

SPECIAL REPORT

NURSING HOME INDUSTRY SEEKS IMMUNITY DURING COVID CRISIS; STATES ARE OBLIGING

In response to coronavirus pandemic, the nursing home industry is seeking broad immunity from COVID-related harm. Through executive orders and state legislation, Governors and states are rapidly granting immunity to various health care providers, including nursing facilities.

The nursing home industry’s interest in preventing litigation against nursing facilities is longstanding. When the federal standards of care for facilities participating in Medicare or Medicaid or both (called Requirements of Participation) were revised in October 2016,¹ they contained an explicit prohibition against mandatory pre-dispute arbitration provisions in nursing home admissions contracts. Such provisions prevent residents and their families from filing lawsuits against nursing facilities. Although the Requirements reflected the first comprehensive revision in 25 years and strengthened resident protections in many areas, the nursing home industry filed a lawsuit solely about arbitration. A Mississippi federal district court granted a nationwide preliminary injunction on November 7, 2016.² The Trump administration published proposed rules³ and then final rules,⁴ which permit pre-dispute arbitration agreements, with certain resident protections. Nursing facilities again filed a lawsuit challenging four provisions of the new regulations.⁵ The new rule was upheld by a federal district court in Arkansas in April 2020.⁶

Some federal laws grant some immunity. Under the authority of the Public Readiness and Emergency Preparedness Act (PREP Act),⁷ HHS Secretary Alex Azar, on March 20, 2020, issued a Notice of Declaration⁸ “for certain medical procedures to be used against COVID-19,”⁹ retroactive to February 4, 2020. The Declaration provides liability from immunity for use of “covered countermeasures” against COVID-19. In an Advisory Opinion issued on April 14, 2020, the HHS Office of General Counsel explains that the PREP Act does not provide immunity against federal enforcement actions, whether civil, criminal, or administrative.¹⁰

The Administration called for immunity in March. In a March 24 letter to Governors, HHS Secretary Alex Azar writes, “For health care professionals to feel comfortable in expanded capacities on the frontlines of the COVID-19 emergency, it is imperative that they feel shielded from medical tort liability.”¹¹ He continues, “Given variation in the scope of these state laws, it is particularly important for states to issue guidance publicly, outlining the available liability protections during the COVID-19 emergency.”

National nursing home trade associations call for immunity. In a March 25, 2020 letter to Secretary Azar, LeadingAge, the association of not-for-profit nursing homes and other providers, writes,

Given the indispensable public-health role of SNFs and ALFs in tackling this pandemic, it is essential that they are afforded the fullest extent of legal immunity available under the law in connection with their efforts in responding to COVID-19, including the immunity provided under the PREP Act. This immunity will give SNFs and ALFs the confidence to take all necessary measures under these extraordinary conditions to care for elderly and at-risk individuals afflicted by COVID-19 and to prevent the further spread of COVID-19 without fear of liability.¹²

Skilled Nursing News quotes an April 15, 2020 Statement by the American Health Care Association, the larger nursing home trade association representing primarily for-profit facilities, as stating, ““We encourage every state to extend sovereign immunity provisions to the long-term care providers and other health care sectors associated with care provided during the COVID-19 pandemic.””¹³

State nursing home trade associations call on their states for immunity. *Skilled Nursing News* and others identify a number of state nursing home associations that have sought immunity, sometimes jointly, sometimes with other health care providers in the state. Links to the letters, other than California’s, are included in the *Skilled Nursing News* article.

State	To Whom	From Whom	Date	Request
CA	Governor Gavin Newsom	Six California health care associations, including LeadingAge California and California Association of Health Facilities	Apr. 9	Requests executive order, including proposed language: “facilities, plans, physicians, professionals, and employees shall be immune from any administrative sanction or criminal or civil liability or claim for any injury, death, or loss alleged to have resulted from any act, omission, or decision made related to providing or arranging services, including but not limited to acts, omissions, or decisions undertaken because of a lack of resources, absent proof by no less than clear and convincing evidence of willful misconduct as measured by a standard of care that incorporates all of the circumstances of the emergency.” ¹⁴
CT	General Counsel, Office of	LeadingAge CT, CT Association of Health Care	No date	“Executive order granting immunity to providers in light of the extraordinary

	the Governor	Facilities, CT Association for Healthcare at Home		circumstances they face during the COVID-19 crisis.” Suggests revisions to proposal of Connecticut Hospital Association.
FL	Governor Ron Desantis	Florida Health Care Association	Apr. 8, 2020	“any health care facility or health care professional should have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services” during the coronavirus pandemic, but not including “willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction or harm (but “resource or staffing shortage shall not be considered willful or intentional misconduct, gross negligence, reckless misconduct, or intentional infliction of harm”). Asks the Governor “to extend sovereign immunity to health care professionals and health care facilities engaged in responding to the COVID-19 outbreak.”
PA	Governor Wolf	PA Health Care Association, LeadingAge PA	Apr. 8, 2020	Asks for “executive order providing civil immunity to health care professionals. Staff are putting themselves at risk every single day. They should not have to worry about the threat of lawsuits as they care for residents.”
WA	Office of the Governor	32 state health care professional and trade associations, including LeadingAge Washington and Washing Health Care Association	Apr. 2, 2020	Asks for extension of the Uniform Emergency Volunteer Health Practitioner Act to Washington Practitioners, RCW 70.15.010, retroactive to Feb. 29, to get civil immunity for damages, except for “acts or omissions constituting gross negligence or willful or wanton misconduct.”

A number of Governors have issued Executive Orders giving broad civil immunity to health care providers during the pandemic, except, generally for willful misconduct or gross negligence.

Alabama: A Proclamation (May 8, 2020) provides:

C.1. Liability protections. A business, health care provider, or other covered entity shall not be liable for the death or injury to persons or for damage to property in any way arising from any act or omission related to, or in connection with, COVID-19 transmission or a covered COVID-19 response activity, unless a claimant shows by clear and convincing evidence that the claim's alleged death, injury, or damage was caused by the business, health care provider, or other covered entity's wanton, reckless, willful, or intentional misconduct.¹⁵

In a case that does not involve serious physical injury, a provider could be liable for "actual economic compensatory damages," but not "non-economic or punitive damages." mental anguish or emotional distress. In cases of wrongful death, only punitive damages may be awarded.¹⁶

Arizona: Executive Order No. 2020-27 (April 8, 2020) provides immunity to licensed health care institutions, including nursing facilities, "for any acts or omissions undertaken in good faith by one or more of its agents, officers, employees, representatives or volunteers while providing healthcare services in support of the State's public health emergency declaration for COVID-19."¹⁷ Immunity does not apply for "gross negligence or reckless or willful misconduct," including providing care "under the influence of alcohol or an intoxicating drug."¹⁸

Arkansas: Executive Order 20-18 (April 13, 2020) gives immunity to licensed health care providers, including nursing facilities, "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 or the implementation of measures to control the causes of the COVID-19 epidemic."¹⁹ Immunity does not apply in instances of "gross negligence, willful misconduct, or bad faith."²⁰

Connecticut: Executive Order No. 7V (April 7, 2020) (superseding Executive Order No. 7U, April 5, 2020) provides immunity from civil liability to various health care providers, including nursing facilities:

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, including but not limited to 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, provided that nothing in this order shall remove or limit any immunity conferred by any provision of the Connecticut General Statutes or other law.

Such immunity 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 Section 4-275 et seq. of the Connecticut General Statutes or 31 U.S.C. §§3729 et seq.²¹

Georgia: On April 14, the Governor issued an executive order “that employees, staff, and contractors of health care institutions and medical facilities shall be considered auxiliary emergency management workers pursuant to Code Section 38-3-35.”²² This section of the Georgia Code grants immunity for “personal injury or property damage” to emergency management workers, “except in cases of willful misconduct, gross negligence, or bad faith.”

Illinois: Executive Order 2020-19 (April 1, 2020) provides that, during the Public Health State of Emergency, health care facilities

shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by the Health Care Facility, which injury or death occurred at a time when a Health Care 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,²³

Indiana: “Guidance Concerning Liability for Healthcare Providers and Facilities,” section 3 (April 3, 2020) provides “Facilities and individuals providing healthcare services in response to a declared disaster emergency, such as the one declared because of COVID-19, may not be held civilly liable for care provided in response to that emergency event unless the care resulted from gross negligence or willful misconduct.”²⁴ “Healthcare services” is defined broadly for the purpose of this immunity and includes references to services provided by licensed providers, care related to hospitalization, and “any other services or goods furnished for the purpose of preventing, alleviating, curing, or healing human illness, physical disability, or injury.”

Kansas: Executive Order 20-26, ¶5 (Apr. 22, 2020) provides that a health care provider (as defined in state law, Kansas Statutes Annotated 40-3401, to include a licensed medical care facility) “shall [temporarily, during the pandemic] be 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.”²⁵

Michigan: Executive Order 2020-30 (COVID-19) (March 29, 2020) provides:

7. Consistent with MCL 30.411(4), any licensed health care professional or designated health care facility that provides medical services in support of this state’s response to the COVID-19 pandemic is not liable for an injury sustained by a person by reason of those services, regardless of how or under what circumstances or by what cause those injuries are sustained, unless it is established that such injury or death was caused by the gross negligence, as defined in MCL 30.411(9), of such health care professional or designated health care facility.²⁶

Mississippi: Executive Order No. 1471, III (April 10, 2020) declares that health care facilities, including nursing facilities,

absent a showing of malice, reckless disregard or willful misconduct, shall be immune from suit for civil liability for any injury or death alleged to have been sustained because of the . . . Healthcare Facility's acts or omissions while providing healthcare services including, but not limited to, screening, assessing, diagnosing, treating patients for COVID-19 or otherwise acting in support of the State's COVID-19 response, including but not limited to acts or omissions undertaken because of a lack of resources attributable to the COVID-19 pandemic that renders the . . . 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.²⁷

Nevada: Emergency Directive 011 (April 1, 2020), provides

Section 10: All providers of medical services related to COVID-19 are performing services for emergency management subject to the order or control of and at the request of State Government and shall be afforded the immunities and protections set forth in [NRS 414.110](#), subject to the same exclusions therein.²⁸

New Jersey: Executive Order 112 (April 1, 2020) grants immunity to health care facilities, among others:

9. Any healthcare facility, within the meaning of N.J.S.A. 26:13-2, any modular field treatment facility, and any other site designated by the Commissioner of the Department of Health for temporary use for the purpose of providing essential services in support of the State's COVID-19 response, including hotels and student dormitories, shall be immune from civil liability for any damages alleged to have been sustained as a result of an act or omission undertaken in good faith in the course of providing services in support of the State's COVID-19 response by one or more of its agents, officers, employees, servants, representatives or volunteers, if, and to the extent, such agent, officer, employee, servant, representative or volunteer is immune from liability, whether or not such immunity is otherwise available under current law. Such immunity shall not extend to acts or omissions that constitute a crime, actual fraud, actual malice, gross negligence or willful misconduct.²⁹

Pennsylvania: "ORDER OF THE GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA TO ENHANCE PROTECTIONS FOR HEALTH CARE PROFESSIONALS" (May 6, 2020) designates nursing facilities, among others, as "agents of the Commonwealth solely and exclusively for purposes of immunity from civil liability due to emergency services activities or disaster services activities only as related to the Commonwealth's COVID-19 disaster emergency response."³⁰ "During the duration of the disaster emergency," they are "immune from civil liability and shall not be liable for the death of or any injury to a person or for loss of or damage to property as a result of the emergency services activity or disaster services activity described above, except in the cases of willful misconduct or gross negligence, to the fullest extent permitted by law."

Rhode Island: Executive Order 20-21 (April 10, 2020) declares that health care facilities and workers, including nursing facilities, are “disaster response workers’ entitled to immunity under R.I. Gen. Laws § 30-15-IS(a).”³¹

Vermont: Addendum 9 to Executive Order 01-20, ¶6 (April 10, 2020) provides legal immunity to health care facilities, including nursing facilities, “from civil liability for any death, injury, or loss resulting from COVID-19 related emergency management services or response activities, except in the case of willful misconduct or gross negligence.

Virginia: Executive Order 70 (April 28, 2020), CLARIFICATION OF CERTAIN IMMUNITY FROM LIABILITY FOR HEALTHCARE PROVIDERS IN RESPONSE TO NOVEL CORONAVIRUS (COVID-19),” declares, “It is in the public interest to afford healthcare providers involved in the delivery of healthcare impacted by COVID-19 with adequate protection against liability for good faith actions or omissions taken in their efforts to combat this health emergency.”³² The Order cites §§8.01-225 and 8.01-225.02 of the Code of Virginia, which provide “certain liability protection to healthcare providers during a state of emergency.”

Section 8.01-225.01 provides in relevant part:

A. In the absence of gross negligence or willful misconduct, any health care provider who responds to a disaster by delivering health care to persons injured in such disaster shall be immune from civil liability for any injury or wrongful death arising from abandonment by such health care provider of any person to whom such health care provider owes a duty to provide health care when (i) a state or local emergency has been or is subsequently declared; and (ii) the provider was unable to provide the requisite health care to the person to whom he owed such duty of care as a result of the provider's voluntary or mandatory response to the relevant disaster.

Section 8.01-225.02 in relevant part provides:

In the absence of gross negligence or willful misconduct, any health care provider who responds to a disaster shall not be liable for any injury or wrongful death of any person arising from the delivery or withholding of health care when (i) a state or local emergency has been or is subsequently declared in response to such disaster, and (ii) the emergency and subsequent conditions caused a lack of resources, attributable to the disaster, rendering the health care provider unable to provide the level or manner of care that otherwise would have been required in the absence of the emergency and which resulted in the injury or wrongful death at issue.

State Laws

Kentucky: Acts Ch. 73 (SB 150) (March 30, 2020) provides immunity to health care providers:

(b) A health care provider who in good faith renders care or treatment of a COVID-19 patient during the state of emergency shall have a defense to civil liability for ordinary negligence for any personal injury resulting from said care or treatment, or from any act or failure to act in providing or arranging further medical treatment, if the health

care provider acts as an ordinary, reasonable, and prudent health care provider would have acted under the same or similar circumstances.³³

Massachusetts: An Act to Provide Liability Protections for Health Care Workers and Facilities During the COVID-19 Pandemic (Bill S.2640), an emergency law signed by the Governor April 17, 2020,³⁴ makes health care professionals and facilities (including nursing facilities)

Immune from suit and civil liability for any damages alleged to have been sustained by an act or omission by the health care professional or health care facility in the course of providing health care services during the period of the COVID-19 emergency, provided, however, that (i) the health care facility or health care professional is arranging for or providing health care services pursuant to a COVID-19 emergency rule and in accordance with otherwise applicable law; (ii) arranging for or providing care or treatment of the individual was impacted by the health care facility's or health care professional's decisions or activities in response to treatment conditions resulting from the COVID-19 outbreak or COVID-19 emergency rules; and (iii) the health care facility or health care professional is arranging for or providing health care services in good faith.³⁵

Immunity does not apply

if the damage was caused by an act or omission constituting gross negligence, recklessness or conduct with an intent to harm or to discriminate based on race, ethnicity, national origin, religion, disability, sexual orientation or gender identity by a health care facility or health care professional providing health care services; (ii) to consumer protection actions brought by the attorney general; or (iii) to false claims actions brought by or on behalf of the commonwealth.³⁶

New Jersey:

New York: The state's budget bill for fiscal year 2021 includes the Emergency or Disaster Treatment Protection Act, which provides immunity for health care facilities and professionals "from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services" during the COVID-19 emergency rule.³⁷ Immunity does not apply

if the harm or damages were caused by an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care professional . . . provided, however, that acts, omissions or decisions resulting from a resource or staffing shortage shall not be considered to be willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm.³⁸

Utah: SB3007 (enacted) amends the Utah Code, 78B-4-517, to provide immunity for "civil liability for damages or an injury resulting from exposure of an individual to COVID-19 on the

premises owned or operated by the person, or during an activity managed by the person,” excluding “willful misconduct,” “reckless infliction of harm,” or “intentional infliction of harm.”³⁹

Conclusion

During the COVID pandemic, longstanding regulatory protections for residents are waived, there are no family visitors, no ombudsman visitors, few if any surveyor visits, there is limited enforcement, and facilities are receiving additional Medicare and Medicaid reimbursement. Granting broad immunity to nursing facilities under these circumstances increases the enormous risks that residents are already facing. Granting broad immunity also fulfills the nursing home industry’s longstanding efforts to avoid accountability by preventing litigation.

May 14, 2020 – T. Edelman

¹ 81 Fed. Reg. 68688, 68790 (Oct. 4, 2016).

² *American Health Care Association v. Burwell*, 217 F.Supp.3d 921 (N.D. Miss. 2016).

³ 82 Fed. Reg. 26649, 26650 (Jun. 8, 2017).

⁴ 84 Fed. Reg. 34718 (Jul 8, 2019).

⁵ The prohibition on requiring a resident to sign an arbitration agreement as a condition of admission, 42 C.F.R. §483.70(n)(1); the requirement that an arbitration agreement be explained in a language that the resident or resident’s representative understands, §483.70(n)(2)(i); the 30-day right of rescission for residents signing an arbitration agreement, §483.70(n)(3); and the five-year retention requirement, §483.70(n)(6).

⁶ *Northport Health Services of Arkansas v. United States Department of Health and Human Services*, Case No. 5:19-CV-5168 (W.D. Ark., Apr. 7, 2020), <https://cases.justia.com/federal/district-courts/arkansas/arwdce/5:2019cv05168/58185/44/0.pdf?ts=1586337487>.

⁷ 42 U.S.C. §247d-6d.

⁸ 85 Fed. Reg. 15198 (Mar. 17, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-03-17/pdf/2020-05484.pdf>.

⁹ CMS, “Advisory Opinion on the Public Readiness and Emergency Preparedness Act and the March 20, 3030 Declaration under the Act” (Apr. 14, 2020), <https://www.hhs.gov/sites/default/files/prep-act-advisory-opinion-april-14-2020.pdf>.

¹⁰ *Id.*

¹¹ <https://www.nacds.org/pdfs/government/2020/SecAzar-COVID-Governor-Letter-3-24-20.pdf>.

¹² Maggie Flynn, “Multiple States Take Steps to Shield Nursing Homes From Liability Amid CoVID-19 – But Rules Vary,” *Skilled Nursing News* (Apr. 19, 2020), <https://skillednursingnews.com/wp-content/uploads/sites/4/2020/04/LeadingAge-Secretary-Azar-Letter-PREP-Act.pdf>.

¹³ Maggie Flynn, “Multiple States Take Steps to Shield Nursing Homes From Liability Amid CoVID-19 – But Rules Vary,” *Skilled Nursing News* (Apr. 19, 2020), <https://skillednursingnews.com/2020/04/multiple-states-take-steps-to-shield-nursing-homes-from-liability-amid-covid-19-but-rules-vary/>.

¹⁴ www.cahf.org/Portals/29/COVID/liability%20Protection%20coalition%20letter%20Final_4_9_20.pdf?ver=2020-04-20-174504-373.

¹⁵ <https://www.alabamapublichealth.gov/legal/assets/soe-covid19-liability-protection-050820.pdf>.

¹⁶ *Id.* C.2.

¹⁷ <https://azgovernor.gov/executive-orders>. Click on Executive Order 2020-27, ¶4.

¹⁸ *Id.*

¹⁹ ¶4. https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-18.

²⁰ *Id.* ¶5.

²¹ <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7V.pdf?la=en>.

²² <https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders> (click on the executive order for Apr. 14, 2020, no number).

²³ <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-19.aspx>.

²⁴ <https://www.coronavirus.in.gov/files/Liability%20Guidance%204.3.20.pdf>.

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²⁵ <https://governor.kansas.gov/executive-order-no-20-26/>.

²⁶ https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-523481--,00.html.

²⁷ <https://www.sos.ms.gov/content/executiveorders/ExecutiveOrders/1471.pdf>.

²⁸ gov.nv.gov/News/Emergency_Orders/2020/2020-04-01_-_COVID-19_Declaration_of_Emergency_Directive_011/

²⁹ <https://nj.gov/infobank/eo/056murphy/pdf/EO-112.pdf>.

³⁰ <https://www.governor.pa.gov/wp-content/uploads/2020/05/20200506-GOV-health-care-professionals-protection-order-COVID-19.pdf>.

³¹ <https://governor.ri.gov/documents/orders/Executive-Order-20-21.pdf>.

³² [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-60-Clarification-of-Certain-Immunity-From-Liability-For-Healthcare-Providers-in-Response-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-60-Clarification-of-Certain-Immunity-From-Liability-For-Healthcare-Providers-in-Response-to-Novel-Coronavirus-(COVID-19).pdf).

³³ <https://legiscan.com/KY/text/SB150/id/2175871>.

³⁴ <https://malegislature.gov/Laws/SessionLaws/Acts/2020/Chapter64>.

³⁵ Chapter 64 of the Acts of 2020, §2(a).

³⁶ Chapter 64 of the Acts of 2020, §2(b),

³⁷ NY Public Health Law, Article 30-D, §§3080-3082, <https://www.mlmic.com/wp-content/uploads/2020/04/NYS-Article-30-D-of-the-Public-Health-Law.pdf>.

³⁸ *Id.* §3082.2.

³⁹ <https://le.utah.gov/~2020S3/bills/static/SB3007.html>.