Liability protections for health care professionals during COVID-19

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The COVID-19 pandemic created a public health emergency that is rapidly altering the provision of health care services across the country based on guidance and recommendations from the Centers for Disease Control and Prevention and other federal, state and local government directives. Although necessary, these measures have raised concern about the potential liability of physicians and other health care professionals who are responding to the pandemic and continue to provide high-quality patient care while adhering to these guidance and recommendations.

Also, in an effort to extend the capacity of our nation’s health care workforce to provide care on the frontlines of the COVID-19 crisis, on March 24 the Secretary of Health and Human Services issued a letter and associated guidance urging all state governors to take a number of immediate actions, including shielding health care professionals from medical liability. Below is a list of liability protections for health care professional that are currently in effect, as well as other activities underway.

Federal

On March 27, President Donald Trump signed into law H.R. 748, the “Coronavirus Aid, Relief and Economic Security Act” (CARES Act). This new law includes Good Samaritan language that provides additional federal liability protections for volunteer health care professionals during the COVID-19 emergency response (see section 3215).

It clarifies that physicians and other health care professionals who provide volunteer medical services during the public health emergency related to COVID-19 shall not be liable for providing such services that relate to the diagnosis, prevention or treatment of COVID-19 or the assessment or care of a patient related to an actual or suspected case of COVID-19.

Limited exceptions apply for such things as gross negligence, criminal misconduct and providing care while intoxicated. These protections preempt state and local laws that are inconsistent with the CARES Act. However, state laws that provide greater liability protections are not preempted.
The Public Readiness and Emergency Preparedness Act (PREP Act) provides broad immunity protections to health care professionals who administer or use countermeasures covered by declarations issued by the Secretary of HHS. On March 17, the Secretary issued such a declaration, applying immunity protections to physicians and other health care professionals who administer or use such countermeasures as antiviral medications, other drugs, biologics, vaccines, diagnostics and/or devices (e.g., COVID-19 testing and respiratory therapy) to treat, diagnose, cure, prevent or mitigate COVID-19 or the transmission of SARS-CoV-2 or a virus mutating therefrom.

The Volunteer Protection Act of 1997 (VPA) provides liability protections to volunteers, including physicians, who are performing services for nonprofit organizations or government entities. A public health emergency or national emergency declaration is not required for these protections to apply. The protections apply to an uncompensated volunteer for acts of ordinary negligence committed within the scope of the volunteer’s responsibilities. Physician volunteers are not liable for economic damages caused when they provide medical care within their scope of practice.

The volunteer must be properly licensed, certified or authorized by the appropriate authorities as required by the law in the state in which the harm occurred. Limited exceptions apply for such things as gross negligence and reckless misconduct. These protections preempt state and local laws that are inconsistent with the VPA. However, state laws that provide greater liability protections are not preempted.

Section 194 of the Health Insurance Portability and Accountability Act of 1996 (PDF, HIPAA) extends eligibility for Federal Tort Claims Act liability protections to volunteer health professionals at qualifying free clinics, provided that the clinic sponsors the physician by submitting an application to the Health Resources and Services Administration.

States

States have a variety of liability protections in place that could apply to a physician providing care in an emergency, particularly those serving as a volunteer. For example, 50-states have Good Samaritan statutes which provide immunity to licensed physicians acting in good faith who provide gratuitous care at the scene of an accident.

Some states extend these protections to care provided by volunteer physicians, often as part of an official response team, in a public health emergency, state of emergency or other state declared disaster proclamation issued by governors. State laws also provide liability protections for volunteer physicians providing care in a free clinic, non-profit hospital, non-profit organization or as part of a government organization.


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States have also enacted Compacts or Uniform Laws, which include liability protections for volunteers responding to a declared emergency, however these protections are not automatic and are limited in their applicability. For example, the Emergency Management Assistance Compact (EMAC) which has been enacted by all 50-states provides immunity to officers or employees from the rendering state to the state requesting aid, in which officers or employees are considered agents of the requesting state for tort liability and immunity purposes. For EMAC protections to apply, however, a state must make a request to another state(s) though the Compact and such request must be formally accepted by the rendering state.

The Uniform Emergency Volunteer Health Practitioners Act (UEVHPA), grants immunity of civil liability to out-of-state licensed health professionals for gratuitous care provided in a declared emergency. There are, however, limitations to whom the UEVHPA applies, including only out-of-state physicians who have registered in advance or during an emergency. According to the National Conference of Commissioners on Uniform State Laws, the UEVHPA has been enacted in 17 states, D.C. and U.S. Virgin Islands since 2007 (AR, CO, GA, IL, IN, KY, LA, ME, NV, NM, ND, OK, TN, TX, UT, WA, WV).

It’s important to note, the laws described above typically include exceptions for gross negligence or reckless or intentional misconduct.

In response to COVID-19, states are considering ways to extend liability protections for physicians and other health care professionals. For example, Governor Andrew Cuomo issued an executive order amending New York’s Good Samaritan statute to provide broad civil immunity to health care professionals 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. The EO is valid through April 22, 2020.

In a letter to the governors on workforce solutions to address COVID-19, Secretary of Health and Human Services Alex Azar encouraged Governors to develop a list of liability protections for in-state and out-of-state physicians, including volunteers, relicensed or recently licensed medical professionals, services provided through telehealth and services consistent with expanded scopes of practice. The National Governors Association website is tracking state declarations and other COVID-19 responses at https://www.nga.org/coronavirus/#states.

COVID-19: Recommendations for pursuing liability protections through state action (PDF)

Read about policy options for states to address COVID-19, for additional guidance on how states may provide additional liability protections for physicians in response to COVID-19.


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