In order to manage the unprecedented medical need due to the COVID-19 pandemic, some states have loosened scope of practice restrictions imposed on healthcare professionals. The relaxing of these restrictions has enabled registered nurses, nurse practitioners, physician assistants, pharmacists and other health care professionals to provide certain medical services that are outside the scope of practice permitted under the practitioner’s license during the COVID-19 crisis.

While these measures serve to mitigate some of the stress on our overburdened healthcare system, they also raise the issue of liability for practitioners who are providing services outside the typical scope of a practitioner’s area of qualification and competency. At both the state and the federal level, lawmakers and regulators seek to address these issues.

**Federal Measures**

The Public Readiness and Emergency Preparedness Act (“PREP Act”) authorizes the Secretary of the Department of Health and Human Services (“HHS”) to issue a declaration providing immunity from liability, except for willful misconduct, for claims of loss caused, arising out of, relating to, or resulting from administration or use of countermeasures to diseases, threats and conditions determined by the Secretary to constitute a present, or credible risk of a future public health
emergency to entities and individuals involved in the development, manufacture, testing, distribution, administration, and use of such countermeasures. On March 17, 2020, the Secretary of HHS issued such a declaration to provide liability immunity for activities related to medical countermeasures against COVID-19, including antivirals, other drugs, biologics, vaccines, diagnostics, or devices used to treat, diagnose, cure, prevent, or mitigate COVID-19. These protections apply to “qualified persons”, defined as licensed health professionals or other individuals authorized to prescribe, administer, or dispense the covered countermeasures under state law.

One of Congress’ relief and stimulus packages, the Coronavirus Aid, Relief and Economic Security Act (“CARES Act”), also includes provisions addressing liability of health care workers and facilities. The CARES Act, passed March 27, 2020, provides federal protection from liability for volunteer healthcare professionals providing medical services during the COVID-19 outbreak. Section 3215 of the CARES Act provides “a health care professional shall not be liable under Federal or State law for any harm caused by an act or omission of the professional in the provision of health care services during the public health emergency with respect to COVID–19”, with exceptions for services provided under the influence, or willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference. However, the provision also requires that the health care professional be providing health care services that “are within the scope of the license, registration, or certification of the volunteer, as defined by the State of licensure, registration or certification”.

As the application of these federal protections are in part dependent on state law, the expansion of scope of practice at the state level allows more health care professionals to be encompassed by the immunity the declaration and law provide.

**State Action**

Similar efforts are occurring at the state level. Even pre-pandemic, all states had a “Good Samaritan” statute on the books, protecting physicians acting in good faith from liability when they provide medical care at the scene of an accident. And some of the states’ Good Samaritan statutes are broader in scope, providing liability protection for volunteer physicians and health practitioners during a national emergency. For example, the Uniform Emergency Volunteer Health Practitioners Act (“UEVHPA”), which has been enacted by seventeen states, D.C., and the U.S. Virgin Islands, grants immunity from civil liability to out-of-state licensed health professionals for volunteer care provided during a declared emergency.

In addition to existing protections, many states have also made steps to protect health care workers in the midst of the pandemic. The governors of Illinois and Connecticut have issued Executive Orders that similarly provide civil liability immunity for all health care professionals and facilities. Illinois Governor JB Pritzker’s April 1, 2020 executive order made health care professionals “immune from civil liability for any injury or death alleged to have been caused by any act or omission by the Health Care Professional, which injury or death occurred at a time when a Health Care Professional was engaged in the course of rendering assistance to the State by providing health care services in response to the COVID-19
“outbreak”. Connecticut Governor Ned Lamont’s April 5, 2020 executive order protects health care professionals from civil liability “for any injury or death alleged to have been sustained because of the individual’s or health care facility’s acts or omissions undertaken in good faith while providing health care services in support of the State’s COVID-19 response, including but not limited to acts or omissions undertaken because of a lack of resources, attributable to the COVID-19 pandemic, that renders the health care professional or health care facility unable to provide the level or manner of care that otherwise would have been required in the absence of the COVID-19 pandemic and which resulted in the damages at issue.” Both states’ protections do not apply to gross negligence or willful misconduct.

On March 23, 2020, Governor Andrew Cuomo of New York, also issued an executive order, Executive Order 202.10, which provides immunity from civil liability for all physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered professional nurses and licensed practical nurses for any injury or death caused by such medical professional in the course of providing medical services in support of New York’s response to the COVID-19 outbreak, unless the injury or death was caused by the gross negligence. Shortly after, on April 6, 2020, New York codified these protections as part of the Emergency or Disaster Treatment Protection Act (“EDTPA”), and expanded the immunity to criminal liability as well. The EDTPA provides, “any health care facility or health care professional shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services” if done in good faith, “pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law,” and the treatment is “impacted by the health care facility’s or health care professional’s decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state’s directives.” However, the immunity does not extend to harm or damages caused by an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm, provided that “acts, omissions or decisions resulting from a resource or staffing shortage” are not encompassed by the carveout.

Some states, in establishing these protections, affirmatively address the issue of expanded scope of practice, and explicitly include protections for health care providers acting outside their licensed scope of practice, like the laws recently passed in Kentucky and New Jersey. On March 30, 2020, Kentucky passed a bill that provides “a defense to civil liability for ordinary negligence for any personal injury resulting from” good faith care of treatment of a COVID-19 patient, “if the health care provider acts as an ordinary, reasonable, and prudent health care provider would have acted under the same or similar circumstances”, and explicitly includes a health care provider who “[p]rovides health care services, upon the request of health care facilities or public health entities, that are outside of the provider’s professional scope of practice.”

On April 13, 2020, Governor Phil Murphy of New Jersey signed into law a bill that grants immunity from civil liability to physicians, physician assistants, advanced practice nurses, registered nurses, licensed practical nurses, and other health care professionals who provide health care services, as long as those services are provided “in support of the State’s response to the outbreak of coronavirus.” The
immunity includes “any act or omission undertaken in good faith by a health care professional or health care facility or a health care system to support efforts to treat COVID-19 patients and to prevent the spread of COVID-19” during the PHE, including telemedicine or telehealth and diagnosing or treating patients outside the normal scope of the health care professional’s license or practice. However, comparable to the New York and federal law, the immunity does not extend to acts or omissions constituting a crime, actual fraud, actual malice, gross negligence, recklessness, or willful misconduct.

While many of these state laws and orders protecting health care providers from liability make explicit reference to scope of practice, not all of them do. While it seems that these two categories of laws will converge in many states to truly insulate health care professionals in the good faith provision of services, providers, and the facilities who employ them, should be mindful of the limits to these protections, and how the laws overlap.

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