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Practice Group:  
[Health Care](#)

## COVID-19: Nursing Homes and Long-Term Care Facilities: Snapshot of 90 Days After the First Reported Outbreak

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We are around 90 days from when the first reported case of COVID-19 hit a nursing home in the state of Washington.<sup>1</sup> Since that time, the nursing home industry has continued to be hit hard by the virus throughout the country. According to data from a compilation of recent state reports by Kaiser Family Foundation, long-term care (LTC) facilities represent approximately 43 percent of the COVID-19 deaths in 40 states.<sup>2</sup> On March 30, the Centers for Disease Control and Prevention (CDC) estimated that over 400 nursing homes had been impacted.<sup>3</sup> By April 13, it was being reported that there were 2,300 facilities with cases in 37 states.<sup>4</sup> A May 17, 2020 analysis found that approximately one in four nursing homes reported a case of COVID-19.<sup>5</sup> As of May 28, 2020, it is being reported that in the 39 reporting states there have been almost 40,000 deaths in LTC facilities.<sup>6</sup>

In response to the crisis nursing homes are facing, the U.S. Department of Health and Human Services (HHS) recently announced that it had begun distributing almost \$4.9 billion to skilled nursing facilities (SNFs) to help them address critical needs related to COVID-19.<sup>7</sup> Such needs may include addressing labor shortages, increasing testing capacity and purchasing additional personal protective equipment and other necessary items.<sup>8</sup> HHS indicated that SNFs will receive a fixed distribution of \$50,000, plus a distribution of \$2,500

<sup>1</sup> Temet M. McMichael et al., COVID-19 in a Long-Term Care Facility — King County, Washington, February 27–March 9, 2020, *Morbidity and Mortality Weekly Report*, CDC (Mar. 26, 2020), [https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e1.htm?s\\_cid=mm6912e1\\_w](https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e1.htm?s_cid=mm6912e1_w). (A patient at Life Care Center of Kirkland tested positive on 28 February 2020, although onset dates for individuals at the facility ranged from 16 February to 5 March).

<sup>2</sup> KAISER FAMILY FOUND., *State Data and Policy Actions to Address Coronavirus* (May 28, 2020), <https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/> (The authors note that the definition "of "long-term care facility" differs by state, but data reflect a combination of nursing facilities, assisted living facilities, adult care centers, intermediate care facilities, and/or other long-term care facilities.").

<sup>3</sup> Laura Strickler, *Number of long-term care facilities with COVID-19 cases tops 400 nationwide*, NBC NEWS (Mar. 30, 2020), <https://www.nbcnews.com/health/health-care/number-long-term-care-facilities-covid-19-cases-tops-400-n1172516>. See also Joanne Kenen, Rachel Roubein & Susannah Luthi, *How public health failed nursing homes*, POLITICO (Apr. 6, 2020), <https://www.politico.com/news/2020/04/06/public-health-failed-nursing-homes-167372>.

<sup>4</sup> Marisa Kwiatkowski & Tricia L. Nadolny, *At least 2,300 nursing homes have coronavirus cases — and the reality is likely much worse*, USA TODAY (Apr. 13, 2020), <https://www.usatoday.com/story/news/2020/04/13/coronavirus-nursing-homes-2-300-facilities-report-positive-cases/2978662001>.

<sup>5</sup> Debbie Cenziper et al., *Major nursing home chain violated federal standards meant to stop spread of disease even after start of covid-19, records show*, WASH. POST (May 17, 2020), [https://www.washingtonpost.com/investigations/major-nursing-home-chain-violated-patient-care-infection-control-standards-before--and-after--pandemic-started-records-show/2020/05/16/f407c092-90b1-11ea-a0bc-4e9ad4866d21\\_story.html](https://www.washingtonpost.com/investigations/major-nursing-home-chain-violated-patient-care-infection-control-standards-before--and-after--pandemic-started-records-show/2020/05/16/f407c092-90b1-11ea-a0bc-4e9ad4866d21_story.html).

<sup>6</sup> *Supra*, note 2.

<sup>7</sup> Press Release, Ctrs. for Medicare & Medicaid Servs., *HHS Announces Nearly \$4.9 Billion Distribution to Nursing Facilities Impacted by COVID-19* (May 22, 2020) <https://www.hhs.gov/about/news/2020/05/22/hhs-announces-nearly-4.9-billion-distribution-to-nursing-facilities-impacted-by-covid19.html>.

<sup>8</sup> *Id.*

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per bed, noting that all certified SNFs with six or more certified beds are eligible for funding.<sup>9</sup> This alert is meant to provide a snapshot of the nursing home and LTC industry 90 days after its first reported COVID-19 outbreak. Key takeaways in the areas of reporting, surveying, and liability include an information tracker, revised policies, training, enhanced documentation, self-assessments, and mock surveys. These takeaways will be described more fully below.

K&L Gates has previously issued alerts on nursing home and LTC guidance from the Center for Medicare and Medicaid Services (CMS), the CDC, and other entities. Details about prior guidance can be found at [COVID-19: UPDATED Nursing and Long-Term Care Facilities – Coronavirus \(COVID-19\) Considerations](#).

### Statistics

The impact of COVID-19 has varied by state, but the theme is consistent. Nursing homes represent a significant amount of the cases in each state. In at least 26 states, half or more of the total COVID-19 deaths were in LTC facilities.<sup>10</sup> In both Minnesota and Rhode Island, LTC facility deaths account for 81 percent of COVID-19 deaths statewide.<sup>11</sup> In Florida, a state with a significant number of senior citizens, it was reported that 1,228 people at LTC facilities have died.<sup>12</sup> Although, the total number of LTC Facility deaths in the state hovers around 50 percent, over the course of a week up to “seven-in-10 Florida deaths” are in LTC facilities.<sup>13</sup> States have responded differently with respect to the manner in which they have publicly shared data concerning nursing home cases and deaths.<sup>14</sup> As noted in our previous alert, senators have called for uniformity in both the format and timeliness of the data being reported concerning nursing homes.<sup>15</sup>

### Reporting

In an effort to support surveillance of COVID-19 cases, CMS has revised its procedures to establish explicit reporting requirements for confirmed or suspected cases of COVID-19 in an Interim Final Rule published May 8, 2020.<sup>16</sup> Specifically, CMS added a new provision to require facilities to electronically report information about COVID-19 in a standardized format specified by the United States Secretary of Health and Human Services (the “Secretary”).<sup>17</sup> The report includes, but is not limited to, information on:

<sup>9</sup> *Id.*

<sup>10</sup> *See supra*, note 2.

<sup>11</sup> *Id.*

<sup>12</sup> Carol Marbin Miller & Ben Wieder, *As Florida reopens, the deaths quietly keep piling up in nursing homes*, MIAMI HERALD (May 31, 2020), <https://www.msn.com/en-us/news/us/as-florida-reopens-the-deaths-quietly-keep-piling-up-in-nursing-homes/ar-BB14Qelu?ocid=hplocalnews> (There have been questions concerning the overall reporting of Florida statistics, both by medical examiners and reporters. *See, e.g.*, Greg Allen, *Medical Professionals In Florida Criticize Governor For A Lack Of Transparency*, NPR (May 15, 2020) <https://www.npr.org/2020/05/15/857104962/medical-professionals-in-florida-criticize-governor-for-a-lack-of-transparency>.)

<sup>13</sup> *Id.*

<sup>14</sup> Joel Jacobs et al., *Number of nursing homes with publicly reported cases of the coronavirus soars*, WASH. POST (Apr., 29, 2020), [https://www.washingtonpost.com/investigations/number-of-nursing-homes-with-publicly-reported-cases-of-the-coronavirus-soars/2020/04/29/7375941c-898c-11ea-ac8a-fe9b8088e101\\_story.html](https://www.washingtonpost.com/investigations/number-of-nursing-homes-with-publicly-reported-cases-of-the-coronavirus-soars/2020/04/29/7375941c-898c-11ea-ac8a-fe9b8088e101_story.html).

<sup>15</sup> Laura Strickler, *CDC pressured to start keeping a formal tally of nursing homes with coronavirus cases*, NBC NEWS (Apr. 6, 2020), <https://www.nbcnews.com/health/health-news/cdc-weighs-keeping-formal-tally-how-many-nursing-homes-have-n1177801>.

<sup>16</sup> 85 Fed. Reg. 27,550, 27,601 (May 8, 2020), <https://www.federalregister.gov/d/2020-09608/p-562>.

<sup>17</sup> *Id.* (to be codified at 42 C.F.R. § 483.80(g)(1)).

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- suspected and confirmed COVID-19 infections among residents and staff, including residents previously treated for COVID-19;
- total deaths and COVID-19 deaths among residents and staff;
- personal protective equipment and hand hygiene supplies in the facility;
- ventilator capacity and supplies available in the facility; resident beds, and census;
- access to COVID-19 testing while the resident is in the facility;
- staffing shortages; and
- other information specified by the Secretary.<sup>18</sup>

Relatedly, facilities are now required to report this same information to the CDC's National Healthcare Safety Network at a regular interval but not less than weekly.<sup>19</sup> CMS noted that this information may be publicly reported in order to help protect the health of residents, personnel, and the public.<sup>20</sup>

CMS added a new provision to require facilities to inform residents, their representatives, and families of those residing in facilities of confirmed or suspected COVID-19 cases in the facility among residents and staff.<sup>21</sup> More specifically, facilities must inform residents, their representatives, and families by 5:00 p.m. the next calendar day following the occurrence of either (i) a single confirmed infection of COVID-19, or (ii) three or more residents or staff with new onset of respiratory symptoms that occur within 72 hours of each other.<sup>22</sup> Also, the new provision requires facilities to provide cumulative updates to residents, their representatives, and families under certain circumstances and timeframes.<sup>23</sup> Facilities must include information on mitigating actions implemented to prevent or reduce the risk of transmission, including if normal operations in the nursing home will be altered, such as restrictions or limitations to visitation or group activities.<sup>24</sup>

In a Memorandum to State Survey Agency Directors, CMS noted that the failure of a facility to report the COVID-19 information to the CDC as required by 42 C.F.R. § 483.80(g)(1)-(2) would result in a deficiency citation and the imposition of a civil monetary penalty.<sup>25</sup> Furthermore, CMS detailed that it would extend a two-week grace period to facilities to begin reporting cases to the CDC.<sup>26</sup> This grace period ended on May 24, 2020.<sup>27</sup> If a facility does not report the required information by the third week, ending May 31, 2020, CMS indicated that the facility would receive a warning letter.<sup>28</sup> Facilities that have not started reporting by the fourth week, ending June 7, 2020, will be subject to a \$1,000 penalty per day for the

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (to be codified at 42 C.F.R. § 483.80(g)(2)).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (to be codified at 42 C.F.R. § 483.80(g)(3)).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 27,602.

<sup>24</sup> *Id.*

<sup>25</sup> Memorandum from Ctrs. for Medicare and Medicaid Servs. to State Survey Agency Directors, Ref: QSO-20-29-NH, (May 6, 2020), <https://www.cms.gov/files/document/qso-20-29-nh.pdf>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

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failure to report that week.<sup>29</sup> Subsequent weeks of noncompliance will result in additional penalties increased by \$500.<sup>30</sup>

### Surveying

CMS has allocated approximately \$81 million dollars in funding from the CARES Act for State Survey Agencies.<sup>31</sup> Survey Agencies who receive funds may use them through September 30, 2023.<sup>32</sup> CMS intends for the funds to be used “to complete focused infection control survey for nursing homes by July 2020, increase complaint surveys based on COVID-19 trend data reported by nursing homes to the Centers for Disease Control and Prevention (CDC), and perform “reopening” surveys of facilities with previous COVID-19 outbreaks.”<sup>33</sup>

CMS suspended nonemergency survey activities at health care facilities on March 4, 2020.<sup>34</sup> A new targeted plan for inspections was released on March 23, 2020.<sup>35</sup> With this plan, CMS prioritized conducting targeted survey inspections for infection control and complaints, as well as facility reported incidents involving “Immediate Jeopardy” situations.<sup>36</sup> However, on May 18, 2020, CMS recommended a three-phase approach to reinstating surveying that aligns with the broader “Opening Up America Again” guidance that was released by the White House.<sup>37</sup> The first and current phase is “Significant Mitigation.”<sup>38</sup> During this phase, facilities are at “their highest level of vigilance regardless of transmission within their communities.”<sup>39</sup> While in the first phase, CMS recommends performing the following surveys:

- Investigation of complaints alleging Immediate Jeopardy and revisit surveys to confirm the facility has removed any Immediate Jeopardy findings;
- Focused infection control surveys;
- Initial certification surveys; and
- Surveys of state-based priorities.<sup>40</sup>

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Ctrs. for Medicare & Medicaid Servs., *CARES Act Financial Guidance to State Survey Agencies* (Apr. 30, 2020), <https://www.cms.gov/files/document/cares-act-financial-guidance-state-survey-agencies.pdf>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Memorandum from the Ctrs. for Medicare & Medicaid Servs. to State Survey Agency Directors, Ref: QSO-20-12-All, (Mar. 4, 2020), <https://www.cms.gov/files/document/qso-20-12-all.pdf>.

<sup>35</sup> Press Release, Ctrs. for Medicare & Medicaid Servs., *CMS Announces Findings at Kirkland Nursing Home and New Targeted Plan for Healthcare Facility Inspections in light of COVID-19* (Mar. 23, 2020), <https://www.cms.gov/newsroom/press-releases/cms-announces-findings-kirkland-nursing-home-and-new-targeted-plan-healthcare-facility-inspections>.

<sup>36</sup> *Id.*

<sup>37</sup> Memorandum from the Ctrs. for Medicare & Medicaid Servs. to State Survey Agency Directors, Ref: QSO-20-30-NH, (May 18, 2020), <https://www.cms.gov/files/document/nursing-home-reopening-recommendations-state-and-local-officials.pdf>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

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The second recommended phase should be entered when the community has no rebound in cases after 14 days in phase one.<sup>41</sup> Other criteria for entering phase two includes:

- No new nursing home onset COVID-19 cases in the nursing home for 14 days;
- No staff shortages at the facility;
- Adequate supplies of personal protective equipment and essential cleaning and disinfection supplies to care for residents is available;
- Adequate access to testing for COVID-19 is available; and
- Referral hospital(s) have bed capacity in wards and intensive care units.<sup>42</sup>

As an expansion to the surveys conducted in the first phase, “complaints alleging Immediate Jeopardy or actual harm to residents” should be investigated in phase two.<sup>43</sup> During the third phase, normal survey operations should resume, including:

- All complaint and revisit surveys required to identify and resolve any noncompliance with health and safety requirements;
- Standard (recertification) surveys and revisits;
- Focused infection control surveys; and
- State-based priorities (e.g., localized “hot spots,” “strike” teams, etc.).<sup>44</sup>

The third phase should be entered when phase two criteria are met and there “have been no new, nursing home onset COVID cases in the nursing home for 28 days (through phases 1 and 2).”<sup>45</sup> The CDC has released supplemental guidance with additional detail of considerations for nursing homes at each stage of reopening.<sup>46</sup> This guidance includes information on social distancing, visitor restrictions, and personnel monitoring and restrictions.<sup>47</sup>

In addition to providing guidance on the type of surveys that should be conducted in each phase, CMS offered advice on the prioritization of facilities that should receive surveys starting in phase two.<sup>48</sup> For instance, complaint investigations and Facility-Related incidents should consider the following prioritization criteria:

1. Abuse or neglect
2. Infection control, including lack of notifying families and their representatives of COVID-19 information (per new requirements at 42 CF.R. § 483.80(g)(3))
3. Violations of transfer or discharge requirements
4. Insufficient staffing or competency

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Ctrs. for Disease Control & Prevention, *Nursing Home and Long-Term Care Facilities* (updated May 19, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

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### 5. Other quality of care issues (e.g., falls, pressure ulcers, etc.)<sup>49</sup>

CMS also indicates that with factors such as a trend in allegations or if the state receives corroborating information regarding the allegation, the state “may prioritize a facility for a survey higher than a facility that has met the above criteria.”<sup>50</sup> Additionally for standard recertification surveys, the following criteria should be considered when prioritizing facilities:

1. Facilities that have had a significant number of COVID-19 positive cases
2. Special Focus Facilities
3. Special Focus Facility candidates
4. Facilities that are overdue for a standard survey (over 15 months since last standard survey) and a history of noncompliance at the harm level (citations of “G” or above) with the below items:
  - Abuse or neglect
  - Infection control
  - Violations of transfer or discharge requirements
  - Insufficient staffing or competency; and
  - Other quality of care issues (e.g., falls, pressure ulcers, etc.)<sup>51</sup>

Over 6,000 facility surveys have been conducted under the focused survey procedure for COVID-19 and results from CMS and State Agency inspections and surveys are slowly being announced.<sup>52</sup> On March 23, 2020, CMS announced inspection findings from Life Care Center of Kirkland.<sup>53</sup> The inspections identified three Immediate Jeopardy situations related to the facility’s failure to rapidly identify and manage sick residents, to notify the Washington Department of Health about the increasing rate of respiratory infections among the residents, and the facility’s lack of a backup plan to cover for the facility’s primary clinician.<sup>54</sup> As a result of the findings, CMS imposed a fine of over \$600,000 on the facility.<sup>55</sup> At least 26 other facilities owned by Life Care Centers of America have been inspected in the past six weeks.<sup>56</sup> Of those, 10 facilities were found to have deficiencies in proper use of personal protective equipment, inaccurate infection control logs, and/or sanitizing equipment.<sup>57</sup> The other 16 facilities were not found to have deficiencies.<sup>58</sup> Life Care Centers of America owns over 200 nursing facilities at which there have been at least 2,000 cases of COVID-19 and 250 deaths.<sup>59</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Supra*, note 5.

<sup>53</sup> *Supra*, note 34.

<sup>54</sup> Letter from Patrick Thrift, Branch Manager, Seattle Long Term Care, to Ellie Basham, Administrator, Life Care Center of Kirkland (Apr. 1, 2020), <https://www.documentcloud.org/documents/6824370-CMS-Final-LCC-of-Kirkland-Extension-of-23-to-180.html>.

<sup>55</sup> *Id.*

<sup>56</sup> *Supra*, note 5.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

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CMS also released data from an initial round of surveys of other nursing homes, conducted during the week of March 30, 2020, which found compliance issues relating to hand-washing guidelines in 36 percent of facilities and a failure “to demonstrate proper use of personal protective equipment” in a quarter of the facilities.<sup>60</sup> Similarly, in its first six surveys, Connecticut found five facilities with infection control lapses, while the sixth facility received a citation related to providing notification to a resident’s conservator.<sup>61</sup>

### Visitation and Service Considerations

The nursing home reopening plan also addresses when facilities should begin admitting visitors again.<sup>62</sup> On March 13, 2020, it was recommended that facilities “restrict visitation of all visitors and nonessential health care personnel, except for certain compassionate care situations, such as an end-of-life situation.”<sup>63</sup> The first phase of the reopening plan maintains this restriction while also clarifying that communal dining and group activities should be limited.<sup>64</sup> Additionally, non-medically necessary trips should be avoided, while those taking medically necessary trips should wear a face mask and their COVID-19 status must be shared with the transportation service.<sup>65</sup> Screening and weekly testing requirements are also explained, as well as cohorting procedures.<sup>66</sup>

In the second phase, limited numbers of non-essential health care personnel may be admitted with the appropriate screening and precautions.<sup>67</sup> In the final phase, visitation is allowed with screening and additional precautions, including wearing face masks.<sup>68</sup> Volunteers may also be admitted under the same conditions.<sup>69</sup>

### Liability

With nursing homes often being the epicenter of COVID-19 outbreaks in states, concerns of liability for both health care providers and facilities have arisen. CMS has identified safety and quality in nursing homes as a top priority,<sup>70</sup> indicating that penalties will likely be seen in areas beyond reporting compliance, as discussed above. Both CMS and the states have the authority to issue penalties based on noncompliant survey findings, as evidenced by the penalty assessed against Life Care.<sup>71</sup> These civil money penalties can be imposed “for either

<sup>60</sup> Press Release, Ctrs. for Medicare & Medicaid Servs., Trump Administration Issues Key Recommendations to Nursing Homes, State and Local Governments (Apr. 2, 2020), <https://www.cms.gov/newsroom/press-releases/trump-administration-issues-key-recommendations-nursing-homes-state-and-local-governments>.

<sup>61</sup> Jacqueline Rabe Thomas & Jenna Carlesso, *Limited inspection reports show COVID-19 lapses in nursing homes*, CT MIRROR (May 14, 2020), <https://ctmirror.org/2020/05/14/limited-inspection-reports-show-covid-19-lapses-in-nursing-homes/>.

<sup>62</sup> *Supra*, note 36.

<sup>63</sup> Ctrs. for Medicare & Medicaid Servs., *Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in nursing homes (REVISED)*, QSO-20-14-NH (Mar. 13, 2020), <https://www.cms.gov/files/document/3-13-2020-nursing-home-guidance-covid-19.pdf>.

<sup>64</sup> *Supra*, note 36.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Press Release, Ctrs. for Medicare & Medicaid Servs., CMS Announces Independent Commission to Address Safety and Quality in Nursing Homes (Apr. 30, 2020), <https://www.cms.gov/newsroom/press-releases/cms-announces-independent-commission-address-safety-and-quality-nursing-homes>.

<sup>71</sup> 42 C.F.R. § 488.430.

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the number of days a facility is not in substantial compliance with one or more participation requirements or for each instance that a facility is not in substantial compliance, regardless of whether or not the deficiencies constitute immediate jeopardy.<sup>72</sup> Penalties may also be assessed for the days a facility is noncompliant following the last standard survey.<sup>73</sup>

Additionally, wrongful death suits have been filed across the country by family members of nursing home residents who died from COVID-19. The most notable suit was filed by the daughter of a former resident of Life Care, which was one of the first outbreak locations in the United States.<sup>74</sup> Subsequent lawsuits have been filed in many other states such as Texas, Illinois, Georgia, and Missouri.

HHS has provided limited federal immunity for certain Covered Persons, as defined in the rule, under the Public Readiness and Emergency Preparedness Act, although specific requirements must first be met.<sup>75</sup> This immunity does not extend to situations in which a patient contracts COVID-19 while receiving non-COVID-19-related care at a facility.<sup>76</sup> Additional information on federal immunity is highlighted in [COVID-19: Health Care In Transition: Re-Opening for Non-COVID-19 Related Care](#).

Secretary Azar also urged governors to consider extending protection to health care workers so that they felt “shielded from medical tort liability” when providing COVID-19-related care.<sup>77</sup> Nursing homes and related trade associations have successfully lobbied states to implement a broad range of protections from liability. As of May 14, some form of immunity protections had been extended to long-term care facilities in at least 18 states.<sup>78</sup> New York’s immunity law goes farther than many other states, covering both civil and criminal liability for actions taken in response to the COVID-19 emergency.<sup>79</sup> Like most states, New York is not providing immunity for actions involving gross negligence or intentional misconduct.<sup>80</sup>

Despite pushes for immunity, some states are ramping up their response to potential criminal acts in nursing homes. For instance, although the Governor signed an Executive Order providing civil immunity for health care providers,<sup>81</sup> Pennsylvania’s Attorney General is seeking to hold nursing home facilities accountable for mistreatment that arises to criminal

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Tim Reid, *Seattle-area nursing home hit with wrongful death lawsuit over coronavirus death*, REUTERS (Apr. 10, 2020) <https://www.reuters.com/article/us-health-coronavirus-lawsuit/seattle-area-nursing-home-hit-with-wrongful-death-lawsuit-over-coronavirus-death-idUSKCN21T00Q>.

<sup>75</sup> 85 Fed. Reg. 15,198, <https://www.federalregister.gov/documents/2020/03/17/2020-05484/declaration-under-the-public-readiness-and-emergency-preparedness-act-for-medical-countermeasures>.

<sup>76</sup> *Id.*

<sup>77</sup> Letter from Sec. Alex Azar (Mar. 2020), <https://www.mplassociation.org/docs/GR/Governor-Letter-from-Azar-COVID-19V2.pdf>.

<sup>78</sup> Abigail Abrams, *‘A License for Neglect.’ Nursing Homes Are Seeking — and Winning — Immunity Amid the Coronavirus Pandemic*, TIME (May 14, 2020), <https://time.com/5835228/nursing-homes-legal-immunity-coronavirus/> (States with immunity provisions for providers and/or facilities include Connecticut, Maryland, New York, New Jersey, Pennsylvania, Illinois, Indiana, Louisiana, Maryland, and Virginia.).

<sup>79</sup> Andrew Cuomo, Governor, Executive Order No. 202.10, (Mar. 23, 2020), <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

<sup>80</sup> *Id.*

<sup>81</sup> Press Release, Gov. Wolf Signs Executive Order to Provide Civil Immunity for Health Care Providers (May 6, 2020), <https://www.governor.pa.gov/newsroom/gov-wolf-signs-executive-order-to-provide-civil-immunity-for-health-care-providers/>.





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- Workforce and Staffing
- Cohorting
- Infection Control “Strike Teams”
- Infection Control Surveys and Other State Survey Activity
- Nursing Home (NH) Communications
- Personal Protective Equipment (PPE): Actions To Improve Access to PPE
- Housing and Sheltering
- Transportation Needs.
- Patient Transfer Resources
- Screening/Visitors<sup>96</sup>

State actions were compiled by quality improvement contractors in late April 2020 and, as such, not all state actions are documented in the Toolkit. For instance, in May, Texas Governor Greg Abbott issued a directive to test all residents and staffers in nursing homes<sup>97</sup> and Florida is requiring hospital patients to have two consecutive negative tests at least 24 hours apart before they can be discharged to a nursing home.<sup>98</sup>

### Takeaways

As noted above, the regulatory guidance is continually changing in this area. Regardless of whether they have COVID-19-positive cases, there are several steps facilities should take at this time. Nursing homes should dedicate a person who is tasked with identifying recent changes and updates on a frequent basis. Although not an all-inclusive list, websites and publications from CMS, CDC, and state departments of health should be reviewed frequently for updated guidance. Additionally, K&L Gates has a compendium of resources available upon request.

Nursing home policies and protocols should be evaluated against current guidance to see if any necessary changes should be made, and subsequent training should occur. Surveying and inspections will continue to be seen on a number of fronts. Nursing homes should consider self-assessments or mock surveys to assess their preparedness level and compliance with regulatory guidance. To that end, records of any self-assessments or other actions taken to demonstrate compliance of changing regulatory guidance should be created. Meanwhile, standard documentation of compliance with policies and training should continue to be maintained.

This guidance can assist long-term care facilities in making informed, strategic decisions related to the very real threat faced by facilities and their patients. While these documents can serve as guideposts in formulating a response to COVID-19, long-term care facilities

<sup>96</sup> *Id.*

<sup>97</sup> Britny Eubank et al., *Gov. Abbott says all Texas nursing home residents, staff must be tested for COVID-19*, KVUE (May 15, 2020), <https://www.kvue.com/article/news/investigations/defenders/coronavirus-abbott-hhsc-dshs-nursing-home-testing-required/269-ac874293-6e3a-4093-b10b-c73c7df7eaf0>.

<sup>98</sup> Liz Freeman, *Florida hospitals must follow testing rule before discharging COVID-19 patients to nursing homes*, NAPLES DAILY NEWS (May 7, 2020), <https://www.naplesnews.com/story/news/health/2020/05/07/florida-passes-emergency-rule-hospital-discharges-nursing-homes/5175344002/>.

## Nursing Homes and Long-Term Care Facilities: Snapshot of 90 Days After the First Reported Outbreak

may wish to engage inside and/or outside counsel to ensure their response is tailored to their needs and the patient population they service. To that end, K&L Gates LLP has created a HUB webpage to generally address the legal implications of the COVID-19 outbreak on businesses. In addition to alerts, in upcoming weeks, you will find two LTC and SNF focused *Triage* podcasts posted to the HUB. K&L Gates is well positioned to provide guidance to long-term care facilities on the many health care-related concerns raised by the COVID-19 outbreak as well as other matters that may arise in the current climate.

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