

# COVID-19: (LEGAL) IMMUNITY

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Noon Mountain Time



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# PRESENTER



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# OVERVIEW

- States have begun providing immunities for COVID-19 exposure.
- Primary sources of protection:
  - Executive orders / emergency directives
  - Legislation
- Distinctions:
  - Some states treat medical providers differently than other businesses.
  - Medical providers were covered in first round of orders; legislation has been more deliberate in providing other businesses with qualified immunity.

# A BRIEF HISTORY OF COVID RESPONSE

- United States Department of Health and Human Services (“HHS”) declared a public health emergency on January 31, 2020 under the Public Health Service Act (42 U.S.C § 247d).
- National emergency declared on March 13, 2020 under two separate authorities:
  - National Emergency Act – expedited federal funding and responses
  - Stafford Act – facilitates natural disaster assistance for **state and local governments** in responding to crisis and aiding citizens.

# A BRIEF HISTORY OF COVID RESPONSE

- Individual states began declaring emergencies that triggered their own emergency powers statutes.
- Utah: March 6, 2020 (periodically renewed through present)
- Colorado: March 11, 2020
- New Mexico: March 11, 2020
- Nevada: March 12, 2020
- Idaho: March 13, 2020
- Wyoming: March 13, 2020

# STATE EMERGENCY RESPONSE

- States have emergency response statutes that grant governors broad emergency powers.
- Extent of powers had not been tested in the modern era – the length of the present emergency has prompted some constitutional challenges.
- Declaration of emergency required to invoked emergency powers.

# STATE EMERGENCY POWERS

- Nevada Revised Statutes (NRS) 414.060: Powers and duties of governor.
  1. The Governor is responsible for carrying out the provisions of this chapter, and in the event of an emergency or disaster beyond local control, **may assume direct operational control over all or any part of the functions of emergency management within this State.**  
[...]
  3. In performing his or her duties under this chapter and to effect its policy and purpose, the Governor may:
    - (a) **Make, amend and rescind the necessary orders and regulations to carry out the provisions of this chapter** within the limits of the authority conferred upon the Governor in this chapter, with due consideration of the plans provided by the Federal Government.



# STATE EMERGENCY POWERS

- Colorado Revised Statutes (CRS) § 24-33.5-704: The governor and disaster emergencies – response – duties and limitations.

(1) The governor is responsible for meeting the dangers to the state and people presented by disasters.

(2) **[T]he governor may issue executive orders, proclamations, and regulations and amend or rescind them. Executive orders, proclamations, and regulations have the force and effect of law.**

(6) During the continuance of any state of disaster emergency, **the governor is commander-in-chief of the organized and unorganized militia and of all other forces available for emergency duty.** To the greatest extent practicable, the governor shall delegate or assign command authority by prior arrangement embodied in appropriate executive orders or regulations, but nothing in this section restricts the governor's authority to do so by orders issued at the time of the disaster emergency.

# STATE EMERGENCY IMMUNITY

- NRS 414.110: Immunity and exemption.

*(N.B. – Idaho’s statute, Idaho Code § 46-1017, is almost identical.)*

414.110(1):

All functions under this chapter and all other activities relating to emergency management are hereby declared to be governmental functions. **Neither the State nor any political subdivision thereof nor other agencies of the State or political subdivision thereof, nor except in cases of willful misconduct, gross negligence, or bad faith, any worker complying with or reasonably attempting to comply with this chapter, or any order or regulation adopted pursuant to the provisions of this chapter, or pursuant to any ordinance relating to any necessary emergency procedures or other precautionary measures enacted by any political subdivision of the State, is liable for the death of or injury to persons, or for damage to property, as a result of any such activity.**

# STATE ORDERS AND DIRECTIVES

- Based on these emergency powers, states nationwide have issued orders protecting healthcare providers and facilities to varying degrees.
- Many of these orders are still in effect and are contemplated to last the duration of the emergency, which is either ongoing or continually renewed (depending on state law)
- Illinois and New York were leading actors in this regard; other states like California had legislation that addressed this (immunity for actions taken at direction of governmental authority during state of emergency – Cal. Gov't Code § 8659).

# STATE ORDERS AND DIRECTIVES

- Illinois Executive Order 2020-19
- Declared that facilities, health care providers, and volunteers were rendering assistance in support of the state's COVID-19 response by providing services in treating COVID-19 (and, initially, for facilities to cancel non-emergency procedures).
- When facility, professional, or volunteer is “rendering assistance” to the state and assisting in COVID-19 treatment, the facility, practitioner, or volunteer is immune from civil liability for “any injury or death occurred at a time when [...] engaged in the course of rendering assistance” by providing services, **unless** the injury or death resulted from gross negligence or willful misconduct.

# STATE ORDERS AND DIRECTIVES

- New York Executive Order Number 202.10
- Relief from recordkeeping requirements “to the extent necessary for health care providers to perform tasks as may be necessary to respond to the COVID-19 outbreak,” including notes on evaluation, treatment, diagnostic codes, and records for billing purposes. This is a rare grant of “absolute immunity”.
- Physicians, PAs, NPs, RNs, and LPNs “shall be immune from civil liability for any injury or death alleged to have been sustained directly as a result of an act or omission by such medical professional in the course of providing medical services in support of the State’s response to the COVID-19 outbreak, unless it is established that such injury or death was caused by the gross negligence of such medical professional”

# STATE ORDERS AND DIRECTIVES

- Nevada Emergency Directive 011
- Issued April 1, 2020 – still in effect today.
- Applies to virtually every licensed provider (Section 1).
- Allows for practice outside of scope of licensure, but within provider's competency (Section 7).
- Section 10 of Emergency Directive 011 Provides:

All providers of medical services related to COVID-19 are performing services for emergency management subject to the order or control of and at the request of State Government and shall be afforded the immunities and protections set forth in NRS 414.110, subject to the same exclusions therein.

# STATE LAWS

- Emergency directives and orders can have the force of law but expire when the state of emergency ends – fallout from COVID may last beyond the end of the present emergency.
- Delayed legislative responses.
  - Statutory requirements for when the legislature can be called into session.
  - Legislatures are designed for in-person proceedings; logistical changes, and even changes in rules, may have been needed for faster action.
  - Feedback from stakeholders needed to determine what is feasible, and then legislation had to be drafted
  - Most legislatures are bicameral (some exceptions, e.g. Nebraska) and require two houses to approve before going to governor for signature – can be complicated when different houses or branches are controlled by different political parties.

# STATE LAWS

- Some states with more regular legislative meetings were able to act on this in the regular course. Others, such as Nevada, had to call an emergency session.
- Need to research and balance or integrate COVID-19 specific protections with existing state laws protecting volunteers and “Good Samaritans” rendering emergency care.
- Relevant Nevada immunity examples:
  - NRS 41.485 – immunity for volunteers of (charitable) non-profit entities.
  - NRS 41.504, 506, and 507 – immunity for supervising or providing certain emergency services when acting in good faith.



# LEGISLATIVE RESPONSES TO COVID

- Utah: SB 3007, enacted in April of 2020
- “a person is immune from civil liability for damages or an injury resulting from exposure of an individual to COVID-19 on the premises owned or operated by the person, or during an activity managed by the person.”
- Not limitless – the immunity does not apply to:
  - Willful misconduct
  - Reckless infliction of harm; or
  - Intentional infliction of harm.
- Also does not affect application of workers’ compensation, occupational disease

# LEGISLATIVE RESPONSES TO COVID

- Wyoming: Wyo. Stat. § 35-4-114, enacted May 20, 2020
- During public health emergency, “any health care provider or other person, including a business entity, who in good faith follows the instructions of a state, city, town or county health officer or who acts in good faith in responding to the public health emergency is immune from any liability arising from complying with those instructions or acting in good faith.”
- Immunity extends to providers who are retired, have inactive licenses, or are licensed in states other than Wyoming during a public health emergency.
- Immunity “shall not apply to acts or omissions constituting gross negligence or willful or wanton misconduct.”

# LEGISLATIVE RESPONSES TO COVID

- Idaho: House Bill 6 (Idaho Code 6-3401 through 6-3403); passed during First Extraordinary Session of legislature in August, 2020.
- “A person is immune from civil liability for damages or an injury resulting from exposure of an individual to coronavirus” (N.B. – “person” is broadly defined to include businesses and governmental entities.)
- Immunity does not extend to conduct that constitutes an intentional tort, or willful or reckless misconduct.
- Does not affect the application of workers’ compensation laws.
- Law sunsets on July 1, 2021 – may or may not need to be extended.

# LEGISLATIVE RESPONSES TO COVID

- Nevada: SB4 (32<sup>nd</sup> Special Session) Approved August 11, 2020
- Provides qualified immunity from liability, but not liability from being sued; however, the lawsuit must be “pled with particularity” (i.e., state who, what, where, when, how, and why under Nevada/Federal Rule of Civil Procedure 9(b).)
- Business is immune from liability if “in substantial compliance with controlling health standards” unless plaintiff can plead and prove that:
  - The business violated controlling health standards with gross negligence; and
  - The gross negligence was the proximate cause of injury or death.
- Courts decide as a matter of law whether a business complied with controlling health standards; plaintiff must prove a business was not in substantial compliance.

# LEGISLATIVE RESPONSES TO COVID

- Nevada: SB4 (32<sup>nd</sup> Special Session) Approved August 11, 2020
- “Substantial compliance” defined within law to allow for “isolated or unforeseen events of noncompliance” without losing immunity
- Notably, the entities protected by this law specifically **exclude**:
  - Home health agencies and hospices
  - Intermediate care facilities and skilled nursing facilities
  - Hospitals and independent centers for emergency care
  - Silent as to all other medical facilities defined in NRS 449.0151 (e.g., ASCs)
- This concern was raised by numerous commenters, including the Nevada Health Care Association, Nevada Center for Assisted Living, and individual physicians.
- Rationale for this decision: Emergency Directive 11, Section 10 adequately protected health care providers.

# QUESTIONS?

- Send questions through the chat function.
- If the questions are too specific or involved for a brief answer, please e-mail the organizer to receive a follow-up response.