LIMITATION OF LIABILITY DURING THE CORONAVIRUS PANDEMIC

by Jeremy Belanger and Mark E. Wilson

In response to the COVID-19 pandemic, state and federal authorities have recognized a need for as many trained, experienced, and qualified health care providers as possible. To ensure those providers are fully enabled to provide critical care in response to COVID-19, several laws limit the tort liability of health care providers providing services in response to COVID-19.

Michigan Action

Under Section 7 of Executive Order 2020-30, Michigan Governor Gretchen Whitmer used the Emergency Management Act, MCL 30.401 *et seq.*, to limit the liability of health care professionals to provide care. Specifically, the Order provides:

> *[A]ny licensed health care professional or designated health care facility that provides medical services in support of this state's response to the COVID-19 pandemic is not liable for an injury sustained by a person by reason of those services, regardless of how or under what circumstances or by what cause those injuries are sustained.*

The Emergency Management Act limits liability for specified providers, whether licensed in Michigan or in another jurisdiction, "render[ing] services during a state of disaster declared by the governor and at the express or implied request of" the State. MCL 30.411(4). Those covered under the Act include:

1. Doctors of medicine or osteopathic medicine and surgery;
2. Licensed hospitals;
3. Registered nurses;
4. Practical nurses;
5. Nursing students;
6. Dentists;
7. Veterinarians;
8. Pharmacists or pharmacist interns acting under the supervision of a licensed pharmacist;
9. Paramedics; and
10. Medical residents undergoing training.

This limitation of liability does not apply to the following:

a. Conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results ("gross negligence"); or
b. Willful conduct.

Note — despite the statute, permitting providers licensed in other states to obtain the immunity under Michigan law, for any action brought alleging willful or gross negligence, those providers are judged by the relevant standard of care in Michigan.

The Federal Volunteer Protection Act

The Federal Volunteer Protection Act of 1997 ("VPA"), 42 USC 14503, provides additional limitations on liability for others, including non-health care providers. Under the VPA, a volunteer of a nonprofit organization or governmental entity shall not be liable for harm caused by an act or omission of the volunteer on behalf of the organization if:

1. The volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission; and
2. If appropriate or required, the volunteer was properly licensed, certified, or authorized in the state in which the harm occurred and acted within the scope of the volunteer's authority and responsibilities in the nonprofit organization or governmental entity;

The limitation of liability does not apply to harm caused by:

a. Willful or criminal misconduct, including:
   i. Violent crime or terrorism;
   ii. A hate crime;
   iii. A sexual offense as defined by state law; or
   iv. Federal or State civil rights law violations.
b. Gross negligence;
c. Reckless misconduct;
d. A conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer;
e. The volunteer was under the influence of intoxicating alcohol or any drug; or
f. The volunteer was operating a motor vehicle, vessel, aircraft, or other vehicle for which the state requires the operator or the owner of the vehicle, craft, or vessel to possess an operator's license or maintain insurance.

The VPA preempts any state law that is inconsistent with the VPA, unless it either:

a. Provides greater protection from liability; or
b. A state enacts a statute and declares that the VPA does not apply.

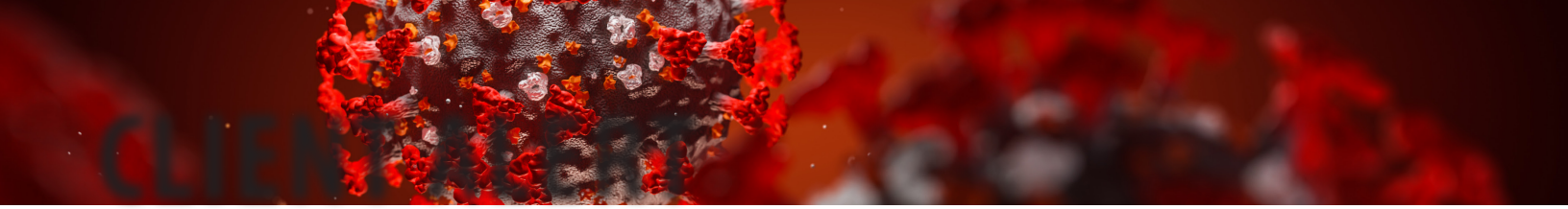
The VPA protections only apply to volunteers that do not receive compensation, other than reasonable reimbursement or an allowance for expenses actually incurred or any other thing of value exceeding $500 per year.

One drawback to the VPA is that it does not affect the liability of the organization or governmental entity. Thus, while a doctor or nurse providing volunteer services is protected under the VPA, a nonprofit entity where he or she provides services is not.

The CARES Act

To expand the scope of the VPA, Congress decided to step further into an area traditionally under state law. Section 3215 of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") limits the liability under federal or state law for any harm (e.g., physical, nonphysical, economic, noneconomic) caused by an act or omission of a health care professional if:

1. He or she is providing care or services as a volunteer;
2. The act or omission occurs in the course of providing services in the capacity of a volunteer;
3. The services are within and do not exceed the scope of his/her license under state law;



4. The services were related to the diagnosis, prevention, or treatment of COVID-19 or the assessment or care of an actual or suspected case of COVID-19; and
5. The professional was acting in good faith.

This limitation of liability does not apply under the following circumstances:

a. Willful or criminal misconduct;
b. Gross negligence;
c. Reckless misconduct;
d. Conscious flagrant indifference to the rights or safety to the individual harmed; or
e. The provider was under the influence of alcohol or an intoxicating drug.

Section 3215 preempts any laws of any state or political subdivision that is inconsistent with Section 3215, unless they provide greater protection from liability.

In order to qualify, a "provider" must be "an individual" licensed to provide health care services. Thus, like the VPA, Section 3215 does not protect business entities. The individual must be a "volunteer" that does not receive compensation or anything of value, including payments from any insurance policy or Federal health care program. However, a provider can receive items to provide health care services and reimbursement for travel more than 75 miles from the provider's principal place of residence.

One significant difference with the VPA is that a provider does not need to be providing services through a nonprofit entity or governmental entity.

Health care providers providing services in response to COVID-19 should consult with their health care attorneys to ensure they qualify for these limitations of liability. Dickinson Wright attorneys have the knowledge and experience to assist providers evaluating these rules.

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