

# CORONAVIRUS INFORMATION & UPDATES

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## UPDATED: Key Considerations for COVID-19 Emergency Triage Policies in Washington State

Ropes & Gray offers immediate practical guidance on how to navigate the legal and ethical issues raised by the need to have a clear plan for allocating scarce resources as COVID-19 strains Washington hospitals in unprecedented ways. Below are key considerations as hospitals and academic medical centers evaluate policies and procedures to guide these challenging decisions.

- 1. Review your written plan to ensure it addresses the anticipated shortages.** Washington state law requires hospitals to have plans to prevent the spread of disease. In preparation for a health care “surge,” a plan should address allocating scarce resources in cases of extreme shortages. A triage plan should include a clear statement of goals, be developed in an open and transparent manner, provide appropriate accountability for all decisions made, and clearly indicate the parties responsible for developing and updating the plan. At a minimum it should address:
  - What triggers the plan,
  - How treatment and supplies are allocated,
  - Whether the plan may result in withdrawing or withholding care, or in any combination of the two, and
  - Who will make allocation decisions for and among specific patients.
- 2. Your plan should comply with non-discrimination laws.** The federal Office for Civil Rights (OCR) recently issued guidance warning that supply shortages do not suspend anti-discrimination laws. Washington state law similarly bars hospitals from discriminating. Your triage plan should account for the following:
  - The triage plan should be facially neutral, meaning it does not discriminate against any protected class as written, and that its various measures and procedures are justified by necessity. Any plan should include a statement explaining why that specific plan is necessary to provide the applicable standard of care and the rationale behind it.
  - The greatest discrimination risk in triage plans is that they unfairly—and perhaps illegally—distinguish among patients based on underlying disabilities. In some cases, disabling conditions are co-morbidities that are appropriately considered in allocation of scarce medical resources, but those priorities should be established by clinical experience and ratified by senior medical staff, preferably by reference to professional or government guidelines.
  - State law requires that a hospital implement a specific policy defining a patient’s rights relating to access to care. The triage plan should be consistent with that policy.
- 3. Clear communication to patients and their families.** Clear, accurate communication will ensure patients and their families know that care is being provided under an altered or crisis standard. Washington hospitals should consider any guidance published by their Local Health Jurisdiction and healthcare coalitions.

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4. **The transition to alternate or crisis standards of care.** Transitioning to crisis standards of care is forced by the exhaustion of other options.

- **Facility steps to confirm need to transition.** Transition to an alternate or crisis standard should not occur until allocation or rationing becomes necessary. A triage plan should be followed only as long as the circumstances require. Before implementing your plan, the hospital should confirm and document:
  - Which resources and infrastructure are critically limited;
  - The hospital has maximized its efforts to conserve, reuse, adapt, and substitute conventional therapies;
  - Available supply is insufficient to meet demand for conventional standard of care therapy;
  - Patient transfer is not feasible or creates undue strain, with provisions made for discussing individual cases with, and gaining consent from, patients and/or legally authorized representatives; and
  - The hospital has requested necessary resources from appropriate government health officials.

When the hospital is ready to implement its triage plan, be sure to check local laws and regulations to confirm mandates to coordinate with local authorities, if any.

5. **Liability protection under state or federal emergency declarations.** In Washington, providers are not generally civilly liable provided they act in accordance with generally accepted standards of care under the circumstances and use such care, skill, and learning as other members of the profession commonly possess and exercise. In addition, current emergency declarations applicable to Washington offer the following protections:<sup>1</sup>

- Washington has lifted certain statutory and regulatory obligations or limitations on health care providers and workers to alleviate burdens or restrictions on the health care system. For example, certain barriers have been lifted on the provision of telemedicine and the use of health care volunteers and physician assistants. Long-term health care facilities also need not abide by certain statutes and regulations regarding bed limits, visitation rights, and minimum qualification, training, and educational requirements for physicians and other health care workers. These waivers will end when the Governor declares an end to the current state of emergency. Currently that date has not been set.
- The Washington Good Samaritan law protects physicians who act in the event of a sudden medical emergency and without compensation.
- Protection from tort claims may be available under the federal Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C. § 247d-6d. PREP protects the manufacture, distribution, administration, or use of medical countermeasures. Key questions are whether the hospital and its agents are “covered persons” and whether the specific care being providing is a “covered countermeasure.” Any protection that is available under the PREP Act is expected to extend until 2024.

<sup>1</sup> These are the Proclamations by Governor Inslee, Nos. 20-05, 20-06, 20-07, 20-10, 20-16, 20-17, 20-29, 20-32, 20-36, 20-37, 20-38; March 13, 2020, National Emergency Determination by President Trump; and March 22, 2020, Washington State Major Disaster Declaration by President Trump.