

**NEW YORK'S
EMERGENCY DISASTER TREATMENT PROTECTION ACT
ARTICLE 30-D OF PUBLIC HEALTH LAW
SUMMARY**

On April 2, 2020, New York passed legislation, entitled "Emergency Disaster Treatment Protection Act," (the "Act") that provides comprehensive immunity from liability to health care professionals and health care facilities. Previously, New York's Governor issued Executive Orders that provided for limited liability for thirty-day periods. The Act is retroactive to cover acts or omissions that occurred on or after March 7, 2020, the date of the COVID-19 emergency declaration in New York State, through the expiration date of that declaration. The stated purpose of the Act, which took effect immediately, is to promote the public health, safety, and welfare of all citizens by broadly protecting the health care facilities and health care professionals in New York State from liability that may result during the public health emergency.

The most significant difference in the Act from the Executive Orders is that the health care facilities, along with volunteer organizations and an expanded class of individuals, are protected from liability. The Act also provides immunity protection from criminal liability in addition to civil liability. Finally, the Act clarifies that the exemption for willful or intentional misconduct does not include acts, omissions, or decisions that result from a resource or staffing shortage. This language will protect professionals and facilities against actions and decisions in rationing medical devices and services, among others.

WHO IS PROTECTED WITH IMMUNITY?

Health care facilities and health care professionals (volunteers, agents, contractors, employees, or others), as defined, are protected.

1. The following list of individuals, who are licensed or otherwise authorized under Title 8 of Education Law:

- Physicians
- Nurse Practitioners
- Pharmacists
- Mental Health Practitioners
- Clinical Laboratory Technologists
- Histological Technicians
- Physician Assistants
- Registered Professional Nurses
- Licensed Midwives
- Respiratory Therapists
- Cytotechnologists
- Specialist Assistants
- Licensed Practical Nurses
- Psychologists
- Respiratory Technicians
- Clinical Laboratory Technicians

2. In addition to those licensed in New York, immunity is also provided to any individual who provides health care services within the scope of authority permitted by a COVID-19 emergency rule. This class of individuals includes:

- Physicians – Licensed to practice outside of New York (including Canada) or Physicians without current registration (such as retired) (Executive Order Nos. 202.5¹; 202.18²)
- Registered Professional Nurses– Licensed to practice outside of New York (including Canada); or without current registration (EO Nos. 202.5; 202.10; 202.18)
- Respiratory Therapists – Licensed to practice outside of New York (EO No. 202.10)
- Students of any licensed healthcare profession that volunteer without an affiliation agreement (EO No. 202.10)
- Unlicensed Physicians – Graduates of foreign medical schools with completion of one year of graduate medical education (EO No. 202.10)
- Physician Assistants– Licensed to practice outside of New York (including Canada) or without current registration or without physician supervision (EO Nos. 202.5; 202.10³; 202.18)
- Licensed Practical Nurses – Licensed to practice outside of New York (including Canada) or without current registration (EO Nos. 202.5; 202.10; 202.18)
- Nursing graduates of RN and LPN programs employed for 180 days with supervision of RN (EO No. 202.11)
- Advanced Practice Registered Nurse (e.g. CRNA) – without physician supervision (EO No. 202.10)
- Clinical nurse specialists, specialist assistants, and substantially similar titles licensed outside of New York (including Canada) (EO No. 202.18)
- Nurse Practitioners – Licensed outside of New York (including Canada) or without current registration or without collaboration agreements/relationships (EO Nos. 202.5; 202.10; 202.18)
- Radiologic Technologists – Licensed to practice outside of New York (including Canada) or without current registration (EO No. 202.10; 202.18)
- Midwives – Licensed to practice outside of New York (including Canada) (EO No. 202.11)
- Specialist Assistant – without physician supervision (EO No. 202.10)
- Licensed Master Social Workers, licensed clinical social workers, and substantially similar titles outside of New York

¹ Executive Order 202.05 was issued on March 18, 2020. The suspension and modification of the statutes and regulations therein are effective March 18, 2020 through April 17, 2020. See New York State, Executive Orders from the Office of the Governor,

https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202_5.pdf.

² https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.18.pdf

³ Executive Order 202.10 was issued on March 23, 2020. The suspension and modification of the statutes and regulations therein are effective from March 23, 2020 through April 22, 2020. See New York State, Executive Orders from the Office of the Governor,

https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.10.pdf.

- Graduates of a qualified nurse practitioner education program employed in a hospital or nursing home for 180 days immediately following completion of program so long as application for certification has been filed (EO 202.18)
- Midwives, perfusionists, clinical laboratory technologists, cytotechnologists, certified clinical laboratory technicians, and certified histological technicians, who have an unencumbered NY license but not currently registered in New York (EO 202.18)
- Medical School Graduates of 2020 --- Medical students who have been accepted into a residency program and are under a licensed physician's supervision (EO No. 202.14⁵)
- Mental Health Counselors, Marriage and Family Therapists, Creative Arts Therapists and Psychanalysts licensed outside of New York State (EO No. 202.15)
- Graduates of clinical laboratory technology and clinical laboratory technician education programs employed to practice for 180 days following completion of program so long as application for certification has been filed (EO 202.18).
- Licensed clinical social workers, licensed master social workers, podiatrists, physical therapists, and physical therapist assistants, who have an unencumbered NY license but not currently registered in New York (EO 202.18)
- Medical School Graduates of 2020 from an accredited medical program located in New York State without a license to practice and under the supervision of a licensed and registered physician in New York. (EO No. 202.15⁶)
- (including Canada) (EO No. 202.18)
- Specialist assistants, respiratory therapists, respiratory therapist technicians, pharmacists, clinical nurse specialists, and, who have an unencumbered NY license but not currently registered in New York (EO 202.18)
- Mental health counselors, marriage and family therapists, creative arts therapists, psychoanalysts and psychologists, who have an unencumbered NY license but not currently registered in New York (EO 202.18)⁴
- Licensed Respiratory Therapist Technicians licensed outside of New York (EO No. 202.15)

⁴ EO 202.18 also provides that dentists, dental hygienists and registered dental assistants that have unencumbered license in New York but not currently registered may practice. Emergency Orders are incorporated into the EDTPA by reference, providing immunity to these classes of professionals. This is likely an error in the executive order because the EDTPA does not provide immunity to dental professionals during the state of emergency. In any event, the retired dental professionals mentioned may practice, likely with immunity, even though currently registered dental professionals do not have immunity.

⁵ This executive order applied to graduates from an academic medical program accredited by a medical education accrediting agency for medical education by the Liaison Committee on Medical Education or the American Osteopathic Association. https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.14_final.pdf

⁶ https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.15.pdf

3. Other immune healthcare workers, covered by the Act, include the following:

- Nursing Attendants or Certified Nurse Aides (or trainee in those programs)
- Licensed or certified Emergency Medical Service First Responders
- Emergency Medical Technicians
- Advanced Emergency Medical Technicians
- Home Care Services Workers – any person engaged in or applying to become engaged in providing home health aide services.
- Health Care Facilities: Administrator; Executive; Supervisor; Board Member; Trustee; or Any other person responsible for directing, supervising, or managing a health care facility

4. Health Care Facilities:

- Hospitals
- Nursing Homes
- Facilities Under Article 28 of the Public Health Law
- Facilities Under Article 16 of the Mental Hygiene Law
- Facilities Under Article 31 of the Mental Hygiene Law
- Facilities created under a COVID-19 Emergency Rule

5. Volunteer Organizations, which includes any organization, company, or institution that has made its facility or facilities available to support the state's response and activities under the COVID-19 emergency declaration and in accordance with any applicable COVID-19 emergency rule.

WHAT DOES THE IMMUNITY COVER?

- Health care facilities and health care professionals are immune from any civil or criminal liability, meaning that they are not liable for any harm or 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," if:
 - the health care services being arranged or provided are pursuant to a COVID-19 emergency rule or otherwise in accordance with the law;
 - the act or omission occurs while arranging or providing health care services, and the treatment of the patient is impacted by the health care facility's (or professional's) decisions and activities in response to or as a

- result of the COVID-19 outbreak and in support of the state's directives; and
 - the health care facility (or professional) acted in good faith
- **"Health care services"** means services provided by a health care facility (or professional) provided at any location that relate to:
 - The diagnosis, prevention, or treatment of COVID-19; or
 - The assessment or care of an individual with a confirmed or suspected case of COVID-19; or
 - The care of any other individual who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration.
 - **"Volunteer Organizations"** are immune from civil or criminal liability for any harm or damages (irrespective of the cause) occurring at its facility arising from the state's response under the COVID-19 emergency declaration and in accordance with COVID-19 emergency rules.

WHAT IS EXEMPTED FROM THESE IMMUNITIES?

- Immunity for health care facilities and health care professionals does not apply if the harm or damages were caused by an act or omission constituting (1) willful or intentional criminal misconduct, (2) gross negligence, (3) reckless misconduct, or (4) intentional infliction of harm, by the health care facility or professional.
 - Acts, omissions, or decisions that result from a shortage of resources or staffing shall not be considered willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm.
- Immunity for Volunteer Organizations does not apply if it is established that such harm or damages were caused by the (1) willful or intentional criminal misconduct, (2) gross negligence, (3) reckless misconduct, or (4) intentional infliction of harm, by the volunteer organization.

WHEN IS THIS ACT IN EFFECT?

The Act became effective immediately, and it applies to acts and omissions that occurred on or after March 7, 2020, the date of the New York State Emergency Disaster Declaration for COVID-19, through the expiration date of that declaration.

If you have any questions regarding the Act or its applications, please contact Mia D. VanAuken, Esq, at 518-786-2880 or mvanauken@fakslaw.com.

