

## Alerts

### Review of Federal and State Immunity Laws in Response to COVID-19

May 8, 2020

*Health Care Alert*

In light of the ongoing COVID-19 public health crisis, the Secretary of the U.S. Department of Health and Human Services (HHS) signed a declaration providing immunity from suits involving the production and administration of certain COVID-19 countermeasures. While this immunity does not completely shield healthcare facilities and professionals from liability, approximately 50% of states have introduced legislation or executive orders providing broader immunity.

#### Immunity Under Federal Law

Pursuant to the Public Readiness and Emergency Preparedness Act (The PREP Act), 42 U.S.C. §247d-6d, the Secretary of HHS signed a declaration providing immunity to persons involved in the manufacture and distribution of Covered Countermeasures as well as licensed health care professionals authorized to administer or prescribe such Covered Countermeasures. "Covered Countermeasures" include any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19. To qualify, the countermeasure must be determined necessary by the HHS. The countermeasure must also be either licensed by the FDA, Authorized by Emergency use by the FDA, or may reasonably be determined to qualify for licensing within eight years. Thus, the scope of immunity under PREP is limited in scope and only extends to care directly related to COVID-19. For additional information on the HHS Declaration, see our *Health Care Alert* dated [April 3, 2020](#).

#### State Law Expansion of Immunity

**ILLINOIS:** Illinois Governor J.B. Pritzker issued COVID-19 [Executive Order No. 17](#) pursuant to the Illinois Emergency Management Agency Act, the Emergency Medical Services Systems Act, and the Good Samaritan Act. It provides much broader immunity than that provided by The PREP Act. The order directs all Healthcare Facilities, Professionals, and Volunteers to render assistance in support of the state's response to the disaster. During the pendency of the Gubernatorial Disaster Proclamation:

- Health Care Facilities and Health Care Professionals shall be immune from civil liability for any injury or death alleged to have been caused by any act

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or omission by the Health Care Facility or Professional.

a. "Health Care Facilities" means Facilities licensed, certified, or approved by any state agency and subject to the Health Facilities Planning Act, including ambulatory surgical treatment centers and hospitals (among others), as well as long-term care facilities licensed under the Nursing Home Care Act and Federally Qualified Health Centers.

b. "Health Care Professional" means all licensed or certified health care or emergency medical services workers who (i) are providing health care services at a Health Care Facility in response to the COVID-19 outbreak and are authorized to do so; or (ii) are working under the direction of the Illinois Emergency Management Act (IEMA) or the Illinois Department of Public Health (IDPH) in response to the disaster proclamation.

- Regarding an injury or death which occurred at a time when the Health Care Facility or Professional was engaged in the course of rendering assistance to the state by providing health care services in response to the COVID-19 outbreak, note the following:
  - a. For Facilities, "Rendering Assistance" must include cancelling or postponing elective surgeries or procedures and taking measures such as increasing the number of beds, preserving personal protective equipment or taking necessary steps to prepare to treat patients with COVID-19.
  - b. For Professionals, "Rendering Assistance" in support of the state's response means providing health care services at a Health Care Facility in response to the COVID-19 outbreak, or working under the direction of IMEA or IDPH in response to the Gubernatorial Disaster Proclamations.
- The Executive Order does not extend protections to claims of willful misconduct involving private persons, firms, or corporations, or their employees and agents. In a typical medical malpractice case involving a private person, firm, or corporation, the standard of care is defined as the doing of something or the failure to do something that a reasonably careful provider would do under the same or similar circumstances. Under the Governor's Executive Order, liability is triggered by willful misconduct, a much more onerous standard to meet given that it requires a showing of intention to achieve a purpose.
- The Executive Order also does not extend protections to claims of gross negligence or willful misconduct involving the state or any of its political subdivisions.
- The Executive Order as written appears to provide immunity not just for acts arising directly from "Rendering Assistance," but rather during the period of time a Health Care Facility is "Rendering Assistance," which may apply beyond care and treatment rendered to COVID-19 patients.

**WISCONSIN:** Wisconsin enacted s. 895.4801, Wis. Stats., entitled "Immunity for health care providers during COVID-19 emergency." It provides much broader immunity than that provided by The PREP Act. It provides immunity to:

- "Health care professionals" and "health care providers" and their employees, agents and contractors for civil liability for the death of or injury to any individual or any damages caused by actions or omissions that satisfy all of the following:
  - a. The action or omission is committed while the professional, provider, employee, agent, or contractor is providing services during the state of emergency declared under s. 323.10 on March 12, 2020, by executive order 72, or the 60 days following the date that the state of emergency terminates;
  - b. The actions or omissions relate to the health services provided or not provided in good faith or are substantially consistent with any of the following: (1) Any direction, guidance, recommendation, or other statement made by a federal, state, or local official to address or in response to the emergency or disaster declared as described in (a); or (2) Any guidance published by the department of health services, the federal department of health and human services, or any divisions or agencies of the federal department of health and human services relied upon in good faith.



- It does not provide immunity for actions or omissions that involve reckless or wanton conduct or intentional misconduct.