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## Client Alert: New York Assembly Bill Would Repeal State's Healthcare Immunity Statute Passed in Wake of COVID-19 Citing Concerns Over Nursing Home Conduct

21 May 2020

A New York Assemblyman has introduced a bill that would repeal [Article D-30, Emergency or Disaster Treatment Protection Act](#) of the New York Public Health Law, which was enacted on April 2, 2020, and provides health care facilities, health care providers, and volunteer organizations from immunity from civil or criminal liability for harm or damages sustained as a result of COVID-19.

Pursuant to Article 30-D, any health care facility or health care professional will have immunity from civil or criminal liability for any harm or damage alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services so long as:

- the health care facility or professional is arranging for or providing health care services pursuant to a COVID-19 emergency rule, as defined, or otherwise in accordance with applicable law;
- the act or omission occurs in the course of providing health care services and treatment of individual is impacted by the health care facility or professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives;
- the health care facility or professional is arranging for or providing health care services in good faith.

Additionally, volunteer organizations are immune from civil or criminal liability for harm or damages irrespective of the cause of the harm or damage occurring in or at its facility or facilities arising from the state's response and activities under the COVID-19 emergency declaration and in accordance with any applicable COVID-19 emergency rule.

The immunity for health care professionals, facilities, and volunteer organizations will not apply if the harm or damage is caused by an act or omission constituting willful or intentional criminal conduct, gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or professional providing health care services or by the volunteer organization. However, acts, omissions or decisions of health care professionals or facilities resulting from resource or staffing shortages are not considered willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm.

Article 30-D is effective from March 7, 2020 to the expiration date of the COVID-19 emergency declaration, to be determined by Governor Cuomo. The law was drafted by the Greater New York Hospital Association, which lobbies for hospitals and nursing homes, and goes further than most states in that it provides immunity for both civil and criminal liability with or without a COVID-19 or presumptive COVID-19 diagnosis.

[Assembly Bill No. A10427](#), introduced by Assemblyman Ron Kim, would repeal the entirety of Article 30-D, citing as justification that negligence by administrators and executives of nursing homes has occurred at an extraordinary degree, and that Article 30-D "egregiously uses severe liability standards" as a means to insulate health care facilities, and specifically, administrators and executives of such facilities, from any civil or criminal liability for negligence. The bill further states that nearly 5,000 elderly and vulnerable residents have succumbed to COVID-19 in New York nursing homes, with zero accountability or transparency for the deaths. While the bill identifies concerns over nursing homes,

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the current text of the bill repeals the entirety of New York's immunity provision, which would leave all health care providers, facilities, and volunteer organizations open to the threat of medical malpractice litigation. As currently written, the bill does not contain a retroactive repeal, so Article 30-D could arguably remain an effective bar to medical malpractice claims from March 7, 2020 until passage of the repeal. In a state that has seen at least 353,000 positive cases and 22,843 deaths, that potential protection is not insignificant.

The concern over nursing home conduct is not specific to New York, however. Industry advocate groups across the country are echoing the same sentiments. To date, at least 20 states have granted immunity provisions to protect health care providers and facilities from liability for COVID-19 related injuries or death, either through laws or executive orders, and many of those protect nursing homes and long-term care facilities from the same liabilities. Nursing homes were the site of some of the first major COVID-19 outbreaks in March, and nursing homes' residents and staff have borne a heavy load of the pandemic's burden, particularly because the virus appears to disproportionately affect the elderly and those with pre-existing conditions. Deaths in long-term care facilities now make up at least one third of the COVID-19 fatalities.

Nursing homes argue that the legal protections are necessary for staff, who have become first responders, to do their jobs as the pandemic has created an unprecedented burden in caring for the high-risk population. The CEO of the American Health Care Association (AHCA), which represents for-profit nursing homes, said in a statement that "[l]ong term care workers and centers are on the frontline of this pandemic response and it is critical that states provide the necessary liability protection staff and providers need to provide care during this difficult time without fear of reprisal."

The New York Assembly bill, with 13 co-sponsors, is still in the early stages of consideration. Whether and to what extent the bill gains traction in New York, or starts a ripple effect of similar legislation across the country, it yet to be seen.

For information regarding other states' enacted healthcare immunity provisions, please visit Jackson & Campbell's Blog [here](#), which is being periodically updated. For other legal developments related to the COVID-19 pandemic, visit the [COVID-19 section](#) of Jackson & Campbell's Blog.

*This summary is not intended to contain legal advice or to be an exhaustive review. If you have any questions regarding this article, please contact [Annette P. Rolain](#) or another member of Jackson & Campbell's [Insurance Coverage Practice Group](#).*

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**TAGGED:** COVID-19, Emergency or Disaster Treatment Protection Act, Assembly Bill No. A10427