

COVID-19 PANDEMIC UPDATE: GOVERNOR ISSUES EXECUTIVE ORDER 60 TO PROVIDE LIABILITY PROTECTIONS TO HEALTH CARE PROVIDERS

April 29, 2020

On Tuesday, April 28, 2020, Governor Ralph Northam issued Executive Order 60 (EO-60)¹ to provide immunity from certain liability to health care providers responding to the COVID-19 pandemic. The primary scope of EO-60 focuses on interpretative guidance for the application of two immunity statutes for health care providers responding to disasters.

CURRENT IMMUNITY STATUTES

Virginia has two statutes that address immunity for acts of simple negligence when health care providers respond to disasters. Va. Code § 8.01-225.01² became law in Virginia in 2003 and provides immunity protection to “health care providers”³ who respond to a disaster where an injury or death arises “from abandonment by such health care provider of any person to whom such health care provider owes a duty to provide health care” in certain circumstances. Under Virginia law, “health care providers” include, for example, if a health care provider has a duty to a patient and must leave him to respond to a disaster, the statutory immunity would be available to the provider as an affirmative defense in a lawsuit.

Subsequently, the Virginia General Assembly passed Va. Code § 8.01-225.02,⁴ which became law in 2008. This statute provides immunity from acts of simple negligence to “health care providers” who respond to disasters when an injury or death to a person arises “from the delivery or withholding of health care” in certain circumstances.

¹ Access to all of the Governor’s Executive Orders can be found at <https://www.governor.virginia.gov/executive-actions/>

² 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.

B. In the absence of gross negligence or willful misconduct, any hospital or other entity credentialing health care providers to deliver health care in response to a disaster shall be immune from civil liability for any cause of action arising out of such credentialing or granting of practice privileges if (i) a state or local emergency has been or is subsequently declared and (ii) the hospital has followed procedures for such credentialing and granting of practice privileges that are consistent with the applicable standards of an approved national accrediting organization for granting emergency practice privileges.

³ See footnote 5, *supra*.

⁴ A. 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.

Neither statute provides immunity for acts of gross negligence or willful misconduct. The immunity granted in both statutes does not hinge on whether the health care provider is compensated, or not. Research indicates that no court of law has been asked to interpret the various phrases in either statute or issue an opinion on what the phrases mean. The absence of any judicial interpretations prompted a request of Governor Northam, by approximately 20 associations or groups of the health care community, to provide interpretation of the various phrases in the statutes.

In addition, Governor Northam was requested to expand the applicability of the immunity in the two statutes to entities beyond “health care providers.” As used in both statutes, the definition of “health care providers” tracks that definition which is found in the Medical Malpractice Act⁵. That definition of health care provider does not include assisted living facilities, home health providers, hospice providers or adult day care providers. Therefore, the Governor was asked to extend the applicability of 8.01-225.01 and 8.01-225.02 to those entities.

Of note, the health care associations and groups were approached by and worked with the Virginia Trial Lawyers Association (VTLA) in drafting agreed upon language for the executive order. The VTLA not only agreed to the language but joined the Virginia Health Care Association|Virginia Center for Assisted Living (VHCA|VCAL) in requesting the Governor enter the executive order.

After the draft executive order language was submitted to the Governor, it was reported by the Governor’s staff that because the General Assembly had specifically targeted the scope of these two statutes to apply to “health care providers,” the Governor did not have the statutory authority to broaden the scope of either statute. Accordingly, these changes will be sought through legislative action in the upcoming special session of the Virginia General Assembly, which is anticipated to be scheduled at some point later in the summer or early fall of 2020.

As to the scope of EO-60, it provides guidance in four key areas by interpreting the applicability of the two immunity statutes. Paragraphs one and two of EO-60 clarify that COVID-19 does, in fact, constitute a “disaster” as the term is used in both statutes, and that Executive Order 51 (EO-51) declares a state of emergency in response to the COVID-19 “disaster.”

Next, EO-60 addresses a phrase, contained in both statutes, pertaining to “a health care provider who responds to a disaster.” The Governor interprets that phrase to include pursuant to Order of Public Health Emergency Two, the “withholding of the provision of procedures, consultations or surgeries.” The Governor addresses these actions being taken both in inpatient or outpatient surgical hospitals, freestanding emergency departments, endoscopy centers,

⁵ § 8.01-581.1 – “Health care provider” means (i) a person, corporation, facility or institution licensed by this Commonwealth to provide health care or professional services as a physician or hospital, dentist, pharmacist, registered nurse or licensed practical nurse or a person who holds a multistate privilege to practice such nursing under the Nurse Licensure Compact, nurse practitioner, optometrist, podiatrist, physician assistant, chiropractor, physical therapist, physical therapy assistant, clinical psychologist, clinical social worker, professional counselor, licensed marriage and family therapist, licensed dental hygienist, health maintenance organization, or emergency medical care attendant or technician who provides services on a fee basis; (ii) a professional corporation, all of whose shareholders or members are so licensed; (iii) a partnership, all of whose partners are so licensed; (iv) a nursing home as defined in § [54.1-3100](#) except those nursing institutions conducted by and for those who rely upon treatment by spiritual means alone through prayer in accordance with a recognized church or religious denomination; (v) a professional limited liability company comprised of members as described in subdivision A 2 of § [13.1-1102](#); (vi) a corporation, partnership, limited liability company or any other entity, except a state-operated facility, which employs or engages a licensed health care provider and which primarily renders health care services; or (vii) a director, officer, employee, independent contractor, or agent of the persons or entities referenced herein, acting within the course and scope of his employment or engagement as related to health care or professional services.

physician offices, dental, orthodontic, oral surgeon or endodontic offices that require Personal Protective Equipment (PPE).

The fourth aspect of EO-60 addresses a phrase contained in Va. Code § 8.01-225.02 relating to “emergency and subsequent conditions caused by 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.” Governor Northam includes five occurrences that may be captured by this phrase.

The five occurrences include the following:

- i. insufficient availability of PPE, ventilators or other drugs, blood products, supplies or equipment;
- ii. insufficient availability of trained staff;
- iii. having licensed health care professionals deliver care that, while included in the scope of their licensure, exceeds the scope of their credentials at the hospital or the health care facility, at which they deliver services or exceeds the scope of services they normally provide;
- iv. implementation or execution of triage protocols or scarce resource allocation policies necessitated by health care provider declaration of crisis standards of care; and
- v. using supplies or equipment in innovative ways that differ from the way that these supplies and equipment are normally used.

Of note, Virginia does not have a definition of “crisis standards of care” as do some states. The standard of care applicable to all health care providers is found in the Medical Malpractice Act in Va. Code § 8.01-581.20. This largely holds a health care provider to a statewide standard of care as to what a reasonably prudent practitioner, in the same or similar specialty, would do. While EO-60 does not mandate the declaration of crisis standards of care, it clearly enables health care providers to rely on crisis standards of care in responding to patient care needs under a disaster.

The final provision of EO-60 clarifies that the Executive Order is not intended to waive or limit any other immunity protection a health care provider may be entitled to assert.

As to timeframe, Governor directed EO-60 to track the same timeframe of EO-51, which was the declaration of COVID-19 as a disaster.

CONCLUSION

EO-60 provides a very important liability protection for health care providers. Governors in many states have executed executive orders addressing liability and many states do not even have similar statutes to the two that Virginia has.

Attention now needs to be focused on seeking the necessary legislative relief for assisted living, home health, hospice and adult day care. Additionally, both immunity statutes will need to undergo modernization in the 2021 General Assembly to capture the actions taken in EO-60 and the actions taken in the special session.

For questions on EO-60, please contact a member of our [Government Relations](#) team. For any other concerns arising from the pandemic, please contact a member of our [COVID-19 Taskforce](#).

The information contained in this advisory is for general educational purposes only. It is presented with the understanding that neither the author nor Hancock, Daniel & Johnson, P.C., is offering any legal or other professional services. Since the law in many areas is complex and can change rapidly, this information may not apply to a given factual situation and can become outdated. Individuals desiring legal advice should consult legal counsel for up-to-date and fact-specific advice. Under no circumstances will the author or Hancock, Daniel & Johnson, P.C. be liable for any direct, indirect, or consequential damages resulting from the use of this material.