
New Legislation: A Prescription to Protect Health Care Providers

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The North Carolina Emergency or Disaster Treatment Protection Act signed into law on May 4, 2020 affords immunity to health care providers practicing in extraordinary conditions consistent with COVID-19 emergency directives.



Health care providers are currently practicing in extraordinary conditions. Facilities, staff, and equipment are

overwhelmed by the demands of the COVID-19 pandemic. Providers are faced with difficult decisions, including cautiously admitting patients to the hospital, discharging patients earlier than usual, postponing elective procedures, practicing virtually, and determining how to allocate limited resources. Some are also being asked to return from retirement, work outside their usual scope of practice, provide care in unfamiliar settings, or practice in states in which they are not licensed. The COVID-19 pandemic necessitated a shift in the way medicine is practiced and left many health care providers concerned about liability. Practicing medicine in crisis mode increases the potential for negligence and practicing during a pandemic can increase liability exposure due to increased contact. In an effort to promote public health, safety, and welfare, North Carolina enacted the Emergency or Disaster Treatment Protection Act affording health care providers immunity practicing in these extraordinary conditions.

A traditional medical malpractice action exposes a health care provider to liability for failing to comply with the standard of care. In North Carolina, the standard of care is defined as care that is provided in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action. The pandemic impacted how all providers render care, not just those treating patients with the virus in an emergency setting. Practically speaking, the standard of care quickly evolved for all providers when the pandemic necessitated a change in the way providers are rendering care. The law, though, can be slow to catch up. The Emergency or Disaster Treatment Protection Act may help to bridge the gap between the practical, clinical treatment of patients and the legal implications by waiving the statutory standard of care and imposing a gross negligence standard to hold health care providers liable who are practicing in good faith and in compliance with the emergency directives issued regarding the State of Emergency.

On March 10, 2020, Governor Cooper issued an Executive Order declaring a State of Emergency in North Carolina. Recognizing the need for health care providers to respond to the pandemic, the Order temporarily waived the North Carolina licensure requirements for health care and behavior health care personnel who are licensed in another state, territory, or the District of Columbia to provide health care services within North Carolina during the State of Emergency.

As COVID-19 continued to spread and the demand for health care services continued to increase, many Governors issued executive orders affording protections to providers rendering care during the State of Emergency. Governor Cooper followed suit and declared health care providers emergency management workers who are insulated from liability except in cases of willful misconduct, gross negligence, or bad faith in an Executive Order issued on April 8, 2020. To address the need for additional health care providers, the Order permits:

- providers licensed elsewhere in the United States to render care in North Carolina,
- retired providers or providers with inactive licenses to render care,
- unlicensed skilled volunteers to provide care, and
- students with an appropriately advanced stage of professional study to render care

The Order also addresses the extraordinary health care needs and waives and/or modifies the enforcement of many legal and regulatory constraints that:

- limit the number of licensed beds in health care facilities,

- restrict dialysis stations,
- impede acquisition of medical imaging equipment, and
- prevent ambulatory surgical facilities from operating as a temporary hospital.

As some states are facing questions as to the constitutionality of provisions of executive orders issued by governors, the North Carolina General Assembly passed the Emergency or Disaster Treatment Protection Act, which Governor Cooper signed into law on May 4, 2020. The Act affords immunity to health care providers practicing in these extraordinary conditions consistent with COVID-19 emergency rules, including the provisions of previously issued Executive Orders.

The Act broadly defines health care providers as those who are:

- licensed in North Carolina,
- practicing under a waiver,
- practicing pursuant to Governor Cooper's Executive Order/emergency directives, and
- certain administrative and managerial employees of health care facilities.

It also broadly defines health care services as treatment, clinical direction, supervision, management, and administrative services rendered in confirmed or suspected cases of COVID-19 and to patients who present seeking care during the COVID-19 emergency declaration.

The broad definitions set forth in the Act afford protection to all health care providers rendering care in good faith to all types of patients, COVID-19 and non-COVID-19 alike, in accordance with the emergency declaration.

Immunity is afforded to health care providers:

- who are arranging for or providing health care services during the COVID-19 emergency declaration pursuant to COVID-19 emergency rules,
- when the arrangement of such health care services has been directly or indirectly impacted by the decisions or activities in response to the pandemic, and
- who are arranging services in good faith.

The immunity also applies to volunteer organizations that have made their facilities available to support the State's response and activities under the COVID-19 emergency declaration.

Immunity is not afforded in cases of gross negligence, reckless misconduct, or intentional infliction of harm. Importantly, the General Assembly specified that acts, omissions, or decisions resulting from a resource or staffing shortage shall not be considered gross negligence, reckless misconduct, or intentional infliction of harm. **The gross negligence standard is a higher bar than the standard of care generally applicable in medical malpractice actions and claims based on an error or mistake will not satisfy the heightened standard.**

The protection offered by this Act should encourage providers to focus on patient care and alleviate some liability concerns of health care providers practicing in the extraordinary conditions imposed by COVID-19.

For more information, please contact Susan T. Fountain or David A. Senter, Jr.

Related Links:

- [New Act Provides Protection from COVID-19 Related Civil Lawsuits for Long Term Care Facilities](#)
- [Young Moore's Coronavirus \(COVID-19\) Resource Center](#)

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