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Client Alert: North Carolina Expands COVID-19 Civil Immunity for Health Care Providers

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Please allow this to serve as an update to our April 16, 2020 client alert outlining the preliminary COVID-19 health care liability immunities ordered on April 8, 2020 by North Carolina Governor Roy Cooper. On May 4, 2020, Governor Cooper signed into law Senate Bill 704, which, among many other things, greatly expands upon the previously ordered health care liability immunities.

Section 3D.7.(a) of Senate Bill 704 greatly broadens the previously enacted liability immunities by amending Chapter 90 of the North Carolina General Statutes (N.C.G.S.) to add Article 1L, the Emergency or Disaster Treatment Protection Act (the "Act"), codified as N.C.G.S. §§ 90-21.130 – 134. The Act broadly protects North Carolina health care facilities and providers from liability that may result from treatment of individuals during the COVID-19 public health emergency under conditions resulting from circumstances associated with the COVID-19 public health emergency. The protections under the Act are retroactive to March 10, 2020, the date Governor Cooper declared a state of emergency under Executive Order No. 116, and remain in effect until such time that Governor Cooper lifts the state of emergency order.

N.C.G.S. 90-21.132 of the Act defines the scope of health care providers and facilities protected. Not only does it protect health care providers who provide direct medical treatment to patients seeking care related to COVID-19, as was previously ordered by Governor Cooper pursuant to his April 8, 2020 executive order, it now specifically protects all health care providers and facilities who "provide care to any other individual who presents or otherwise seeks care at or from a health care facility or to a health care provider during the period of the COVID-19 emergency declaration." The Act broadly defines "health care provider" and "health care facility" as essentially all conceivable medical providers and entities providing health care in the state, including health care facility administrators, executives, officers, directors, supervisors, board members, trustees, or any other individual in a managerial role, and COVID-19 volunteer organizations.

N.C.G.S. § 90-21-133(a) sets forth the specific immunities under the Act and provides immunity from any civil liability for any harm or damages (to include economic and noneconomic damages) alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services. However, the immunity applies only to medical care meeting the following criteria:

1. The health care facility or provider is arranging for or providing health care services during or pursuant to the COVID-19 state of emergency;
2. The arrangement or provision of health care services is impacted, directly or indirectly, by decisions or activities in response to or as a result of the COVID-19 pandemic; and
3. The health care facility or provider is arranging for or providing health care services in good faith.

It is clear that the Act's intent is to protect all health care impacted by the COVID-19 pandemic, including health care to non-COVID-19 patients that is impacted by conditions created by the pandemic. This includes shortages of health care supplies and health care providers during the pandemic, as well as providers who provide good faith care during the pandemic, but may lack the necessary training and experience typically required under normal circumstances to render such care.

N.C.G.S. §§ 90-21-133(b) and (c) of the Act set forth limitations to the immunity provided under the Act. The immunity does not apply to acts of gross negligence, reckless misconduct, or intentional infliction of harm. However, acts, omissions, or decisions resulting from resource or staffing shortages are specifically carved out in the Act and are not to be considered gross negligence, reckless misconduct, or intentional infliction of harm.

Finally, in anticipation of a constitutionality challenge to the Act, N.C.G.S. §§ 90-21-134 of the Act includes a severability clause stating that the Act should be "liberally construed" and that its provisions are severable. In other words, in the event that any part of the Act is declared invalid by a court, the invalidity shall not affect any other parts of the Act not declared invalid by a court.

Senate Bill 704 issues several other directives that should be of particular interest to health care providers, including antibody testing, the strategic state stockpile of PPE and testing supplies, the provision of dental and dental hygiene service during the state of emergency, and providing temporary flexibility to the NC Medical Board and Nursing Board quality improvement requirements.

Section 3D.3 of the bill authorizes immunizing pharmacists, as defined in N.C.G.S. 90-85.3, to administer any immunization or vaccination for COVID-19 recommended by the Centers for Disease Control and Prevention (CDC) and approved by the North Carolina State Health Director. Notably, the bill provides pharmacists and the State Health Director immunity from any civil or criminal liability in connection with approving and administering COVID-19 immunizations or vaccines in compliance with N.C.G.S. 90-85.15B.

For more detailed information on the provisions of Senate Bill 704 signed into law by Governor Cooper on May 4, 2020, please see the link below.

https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v5.pdf

Please do not hesitate to contact Terence S. Reynolds at treynolds@shumaker.com or 704.945.2909, or Scott M. Stevenson at sstevenson@shumaker.com or 704.945.2180, if you have any questions.

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