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Limited Federal Liability Protections for Pandemic Responders: FAQs

The Health Coalition on Liability and Access strongly supports comprehensive protections for the healthcare professionals and facilities that have not wavered in their willingness to provide for the American public.

The frequently asked questions below highlight the topics and comments making their way into discussions regarding the need for policymakers to act now in enacting limited federal protections for pandemic responders.

Q: What is driving the need for the passage of targeted protections from liability lawsuits?

A: The very healthcare providers that have been celebrated as our nation's heroes are left susceptible to the threat of substantial liability risks unless action is taken at the federal level to protect them.

Q: What evidence is there that a problem is looming?

A: An early indication of the medical lawsuit wave to come stems from current personal injury attorney advertisements and aggressive domain name marketing seeking solicitations for medical liability cases.¹

Anecdotal evidence from medical liability insurers cites notices received each week, informing them of potential claims being filed against their insureds.

Q: Isn't this best addressed at the state level?

A: State liability protections issued by executive order or legislation vary substantially from one state to the next, leaving a patchwork that protects some of our frontline healthcare professionals while leaving others exposed to unwarranted lawsuits. In addition, some of the executive orders that have been issued may be subject to legal challenges from personal injury lawyers, potentially leaving even more health professionals exposed.

In addition, a gap in state laws remains that does not sufficiently protect healthcare providers working across state lines to support the areas hardest hit by the virus.

Q: Doesn't the PREP Act grant healthcare providers immunity in this case?

A: The liability protections in the Public Readiness and Emergency Preparedness (PREP) Act are limited and insufficient to protect the overwhelming majority of pandemic responders. The PREP Act should not be considered a comprehensive measure to address medical liability issues resulting from the COVID-19 pandemic.

¹ "COVID-19: Malpractice Risks When Treating Patients," *Medscape*, April 29, 2020

The Act only applies to care involving specific countermeasures that have received protection from product liability lawsuits. Examples of situations in need of protection not afforded by the PREP Act include:

- Practitioner shortages that have required providers to treat patients outside their general practice areas and prompted retired physicians to return to the workforce;
- Inadequate protective safety gear that could result in the inadvertent transmission of the virus;
- Lack of essential medical equipment, including ventilators, which may require the rationing of care;
- Inadequate testing leading to delayed or flawed diagnosis; and
- Delayed treatment of elective and non-COVID-19 medical treatments to save resources for coronavirus patients.

Q: How can limited protections be passed while ensuring patient safety remains a priority?

A: Building on provisions adopted by Congress in the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the HCLA supports incorporating language in any future pandemic response legislation granting specifically targeted protections from liability for healthcare professionals and the facilities in which they serve. *These protections would not apply to any care stemming from acts that constituted gross negligence or willful misconduct.*

Q: What is the scope of the proposed federal protections?

A: HCLA supports liability provisions that would apply only when:

- The act or omission occurred during the declared COVID-19 public health emergency or within 60 days of termination of the emergency;
- The act or omission occurred while providing or arranging care;
- The services were within the provider's scope of licensure/certification; and
- The services were provided in good faith.

Additional actions covered by the provision would include those taken based on direction or guidance from any Federal, State, or local official/department/agency as well as those taken due to a lack of resources attributable to the declared emergency.