

Wisconsin Expands Immunity for Health Care Providers and Health Care Manufacturers, Distributors & Sellers Amidst COVID-19

Amundsen Davis Health Care Alert

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On April 15, 2020, Wisconsin Governor Tony Evers signed 2019 WISCONSIN ACT 185, Wisconsin's COVID-19 relief bill, into law. This legislative enactment granted explicit immunity against negligence lawsuits to health care providers providing services in response to the COVID-19 outbreak, similar to Indiana's legislative enactment and Illinois' executive order. Similar to Illinois, Wisconsin extended that immunity to actions or omissions related to health services provided or not provided in good faith. As with both Indiana and Illinois, this immunity does not extend to reckless or wanton conduct or intentional misconduct.

Under Wis. Stat. Sec. 895.4801(2), any health care professional, health care provider, or employee, agent, or contractor of a health care professional or health care provider is immune from civil liability for the death of or injury to any individual or any damages caused by actions or omissions that satisfy all of the following:

1. The action or omission is committed while the professional, provider, employee, agent, or contractor is providing services during the state of emergency declared under s. 323.10 on March 12, 2020, by executive order 72, or the 60 days following the date that the state of emergency terminates.
2. The actions or omissions relate to health services provided or not provided in good faith or are substantially consistent with any of the following:
 1. Any direction, guidance, recommendation, or other statement made by a federal, state, or local official to address or in response to the emergency or disaster declared as described under part (a).
 2. Any guidance published by the department of health services, the federal department of health and human services, or any divisions or agencies of the federal department of health and human services relied upon in good faith.
3. The actions or omissions do not involve reckless or wanton conduct or intentional misconduct.

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All Wisconsin health care professionals, providers, employees, agents, and contractors should take notice of this legislation because, at first glance, one might expect this immunity to apply only to treatment related to COVID-19, and while the statutory language encompasses COVID-19 treatment, this legislation is much broader.

The legislation not only insulates health care providers from liability for treatment related to COVID-19, but extends that liability to any treatment rendered for any condition so long as the act or omission (1) occurs between March 12, 2020, and the end of the Wisconsin Emergency Declaration, or in the 60 days following the expiration of the Declaration, and (2) the act or omission relates to health services provided or not provided in good faith or the act or omission is substantially consistent with guidance from a federal, state, or local government to address or respond to the emergency and relied upon by the provider in good faith.

All Wisconsin health care providers are effectively immune from any negligence suit for any alleged negligent act or omission that occurs between March 12, 2020, and the 60 days following the expiration of the Wisconsin Emergency Declaration, so long as the act relates to health services provided, or not provided, in good faith, or substantially consistent with guidance from Wisconsin or federal officials and relied upon in good faith. With virtually all elective procedures postponed during this crisis, this provision is crucial, as providers deciding to not provide elective treatment during this time are immune from suit so long as the decision is not reckless or wanton or involve intentional misconduct. The newly enacted statute does not define “reckless” and “wanton,” however; Wisconsin courts have interpreted the terms in various contexts as constituting more than mere negligence and involving intent, unreasonableness, dangerousness, indifference to consequences, and similar standards.

With some patients already unhappy that their elective procedures have been postponed, and in some instances, those patients may have suffered death or injury as a result of the delay, there will certainly be future attempts to file suit based on the important medical decisions being made during this time for the health and safety of all Wisconsin residents. Health care providers and insurers should watch for attempts to transform what would typically be negligence suits, into suits alleging reckless or wanton conduct, or even intentional misconduct, or attempts to allege that the actions taken were not in “good faith,” as the statute does not define good faith. Health care providers and insurers should also watch for attempts to challenge the statute as vague and ambiguous with respect to whether the action was substantially consistent with guidance from government officials regarding the emergency. However, the enactment of Wis. Stat. Sec. 895.4801(2), should provide Wisconsin health care providers with the assurance that they can not only effectively treat COVID-19, but can also effectively manage the care of their other patients; all while preserving the health and safety of all Wisconsinites, with the full support of the State of Wisconsin.

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At the same time, Wisconsin also enacted immunity to those involved in the production of emergency medical supplies. Previously, immunity applied only to those involved in the distribution, donation, or sale of food or emergency household products to a charitable organization, food distribution service, or governmental unit. Now, under Wis. Stat. Sec. 895.51(2r):

Any person engaged in the manufacturing, distribution, or sale of emergency medical supplies, who donates or sells, at a price not to exceed the cost of production, emergency medical supplies to a charitable organization or governmental unit to respond to the public health emergency related to the 2019 novel coronavirus pandemic is immune from civil liability for the death of or injury to an individual caused by the emergency medical supplies donated or sold by the person.

Any charitable organization that distributes free of charge the emergency medical supplies received is also immune from civil liability for the death of or injury to an individual caused by the emergency medical supplies distributed by the charitable organization. Wisconsin defined emergency medical supplies to mean medical equipment or supplies necessary to limit the spread of, or provide treatment for, a disease associated with the public health emergency related to the 2019 novel coronavirus pandemic, including life support devices, personal protective equipment, cleaning supplies, and any other items determined to be necessary by the secretary of health services.

This law is clear in its provision of blanket immunity. With the use of the Defense Production Act, and local governments seeing an urgent need for emergency medical supplies, the Wisconsin Legislature has provided that any person who is engaged in the manufacturing, distribution, or sale of emergency medical supplies, and who donates or sells, at a price not to exceed the cost of production, emergency medical supplies to a charitable organization or governmental unit to respond to this crisis is immune from civil liability for the death of or injury to an individual caused by the emergency medical supplies. Charitable organizations that distribute, free of charge, the emergency medical supplies are also immune.

With Governor Evers saying on April 16, 2020, that an adequate supply of emergency medical supplies is crucial to a re-opening of the State's economy, we can expect to see more and more manufacturers, distributors, and sellers focusing on emergency medical supplies. This immunity is in some respects broader than the immunity for health care providers in that it insulates manufacturers, distributors, sellers, and charitable organizations from civil liability for the death of or injury to an individual caused by the emergency medical supplies. This enactment will permit the supply chain to provide the emergency medical supplies urgently needed to fight this pandemic. Those engaged in the supply chain of emergency medical supplies should take notice of this important statutory change and have peace of mind that they are protected and can focus on protecting others.

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