of COVID-19.

Given the singular importance of the country's health care providers, long-term care facilities and frontline workforce during the pandemic, as well as concerns about the viability of their continued operations absent liability protections, there were early calls for such protections at both the federal and state levels. This alert provides an update of the recent federal liability reform efforts directed at health care providers and a detailed, state-by-state review of the liability protections for providers, including the embattled nursing homes, which are already in place at the state-level.

(Limited) Action at the Federal Level (So Far)

In the early weeks of the pandemic, it became clear that providers and their health care workers were on the front lines of the COVID-19 crisis. In nursing homes, especially, the already difficult work was made far more challenging and dangerous by a lack of adequate staffing as the result of the pandemic, insufficient personal protective equipment (PPE), and the extreme vulnerability of the patients and residents. With the high rates of nursing home staff sickened or killed by COVID-19,

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one Congressional witness testified that these jobs are now more dangerous than those in the logging and commercial fishing industries.¹

As outlined in depth below, seemingly overnight, through executive order, legislation, and regulation, states took the initiative to put liability protections in place. At the federal level, however, although there were early calls for protections, Congress and the administration were keenly focused on the more immediate concerns of combating the virus, providing relief funds to health care providers, and putting in place a variety of sweeping measures in an attempt to protect U.S. citizens and the economy.

Although the federal government has yet to enact liability protections for health care providers, the topic has now taken center stage in Congress. On July 27th, the Senate GOP unveiled its \$1 trillion **Health, Economic Assistance, Liability Protection and Schools (HEALS) Act**. As pertinent here, the Safe to Work Act, a part of the HEALS Act, would provide liability protections to health care providers related to COVID-19.²

The proposed legislation creates an exclusive federal cause of action for medical liability claims relating to COVID-19 care. The Act would limit liability for providers and facilities to instances where it is proven by the heightened clear-and-convincing evidentiary standard that the defendant acted with gross negligence or willful misconduct and failed to make reasonable efforts to comply with applicable public health requirements.

As written, the legislation would cover all alleged COVID-related injuries that arise between December 1, 2019 and the later of the following: (1) the end of the coronavirus state of emergency declaration or (2) October 1, 2024. The Senate proposal also establishes a one year statute of limitations for these claims. Moreover, if enacted, these measures would serve as a floor for state-level liability protections, thereby preempting any state law that does not provide equal or greater protections to medical personnel and facilities.

To be sure, these are sweeping protections that would be welcomed by the health care industry. There are deep divisions and disagreements in Congress, however, regarding what the fourth COVID-19 relief package should contain and it is unclear whether, or in what form, these liability protections will ultimately be included in the final legislation. That said, it is important to note that Senate Majority Leader Mitch McConnell (R-KY) has said for weeks that he will not allow a new COVID relief package to pass the Senate without significant liability protections.

State-Level Protections are in Place

Regardless of whether Congress enacts liability reforms or not, more than thirty states already have significant protections in place.

The following **chart** catalogues the present liability protections available to providers at the state level. Although some states enjoyed existing emergency provisions that extended a degree of immunity to health care providers during a declared state of emergency, many have issued new executive orders or regulation, or passed legislation, to address the issue in the wake of the current pandemic.

Though it is important to review the specific authorities and nuances of the protections in each state detailed above, in general these new measures provide protection for health care providers, except in cases of willful or wanton misconduct or gross

negligence. It should be noted that many measures do make reference to the impact of COVID-19 on the facility, requiring that it have been a factor in or the direct cause of the injury.

Despite the prevalence of state-level liability protections, they certainly will not bring an end to the filing of lawsuits against providers and facilities. Nursing homes and other providers may still see the plaintiff's bar file lawsuits claiming that they are not covered by the liability protections because they acted with gross negligence while treating patients, staffing the facility or providing sufficient PPE. In addition, some plaintiff's attorneys reportedly are considering lawsuits challenging the underlying validity of these laws on Constitutional grounds. In any event, as the pandemic continues, and the health care industry across the United States continues to struggle through this historically challenging period, the call for strong liability protections at both the state and federal level will certainly not abate.

If you have any questions about the state-level liability protections described above or the negotiations regarding federal protections in Washington, D.C., please let us know.

More coverage of legal issues relating to the COVID-19 pandemic can be found in Akin Gump's [COVID-19 Resource Center](#).

¹ *COVID-19 and Nursing Homes Before the H. Comm on Ways & Means Subcommittee on Health*, 116th Cong. (2020) (statement of Dr. David Grabowski, Professor of Healthcare Policy, Harvard University), available at <https://youtu.be/KITeBCX7K50>.

² The Safe to Work Act, [S.], 116th Cong. (2020), available [here](#).

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