

## Health Workers Need Better COVID-19 Liability Protections

By **Michael Feeney** (August 28, 2020, 4:05 PM EDT)

This week, the U.S. crossed the grim threshold of having lost over 1,000 health care workers to COVID-19.[1] We owe them and those who serve in their place a massive debt of gratitude, awe and respect.

Health care providers, from certified nursing assistants all the way up to administrative leaders, are facing challenges never before seen in our lifetime. Despite this, they walk into work every day knowing that the patients they are trying to save are infected with a deadly, highly contagious virus. The word "hero" comes to mind.



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Unsurprisingly, the pandemic has also exacted an emotional toll on our health care providers. A recent study published in *The Lancet* surveyed over 2,000 frontline nurses who were caring for COVID-19 patients in Wuhan, China. It showed that nurses treating coronavirus patients experienced high work burnout, a high level of fear, emotional exhaustion, anxiety and depression.[2] There's no doubt that health care workers on our shores are suffering from these same mental health challenges as a result of the pandemic.

It is our societal obligation to ensure that these aides, nurses and doctors — these heroes — are treated fairly in courts of law, with full recognition of the significant challenges they are facing amid a worldwide crisis. **A recent Law360 guest article** argues hyperbolically and without support that providing health care workers with COVID-19 liability protections will endanger patients, but in fact the proposed reforms are both reasonable and safe.

### The Negligence Standard

Health care provider liability is normally judged using the negligence standard. Liability is imposed if the provider fails to comply with the standard of care utilized by other health care providers within the same field, assuming the alleged failure caused harm.

For example, an orthopedic surgeon being sued by a patient who suffered a post-operative joint infection would be judged by what infection control protocols most other orthopedic surgeons employ before, during and after joint surgeries.

The negligence standard is simply unworkable when applied to lawsuits involving COVID-19. Just think of how frequently recommendations to the general public have changed since the pandemic took over our lives.

The Centers for Disease Control and Prevention, the U.S. Department of Health and

Human Services and the surgeon general initially advised that Americans should not wear face masks to prevent the spread of coronavirus.[3] Each has since reversed course.[4] The virus was first feared to spread through contaminated surfaces, but researchers now believe that transmission occurs primarily through the air, via droplets and aerosol.[5] Whether to send our children back to school has been a national discussion for months.

It's not an exaggeration to say that our understanding of this virus has evolved more rapidly than any other in medical history.[6] Now imagine how complex and fluid the flow of information has been for health care providers.

Imagine the challenge of discerning where to obtain reliable information with the politicization of the pandemic response, infighting between states and the federal government, and the U.S. withdrawal from the World Health Organization.[7][8] Imagine the intense pressure doctors face in making decisions to combat this virus when they don't have the answers.

Imagine how difficult it has been for hospitals to develop effective patient safety protocols when the target is constantly moving, and when supplies are unobtainable. And imagine how impossible it would be to retrospectively reconstruct and speculate on what the standard of care was for the treatment or prevention of coronavirus in a given specialty, at a precise moment of time in this pandemic.

Then pin a health care provider to the wall against that standard and, if she doesn't measure up, impose judgment against her. Is this fair? Is this how our nation should thank people who are literally risking their lives to save others?

At a gut level, application of the negligence standard to coronavirus-related medical liability claims should strike us as predatory and cruel. Our doctors and nurses are human. They are working — and dying — under extraordinary circumstances.

This is why COVID-19 liability protections for health care providers are urgently needed across the nation, now.

### **Proposed Legislation and the Gross Negligence Standard**

At the federal level, legislation has already been proposed. The Safeguarding America's Frontline Employees To Offer Work Opportunities Required to Kickstart the Economy, or Safe to Work, Act, was introduced in the Senate on July 27.[9]

It is part of a broader package of coronavirus relief bills known together as the Health, Economic Assistance, Liability Protection, and Schools, or HEALS, Act. Negotiations on these bills are likely to resume when the U.S. Senate reconvenes on Sept. 8.

As it relates to health care providers, the Safe to Work Act does not provide complete immunity. Rather, it takes a middle-of-the-road approach, creating an exclusive cause of action for coronavirus-related medical liability claims.[10]

It eschews the negligence standard, and instead allows plaintiffs to pursue claims where a health care provider has acted with gross negligence or willful misconduct, if proved by clear and convincing evidence.[11] In a time of unprecedented crisis, as we find ourselves now, this is the more appropriate standard, and the fairer standard.

Most states have laws that apply the same "gross negligence or willful misconduct" standard to medical care provided during emergencies and even for good Samaritans.[12] The logic behind those laws supports application of the same standard during a pandemic.

### **Opposing Views**

A recent Law360 guest article by Kay Van Wey takes the position that COVID-19 liability protections for health care providers endanger patients.[13] Respectfully, the arguments she offers do not add up.

For example, Van Wey states that "the CARES Act clarifies that physicians and volunteer health care professionals shall not be liable for providing services that relate to the diagnosis, prevention or treatment of COVID-19," but fails to mention the act's clear imposition of liability for gross negligence until the end of the following paragraph.

She also implies that existing state laws governing emergency care, and applying a gross negligence standard — briefly discussed above — would apply to COVID-19 claims. In most circumstances, however, they obviously would not. How could they, when many COVID-19 admissions last for weeks and even months?

The most concerning aspect of Van Wey's piece is her suggestion that COVID-19 liability protections would apply to all medical malpractice litigation and would continue on forever, in perpetuity, without further affirmative repeal by federal and state legislatures. This is untrue.

The Safe to Work Act only applies to coronavirus-related cases, and has a built-in expiration date.[14] Most legislation proposed at the state level, like Pennsylvania's S.B. 1239, has similar guardrails.[15]

### **What to Expect in the Absence of Legislative Intervention**

Already, nearly 5,000 coronavirus-related lawsuits have been filed across the nation.[16] In the absence of safe harbor legislation to protect our health care providers, we are likely to suffer an ever-expanding tsunami of coronavirus-related medical liability actions over the next several years. This could have a devastating effect on the cost of medical liability insurance and, as a result, the cost and availability of health care overall.

Rural community hospitals, which are already struggling financially due to a sharp decline in elective medical procedures during the pandemic, will likely collapse. In the last 15 years alone, 170 rural hospitals across America have closed their doors.[17]

Unfettered COVID-19 medical liability suits would also pile even more mental health challenges on health care providers who are sued, including anxiety, major depressive disorder, emotional distress and adjustment disorder.[18]

### **States Must Act Too**

States should not wait for action at the federal level. If the Safe to Work Act is passed, it will preempt state laws that provide fewer liability protections, but not those that provide more.[19] States should also not rely exclusively on liability protections afforded by executive action, as such orders will undoubtedly be challenged on constitutional grounds.

Thankfully, some states have already taken legislative action to protect health care providers. New Jersey showed leadership when its COVID-19 health care provider immunity legislation was signed into law, nearly unanimously, on April 14.[20]

Massachusetts followed suit three days later, on April 17.[21] New York passed its Emergency or Disaster Treatment Protection Act on Aug. 3.[22] In perhaps the best approach, many states provide immunity to health care providers automatically upon the declaration of a public health emergency.[23]

Here in Pennsylvania, state legislators have proposed the aforementioned S.B. 1239, which

would similarly change the standard of liability in coronavirus-related medical liability cases from negligence to "gross negligence, recklessness, willful misconduct or intentional infliction of harm." [24]

Please contact your state and federal legislators and urge them to support meaningful COVID-19 liability protections for our health care providers, such as the Safe to Work Act and similar state legislation. Share this article and others like it. And most importantly, thank your health care providers for all that they do. We owe it to them.

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[1] The Guardian, Over 1,000 US health workers died of COVID-19, many were immigrants and minorities, by Danielle Renwick and Shoshana Dubnow, Aug. 26, 2020 (available online at <https://www.theguardian.com/us-news/2020/aug/26/us-health-workers-covid-19-deaths-lost-on-the-frontline>).

[2] The Lancet, Frontline nurses' burnout, anxiety, depression, and fear statuses and their associated factors during the COVID-19 outbreak in Wuhan, China: A large-scale cross-sectional study, by Deying Hu, Yue Kong, Wengang Li, Qiuying Han, Xin Zhang, Li Xia Zhu, et al., July 1, 2020 (available online at [https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370\(20\)30168-1/fulltext](https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(20)30168-1/fulltext)).

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[8] The New York Times, Trump Administration Signals Formal Withdrawal From W.H.O., by Katie Rogers and Apoorva Mandavilli, July 7, 2020 (available online at <https://www.nytimes.com/2020/07/07/us/politics/coronavirus-trump-who.html>).

[9] Safe to Work Act, S. 4317, 116th Congress, 2nd Session (2020) (available online at

<https://legiscan.com/US/text/SB4317/2019>).

[10] Safe to Work Act, Subtitle B, Section 141(a)(1)(A).

[11] Safe to Work Act, Subtitle B, Section 142(a)(1).

[12] See, e.g., 42 Pa.C.S.A. § 8331, governing "Medical good Samaritan civil immunity" (limiting healthcare provider liability during emergencies to "any acts or omissions intentionally designed to harm or any grossly negligent acts or omissions which result in harm").

[13] Law360, COVID-19 Medical Malpractice Shield Laws Endanger Patients, by Kay Van Wey, Aug. 24, 2020 (available online at <https://www.law360.com/articles/1303205/covid-19-medical-malpractice-shield-laws-endanger-patients>).

[14] Safe to Work Act, Section 3(4)(A)(iii)(II).

[15] An Act amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, providing for COVID-19-related liability, S.B. 1239, Section 8404(a)(1) PA General Assembly Regular Session 2019-20 (stating that covered provider limited immunity only applies "during the proclamation of disaster emergency") (available online at <https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?sYear=2019&sInd=0&body=S&type=B&bn=1239>).

[16] COVID-19 Complaint Tracker, maintained by Hunton Andrews Kurth (available online at [https://www.huntonak.com/en/covid-19-tracker.html?utm\\_source=npr\\_newsletter&utm\\_medium=email&utm\\_content=20200727&utm\\_term=47](https://www.huntonak.com/en/covid-19-tracker.html?utm_source=npr_newsletter&utm_medium=email&utm_content=20200727&utm_term=47)

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[22] N.Y. Pub. Health Law § 3082 (McKinney).

[23] Health Affairs, COVID-19 And State Medical Liability Immunity, by Benjamin J. McMichael, John R. Lowry, William H. Frist, R. Lawrence Van Horn, May 14, 2020 (available online at <https://www.natlawreview.com/article/new-massachusetts-law-provides-liability-protections-health-care-professionals>).

[24] Pennsylvania S.B. 1239, *supra*.