

# COVID Claims Are Coming: Here's How You Can Prepare

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For many senior living and care facilities and healthcare workers, the events and tragedies surrounding COVID-19 were by far the most challenging industry issue that they have ever encountered.

During the initial surge of the virus, facilities were left scrambling for support, supplies, staff and reliable solutions to complex infectious disease issues. Many facilities were able to leverage their experience and resourcefulness to survive, developing strategies to provide for and protect residents and staff. Yet their actions, done in good faith by the majority of facilities, already are being scrutinized, and plaintiffs' lawyers are considering who to blame.

Families of residents and staff members who fell ill to COVID-19 are starting to place blame on facilities and healthcare workers. This is a brewing crisis for senior living care facilities, and litigation most certainly will follow. Whether the facilities will be penalized is yet to be seen, but owners should be aware that "COVID claims" likely are coming, and because of the unprecedented nature of the pandemic, the outcomes cannot be predicted with any certainty.

## **Legislation may or may not offer immunity or other protection**

In the early days of the pandemic, legislation was enacted in dozens of states providing civil and criminal immunity for senior living and nursing home operators and workers acting in good faith. Legislatures recognized the need to protect facilities and healthcare workers from facing a flood

of malpractice suits for acts and omissions undertaken in good faith for care and treatment provided in response to COVID-19.

Many of these laws, however, contain exceptions that will be tested as loopholes to the legislation. Moreover, several of the states that enacted immunity-based legislation early on in the pandemic, such as New York, have taken steps to roll back the legislation.

Facilities are seeing that their initial actions are being scrutinized. Critics point to the current availability of personal protective equipment and the effective protocols now in place.

Will facilities be protected from malpractice when a plaintiff claims that “good faith actions” taken at the onset of the pandemic fell short? Will the civil and criminal immunity that originally was provided to facilities protect them, or will loopholes and roll backs open the door to litigation?

## **Comparing COVID-19 preparedness to preparedness for other infectious diseases**

The comparisons of COVID-19 to prior infectious diseases started early on, and critics readily condemned some long-term care facilities for their “lack” of preparedness, on the grounds that prior infectious disease protocols should have enabled COVID-19 preparedness. But it is questionable whether a facility’s prior experience with infectious disease preparedness could be expected to guarantee preparedness for the COVID-19 pandemic.

One need only look to the state and federal governments and agencies, along with businesses across many industries, that had prior experience with infectious disease; their experience did not necessarily equate to preparedness for the COVID-19 pandemic. The scope and duration of the pandemic has changed. Information from scientists and epidemiologists has changed. The initial protocol and guidance from the Surgeon General and Centers for Disease Control and Prevention have changed or have been inconsistent. For many senior living and care communities, questions posed to government

agencies about health protocols perhaps were overlooked or ignored.

## **A no-win situation, even for good acts**

Operators were presented with unprecedented challenges, often with few solutions. Shortages of PPE crippled facilities, and the lack of essential supplies and testing contributed to illness and deaths.

Staff shortages were prevalent, despite many employers offering additional compensation. For many communities, they were damned if they did and damned if they didn't.

For example, when state regulations and CDC guidance called for social distancing, operators restricted outdoor and indoor visitations to lower risk in their communities. Yet even though facilities were following recommended protocols that supported the safety of facility residents and staff, many residents, family and the lay media lambasted the facilities for the visitation limits.

## **News headlines will affect perception of good faith**

Most facilities and their staff members performed heroically, risking not only their lives but also those of their loved ones. Unfortunately, many lay media outlets have painted assisted living communities and nursing homes with a broad brush, lumping all of them into the category of bad actors. The stories of facilities that were negligent in obtaining PPE or delayed in locking down or that refused to permit staff members to use PPE, generally are the exception as opposed to the rule.

Many headlines in the lay media have called out clear cases of facilities, owners and healthcare workers not acting in good faith. Those negligent facilities should not be entitled to any immunity and, due to their actions, are unlikely to benefit from immunity. But the lines are not clear as to what actions were done in good faith. Undoubtedly, an onslaught of litigation will ensue, but it may be years before we know how courts and juries interpret what was reasonable and in good faith.

## The financial impact already is underway

The results of individual lawsuits cannot be predicted, but we already are seeing the effects of pending litigation against facilities. Many now are facing increased insurance premiums for both malpractice and employment practices liability insurance. The strain of rebuilding a facility's reputation will be seen in the number of new residents. Even marketing communications will be affected by the need to regain trust and promote safety. For years to come, there will be uncertainty, business disruption and expense.

## Prepare for pandemic litigation

Take the time to prepare for litigation that undoubtedly will affect the industry. Do a thorough and strategic review of insurance policies, compliance requirements and all obligations regarding the potential for litigation.

Of note, policies regarding digital and hard-copy information must address storage procedures to prevent even the inadvertent destruction of what may become evidence in a litigation. This direction must happen before a "litigation hold" is sent from the facility's legal team instructing employees not to delete electronically stored information or discard paper documents that may be relevant to a new or imminent legal case.

The "COVID claims" are coming, and now is the time to prepare for litigation that may result from the pandemic.

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