

# COVID-19 Update

April 14, 2020



## COVID-19: Immunity from Liability and Expanded Scope of Practice

Conventus has received several questions from our healthcare community regarding immunity from civil liability during the 2019 Novel Coronavirus (COVID-19) state of emergency and/or public health emergency (PHE). There are four laws and/or executive orders that will be discussed affecting provider liability in NJ: (1) Executive Order (EO) 112; (2) Senate Bill Number 2333 (S2333); (3) Coronavirus Aid, Relief and Economic Security (CARES) Act; and (4) Public Readiness and Emergency Preparedness (PREP) Act.

### I. Executive Order 112 – Immunity from Liability

Governor Murphy signed [Executive Order 112](#) (EO 112) on April 1, 2020. The purpose was to expand the availability of healthcare professionals in response to NJ's 2019 Novel Coronavirus (COVID-19) public health emergency (PHE). Healthcare professionals are defined as including, but not limited to: physicians, physician assistants (PAs), advanced practice nurses (APNs), registered professional nurses, licensed practical nurses, respiratory care therapists, and "others" whose training and experience enable them to manage critically ill patients, perform essential invasive procedures, conduct diagnostic testing or render general medical care to patients presenting with non-COVID-19 emergencies in support of the COVID-19 response. The major highlights are summarized below.

#### Duration

EO 112 is in effect during the PHE or state of emergency, whichever is longer. In addition, ***the immunity from liability provisions apply to acts or omissions occurring any time during the state of emergency or PHE, including those prior to the issuance of the order.***

#### Licenses

##### ***Retired/Lapsed NJ Healthcare Professional Licenses***

The license of any previously NJ licensed healthcare professional who retired, elected inactive status or allowed their license to lapse within the last 5 years, can apply for temporary licensure through an expedited process. Certain requirements will be waived, such as fees, affidavits of employment during the retirement period, proof of continuing education credits, and the need to obtain "liability insurance."

##### ***Foreign Physicians***

The Division of Consumer Affairs (DCA) is authorized to issue temporary licensure through an expedited process to any physician who is licensed in good standing in another country. The following statutory requirements are waived or suspended: licensure exams and fees, additional education requirements, and the need to obtain "medical malpractice insurance coverage."

#### Scope of Practice

##### ***APNs***

The following statutory limitations on APN scope of practice are suspended and waived:

1. Establishment of joint protocols with a collaborating physician.
2. Inclusion of name, address, telephone number of a collaborating physician on prescriptions or orders.
3. Review of patient charts by the collaborating physician.
4. Obtain written authorization from a collaborating physician to dispense narcotic drugs for maintenance or detoxification treatment for substance abuse disorders.

## Scope of Practice (cont'd)

### **PA's**

The following statutory limitations on PA scope of practice are suspended and waived:

1. Requirement for physician supervision.
2. Enter into a delegation agreement.
3. Obtain authorization to order controlled dangerous substances (CDS).
4. Limits on assistance provided in the operating room (OR)

### **Physicians**

Physicians and other providers can access the NJ Prescription Monitoring Program without a CDS registration if they have a current Drug Enforcement Administration (DEA) registration.

## Civil Immunity from Liability

### **Temporary Licensees**

Temporary licensees are afforded immunity from civil liability for any damages from acts or omissions in good faith and in the course of providing services “in support of NJ’s COVID-19 response,” **whether or not within the scope of their practice**. The immunity does not apply to acts or omissions that constitute a crime, actual fraud, actual malice, gross negligence, or willful misconduct.

### **Current Licensees**

Any individual holding a NJ license, certificate, registration or certification will be immune from civil liability for any damages from acts or omissions in good faith and in the course of providing services in support of NJ’s COVID-19 response, **whether or not within the scope of their practice**. Originally, the immunity would only have been effective “to the extent that the practitioner’s liability insurance does not provide coverage or an applicable limit is exceeded.” This exception was subsequently eliminated. However, the immunity still does not apply to acts or omissions that constitute a crime, actual fraud, actual malice, gross negligence, or willful misconduct.

### **Hospitals**

Hospitals had the same exception to the civil liability as current licensees, but it was also eliminated in the modified EO 112. The immunity applies to its agents, officers, employees, servants, representatives or volunteers. Crimes, actual fraud, actual malice, gross negligence, or willful misconduct are excluded from the immunity.

### **Civil Liability Immunity – What It Covers**

EO 112 indicated that the immunity from civil liability applies to damages provided from healthcare services “in support of the state’s COVID-19 response.” However, it didn’t specifically define this phrase. It could be inferred that immunity is broader and apply to the provision of healthcare services to non-COVID-19 patients during the pandemic (i.e., providing telemedicine services to maintain patient access to healthcare and keep patients safe). Please note that it does not preclude a lawsuit seeking damages for one of the EO’s exceptions to immunity. In addition, it may be up to the courts to determine the extent of the immunity should a malpractice lawsuit be filed.

## **II. S2333 – Immunity Defined**

[S2333/A3910](#) was signed into law by Governor Murphy on April 14, 2020 and will be retroactive to March 9, 2020. The bill further clarifies the meaning of healthcare services “in support of the state’s COVID-19 response.” The legislature specifically made it clear their intent was to ensure no impediments to providing medical treatment related to the COVID-19 emergency and that all medical personnel supporting the COVID-19 response are granted immunity.

It was reported that some healthcare providers believed the immunity applied to all inpatient or outpatient procedures or any medical treatment rendered during the timeframe of the COVID-19 PHE. Consequently, S2333 now specifically states that **“medical care rendered in the ordinary course of medical practice does not provide the granting of immunity. For example, procedures performed by licensed medical professionals in their ordinary course of business, including orthopedic**

## **II. S2333 – Immunity Defined (cont'd)**

*procedures, OB/GYN services, and necessary cardiological procedures,” are not granted immunity.* The bill does state that the limited immunity from civil liability *“includes but is not limited to engaging in telemedicine or telehealth and diagnosing or treating patients outside the normal scope of a health care professional’s license or practice”* to support efforts to treat COVID-19 patients and to prevent the spread of COVID-19 during the PHE.

S2333 also provides immunity from civil or criminal liability for damages, injury or death alleged to have been sustained in connection with the allocation of mechanical ventilators or other scarce medical resources *if* the facility adopts and adheres to a scarce critical resource allocation policy that at a minimum incorporates the core principles identified by the Commissioner of Health in an executive directive or administrative order.

Although S2333 gives more guidance on what is immune from liability, it may still be up to the courts to determine on a case-by-case basis what treatments and procedures were rendered to support or prevent the spread of COVID-19. Providers may consider developing a policy to include but not be limited to the type of treatments or procedures in support of diagnosis, treatment or prevention of COVID-19 (i.e. telemedicine, telehealth, screening assessments, testing, vaccines, etc.).

## **III. CARES ACT - Immunity for Volunteers**

The federal [CARES Act](#) also provides volunteer liability immunity. Volunteers are not liable under federal or state law for any harm from an act or omission in the diagnosis, prevention or treatment of patients with suspected or confirmed COVID-19 if acting in good faith. Volunteers must not receive compensation or anything of value in lieu of compensation, except for reimbursement for travel and room/board, if traveling  $\geq$  75 miles from a principal residence. Exceptions to immunity are harm caused by willful or criminal conduct, gross negligence, reckless misconduct, flagrant indifference to patient safety or rights, or under the influence of alcohol or intoxicating drugs.

## **IV. PREP Act – Liability Immunity for Products and Devices**

The [PREP Act](#) authorizes the Secretary of the U.S. Department of Health & Human Services (DHHS) to issue a PREP Act declaration in response to a PHE. This declaration occurred on February 4, 2020, which resulted in the PREP Act being invoked. The declaration provides immunity from tort liability claims (except willful misconduct) to individuals or organizations involved in the manufacture, distribution or dispensing of “medical countermeasures.” Covered countermeasures include vaccines, antidotes, medications, medical devices or other FDA regulated assets used to respond to pandemics, epidemics, or any biological, chemical, radiological, or nuclear threat. In addition, it covers any product used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom.

Tort claims include all claims (except for willful misconduct), under federal or state law for any type of loss including death; physical, mental, or emotional injury; fear of such injury; or property damage or loss, including business interruption loss, with any causal relationship to any stage of development, distribution, administration, dispensing, or covered countermeasures recommended in the PREP Act declaration. Therefore, any COVID-19-related testing, medications, ventilators, vaccines, and manufacture and/or distribution of personal protective equipment (PPE) could be covered under the PREP Act. This does not preclude other types of claims, such as failure to provide adequate PPE for staff.

As always, Conventus members can contact the Practice Resource Department with any questions at: [877\) 444-0484 ext.7466](tel:877-444-0484). Others may wish to contact their own medical professional liability insurance carrier about the immunity from liability interpretation and other questions.

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