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PHYSICIAN LAW BLOG

Are New Civil Immunity Laws Malpractice PPE?

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Health care providers on the front-lines of the battle against COVID-19 should be provided every weapon that can be mustered. This includes protection from lawsuits while fighting this deadly, insidious and invisible foe. However, health care providers must temper their reliance on the recently enacted laws, executive orders or declarations of civil immunity, as they are not a cloak of unassailable malpractice PPE as reported in the news media.

At the National Level, the CARES Act states that "a health care professional shall not be liable under Federal or State law for any harm caused by an act or omission of the professional in the provision of health care services," but only as a volunteer treating a patient with COVID-19. Any receipt of "compensation or any other thing of value in lieu of compensation," with limited exceptions, disqualifies the practitioner as a volunteer and thus from the protections of the Act. Importantly, the CARES Act includes an express preemption provision.

The PREP Act also purports to provide broad immunity protections to health care professionals who administer or use countermeasures (e.g., COVID-19 testing and respiratory therapy) to treat, diagnose, cure, prevent or mitigate COVID-19 or the transmission of SARS-CoV-2. The scope of the Act is limited to "Covered Persons" and only with respect to "Recommended Activities." With all the buzz about various pharmacological agents being effective treatment for COVID-19, there is no guarantee that off-label drug treatment would be covered by the provisions of PREP.

The Office of Civil Rights has issued bulletins highlighting "unprecedented HIPAA flexibilities" in response to COVID-19, including loosening the criteria for disclosure to a patient's "family members, relatives, friends, or other persons identified by the patient as involved in the patient's care." Again, limitations apply, including requirements that covered entities "should get verbal permission from individuals or otherwise be able to reasonably infer that the patient does not object," including specific requirements applicable to incapacitated patients.

In Illinois, Governor Pritzker issued Executive Order No. 19 on April 1 granting "health care providers," including "skilled and intermediate long term care facilities licensed under the Nursing Home Care Act," immunity from civil liability for injuries that occur while they provide health care services in response to COVID-19 under the Illinois Emergency Management Agency Act ("IEMAA"). The order applies "during the pendency of the Gubernatorial Disaster Proclamation" that currently extends to April 30, 2020. The immunities under Order No. 19 do not apply to willful and wanton misconduct.

The IEMAA applies to "[a]ny private person, firm or corporation. . .[acting] in the performance of a contract with, and under the direction of, the State, or any political subdivision of the State." There is ambiguity here. For example, what kind of "contract" must a healthcare provider in Illinois have with the state to be covered by Order No. 19? Does immunity apply only to the treatment of a COVID-19 residents or would it apply to the treatment of all residents during the outbreak?

In Missouri, many are pushing Governor Parson to sign an executive order granting civil immunity to healthcare providers "deployed" by the state to treat COVID-19 patients, but nothing has been signed to date. Missouri statute 44.045 gives Parson authority to "deploy" any health care provider licensed in Missouri during a state of emergency and grant said provider civil immunity for injuries caused by a failure to meet the standard of care. It is an open question as to the scope of "deploy" and whether such immunity would apply only to care related directly to the treatment of COVID-19 or broader.

Practitioners must be wary as the scope of such immunity is sometimes limited, and it will be left up to the Courts to determine applicability and enforceability in any particular case.