

COVID-19 HEALTHCARE LITIGATION TASK FORCE



The COVID-19 pandemic has affected all facets of the healthcare industry in this country and around the world. Healthcare providers in every specialty and in every facility have been forced to adapt to constantly evolving regulations, guidelines, and new challenges in treating COVID-19 patients while at the same time protecting themselves, their employees, and other patients from exposure. As the state recovers and enters Phase 2 of Governor Edwards' Resilient Louisiana plan, there will be additional pressure on Louisiana healthcare providers to continue to treat COVID-19 patients with a larger focus on testing, contact tracing, and limiting the further spread of the virus with growing social contact from the re-opening of businesses.

Unfortunately, Louisiana healthcare providers will almost certainly be faced with exposure to unique COVID-19 related claims from the early phases of the pandemic through the current efforts to re-open the economy while keeping the virus contained. Claims will come from various sources including COVID-19 patients themselves, family members of COVID-19 patients who have died, nosocomial infected patients, visitors, and even employees and contractors of healthcare facilities. In our estimation, the potential claims will not only involve allegations of medical negligence, but providers may also be exposed to labor and employment claims as well as claims under general negligence theories of liability in an attempt to circumvent the statutory protections afforded by the Louisiana Medical Malpractice Act.

In anticipation of claims, it is vital that providers maintain all pertinent documentation from these time periods for confirmation of notices and receipt of orders, implementation of procedures and protocols, daily documentation of compliance, and the facility's response to evolving issues of risk.

LIABILITY THEORIES MAY INCLUDE:

- Failure of facilities to be adequately staffed, prepared with supplies, and organized to handle the pandemic;
- Failure of providers to comply with various orders from the Governor and the Louisiana Department of Health ("LDH") related to treatment, precautions, restrictions, and specific protocols;
- Failure to implement, timely implement, and/or enforce proper safety protocols for visitors, non-COVID-19 patients, and for use of personal protective equipment ("PPE");
- Failure of individual providers to follow the proper safety protocols related to the use of PPE;
- Failure to timely and properly implement testing and protective protocols for infected/exposed employee providers who treated patients, and contact tracing;
- Failure to timely implement reasonable measures to prevent transmission;
- Failure of infected providers to timely identify risk, failure to properly quarantine, and failure to follow proper quarantine guidelines for suspected or confirmed cases;
- Allegations arising from the use of telehealth services during the pandemic;
- Allegations related to treatment priority and handling of COVID-19 patients;
- Negligent credentialing claims related to volunteers, retired healthcare providers, students, and providers treating outside of their specialty who volunteered to assist during the pandemic;
- Allegations by staff, independent contractors, and/or third parties against facilities and hospitals for failure to protect from workplace hazards related to availability of PPE, staffing, and proper protocols;
- Workers' compensation claims related to employee infections; and
- Employment issues for use of leave by quarantined employees, terminations, potential retaliation suits, and providing reasonable accommodations during the pandemic.

The attorneys at Blue Williams are analyzing all of the above issues in order to prepare for the defense of individual providers, clinics, hospitals, and facilities in their capacity as both healthcare providers and employers. In defending these claims, knowledge of the timelines, guidance, and restrictions provided in the orders issued by the Governor and the LDH that are applicable to the pandemic will be vital. We are further monitoring the legal issues developing across the nation to evaluate exposure to and the defense of any such claims that may arise here in Louisiana. In evaluating these issues in advance of claims being filed, there are several limitations on liability, heightened standards of proof, and statutory immunity provisions provided depending on the circumstances of each claim. Louisiana law has a built-in limitation of liability for healthcare providers providing treatment during any declaration of a public health emergency per La. R.S.29:731(B)(2)(c) limiting liability exposure except for damages caused by acts of gross negligence or willful misconduct.



Similarly, Section 3251 of the CARES Act provides a limitation of liability to providers who are acting as volunteers, unless related to acts of gross negligence or willful conduct. The Public Readiness and Emergency Preparedness Act (“PREP Act”) also provides immunity for any loss arising out of the manufacture, testing, development, distribution, administration, and use of covered countermeasures used for the purposes of addressing COVID-19, with an exception for willful misconduct. It will be important to identify and assert any applicable legal immunity at the earliest stage of litigation.

Please feel free to contact the attorneys at Blue Williams, L.L.P. with any questions concerning COVID-19 litigation facing Louisiana healthcare providers.

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