COVID-19
Key Legal Issues

By **ELIZABETH HOGUE, ESQ.**

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Legal questions and issues related to COVID-19 are raised repeatedly in a variety of settings these days and will likely to continue to surface for a number of years. It is currently difficult to predict how many of these issues will be resolved. Below, however, are some ways that providers can weather legal storms they may face in the future.

First, while many rules have been relaxed at least temporarily, it seems clear that there is going to be a day of reckoning at some point in the future. Perhaps the clearest indication is the fact that the Centers for Medicare and Medicaid Services (CMS) recently proposed to sanction the Life Care facility in Kirkland, Washington, that experienced an early outbreak of COVID. Specifically, CMS proposes to fine the facility $611,000 and to decertify it from participation in the Medicare and Medicaid Programs and all other state and federal healthcare programs.

The lesson for providers is that they must be sure they are complying with current requirements. There is a lot of misinformation flying around and it's easy for providers to get tripped up. But providers must ensure that they are doing it right in order to avoid a day of legal reckoning that could threaten their businesses in the future.

When the state of emergency is over, it will be business as usual and providers will surely be held responsible for their actions. Don't pay the price retrospectively!

In addition, legislators and regulators have a great deal of good will right now for providers. They are generally in "helping mode" as opposed to "enforcement mode." Provider must be careful not to waste the current environment of good will by failing to comply with applicable requirements. They must be especially carefully to avoid situations of really egregious behavior, especially toward patients. Since the usual mode of regulators is enforcement, it won't take much for them to snap back into that mode if they conclude that providers' conduct warrants it.

For the time being, providers have a "boatload" of goodwill from regulators, enforcers and lawmakers. But if they start get-

ting information about patients being adversely affected by providers' actions, their goodwill will disappear quickly. Don't squander it!

In a recent webinar, Michael Giudicissi, CEO of Power Shot Training, Inc; said something that is very relevant to how providers weather the storm of legal issues. Here's what he said: "In trying times, what you do becomes who you are." In these times, what providers do will be remembered by legislators, regulators, enforcers, patients and their families, referral sources and employees. What providers do in addition to compliance with applicable requirements will likely govern whether they later face significant legal issues. So do the right things! Make your Mama proud!

Finally, providers' concern for both patients and employees knows no bounds. Providers' obligations to both are paramount in the pandemic.

With regard to patients, providers must be sure that patients receive the care they need. Anecdotally, recent actions of some providers have raised issues of abandonment of patients.

Time to review information about liability for abandonment of patients in a world afflicted with coronavirus!

First, a number of rules applicable to providers have been relaxed in recent days. There are rules, however, that still must be followed.

It's clear that the well-being of patients remains paramount, but it's also clear that staff members must be protected. Staff members' fears and concerns are surely legitimate. Nonetheless, when services are discontinued, providers must take great care to make sure that patients are not adversely affected as a result.

PATIENT ABANDONMENT

Providers are at risk for legal liability when they terminate services to patients. One type of liability that providers may incur is liability for abandonment of patients. Providers often speak of abandonment as though it is equiv-

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alent to termination of services. On the contrary, patients who want to hold providers liable for abandonment must show that:

1. **Providers unilaterally terminated the provider/patient relationship**
2. **Without reasonable notice**
3. **When further action was needed**

Patients who fail to prove any one of these requirements are likely to lose their lawsuits against providers.

As indicated above, abandonment requires unilateral termination of the relationship between the patient and the provider by the provider. Patients who terminate relationships with providers, therefore, lose the ability to bring a successful claim for this type of liability. Some patients and their families don't want visits from home care providers right now because they are worried about contracting the coronavirus from them. When patients terminate relationships with providers, it is clear that providers have no liability.

The second requirement of abandonment means that providers who give patients reasonable notice prior to termination of services will not be liable for abandonment. The key question is: what is "reasonable" notice? Providers are advised to view what is reasonable on an individualized basis.

Providers must conduct a case conference to determine a reasonable amount of notice to patients. Participants in the case conference must take into account all relevant factors when making decisions about reasonable notice periods. They should, for example, consider availability of staff, what patients want, the clinical condition of patients and their mental status, availability of alternative sources of care, etc. The results of case conferences must be documented.

A reasonable period of time, unless a specified period of notice is mandated by state statutes or regulations, is probably between one and three days for most patients. After staff members agree upon a reasonable notice period, patients and attending physicians should receive verbal and written notice. Written notices should be hand-delivered to patients' homes. Although it is desirable, it is unnecessary to obtain a signature verifying receipt.

Finally, providers can defeat claims of abandonment if patients for whom services are discontinued need no further attention. How do providers know whether further attention is needed? Is this requirement as subjective as it appears?

On the contrary, judges are likely to make retrospective determinations about whether further attention was needed. The basis for such determinations will probably be whether patients were injured as a result of termination. In other words, the law is likely to conclude that no further attention was needed, so long as patients are not injured as a result of termination of services.

What kind of injury must patients prove? Can patients who attempt to prove emotional damage only as a result of termination of services by case managers win lawsuits?

The "good news" for providers is that courts generally require proof of physical injury or damage before they will find providers liable for abandonment. Providers must, therefore, take appropriate steps to make certain that patients are not physically injured as a result of termination of services. In some instances, appropriate action may include sending an ambulance to take the patient to the nearest hospital. If patients refuse transport by ambulance, patients will have been contributorily negligent or will have assumed the risk so that providers are likely to avoid liability.

Now is the time for providers to re-educate themselves about the possibility of liability for abandonment, and to take positive steps to prevent this type of legal liability.

Concern for healthcare workers in every setting knows no bounds! Providers' imperative is clear: everything possible must be done to keep them safe. Two very insightful physicians, Atul Gawande and Siddartha Mukherjee, have published important articles about protecting healthcare workers as follows:

"Keeping the Coronavirus from Infecting Health-Care Workers" by Atul Gawande, The New Yorker, March 21, 2020.

"How Does the Coronavirus Behave Inside a Patient?" by Siddhartha Mukherjee, The New Yorker, March 26, 2020.

Dr. Gawande points out that 1,300 healthcare workers became infected in Wuhan and that the likelihood of infection was more than three (3) times as high as the general population. But Dr. Gawande also points out that transmission to healthcare workers seems to occur primarily through sustained exposure in the absence of basic protection or through the lack of hand hygiene after contact with secretions. He concludes that: "For those who cannot stay home the lesson is that it is feasible to work and stay coronavirus-free, despite the risks."

Dr. Mukherjee asks these important questions: Does a larger viral "dose" result in more severe disease? Can the severity of Covid-19 disease be correlated with the amount of virus to which patients are initially exposed? He says that researchers must begin to address these questions.

OSHA

In the meanwhile, providers must fulfill their obligations to caregivers with regard to safety. The Occupational Safety and Health Administration (OSHA), for example, has established a general mandate to employers to provide a safe working environment for their employees. So, providers may face OSHA violations when workers can prove that conditions are unsafe.

DUTY OF REASONABLE CARE

Likewise, providers owe their employees a duty of reasonable care. That is, they are responsible to take reasonable precautions to protect their employees from harm. This obligation may be far easier to talk about than to fulfill with regard to COVID-19, especially since there is still a great deal that we do not know about transmission of the virus, as Drs. Gawande and Mukherjee point out in their articles. A key question regarding this obligation is: what is reasonable?

Reasonableness is determined by what other providers are doing across the country. In other words, whether providers are taking reasonable precautions to protect workers will be judged by comparison to what others throughout the country would have done under the same or similar circumstances. This definition of reasonableness poses particular difficulty for providers. There is a lack of data or even anecdotal information about how other providers are dealing with protecting workers from harm from COVID-19.

Failure of agencies to fulfill their obligation of reasonable care can be in the form of: 1) acts or errors, and 2) omissions. In other words, providers must show that nothing happened to harm workers because of something that the providers did or should have done.

Providers will be found to have caused injury to employees if the harm to employees would not have occurred "but for" an act or omission by employers. Courts generally require proof that employees were injured physically in order to compensate them for their injuries. It is likely to be very difficult for caregivers to prove that they contracted COVID-19 on the job, as opposed to exposure outside of their work environments.

Nonetheless, the obligation of all providers is clear. All steps must be taken to protect caregivers.

These pandemic days are hard indeed for both providers and patients. Nonetheless, it's important to pay attention to legal issues now in order to avoid potential significant issues in the future.

PATIENT ABANDONMENT: RISK FOR LIABILITY

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