

April 7, 2020

The Honorable Ralph S. Northam
Governor of Virginia
P.O. Box 1475
Richmond, VA 23218

Re: Legal Protections for Healthcare Providers

Dear Governor Northam:

The undersigned organizations sincerely thank you for your unwavering support for our health care system and its physicians, nurses, physician assistants, nurse practitioners and other health care workers who are making tremendous sacrifices as part of the Commonwealth's emergency response to the novel coronavirus (COVID-19) pandemic. The pandemic is certain to be a critical test of all of us, and your additional support during this great time of need is especially appreciated. Accordingly, we are writing to request you issue an Executive Order to afford appropriate legal protections.

Under your leadership, the Commonwealth of Virginia has made great strides in its emergency response to COVID-19, including a series of Executive Orders and Orders of Public Health Emergency aimed at reducing community spread, conserving personal protective equipment (PPE), and building up our capacity to treat the large number of COVID-19 patients that are forecasted and are already beginning to be treated in hospitals, hospices and long term care facilities and residences across the Commonwealth. But the work has only just begun. COVID-19 presents an ongoing threat to our communities. Information from the Virginia Department of Health reveals occurrences of the virus in every region of the Commonwealth. Indeed, the data suggests that in several regions there may be community spread of the virus and the number of confirmed cases, hospitalizations, and persons under investigation (PUIs) in Virginia have increased substantially.

Health care providers are already experiencing critical shortages of PPE and other supplies and in some cases are being required to reuse PPE where appropriate and possible to conserve PPE. This is exacerbated by a severe disruption in both the state, national, and international supply chains caused by the significant increased use of such equipment worldwide in response to COVID-19.

In order to meet the anticipated surge in demand for acute care and intensive care beds, hospitals are retrofitting care areas for use in treating COVID-19 patients. Transfer of patients with COVID-19 from hospitals to other sites of care such as assisted living facilities, hospices, and nursing homes is limited by the need to contain the spread of the virus. Additionally, the state and public and private health care providers are establishing alternate care sites to meet the anticipated surge. All of these measures are necessary in response to the public health emergency created by COVID-19; however, they present less than optimal conditions than those indicated by conventional standards of care, placing patients, the public, and health care workers at risk.

There are already reports of health care workers being infected with COVID-19 and the reality is these will continue as the spread of the disease is inevitable. As the number of health care workers infected increases, this will place an even greater strain on remaining trained staff. As a result, the ability of

hospitals, long term care facilities, and other facilities to adequately staff operations will be limited, also placing patients and health care workers at risk.

Despite our collective good faith and exhaustive efforts and a number of environmental factors that are outside of our control, we have seen a marked increase among the legal community discussing and advertising the possibility of tort litigation for our response to the COVID-19 pandemic. We already face a critical shortage of funds within the health care system. Hospitals and other health care providers that have postponed non-essential health care services and have dedicated resources to COVID-19 emergency response are facing significant financial losses that place our health care system at risk. The threat of tort litigation would accelerate and exacerbate the financial strain placed on us and the care that we provide. However, health care providers may not be afforded the necessary limitations of liability without clarification of existing statutes and declarations from your Administration to allow them to focus on the prioritization of patient care.

Virginia law provides some immunity to health care providers and other persons responding to an emergency, but there is little case law interpreting them and clarification is needed to adequately provide the limitation of liability that is appropriate in response to the COVID-19 emergency. Existing statutes have several gaps that could open health care providers to lawsuits, despite performing in good faith. Examples of needed clarification include:

- Whether COVID-19 is a “communicable disease of public health threat” as defined in § 44-146.16 that constitutes a “disaster” as defined in § 44-146.16.
- Whether for the purpose of Va. Code § 8.01-225.01, Executive Order No. 51 is a state emergency that has been declared and for purposes of Va. Code § 8.01-225.02, Executive Order No. 51 is a state emergency that has been declared in response to a disaster.
- Whether Va. Code § 8.01-225.01 and § 8.01-225.02 provide immunity to “health care providers” during declared state emergencies, such as the current COVID-19 pandemic.
- To what extent facilities such as assisted living facilities, adult day centers, home care and hospice that are not included in the definition of “health care provider” pursuant to the definition in § 8.01-581.1. Va. Code § 8.01-581.1 would have any protection under § 8.01-225.01 and § 8.01-225.02.
- What activities are included in what it means to “respond to a disaster,” and what it means for a “lack of resources” under § 8.01-225.02.

These and other ambiguities open health care providers to lawsuits as the law currently exists in our Commonwealth. The changing dynamic and situation of this pandemic warrant grants of civil and criminal immunity where health care providers act in good faith. Other states have codified such “good faith” immunity by statute, such as Maryland which provides that healthcare providers, including assisted living programs, are “immune from civil or criminal liability if the health care provider acts in good faith and under a catastrophic health emergency proclamation.”¹

Others have proclaimed civil or criminal immunity by way of executive orders such as New Jersey which declares that health care providers are afforded civil liability immunity “as a result of the individual’s acts or omissions undertaken in good faith, whether or not within the scope of the licensee’s practice, in the course of providing healthcare services in support of the State’s COVID-19 response, **whether or not**

¹ Md. Code 14-3A-06

such immunity is otherwise available under current law.”² On March 29, 2020, Governor Gretchen Whitmer of Michigan issued Executive Order No. 2020-30 that provides immunity to “any licensed health care professional or designated health care facility that provides medical services in support of...the COVID-19 pandemic ... regardless of how or under what circumstances or by what cause those injuries are sustained, unless ... caused by ... gross negligence.”³ Such grants of immunity for acting in good faith are essential to recognizing the strain on health care provider resources and protecting them from the difficult decisions that may need to be made.

For the foregoing reasons, we respectfully request that you continue your support of health care providers by issuing an executive order that will afford our members with the legal protections necessary to fully focus on treating patients and containing this pandemic rather than focusing on lawsuit mitigation. Specifically, we request that you clarify that existing legal immunity protections include assisted living facilities, adult day centers, home care and hospice, and also declare civil and criminal immunity to health care providers that act in good faith. By doing so, you will enable health care providers to focus on the difficult task of combating the COVID-19 outbreak without fear of legal retribution that could lead to insolvency.

Your leadership and service to our Commonwealth during these difficult times are greatly appreciated.

Sincerely,

LeadingAge Virginia
Medical Society of Virginia
Richmond Academy of Medicine
Psychiatric Society of Virginia
The American College of Obstetricians and Gynecologists
Virginia Academy of Physician Assistants
Virginia Association for Home Care and Hospice
Virginia Association for Hospices & Palliative Care
Virginia College of Emergency Physicians
Virginia Council of Nurse Practitioners
Virginia Dental Association
Virginia’s Family Physicians
Virginia Health Care Association – Virginia Center for Assisted Living
Virginia Hospital and Healthcare Association
Virginia Nurses Association
Virginia Orthopaedic Society
Virginia Society of Eye Physicians and Surgeons
Virginia Society of Oral & Maxillofacial Surgeons
Virginia Society of Plastic Surgeons

² State of New Jersey, Executive Order No. 112, available at <https://nj.gov/infobank/eo/056murphy/pdf/EO-112.pdf>.

³ State of Michigan, Executive Order No. 2020-30, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-523481--,00.html.

