

## **Nursing Facilities and Medicolegal Concerns Arising from the Pandemic**

### **Pandemic Federal and State Legal Provisions**

One of the hardest-hit groups amidst the pandemic has been the elderly, particularly those that reside in nursing facilities. To date, there have been more than [660,000](#) reported COVID cases in nursing homes and over [130,000 deaths](#) nationally.

Early in the pandemic featured a rash of COVID outbreaks in nursing homes, as elderly patients with chronic medical conditions and weakened immune systems were suddenly being infected at an alarming rate with the virus. In addition, nursing homes were often practicing without enough staffing, equipment, or PPE to properly care for patients. Recognizing these challenges, federal protections were passed, invoking the 2005 Public Readiness and Preparedness Act (PREP), initially created as a response to bioterrorism threats such as anthrax. The act was significant in that it shielded drug and vaccine manufacturers from legal liability under emergency circumstances, as well as incentivized rapid drug development for COVID. Congress took further actions, adding liability to N95 masks as well.

On the state level, some states also passed the Emergency or Disaster Treatment Protection Act (EDTPA), which created immunity for providers treating COVID patients and also extended protections to long-term care facilities such as nursing homes. The nursing home provisions were a new extension of the EDTPA, aided by a powerful nursing lobby and concerns over PPE shortages and rapidly changing guidance on COVID treatment protocols.

### **“Gross Negligence Standard” for Nursing Homes**

Medicolegally, the standard for nursing homes now changed to “gross negligence”, in that nursing homes are protected from claims except for in the most egregious cases such as reckless misconduct or intentional harm. Nursing homes that had reasonable virus mitigation policies could be granted immunity, regardless of whether they were actually able to carry through the strategies or not. Only facilities that completely disregarded infection control and hygiene standards can potentially be held liable.

### **Untoward Effects of Protection**

Now, over a year later we are starting to see the beginnings of untoward effects of the nursing home provisions. In most cases thus far, protections for nursing homes are justified given the

strained resources and difficult conditions that they have been forced to operate under. However, an increasing number of cases were brought forth where the nursing facility is using liability protections as a shield for subpar standards even prior to the pandemic.

For example, homes that were chronically understaffed may now be incentivized to use their staffing shortages during the pandemic period. Homes that had substandard infection control and hygiene before the pandemics suddenly have new protections they may potentially use even for non-COVID issues such as wound care.

## **Legal Strategies**

These are only a few of the concerns that are surfacing, and undoubtedly more will arise as there are more than 300 nursing lawsuits that have been filed this year alone. The provisions will likely also change how facilities strategize against lawsuits, potentially using federal protection to drag out claims or act as a deterrent for potential claims. There are also financial incentives to use the federal provisions, as no pay-outs will need to be made by facilities if cases can be pushed forward with the protections.

On the other hand, while there are concerns of abusing federal protections, there have also been cases of CMS fining facilities during the pandemic period for failure to adhere to screening policies, failure to maintain infection control and hand hygiene programs, and lack of staff safety protocols, which means that federal claims are unlikely to be a silver bullet against all claims for facilities.

The peri and post-pandemic period will likely see a barrage of nursing home related claims. It will be interesting to see how courts balance the recognition of difficult practicing standards with adherence to basic standards of care for nursing facilities.

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