



COVID-19 Pandemic and Infection Control in Long-Term Care Facilities

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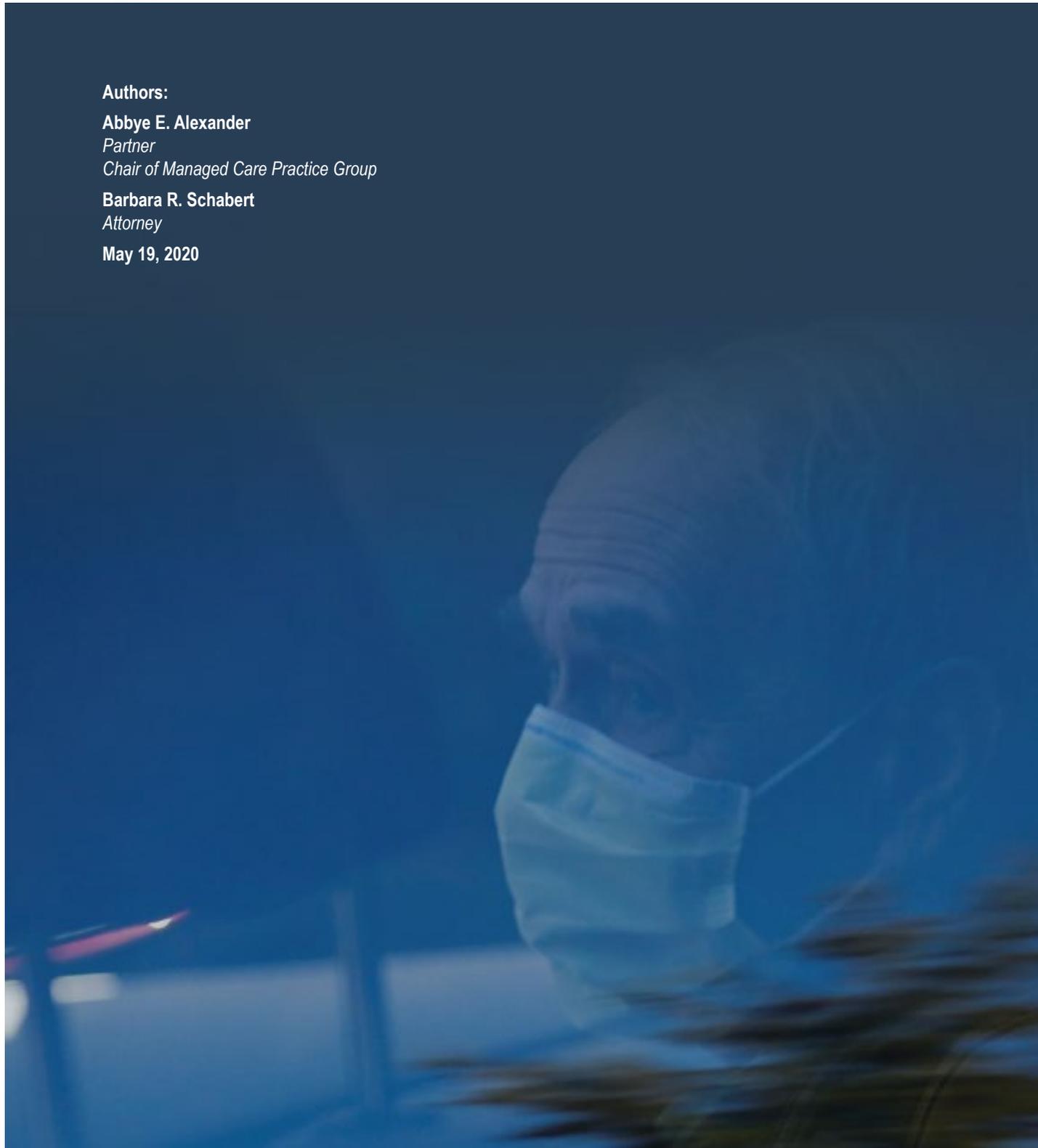
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With the current coronavirus outbreak and COVID-19 pandemic, nursing homes, assisted living facilities, and other long-term care facilities should be on heightened alert to ensure that actions are taken to reduce the spread of this illness and other germs. Published guidelines are constantly being published by the Center for Disease Control and Prevention (CDC), World Health Organization (WHO) and the Center for Medicare and Medicaid Services (CMS). Additionally, long-term care facilities are covered by federal and state regulations as well as other agency standards, such as CMS. Because long-term care facilities employ healthcare workers, the facilities must comply with federal and/or state Occupational Safety and Health Administration (OSHA) regulations. Monitoring of these changes is imperative to assist our healthcare clients in light of the ongoing COVID-19 pandemic.

Infection Control Precautions and Facility Internal Policies and Procedures

Long-term care facilities have an increased risk of the spread of infectious disease due to the convergence of age-related immunity impairments, prevalence of comorbidities and functional limitations among residents, and close-quartered housing of the residents. Accordingly, an important aspect of infection control is the development and updating of infection control policies and procedures. Therefore, policies and procedures for investigating, controlling, and preventing infection transmission in the facility should be established. In developing and updating infection control policies and procedures, it may be necessary for a long-term care facility to consult with an infectious disease physician or other professional with expertise in infection control.

Further, infection control policies and procedures dealing with relevant aspects of infection control such as hand hygiene, disinfection, and isolation precautions should be in place and compatible with current regulations and infection control knowledge. Long-term care facilities should be aware of respiratory therapy issues that may be relevant to the facility, including cleaning of humidifiers, respiratory therapy equipment, suctioning technique, and tracheotomy care.

When responding to an epidemic, such as the current COVID-19 pandemic, long-term care facilities may face difficulty if consent needs to be obtained

on short notice from a resident's decision maker or primary physician. For all new or returning residents, long-term care facilities should consider obtaining consent for vaccination and outbreak control measures at the time of admission.

Facility Staff Training

The long-term care facility's administrative staff should be knowledgeable about the federal, state, and local regulations governing infection control in order to implement and maintain compliance with such regulations. Infection control education should be provided at the initiation of employment and regularly thereafter. Training should include all staff, especially those providing direct resident care. Infection control standards and the susceptibility of residents to infectious diseases should be included in staff education. Employees should also be educated on the infection control policies and procedures. The long-term care facility should also develop a system for monitoring staff compliance with infection control policies and procedures.

Preparedness for Responding to Issues Relating to COVID-19

As COVID-19 becomes more widespread across the United States, the CDC recommends that long-term care facilities move to restrict all visitors and unnecessary healthcare personnel from the facility and cancel group activities and communal dining. Ill visitors and healthcare personnel have been determined to be the most likely sources of introduction of COVID-19 into a facility, and therefore, the CDC recommends aggressive visitor restrictions and enforcement of sick leave policies for ill healthcare personnel, even before COVID-19 is identified in a community or facility.

In some states, such as Florida, emergency orders have been entered prohibiting visitation to long-term care facilities except by family during end-of-life situations. In New York, only medically necessary visitation is allowed in long-term care facilities, and the state is requiring health screenings for all facility staff each day when they enter a facility. The CDC has now issued an Interim Guideline for Infection Prevention and Control for COVID-19 that includes recommendations on limiting how germs can enter the facility, isolating symptomatic patients as soon as possible, and implementing personal protective equipment (PPE) optimization strategies to extend supplies.

Long-term care facilities and healthcare personnel in every state should be prepared to evaluate patients for COVID-19 and should stay apprised on the latest information regarding signs and symptoms, and diagnostic testing. Long-term care facility administrative staff should also know how to contact and receive current and updated information from their state or local public health agency regarding COVID-19.



Liability for Nursing Homes: Preparation for COVID-19 Lawsuits

Preparedness for Responding to Issues Relating to COVID-19

Nursing homes have always been at an increased risk for the spread of infectious disease due to the convergence of age-related immunity impairments, prevalence of comorbidities and functional limitations among residents, and close-quartered housing of the residents. Given these vulnerabilities, the nursing home industry has been struck hard by the COVID-19 pandemic and ongoing health crisis. As COVID-19 related deaths amongst nursing homes in the United States tops more than 10,000, and continues to rise, it is necessary for nursing homes and other long-term care facilities to prepare for future COVID-19 related lawsuits.

It is estimated that nearly 15,000 of the approximately 15,600 nursing homes in the United States receive Medicaid funding, and thus, are subject not only to federal, state, and local agency regulations, but also must adhere to additional regulations issued by the Center for Medicare and Medicaid Services (CMS). As the nursing home industry has long been comprised of vulnerable, elderly residents, infection control guidelines are regularly provided by the Center for Disease Control and Prevention (CDC) to serve as general strategies to prevent the spread of disease. However, the infection control protocols issued by CMS are mandatory for all CMS nursing homes and require nursing homes to have developed and updated infection control policies and procedures, as well as, pandemic protocols in place. Although the majority of nursing homes already had such CMS mandated infection control protocols in place prior to the nationwide spread of COVID-19, nursing homes remain under constant pressure to implement the rapidly evolving and increasingly detailed protocols currently being issued by the CDC and CMS.

Recently, in working with the United States Department of Health and Human Services, CMS has issued updated rules and standards for health inspectors who are inspecting thousands of CMS participating facilities. The CMS has issued directives that focus on monitoring a nursing homes' implemented pandemic plan with a particular emphasis on the effectiveness of the nursing homes' infection control policies and procedures. These heightened inspection standards have already led to civil monetary penalties for nursing homes failure to comply with infection control protocols. Additionally, certain nursing homes have faced losing their Medicaid certification based on a lack of pandemic control efforts.

First and foremost, nursing homes should maintain complete documentation as to all infection control policies and procedures, staff training on such procedures, efforts to adhere to such procedures, and records as to the necessary updates to such procedures. In addition, nursing homes should document its implementation of, and efforts to comply with, all updated CDC and CMC guidelines and regulations. Overall, the nursing home should maintain sufficient documentation demonstrating the nursing homes' efforts in protecting staff and residents from COVID-19. Such documentation should include, without limitation: (1) policies and procedures followed for investigating, controlling and preventing the spread of COVID-19; (2) infection control precautions such as hand hygiene, disinfection, and isolation of sick residents; (3) staff

education on infection control protocols; (4) monitoring of staff compliance with infection control protocols; (5) identification of signs of infection in residents and staff and related isolation protocols; and (6) notification to state and local health departments, as well as CMS of the existence and extent of COVID-19 cases within the facilities.

The high potential for COVID-19 related lawsuits has led to numerous states moving for executive orders, or legislation, for immunity for health care facilities, including nursing homes. Currently, fifteen (15) states have enacted laws or issued executive orders providing nursing homes protections from lawsuits arising from the current global health crisis. These states include New York, Alabama, Arizona, Connecticut, Georgia, Illinois, Kentucky, Michigan, Massachusetts, Mississippi, New Jersey, Nevada, Rhode Island, Vermont and Wisconsin. In Florida, the Governor, and his legal team, are currently reviewing a request for immunity from liability under certain conditions for nursing homes submitted by the Florida Healthcare Association.

The states, and prospective states, with current immunity laws or orders, have suggested that nursing homes protected by an immunity order, also affords protection to the nursing home owners and their employees. In response to such immunity orders, resident advocates have voiced concerns and raised challenges as to the effectiveness such orders will have in eliminating causes of action. However, movants for the immunity orders illustrate the ways in which such orders acknowledge the conditions nursing homes have been forced to navigate during COVID-19, including staff shortages and lack of personal protective equipment. Generally, the currently issued immunity orders grant immunity to nursing homes providing care during the COVID-19 pandemic, in good faith, during the COVID-19 state of emergency. The immunity orders also do not appear to provide immunity to nursing homes for acts or omissions occurring prior to the COVID-19 pandemic. Further, the immunity orders would apply to negligence actions, but would not provide immunity for cases of gross negligence, extreme neglect, or willful misconduct.



Ultimately, the COVID-19 pandemic has created a unique setting for an inevitable increase in civil lawsuits related to deaths and alleged health care failures of nursing homes during the pandemic despite any such immunity orders. Nursing homes will likely see COVID-19 related lawsuits that involve wrongful death and negligence. However, given the unprecedented and extraordinary nature of these expected pandemic-related lawsuit, it should be expected that the debated issues will involve the standard of care and what establishes negligence during a pandemic. The courts will most likely examine the updated guidelines, protocols, and regulations of nursing homes issued by federal, state, and local agencies in response to COVID-19. In anticipation of the forthcoming pandemic lawsuits the nursing home industry is facing, it is imperative that such facilities apply any and all feasible precautions and protections to limit any potential liability exposure.



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