Commonwealth of Virginia
Office of the Governor

Executive Order

NUMBER SIXTY (2020)

CLARIFICATION OF CERTAIN IMMUNITY FROM LIABILITY FOR HEALTHCARE PROVIDERS IN RESPONSE TO NOVEL CORONAVIRUS (COVID-19)

Importance of the Issue

The Commonwealth of Virginia continues to respond to the COVID-19 pandemic. The number of confirmed cases, hospitalizations, and persons under investigation in Virginia has increased substantially. As testing increases, it is highly likely that these numbers will continue to rise. Hospitals and nursing homes across the Commonwealth are reporting large numbers of patients presenting with COVID-19 symptoms, which is putting significant stress on these facilities, as they were already dealing with a more severe seasonal influenza than usual. Healthcare providers are experiencing critical shortages of personal protective equipment (PPE) and other supplies. In some cases, they are being required to reuse PPE where possible and appropriate. Healthcare providers are not able to quickly resupply these critical resources due to severe supply chain disruptions as a result of increased equipment use in the worldwide COVID-19 response. In addition, staffing levels at hospitals are often strained by the inability to transfer patients with COVID-19 to other sites of care such as assisted living facilities, hospice facilities, and nursing homes because of the need to contain the spread of the virus. All of these difficulties are created by the effects of COVID-19 and present less than optimal conditions to deliver the healthcare indicated by conventional standards of care.

Response to the COVID-19 disaster will require both public and private healthcare providers and other persons to deliver care using personnel, supplies, and equipment in ways that would not be undertaken in conventional practices. Examples could include the need to use a single ventilator for multiple patients at the same time, reuse of PPE, and withholding healthcare services in certain situations. It is in the public interest to afford healthcare providers involved in the delivery of healthcare impacted by COVID-19 with adequate protection against liability for good faith actions or omissions taken in their efforts to combat this health emergency.

Sections 8.01-225.01 and 8.01-225.02 of the *Code of Virginia* provide certain liability protection to healthcare providers during a state of emergency.

Section 8.01-225.01 provides in relevant part:

> A. In the absence of gross negligence or willful misconduct, any health care provider who responds to a disaster by delivering health care to persons injured in such disaster shall be immune from civil liability for any injury or wrongful death arising from abandonment by such health care provider of any person to whom such health care provider owes a duty to provide health care when (i) a state or local emergency has been or is subsequently declared; and (ii) the provider was unable to provide the requisite health care to the person to whom he owed such duty of care as a result of the provider's voluntary or mandatory response to the relevant disaster.

Section 8.01-225.02 in relevant part provides:

> In the absence of gross negligence or willful misconduct, any health care provider who responds to a disaster shall not be liable for any injury or wrongful death of any person arising from the delivery or withholding of health care when (i) a state or local emergency has been or is subsequently declared in response to such disaster, and (ii) the emergency and subsequent conditions caused a lack of resources, attributable to the disaster, rendering the health care provider unable to provide the level or manner of care that otherwise would have been required in the absence of the emergency and which resulted in the injury or wrongful death at issue.

It is apparent that in enacting these provisions, the General Assembly intended to afford healthcare providers immunity from certain liability in exactly the circumstances presented by the COVID-19 health crisis. And so, is it imperative that it is clear that the liability protections in these provisions are meant to protect healthcare providers providing healthcare in response to the COVID-19 health emergency.

Directive

Therefore, by virtue of the authority vested in me by Article V, Section 7 of the Constitution of Virginia, by § 44-146.17 of the *Code of Virginia* and in furtherance of Executive Order No. 51, I clarify the following with respect to my executive actions and §§ 8.01-225.01 and 8.01-225.02 of the *Code of Virginia*:

1. COVID-19 is a "communicable disease of public health threat" as defined in § 44-146.16 of the *Code of Virginia* that constitutes a "disaster" as defined in § 44-146.16 of the *Code of Virginia*.

2. Executive Order No. 51 declares a state emergency in response to the COVID-19 disaster.

3. "Responds to a disaster" includes but is not limited to, pursuant to Order of Public Health Emergency Two as amended, temporary withholding of the provision of procedures, consultations or surgeries performed in an inpatient or outpatient surgical hospital licensed under 12 Va. Admin. Code § 5-410, free-standing emergency department or endoscopy center, physicians' office, or dental, orthodontic, oral surgeon, or endodontic offices that require PPE, the delay of which was not anticipated to cause harm to the patient by negatively affecting the patient's health outcomes, or leading to disability or death.

4. "Emergency and subsequent conditions caused a lack of resources, attributable to the disaster, rendering the health care provider unable to provide the level or manner of care that otherwise would have been required in the absence of the emergency" shall be deemed to include but is not limited to: (i) insufficient availability of PPE, ventilators, or other drugs, blood products, supplies or equipment; (ii) insufficient availability of trained staff; (iii) having licensed healthcare professionals deliver care that, while included in the scope of their licensure, exceeds the scope of their credentials at the hospital or other health care facility at which they deliver services or exceeds the scope of the services that they normally provide; (iv) implementation or execution of triage protocols or scarce resource allocation policies necessitated by healthcare provider declaration of crisis standards of care; and (v) using supplies or equipment in innovative ways that are different from the way that these supplies and equipment are normally used.

5. Nothing in this Executive Order shall affect the right or ability to claim immunity from liability for any cause of action under any other federal or state law, regulation, rule, or order or any theory of common law immunity nor the right of any person to receive benefits to which he would otherwise be entitled under law nor the right of any such person to receive any benefits or compensation under any act of the General Assembly or United States Congress.

Effective Date of this Executive Order

This Executive Order shall be effective until the expiration of Executive Order 51 unless sooner amended or rescinded.

Given under my hand and under the Seal of the Commonwealth of Virginia, this 28th day of April, 2020.

Ralph S. Northam, Governor

Attest:

Kelly Thomasson, Secretary of the Commonwealth