

## State Immunity Laws and Executive Orders Relating to Long-Term Care Facilities

Since the beginning of the pandemic in early 2020, many states issued executive orders or passed legislation to shield long-term care facilities from liability for actions, or inactions, that caused harm to residents during the COVID-19 pandemic. The laws and executive orders stripped nursing home residents of necessary protections amidst a pandemic that was claiming the lives of over 180,000 residents of long-term care facilities. Below you will find a summary of the status of immunity for long-term care facilities in the United States. For information on the status of immunity in your state, see our [State Chart](#). In some instances, states had immunity laws that existed prior to the beginning of the pandemic. This report does not include those laws, unless they are referenced by an executive order or law passed subsequent to the beginning of the pandemic.

### Overall Numbers

As of June 1, 2021, there were thirty-eight states<sup>1</sup> that had issued an executive order or passed legislation allowing for immunity for long-term care facilities. The effort by the industry to gain immunity from liability for negligent care began immediately after it became clear that COVID-19 would have its most devastating impact on nursing home residents. Initially, the focus was on convincing governors to issue executive orders. Still, as time passed, the industry focused on legislators who quickly drafted and passed bills. To date:

- Ten states<sup>2</sup> have issued executive orders – most continue to be renewed during the pandemic. Some states had laws that were in place prior to the pandemic that provided immunity to individuals or organizations responding to public health emergencies. Many of the executive orders issued by governors declared that healthcare workers or facilities responding to COVID-19 would be provided immunity under these laws.<sup>3</sup>
- Twenty-eight states<sup>4</sup> have passed legislation that provides some form of immunity for long-term care facilities.
- Twenty-eight states<sup>5</sup> have legislation or executive orders that provide immunity from liability for negligent care to assisted living facilities.

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<sup>1</sup> Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming

<sup>2</sup> Arkansas, Connecticut, Hawaii, Illinois, Maryland, Michigan, Pennsylvania, Rhode Island, Vermont, and Virginia

<sup>3</sup> Arkansas EO does not reference existing immunity legislation.

<sup>4</sup> Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming

<sup>5</sup> Alabama, Arizona, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, and Wisconsin

- Ten states<sup>6</sup> have introduced, but not passed, legislation that would allow for or extend existing provisions for immunity from civil liability for long-term care facilities.
- In April 2021, New York passed legislation retroactively repealing a bill that had been passed in April 2020 providing nursing homes immunity.
- New Jersey has pending legislation that would restore all civil liability to nursing homes and related facilities.
- Connecticut and Rhode Island had provided immunity through executive orders, but recently let the immunity expire.

## Nature of the Immunity Provisions

The breadth of each law is unique across the states; however, most grant facilities broad protections from harm experienced by residents during the pandemic, regardless of whether the harm was the result of COVID-19 exposure or infection. Generally, in granting these broad protections, the laws require that the facility show that it was acting in good faith, in reliance on state or federal guidelines, or in response to COVID-19. Because of the far-reaching effects of COVID-19, it is likely that most claims would fall within the immunity provisions.

- Three states<sup>7</sup> have legislation or executive orders that relate only to harm due to COVID-19 exposure or infection.
- The other states use broad language that will likely cover most harm experienced during COVID-19.
- New Jersey and New York also provided immunity from criminal liability. However, New York subsequently passed legislation rescinding the provision of both civil and criminal liability.
- Pennsylvania and Wyoming were the only states to provide immunity only to staff and not to facilities.

## Exceptions

Most of the laws and executive orders contain exceptions stating that if the harm resulted from gross negligence or recklessness, or willful misconduct, the facility would not be granted immunity. Most cases brought against nursing homes assert that a facility was negligent, which requires a showing that the facility failed to act reasonably or follow the appropriate standard of care. To prove gross negligence, recklessness, or willful misconduct a plaintiff must show that the facility acted while knowing its conduct was likely to cause serious harm to the resident.<sup>8</sup> Proponents of these bills cite these exceptions as proof that residents will still have recourse in the courts. However, these exceptions place such a high evidentiary burden on residents and families that success is unlikely. To prevail, residents and families will have to prove that the facility intended to hurt them.

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<sup>6</sup> California, Colorado, Connecticut, Illinois, Maryland, Michigan, Minnesota, Missouri, New Hampshire, and Texas

<sup>7</sup> Idaho, Oklahoma, and South Carolina.

<sup>8</sup> Although the terms gross negligence, reckless, and willful misconduct are common terms, their meaning in court can vary by state. In general, these terms are defined by the immunity law or executive order.

In essence, these laws and orders mean that facilities will not be held accountable for negligent care.

## Length of Time Immunity Provisions are in Effect

Most of the legislation and executive orders expire when the governor declares the state of emergency to be over. In other instances, states set expiration dates, or governors failed to renew the executive orders.

- Eighteen states<sup>9</sup> have effective dates that are retroactive to the beginning of the pandemic; eight states<sup>10</sup> have effective dates on or around the time the legislation was passed.
- Most of the legislation and executive orders include language that provides immunity until the state's governor declares the COVID-19 emergency to be over.
- Seventeen states<sup>11</sup> have a set expiration date.
- Connecticut and Rhode Island both had immunity through executive order, but both Governors did not extend the executive order in the most recent round of extensions. Connecticut and Rhode Island are included in the totals in this overview to document their actions before the expiration of their executive orders. New York is the only state to pass legislation repealing immunity for nursing homes, although New Jersey is now considering legislation that would do so.

## Why Immunity Is Bad for Nursing Home Residents

Immunity for nursing homes not only deprives residents and their family's access to justice, it places all residents at risk of harm or death by sanctioning inadequate care. It is a threat to the well-being of nursing home residents, because:

- **Immunity rewards bad actors.** There is a correlation between facilities with a history of poor quality of care and infection control procedures and COVID-19 outbreaks.<sup>12</sup> For decades, residents and advocates have seen a steady decline in quality of care as more homes are bought up by for-profit corporations and private equity firms, which, through cost-cutting measures, seek to maximize profits from long-term care facilities. A recent report estimated that private equity ownership of a nursing home increases the short-term mortality rate of Medicare residents by 10%.<sup>13</sup> We are now seeing the direct result that cuts to staff and quality care have on residents of long-term care facilities as studies

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<sup>9</sup> Alabama, Alaska, Arizona, Connecticut, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, New Jersey, New York, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, and West Virginia

<sup>10</sup> Georgia, Nebraska, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Wisconsin, and Wyoming

<sup>11</sup> Alabama, Arkansas, Connecticut, Florida, Georgia, Idaho, Kentucky, Mississippi, Montana, Nebraska, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, and Vermont

<sup>12</sup> He M, Li Y, Fang F (2020) Is there a link between nursing home reported quality and COVID-19 cases? Evidence from California skilled nursing facilities. *J Am Med Dir Assoc* 21: 905-908

<sup>13</sup> Gupta, et al., *Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes*, NBER Working Paper No 28474, February 2021.

[https://www.nber.org/system/files/working\\_papers/w28474/w28474.pdf](https://www.nber.org/system/files/working_papers/w28474/w28474.pdf)

are showing that facilities having lower staffing and providing poorer care had higher COVID-19 infections and deaths.<sup>14</sup> We cannot reward facilities that have placed profits over the well-being of residents.

- **Courts were the last remaining oversight protection for nursing home residents.** For months, those dedicated to oversight and advocacy for residents - family/friends, long-term care ombudsman, state licensing and certification agencies, and adult protective services – were largely excluded from facilities due to bans on visitation. As a result, complaints were not being investigated, annual recertification surveys were not being conducted, and enforcement actions were suspended. The legal system was the last remaining avenue for holding nursing homes accountable for substandard care and obtaining justice for residents.
- **Liability for negligent care incentivizes facilities to comply with laws and regulations.** The threat of liability for negligent care is an effective tool that encourages facilities to comply with state and federal laws and regulations. Failure to hold facilities accountable for care that harms or kills residents means more residents will be harmed.
- **Harm from neglect has significantly increased during the COVID-19 pandemic.** The Consumer Voice conducted an informal survey in the fall of 2020 of nearly 200 family members who were being reunited with their loved ones as visitation restrictions began to lift. The resulting [report](#) revealed that residents were suffering immensely from isolation and neglect. The survey found that:
  - % of families noted a decline in their loved one’s physical abilities, with 87% observing a decline in physical appearance, including significant weight loss, contractures of limbs, and pressure sores.
  - of families reported a decline in their loved one’s mental health and status.
    - Residents were suffering from significant cognitive decline.
    - Some residents were suicidal.
    - Some residents seemed drugged and/or non-responsive.
  - 69% of respondents stated that it appeared that the facility had insufficient staff to care for residents, noting that residents were dirty, ungroomed, and lacking basic care and hygiene.
  - 40% of families reported that their loved ones were missing personal possessions, such as dentures, glasses, and clothes.

## Your Advocacy Can Make a Difference:

Because much of the harm that has occurred during the pandemic was behind closed doors, it is important that residents and their families advocate for accountability. Here are steps you can take to oppose and/or repeal immunity:

- **Share your stories.** By telling the stories of what residents are experiencing during the pandemic, you help decision-makers and the public better understand the problems faced by nursing home residents during this time. These stories can make the issues real

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<sup>14</sup> He M, Li Y, Fang F (2020) Is there a link between nursing home reported quality and COVID-19 cases? Evidence from California skilled nursing facilities. J Am Med Dir Assoc 21: 905-908.

and concrete, instead of abstract. It can motivate both decisionmakers and members of the public to take action to make a change for the better.

- **Contact your elected officials.** Elected officials need to hear directly from families about what is happening in facilities during the COVID-19 crisis. By connecting with these decision-makers, you alert them to problems they may otherwise not hear about. You can also ask state and federal legislators to initiate or support legislation that could address the problem or improve the care and lives of nursing home residents. To learn who your elected officials are, visit: <https://www.usa.gov/elected-officials>.
- **Reach out to the media.** The media can be an important way to inform and educate the public and legislators about how residents are being impacted by COVID-19 in nursing homes and to create pressure for change. There are a range of methods to involve the media, such as directly reaching out to reporters and letters to the editor.
- **Sign up as a Consumer Voice member** and join our [Action Network](#) to keep up to date on the latest information and advocacy on long-term care issues.

For more information about immunity and other long-term care issues, visit the Consumer Voice's website at [www.theconsumervoice.org](http://www.theconsumervoice.org).



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