

CORONAVIRUS INFORMATION & UPDATES

May 21, 2020

Illinois Revises Immunity from Civil Liability for Certain Health Care Providers May 21, 2020

On May 13, 2020, Governor J.B. Pritzker issued [Executive Order 2020-37](#) (the “Order”) clarifying the immunity from civil liability available for hospitals, health care facilities, health care professionals, and health care volunteers (collectively, “Providers”) during the COVID-19 emergency. The Order updates Governor Pritzker’s previous [Executive Order](#), as modified by the [May Stay-at-Home Order](#) (together, the “Existing Orders”), and now makes clear that hospitals following current guidance from the [Illinois Department of Public Health](#) (“IDPH”) regarding the performance of [elective surgeries and procedures](#) (the “Elective Procedures Guidance”) are eligible for immunity from civil liability. The Order makes four key clarifications to the Existing Orders, which we previously outlined [here](#) and [here](#).

Attorneys
[Deborah L. Gersh](#)
[John Saran](#)
[Ryan B. Marcus](#)
[Matthew Colin](#)

1. **Hospitals Performing Elective Surgeries Are Eligible for Immunity.** As before, Providers must be “rendering assistance” in support of the state’s response to COVID-19¹ to be eligible for immunity from civil liability. The Order clarifies that, for hospitals, “rendering assistance” includes following the Elective Procedures Guidance. Accordingly, hospitals that resume elective surgeries and procedures in accordance with such guidance are eligible for immunity under the Order.
2. **With Limited Exceptions, Hospitals Must Accept Transfer of COVID-19 Patients.** The Order requires hospitals “rendering assistance” to accept the transfer of COVID-19 patients from other hospitals or state-operated entities lacking the capacity and capability to provide treatment for such patients. However, hospitals are not obligated to accept transferred COVID-19 patients if the hospital does not have sufficient capacity or the capability to provide treatment for the patient. In evaluating whether it has the capacity and capability to provide treatment to a transferred COVID-19 patient, a hospital must consider its ability to provide safe and effective treatment consistent with IDPH guidance and its available supplies, staffing, and bed capacity.
3. **Additional Testing Requirements for Health Care Facilities.** While hospitals and health care facilities (such as skilled nursing facilities)² must both conduct widespread testing under the Order to qualify for immunity, health care facilities must specifically conduct (i) widespread testing of residents and (ii) regular and widespread testing of staff. Additionally, to qualify for immunity, health care facilities must accept COVID-19 patients upon transfer or discharge from a hospital or another health care facility consistent with current IDPH [guidance](#).³

¹ We understand that the services protected by this Order are considered to be part of the public health operations of the State of Illinois.

² Unlike in the Existing Orders, hospitals are excluded from the definition of “health care facilities” and are instead separately defined. “Health care facilities” include, among others, skilled nursing facilities, ambulatory surgical centers, and behavioral health facilities.

³ [Interim IDPH guidance](#) governs criteria for accepting medically stable patient transfers from acute care settings to long-term care facilities (“LTCFs”). Under the interim guidance, LTCFs are required to implement [Transmission-Based Precautions](#) (“TBP”) for each transferred patient to prevent the spread of COVID-19, such as appropriate patient placement. An LTCF may discontinue TBP and accept the patient only after all criteria are met. Criteria for discontinuing TBP are based on the patient’s COVID-19 status on

CORONAVIRUS INFORMATION & UPDATES



4. **The Order Narrows the Scope of Immunity for Certain Providers.** Under the Existing Orders, Providers were, with limited exceptions, broadly eligible for immunity from civil liability for any death or injury that occurred while the Provider was rendering assistance to the state during the COVID-19 emergency. The Order narrows the scope of immunity granted to certain Providers that participate in elective surgeries and procedures. For the current breakdown of the scope of immunity for Providers, see the below chart. It remains to be seen how these grants of immunity will hold up in state court.

Scope of Immunity for Providers Under the Order⁴

Provider	Elective Surgeries and Procedures?	Scope of Immunity
Hospital	<p>Conducting elective surgeries and procedures in accordance with IDPH guidance</p> <p>See below for Health Care Professionals providing services at such Hospitals⁵</p>	Any injury or death relating to the diagnosis, transmission, or treatment of COVID-19 that occurs while the hospital is “rendering assistance”
	<p>Continuing to postpone or cancel elective surgeries and procedures</p> <p>See below for Health Care Professionals providing services at such Hospitals⁶</p>	Any injury or death that occurs while the hospital is “rendering assistance”
Health Care Facility	N/A	Any injury or death relating to the diagnosis, transmission, or treatment of COVID-19 that occurs while the health care facility is “rendering assistance”

arrival (positive and symptomatic; positive and asymptomatic; symptomatic and suspected to be positive; unknown). IDPH has also issued [interim guidance](#) to LTCFs concerning measures to control COVID-19.

⁴ As before, immunity does not protect a Provider from any death or injury caused by the Provider’s willful misconduct and, in some cases, by gross negligence as well.

⁵ Note that, as reflected below, the scope of immunity for such hospitals is the same as for health care professionals providing services at hospitals conducting elective surgeries and procedures (i.e., any injury or death related to COVID-19).

⁶ Note that, as reflected below, the scope of immunity for such hospitals is the same as for health care professionals providing services at hospitals continuing to postpone or cancel elective surgeries and procedures (i.e., any injury or death). However, it is unclear whether this grant of immunity covers delays in the performance of elective surgeries due to Provider’s decision to cease performing such surgeries. It is further unclear whether the grant of immunity extends to health care professionals who delay elective procedures or surgeries because they cannot secure operating room time slots.

CORONAVIRUS INFORMATION & UPDATES

	See below for Health Care Professionals providing services at Health Care Facilities ⁷	
Health Care Professional	Providing services at a hospital conducting elective surgeries and procedures in accordance with IDPH guidance	Any injury or death relating to the diagnosis, transmission, or treatment of COVID-19 that occurs while the health care professional is “rendering assistance” ⁸
	Providing services at a hospital continuing to postpone or cancel elective surgeries and procedures	Any injury or death that occurs while the health care professional is “rendering assistance”
	Providing services at a health care facility	Any injury or death relating to the diagnosis, transmission, or treatment of COVID-19 that occurs while the health care professional is “rendering assistance”
Health Care Volunteer	N/A	Any injury or death that occurs while the health care volunteer is “rendering assistance”

⁷ Note that, as reflected below, the scope of immunity for health care facilities is the same as for health care professionals providing services at health care facilities (i.e., any injury or death related to COVID-19).

⁸ Health care professionals providing care at their own offices that are part of independent practices are likely not eligible for immunity granted by the Order in general. However, arguments could be made that health care professionals that redirect patients to their independent practices from hospitals at the direction of such hospitals (e.g., to assist with hospital capacity issues) should be considered eligible for immunity under the Order.