

PUBLICATION

Alabama Malpractice Liability and Immunities During COVID-19 Pandemic

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With the rapid and expansive spread of the COVID-19 pandemic, Alabama health care providers may face a shortage of critical supplies, including ventilators and dialysis machines, which would require difficult decisions regarding which patients should receive treatment with those supplies. Recently implemented protocols have expressly called for the rationing and reallocation of supplies in a way that aims to save the most lives. Accordingly, Alabama health care providers may be concerned about the potential legal liability that may arise from implementing the protocols. Fortunately, the federal government and the state of Alabama are equipped with the ability to limit liability for providers and offer immunity in certain situations. Providers should be aware of the liability limits and immunities and take necessary steps to protect themselves.

The Potential for Civil Liability

Health care providers who withhold or withdraw critical supplies from those in need may be sued for negligence and malpractice. In some instances, providers may face temporary restraining orders from families of patients who disagree with the provider's decisions.

Civil suits may be brought against providers by the survivors themselves or the families of patients as a result of difficult triage decisions. A lawsuit may be brought against any person who participated in the triage decision and against the hospital that implemented a triage protocol.

A plaintiff in a civil suit against the health care provider must show that the health care professionals and the hospital violated the applicable standard of care in making the decision to withhold potentially lifesaving treatment, which in turn caused harm to the plaintiff.

Should a lawsuit advance to trial, the plaintiff will have to show causation, meaning that the patient died as a direct result of the decision to deny critical care to the patient and would have otherwise lived if they had received that assistance.

The health care providers forced to defend themselves in civil suits will bear the emotional and financial burdens at great cost in the aftermath of the pandemic.

Alabama Malpractice Limited Liability and Immunities

Governor Kay Ivey declared a [State of Emergency](#) for Alabama on March 13, 2020. Governor Ivey has since issued [seven supplements](#) to coincide with the original declaration. It is important for health care providers to note that any declarations made by Governor Ivey are meant to complement and expand upon the federal regulations in lieu of replacing them.

With the original proclamation, health care facilities were given the green light to implement "alternative standards of care." If a facility invokes its emergency operation plan and implements an "alternative standards of care" plan as provided, the alternative standard of care is declared to be the state-approved standard. In addition, health care professionals and those assisting health care professionals are declared to be "emergency management workers." The declaration changes the potential liability for health care professionals

and those assisting health care professionals by granting them the same immunity that is granted to state officers.

The Alabama Code also confers certain protections on health care providers. Specifically, [Section 6-5-332](#) communicates similar "good samaritan" language on licensed health care providers who render first aid or emergency care, gratuitously and in good faith. Such providers will not be held liable for civil damages as a result of acts or omissions in rendering first aid or emergency care. Licensed providers will also not be liable for civil damages as a result of acts or failure to act to provide or arrange for further medical treatment or care for the injured person.

In addition, [Section 31-9-16](#) exempts "emergency management workers" from certain licensing requirements. These workers are granted the same immunity that is given to state officials, and they will not be held liable for acts or omissions that may occur while acting within the scope and line of their duties.

Finally, Governor Ivey's [Fifth Supplemental State of Emergency](#), issued on April 2, 2020, expanded the scope of practice for certain health care professionals. This means that certain licensed and registered health care professionals may practice outside the normal scope of their duties to treat additional patients in cases of over-capacity and understaffing.

Alabama Crisis Standards of Care Guidelines

On February 28, 2020, the Alabama Department of Public Health released the new [Alabama Crisis Standard of Care Guidelines](#), which serve to "provide guidance in the decision-making process as well as modify the delivery of healthcare services in disasters and other healthcare emergencies." The guidelines' protocols are implemented state-wide after a "substantial change in usual healthcare operations and the levels of care possible due to severe shortages of critical resources causing the delivery system to be overwhelmed."

The guidelines outline a six-tiered response system in place in Alabama for the allocation of scarce resources. The decision process starts with individual health care facilities at the bottom of the tiered response and moves up as the event escalates. The level of assistance and resources required during the emergency dictates which tier is responsible for the decision process.

The guidelines also acknowledge the potential challenges facing health care providers in making difficult decisions regarding the allocation of resources and care. Accordingly, they offer guiding principles and ethical considerations that health care providers should keep in mind when making difficult life-saving decisions. These considerations include the protection of the public from harm, respect for human dignity, the duty to plan and to provide care, reciprocity, stewardship of resources, communication, trust, equity, solidarity, individual liberties, and privacy.

When it comes to clinical protocols and procedures, the Crisis of Care Guidelines suggest a triage protocol to sort patients based on the severity of illness or injury and the probability of survival. It is important to note that any triage procedures should not be based on age, gender, race, social status, or income. The triage process ensures a consistent method is used to evaluate patients during a mass casualty event.

Important Note: Following the publication of the 2020 guidelines, some of the state's webpages still included the 2010, "Criteria for Mechanical Ventilator Triage Following Proclamation of Mass-Casualty Respiratory Emergency," which allowed the denial of ventilator services to individuals based on disability and age. On March 24, groups filed a complaint with the HHS Office for Civil Rights (OCR) regarding the decade-old document. The state promptly resolved the OCR investigation by agreeing to remove all links to the 2010 document from its websites, to comply with applicable civil rights law, and to clarify publicly that those rules are not in effect.

Federal Malpractice Liability Limits and Immunities

For an analysis of federal malpractice liability limits and immunities, as well as an analysis of state laws beyond Alabama, please see, "[Health Care Provider Liability During the COVID-19 Pandemic: Ways to Ensure Protection](#)," which includes a [chart](#) that summarizes provisions for the states and jurisdictions in which Baker Donelson has offices: Alabama, Florida, Georgia, Louisiana, Maryland, Mississippi, South Carolina, Tennessee, Texas, Virginia, and Washington, D.C.

COVID-19 and its rapid spread have caused an influx of patients at health care facilities, as well as a shortage of necessary supplies and equipment to treat all patients. Thus, health care providers and professionals may be faced with difficult decisions regarding the appropriate level of care to be used for patients. Coupled with the ethical dilemma is the potential for a new wave of lawsuits filed by patients or their families. The potential lawsuits will undoubtedly cause added stress and financial burden on already-stretched health care providers. Fortunately, both federal and state regulations are in place that relax the standard of care required for providers in treating patients. Health care providers should take appropriate steps to follow any federal and state mandates during this uncertain time. While not completely immune from liability during the pandemic, health care providers should feel additional security when making these difficult life-saving decisions.

We will continue to monitor these developments, and if you have any questions regarding ways to limit health care provider liability during the COVID-19 pandemic, or if you need information about specific states not covered in this alert, contact [Marcus M. Maples](#) or a member of [Baker Donelson's Health Care Litigation team](#). Also, you may visit the [Coronavirus \(COVID-19\): What You Need to Know](#) page on our website.

Resources

- ["Health Care Provider Liability During the COVID-19 Pandemic: Ways to Ensure Protection"](#) (April 7, 2020)
- [Chart Summarizing Provider Liability During COVID-19 By State](#) (April 7, 2020)
- [Alabama Crisis Standard of Care Guidelines](#) (February 28, 2020)
- [Alabama Code Section 6-5-332](#)
- [Alabama Code Section 31-9-16](#)
- [Alabama Governor Kay Ivey - State of Emergency: Coronavirus \(COVID-19\)](#) (March 13, 2020)
- [First Supplemental State of Emergency: Coronavirus \(COVID-19\)](#) (March 18, 2020)
- [Second Supplemental State of Emergency: Coronavirus \(COVID-19\)](#) (March 20, 2020)
- [Third Supplemental State of Emergency: Coronavirus \(COVID-19\)](#) (March 23, 2020)
- [Fourth Supplemental State of Emergency: Coronavirus \(COVID-19\)](#) (March 26, 2020)
- [Fifth Supplemental State of Emergency: Coronavirus \(COVID-19\)](#) (April 2, 2020)
- [Sixth Supplemental State of Emergency: Coronavirus \(COVID-19\)](#) (April 3, 2020)
- [Seventh Supplemental State of Emergency: Coronavirus \(COVID-19\)](#) (April 13, 2020)