

April 16, 2020

Governor Gavin Newsom
State of California
State Capitol
Sacramento, CA 95814

RE: Request for Executive Order Related to Liability Protection

Dear Governor Newsom:

We wanted to express our joinder in the prior April 9, 2020 letter submitted by various other stakeholders requesting an Executive Order extending liability protection to California's responding providers during the COVID-19 emergency. America's Physician Groups represents over 165 multispecialty medical groups and independent practice associations across California providing care to 18 million patients. Thousands of our members' personnel are responding to the emergency across this state.

The current law on professional liability is too broad for the current conditions. The medical professionals in our member organizations are providing care in the best manner that they can within the limitations imposed by the emergency, subject to their best professional judgment. They don't make the rules under these circumstances. In many cases their decisions are hampered by limitations and problems imposed by other agencies. They are subject to shortages of equipment, medication, beds and lack of well-founded protocols on how to treat this virus.

While California statutory law has recognized medical professional immunity in certain emergent situations under Government Code Section 8659, this outdated provision of law may not address challenges based on actions or inactions that could be characterized as "willful omissions" that arise out of bed and equipment shortages in surge situations:

Government Code section 8659. (circa 1970s)

- a. *Any physician or surgeon (whether licensed in this state or any other state), hospital, pharmacist, respiratory care practitioner, nurse, or dentist who renders services during any state of war emergency, a state of emergency, or a local emergency at the express or implied request of any responsible state or local official or agency shall have no liability for any injury sustained by any person by reason of those services, regardless of how or under what circumstances or by what cause those injuries are sustained; provided, however, that the immunity herein granted shall not apply in the event of a willful act or omission.*

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An executive order would be helpful and reassuring to the medical professionals and staff who are putting their lives on the line every day during this emergency. In addition to the currently proposed language, we want to emphasize the role and necessary inclusion of provider groups, including medical groups, independent practice associations and accountable care organizations, which should also be recognized specifically in any eventual language on this topic.

We further urge you to order the Department of Public Health to develop written crisis standards of care for health professionals responding under emergency and pandemic situations. Established standards will aid in further defining necessary ethical and professional standards in pandemic situations involving surge situations.

The pending efforts in the U.S Congress to address this issue are not enough to encompass all the providers rendering care in this emergency. The most recent language included in the CARES Act applies only to unpaid volunteers. A small fraction of the healthcare workforce involved in this pandemic response are unpaid. Nor can the Congress address liability issues that are reserved to the states for determination, as you have so ably pointed out in another recent context.

Our healthcare system must be ready to meet pandemic level challenges for the next 24 months, not just the next two months. The current lack of liability protection for responding healthcare professionals and facilities will discourage future efforts to reorganize our delivery system to face the next crisis after COVID-19.

That is why we are calling on you, on behalf of the tens of thousands of doctors, nurses and health professionals that work in our member organizations, to issue an executive order that recognizes the necessary immunity for professionals rendering care to Californians in need during this COVID-19 emergency.

Thank you for your consideration of this request and your tireless work on behalf of all Californians.

Sincerely,

A handwritten signature in blue ink, appearing to read 'W. Barcellona', with a stylized flourish at the end.

William Barcellona, Esq. MHA
EVP, Government Affairs

Please reply to Sacramento:

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(916) 606-6763 mobile

Attachment: Letter of April 9, 2020



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OF HEALTH FACILITIES

April 9, 2020

Governor Gavin Newsom
State of California
State Capitol
Sacramento, CA 95814

RE: Request for Executive Order Related to Liability Protection

Dear Governor Newsom:

California's health care workers and those serving in supporting roles are on the front lines of a crisis unlike any our state has ever faced. Every day, they are racing against time to prepare to treat and care for all in need. Sadly, in the coming days and weeks, they will face wrenching, life-threatening decisions in managing scarce resources amid arduous conditions.

The COVID-19 pandemic is projected to affect so many people that health care providers will be forced to allocate scarce medical resources among too many patients who need them.

Given this stark reality, we must have one goal: to save as many lives as possible. With that goal, we request the Governor issue an Executive Order including the following language, which will provide a level of liability protection adequate for care providers to save Californians' lives:

During the current COVID-19 state of emergency, health care facilities, residential care facilities, senior living providers, health care service plans, physicians and other health care professionals, and all employees thereof, are hereby requested to render services to Californians. In recognition of these extraordinary and unprecedented circumstances, such facilities, plans, physicians, professionals, and employees shall be immune from any administrative sanction or criminal or civil liability or claim for any injury, death, or loss alleged to have resulted from any act, omission, or decision made related to providing or arranging services, including but not limited to acts, omissions, or decisions undertaken because of a lack of resources, absent proof by no less than clear and convincing evidence of willful misconduct as measured by a standard of care that incorporates all of the circumstances of the emergency. All state statutes and regulations are hereby waived to the extent necessary to achieve this immunity. The unenforceability or invalidity of any part of this paragraph shall not have an impact on the enforceability or validity of any other part of this paragraph.

Effectively minimizing death and serious illness among the population as a whole entails distributing finite resources to those who have the greatest opportunity to benefit, thereby maximizing appropriate care for the greatest number of patients likely to benefit from these resources.

While the state is creating a framework to guide these difficult decisions, providers need assurance they will not later be judged or sued when abiding by this framework, or when making related care decisions based on their best judgment and determination at the time. In this time of crisis, care providers must be able to observe, evaluate, and respond to rapidly-changing conditions and events; the prospect of being subjected to future lawsuits would burden and slow these decisions, threatening greater loss of life throughout California. Basic ethical principles governing crisis triage decisions include accountability—not only for health care providers called upon to make such decisions, but also for the government in supporting the processes to make these decisions and protecting the providers who make them.

When providers approach their work in the coming weeks and months, we must give them the support they need to make the best possible decisions, including protections from future legal action, as long as that liability protection does not excuse willful misconduct. To help understand the magnitude of the situation, here are several examples of the kinds of situations our health care system will face:

1. Thirty patients require ventilators, but a hospital has only 25 ventilators.
2. A hospital has too few pulmonologists, so *obstetricians* agree to care for respiratory patients.
3. A hospital postpones a patient's elective surgery to accommodate a surge of COVID-19 patients, thus delaying care to the surgery patient.
4. A patient no longer needs acute care, and is moved to a skilled nursing facility, although the patient preferred to stay at the acute care facility and did not provide consent to be transferred.
5. An assisted living facility resident contracts COVID-19 from an employee, even though the facility used proper screening techniques when employees arrived at work.
6. An assisted living facility suspends group dining and activities as well as restricting visitors, due to social distancing requirements, and is sued for causing depression by isolating residents in their rooms.
7. A skilled nursing facility is sued for allegedly deficient care rendered by staff who had not received full training as a result of staffing shortages.
8. A facility cannot access N-95 masks, and health care providers are asked to deliver care using surgical masks.
9. A skilled nursing facility admits an asymptomatic patient in accordance with California Department of Public Health and Centers for Disease Control and Prevention guidelines. The patient later is determined to be COVID-19-positive, and the facility must manage a potential outbreak without full staff and without sufficient personal protective equipment.

In addition to the executive order language requested above, when considering the issue of liability protection, provisions of Government Code Section 8659 should be explicitly invoked; however these provisions are too limited for the unprecedented pandemic we are facing, which is why even broader liability protections is needed. Government Code Section 8659 does not help skilled nursing or assisted living facilities or health plans, and omits many types of health care workers (such as physician assistants, mental health providers, custodial staff, and managers). In addition, this statute does not provide protection for a willful act or willful omission, such as considered decisions to ration ventilators,

stop elective procedures, transfer a patient to an alternate care center, or assign an obstetrician to care for a pulmonary patient which has been the advice of the state or the standard of care in a crisis.

As our care providers make these difficult decisions, they need to know they will not be prosecuted or persecuted. *This request is made with the deep understanding that every care provider is doing all they can to protect all Californians during this unprecedented crisis.*

Respectfully,

Carmela Coyle, President and CEO
California Hospital Association

Janus Norman, SVP, Government Relations
California Medical Association

Craig Cornett, CEO/President
California Association of Health Facilities

Charles Bacchi, President & CEO
California Association of Health Plans

Sally Michael, President & CEO
California Assisted Living Association

Jeannee Parker Martin, President & CEO
LeadingAge California