

STATE COVID-19 HEALTH CARE IMMUNITY LAWS

Health care immunity is the largest category of state COVID-related immunity laws passed in response to the pandemic, yet not every state has taken this action.

Twenty-six states plus the District of Columbia have enacted COVID-related health care immunity laws by Executive Order (EO), legislation, or both.¹ (Note that some existing laws already provided some immunity upon the state’s declaration of a state of emergency.²)

While the impetus for these laws was to support frontline health care workers, most laws are much broader, include nursing homes, and extend in time beyond emergency conditions.

- These laws typically immunize COVID-related negligent care, with carve-outs for gross negligence, recklessness, or intent, or care not rendered in “good faith.” However, some cover anyone treated for any medical problem during the COVID emergency, most immunize facilities, and many have vague or open-ended expiration dates.
- Nursing home immunity was slipped into many of these laws, with some lawmakers freely admitting to not paying close enough attention when voting.³ This has contributed to a shocking nursing home death toll, surpassing 50,000 fatalities and representing about 40 percent of all COVID deaths.⁴
 - According to experts, nursing home immunity creates a “lethal combination” when added to other problems like the lack of state inspections, the absence of regulatory enforcement, and the inability of family members to visit, which are critical accountability tools.⁵
 - Most facilities receiving immunity are run by unsafe for-profit chains⁶ or are owned by private investors,⁷ which has led to egregious safety problems including long histories of atrocious infection-controls.⁸ In addition, the nursing home industry has long and actively fought federal pandemic preparedness requirements, even lobbying against such rules before the current administration.⁹

Many experts and state lawmakers believe that even when limited to individual health care workers, such legislation is unnecessary.

- Medical malpractice cases are already difficult and expensive to bring in non-emergency times, which means only a tiny percentage of injured patients with legitimate cases ever file a lawsuit.¹⁰

- COVID-related medical malpractice cases are even more difficult to bring. In the midst of a pandemic caused by a virus with no medical cure and exacerbated by equipment shortages that the health care system did not create, the standard of care – and what the law reasonably expects of health care professionals – is very different than in non-emergency times.
 - The proof is in the small number of cases that have been brought so far, which has been true whether or not a state has enacted immunity laws.¹¹

NOTES

¹ The American Association for Justice is tracking these laws. Most are Executive Orders. As of June 23, 2020, the list included: Alabama, Arizona, Arkansas, Connecticut, D.C. (legislation), Georgia, Hawaii, Illinois, Iowa, Kansas (executive order expired, done through legislation), Kentucky (legislation), Maryland (emergency declaration), Massachusetts (legislation), Michigan, Mississippi, New Jersey (both), New York (both), Nevada, North Carolina (legislation), Oklahoma (legislation), Pennsylvania, Rhode Island, Utah (legislation), Vermont, Virginia, Wisconsin (legislation), and Wyoming (legislation).

² See, e.g., Baker Donelson, “COVID-19 Health Care Provider Immunity Update,” May 14, 2020, <https://www.bakerdonelson.com/covid-19-health-care-provider-immunity-update>. (“Some existing legislation, like that in California, Delaware, Idaho, Louisiana, Maryland, Montana, and New Hampshire, is immediately and automatically effective upon the state’s declaration of a state of emergency.”)

³ Amy Julia Harris, Kim Barker, and Jesse McKinley, “Nursing Homes Are Hot Spots in the Crisis. But Don’t Try Suing Them,” *New York Times*, May 13, 2020, <https://www.nytimes.com/2020/05/13/nyregion/nursing-homes-coronavirus-new-york.html>

⁴ See Jon Kamp and Anna Wilde Mathews, “As U.S. Nursing-Home Deaths Reach 50,000, States Ease Lockdowns,” *Wall Street Journal*, June 16, 2020, <https://www.wsj.com/articles/coronavirus-deaths-in-u-s-nursing-long-term-care-facilities-top-50-000-11592306919>

⁵ Amy Julia Harris, Kim Barker, and Jesse McKinley, “Nursing Homes Are Hot Spots in the Crisis. But Don’t Try Suing Them,” *New York Times*, May 13, 2020, <https://www.nytimes.com/2020/05/13/nyregion/nursing-homes-coronavirus-new-york.html>

⁶ Laura Strickler, Stephanie Gosk, and Shelby Hanssen, “A nursing home chain grows too fast and collapses, and elderly and disabled residents pay the price,” *NBC News*, July 19, 2019, <https://www.nbcnews.com/health/aging/nursing-home-chain-grows-too-fast-collapses-elderly-disabled-residents-n1025381>

⁷ Matthew Goldstein, Jessica Silver-Greenberg, and Robert Gebeloff, “Push for Profits Left Nursing Homes Struggling to Provide Care,” *New York Times*, May 7, 2020, <https://www.nytimes.com/2020/05/07/business/coronavirus-nursing-homes.html>. (“[F]or-profit nursing homes – roughly 70 percent of the country’s 15,400 nursing homes and often owned by private investors – disproportionately lag behind their nonprofit counterparts across a broad array of measures for quality, The Times found. Also, they are cited for violations at a higher rate than nonprofit facilities.”)

⁸ Mike Stucka and Marisa Kwiatkowski, “Coronavirus a concern in nursing homes, where 75% have been cited for infection control errors,” *USA Today*, March 6, 2020, <https://www.usatoday.com/story/news/investigations/2020/03/06/coronavirus-spread-nursing-home-infections-can-go-beyond-their-walls/4964397002/>

⁹ Bryant Furlow, Carli Brosseau, and Isaac Arnsdorf, “Nursing Homes Fought Federal Emergency Plan Requirements for Years. Now, They’re Coronavirus Hot Spots,” *New Mexico in Depth/News & Observer/ProPublica*, May 29, 2020, <https://www.propublica.org/article/nursing-homes-fought-federal-emergency-plan-requirements-for-years-now-theyre-coronavirus-hot-spots>

¹⁰ Many studies supporting this can be found in the Center for Justice & Democracy’s *Briefing Book: Medical Malpractice By the Numbers* (March 2020), <https://centerjd.org/content/briefing-book-medical-malpractice-numbers>

¹¹ According to Hunton Andrews Kurth’s COVID-19 Complaint Tracker, only about 60 of the nearly 3,000 COVID-related cases involve health care. Only 5 are traditional malpractice cases. Hunton Andrews Kurth, “COVID-19 Complaint Tracker,” <https://www.huntonak.com/en/covid-19-tracker.html> (viewed June 24, 2020).