

## LIABILITY CONSIDERATIONS IN LONG TERM CARE, DIALYSIS, AND OTHER MEDICAL FACILITIES

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Nursing homes are more than healthcare providers: “they are permanent homes for over 1.3 million residents” in the United States.<sup>1</sup> Because of their age and multiple chronic health conditions, these residents are most vulnerable to COVID-19.<sup>2</sup> Indeed, as of March 23, 2020, CDC reports that 147 nursing homes across 27 states have at least one resident diagnosed with COVID-19.<sup>3</sup> Therefore, CDC and CMS have joined forces to identify and implement strategies to help protect nursing home residents.

### FACILITY PREPAREDNESS

Once such regulatory strategy is to prioritize surveys of healthcare facilities and focus on infection control practices. CMS will use an infection control “checklist,” which will also function as a proactive self-assessment tool to help nursing homes assess and improve their preparedness for responding to COVID-19. One such checklist can be found [here](#).

Although *voluntary*, CMS is *urging* nursing homes to use the self-assessment tool. Indeed, using the tool will be helpful in avoiding placing the facility in Immediate Jeopardy, maintaining CMS certification, and defending future litigation that may arise in the aftermath of a COVID-19 outbreak. Plaintiffs’ counsel are well versed in CMS rules and regulations, and they will be sure to request any and all documentation of COVID-19 preparedness and compliance with CMS and CDC recommendations.

### GUIDANCE FOR DIALYSIS FACILITIES

CMS also has issued guidance for infection control and prevention of COVID-19 in dialysis facilities. The guidance includes recommendations for screening patients, staff, and visitors and for safely providing treatment to patients with suspected or confirmed COVID-19. The guidance is available [here](#).

### LITIGATION RISK MANAGEMENT

Although the primary focus of nursing homes, long term care facilities, dialysis centers, and other types of medical facilities in the face of the COVID-19 pandemic has to be protecting patients and providing care, measures can be taken now to reduce the likelihood of future litigation and CMS rule violations. Some examples of these measures include implementing the facilities’ emergency preparedness/disaster plan, staying up to date and following CMS and CDC recommendations (such as using the voluntary assessment tool, social distancing, testing and evaluating the work force, and enforcing visitation restrictions), and complying with document retention protocols.

Theories of liability are likely to include insufficient staffing, failure to police visitation, and failure to timely respond to early symptoms and report worrisome trends to public health officials. Keep in mind, however, that in some jurisdictions, plaintiffs may need to meet a higher standard of proof when pursuing such claims. For example, as a result of recent changes to Ohio law,<sup>4</sup> plaintiffs must now show that providers of emergency medical services as the result of a “disaster” acted with reckless disregard as to the patient’s life or health in order to prevail on certain tort claims. The law’s definition of “disaster” includes epidemics

<sup>1</sup> <https://www.cms.gov/newsroom/press-releases/cms-administrator-seema-vermas-remarks-prepared-delivery-updates-healthcare-facility-inspections>

<sup>2</sup> <https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/prevent-spread-in-long-term-care-facilities.html>

<sup>3</sup> <https://www.cms.gov/newsroom/press-releases/cms-announces-findings-kirkland-nursing-home-and-new-targeted-plan-healthcare-facility-inspections>

<sup>4</sup> <http://codes.ohio.gov/orc/2305.2311v1>

and requires that the disaster be declared by a federal, state, or local government—thus clearly encompassing the current COVID-19 situation.

As is often the case, defenses will depend on complete and accurate documentation that demonstrates the actions and interventions taken and the reasons for taking them, including adaptations to the electronic medical record's format. Just as taking recommended measures to mitigate the spread of COVID-19, taking these measures can mitigate future liability.

#### ADDITIONAL INFORMATION

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