



Commonwealth of Virginia  
Office of the Governor

## *Executive Order*

### **AMENDED NUMBER SIXTY (2020)**

#### **FURTHER 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 resupply quickly these critical resources due to severe supply chain disruptions. 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. The effects of COVID-19 create these difficulties and present less than optimal conditions to deliver the healthcare indicated by conventional standards of care.

**With the possibility that a vaccine may soon be available, Virginia must prepare for its safe and efficient use, distribution, and storage. Further, it is critical that** both public and private healthcare providers and other persons **who** deliver care **continue to** use 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, withholding healthcare services in certain situations, **and the storage, distribution, prescription, dispensation, administration, or research of vaccines or other countermeasures under an Emergency Use Authorization.** It is in the public interest to afford healthcare providers **and others** 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.

**Section 8.01-225.03 of the *Code of Virginia* provides similar liability protection to other providers of healthcare services, including hospices, home care organizations, private providers, assisted living facilities, and adult day care centers during the public health emergency related to the COVID-19 virus. Section 8.01-225.03 in relevant part provides:**

**In the absence of gross negligence or willful misconduct, any (i) hospice licensed pursuant to § 32.1-162.3, (ii) home care organization licensed pursuant to § 32.1-162.9, (iii) private provider licensed by the Department of Behavioral Health and Developmental Services pursuant to Article 2 (§ 37.2-403 et seq.) of Chapter 4 of Title 37.2, (iv) assisted living facility licensed pursuant to § 63.2-1701, or (v) adult day care center licensed pursuant to § 63.2-1701 that delivers care to or withholds care from a patient, resident, or person receiving services who is diagnosed as being or is believed to be infected with the COVID-19 virus shall not be liable for any injury or wrongful death of such patient, resident, or person receiving services arising from the delivery or withholding of care when the emergency and**

subsequent conditions caused by the emergency result in a lack of resources, attributable to the disaster, that render such hospice, home care organization, private provider licensed by the Department of Behavioral Health and Developmental Services, assisted living facility, or adult day care center unable to provide the level or manner of care that otherwise would have been required in the absence of the emergency and that resulted in the injury or wrongful death at issue.

Section 44-146.23 of the *Code of Virginia* provides certain liability protection to public and private agencies and their employees engaged in emergency services activities, which include medical and health services. Section 44-146.23 in relevant part provides:

Neither the Commonwealth, nor any political subdivision thereof, nor federal agencies, nor other public or private agencies, nor, except in cases of willful misconduct, public or private employees, nor representatives of any of them, engaged in any emergency services activities, while complying with or attempting to comply with this chapter or any rule, regulation, or executive order promulgated pursuant to the provisions of this chapter, shall be liable for the death of, or any injury to, persons or damage to property as a result of such activities. The provisions of this section shall not affect the right of any person to receive benefits to which he would otherwise be entitled under this chapter, or under the Workers' Compensation Act (§ 65.2-100 et seq.), or under any pension law, nor the right of any such person to receive any benefits or compensation under any act of Congress. For the purposes of the immunity conferred by this subsection, representatives of public or private employees shall include, but shall not be limited to, volunteers in state and local services who are persons who serve in a Medical Reserve Corps (MRC) unit or on a Community Emergency Response Team (CERT).

Section 44-146.16 of the *Code of Virginia* defines "Emergency services" as:

[T]he preparation for and the carrying out of functions, other than functions for which military forces are primarily responsible, to prevent, minimize, and repair injury and damage resulting from disasters, together with all other activities necessary or incidental to the preparation for and carrying out of the foregoing functions. These functions include, without limitation, firefighting services, police services, medical and health services, rescue, engineering, warning services, communications, radiological, chemical, and other special weapons defense, evacuation of persons from stricken areas, emergency welfare services, emergency transportation, emergency resource management, existing or properly assigned functions of plant protection, temporary restoration of public utility services, and other functions related to civilian protection. These functions also include

**the administration of approved state and federal disaster recovery and assistance programs.**

It is apparent that in enacting these provisions, the General Assembly intended to afford immunity from certain liability in exactly the circumstances presented by the COVID-19 health crisis. Therefore, it is imperative that it is clear that the liability protections in these provisions protect healthcare providers **and other persons and entities involved in the delivery of healthcare, including any COVID-19 vaccine or countermeasure**, in response to the COVID-19 health emergency.

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 **Amended** Executive Order No. 51, I clarify the following with respect to my executive actions and §§ 8.01-225.01, 8.01-225.02, **8.01-225.03, 44-146.23, and 44-146.16** of the *Code of Virginia*.

**Directive**

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. **Amended** 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, **(i)** 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; and **(ii) pursuant to federal or state programs or direction, withholding of the prescription, dispensation, or administration of any COVID-19 vaccine or other countermeasure with an Emergency Use Authorization or other approval issued by the U.S. Food and Drug Administration.**
4. **For purposes of §§ 8.01-225.01, 8.01-225.02, and 8.01-225.03, “[e]mergency and subsequent conditions caused a lack of resources, attributable to the disaster, rendering the health care provider, hospice, home care organization, private provider licensed by the Department of Behavioral Health and Developmental Services, assisted living facility, or adult day care center 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, the COVID-19 vaccine or other countermeasure**

- with an Emergency Use Authorization or other approval issued by the U.S. Food and Drug Administration 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; (v) using supplies or equipment in innovative ways that are different from the way that these supplies and equipment are normally used.
5. **For purposes of § 44-146.23, and this Order “public or private agencies” and “public or private employees” shall be deemed to include any “health care provider” as that term is defined in § 8.01-581.1, any (i) hospice licensed pursuant to § 32.1-162.3, (ii) home care organization licensed pursuant to § 32.1-162.9, (iii) private provider licensed by the Department of Behavioral Health and Developmental Services pursuant to Article 2 (§ 37.2-403 *et seq.*) of Chapter 4 of Title 37.2, (iv) assisted living facility licensed pursuant to § 63.2-1701, and (v) adult day care center licensed pursuant to § 63.2-1701. Any employees of any of the forgoing shall be deemed “public or private employees” for purposes of this Order.**
  6. **For purposes of § 44-146.16, “emergency services” shall be deemed to include the distribution, storage, prescription, dispensation, administration, or research of any COVID-19 vaccine or other countermeasure with an Emergency Use Authorization or other approval issued by the U.S. Food and Drug Administration, as those functions minimize, and repair injury and damage resulting from the COVID-19 pandemic.**
  7. Nothing in this 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 **nor the right of any person to make a claim pursuant to the National Vaccine Injury Compensation Program or Countermeasures Injury Compensation Program.**
  8. **This Order shall only apply to causes of action arising (a) out of the emergency declared in Amended Executive Order 51 and (b) prior to Amended Executive Order 51’s expiration.**

**Effective Date of this Executive Order**

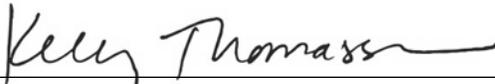
This Executive Order shall be effective upon its signing and remain in full force and effect until the expiration of **Amended** Executive Order 51 unless sooner amended or rescinded.

Given under my hand and under the Seal of the Commonwealth of Virginia, this **11th day of December, 2020**.



  
Ralph S. Northam, Governor

Attest:

  
Kelly Thomasson, Secretary of the Commonwealth