

COVID-19 LEGISLATIVE SUPPLEMENT



July 2020

Respectfully submitted,

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By: The **VBPNP COVID-19 Team**

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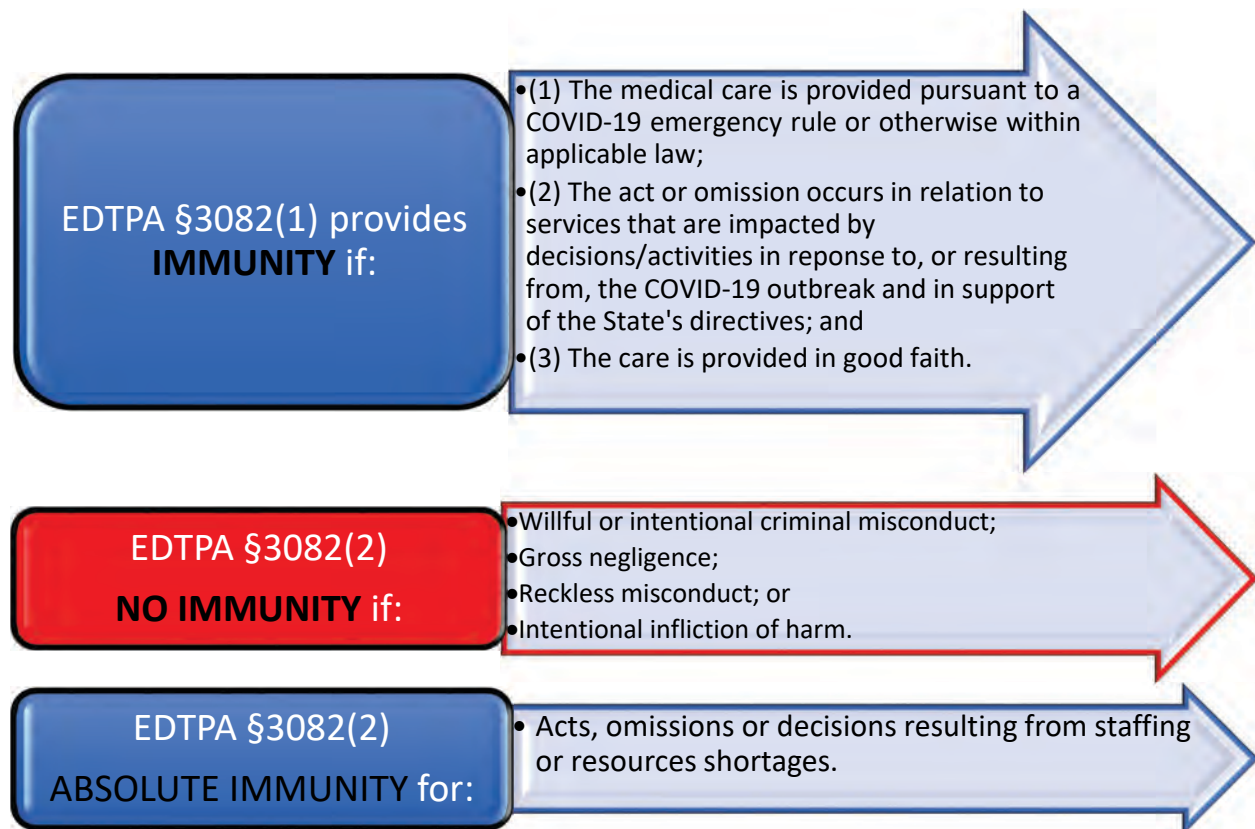
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ANALYSIS OF PROPOSED (JULY 23, 2020) LEGISLATIVE CHANGES TO EDPTA

The New York State Senate and Assembly have passed (July 23, 2020) proposed changes to the EDTPA.

EDTPA (before changes)

The EDTPA, as it currently stands, protects care as follows:



EDTPA (if changes enacted)

This week, the New York State Senate and New York State Assembly passed legislation that severely reduces the scope of the EDTPA immunity. Most significantly, the proposed legislation:

- Eliminates immunity for care not **directly** related to COVID-19 treatment, and
- Eliminates immunity for healthcare actions for the prevention of COVID-19 or arranging for healthcare for COVID-19.

The proposed changes are **prospective**, not retroactive. In other words, the immunities created in the EDTPA on March 6, 2020 continue in full until the day the legislation is signed into law.

GOVERNOR CUOMO’S POSITION

The Bill has been submitted to Governor Cuomo who, we understand, is under tremendous political pressure to sign the Bill into law. Looking for the silver lining, passage of this Bill may create appeasement and lessen the appetite for outright appeal of the EDTPA. Time will tell.

THE LEGISLATION

The Senate Bill (S8835) can be viewed online.¹

The Assembly Bill (A10840) can also be viewed online.²

Note that the provided hyperlinks allow for comment on the legislation and you may sign up to follow the progress of the legislation.

SENATE BILL

Crucially, the Senate Bill, §3 explicitly provides that there is no retroactive effect on immunity:

§3. This act shall take effect immediately and shall apply to claims for harm or damages if the act or omission that causes such harm or damage occurred on or after such effective date; provided however this act shall not apply to any act or omission occurring after the expiration of the COVID-19 emergency declaration.

The Senate Bill sets forth the following “purpose” for the amendment:

To limit immunity granted in the 2020-21 Adopted budget to health care professionals that are providing diagnosis and treatment of COVID-19 directly to confirmed and suspected COVID-19 patients.

¹ <https://www.nysenate.gov/legislation/bills/2019/S8835>

² <https://www.nysenate.gov/legislation/bills/2019/a10840>

The Senate Bill provides the following “justification.” It is important to note that “this Bill is only a first step;” that “[the Senate] must take further action”; that “multiple joint hearings will be held.”

JUSTIFICATION: Part GGG of the 2020-21 Adopted Budget ELFA Bill enacted the "Emergency or Disaster Treatment Protection Act" that provides liability protections for health care facilities and medical professionals that treat, or arrange for treatment of COVID-19 patients, and any other individual who sought health care services during the COVID-19 emergency declaration. This limited protection, as created by Part GGG, applies if the healthcare facility or healthcare professional complies with all other applicable law and directives and the treatment of the individual is impacted by the facility or healthcare professional's response to COVID-19. The protection does not cover gross negligence, intentional criminal or reckless misconduct, or intentional infliction of emotional distress. This Bill seeks **to further narrow the scope** of these liability protections to apply only when a health care facility or medical professional is providing direct care related to the diagnosis or treatment of COVID-19 and the care is impacted by COVID-19. This Bill attempts to move forward from the uncertainty that faced the State from the impact of COVID-19 in late March. **This Bill is only a first step**, however, and we **must** take further action to hold to account any malfeasance that occurred during the height of the COVID-19 crisis. We must continue to make adjustments to the State's response to the COVID-19 outbreak to make our healthcare system more resilient and responsive to the needs of our residents in this, and future, public health crises. To that end, the Legislature will hold **multiple joint hearings** on the subject, including an examination of the fatalities in residential health care facilities and the impact of COVID-19 on hospitals. The Legislature must use what we learn in these hearings to take further action.

The Senate provided the following “summary of provisions”:

Section 1 of the Bill amends the definition of "health care services" that are eligible for immunity from liability by **removing "prevention"** of COVID-19 from the definition of health care services; clarifying that the immunity applies to the assessment or care of an individual as it relates to COVID-19; and **removes the care of any other individual** who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration from the definition of "health care services."

Section two of the Bill **removes from immunity**, protections when a healthcare facility or healthcare professional is **"arranging for" healthcare services**.

Section three of the Bill makes the effective date immediate.

SENATE AND HOUSE BILLS COMPARED TO ORIGINAL EDTPA

We provide the specific language of the statute below. The language/sections deleted from the original EDTPA are in **yellow**; newly added sections are capitalized in **black**.

Public Health Law §3081(5)(c)

Section 1. Subdivision 5 of Section 3081 of the Public Health Law, as added by Section 1 of Part GGG of Chapter 56 of the Laws of 2020, is amended to read as follows:

5. The term "health care services" means services provided by a health care facility or a health care professional, regardless of the location where those services are provided, that relate to:

- a) the diagnosis **[,or prevention]** or treatment of COVID-19, or,
- b) the assessment or care of an individual **[with] AS IT RELATES TO COVID-10, WHEN SUCH INDIVIDUAL HAS** a confirmed or suspected case of COVID-19,
[; or, (c) the care of any other individual who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration.]

Public Health Law §3082

§ 2. Subdivision 1 of Section 3082 of the Public Health Law, as added by Section 1 of Part GGG of Chapter 56 of the Laws of 2020, is amended to read as follows:

1. Notwithstanding any law to the contrary, except as provided in Subdivision two of this Section, any health care facility or health care professional shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of *[arranging for or]* providing health care services, if: the health care facility or health care professional is *[arranging for or]* providing health care services **IN ACCORDANCE WITH APPLICABLE LAW, OR WHERE APPROPRIATE** pursuant to a COVID-19 emergency rule *[or otherwise in accordance with applicable law];*

a) the health care facility or health care professional is *[arranging for or]* providing health care services **IN ACCORDANCE WITH APPLICABLE LAW, OR WHERE APPROPRIATE** pursuant to a COVID-19 emergency rule *[or otherwise in accordance with applicable law];*

(b) the act or omission occurs in the course of *[arranging for or]* providing health care services and the treatment of the individual is impacted by the health care facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the State's directives; and

(c) the health care facility or health care professional is *[arranging for or]* providing health care services in good faith.

ANALYSIS STRATEGY

This legislation will not have any effect on the defense of claims arising from care prior to the date of enactment. As a result, the defenses detailed in our prior White Papers remained intact.

The legislation does alter the defense of prospective claims but not drastically because all defenses available under the federal PREP Act remain and immunity for COVID-19 care is intact.

The loss of immunity for “the care of any other individual who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration”³ is the most notable aspect of this legislation. Immunity will no longer be available for patients who received care unrelated to COVID-19.

The original EDTPA, as outlined in our prior White Papers, potentially provided immunity for all patient care upon the thesis that all care was affected by the COVID-19 crisis, the patient surge, the lack of staffing, the lack of PPE and the lack of testing. A denial of this precept is the conceptual differentiation from the original EDTPA.

Hospitals, over the last months, have adapted to the “new reality” of COVID-19 and are better prepared than at the outset. For this reason, if this amendment becomes law, the defense of prospective cases should not be overly impacted by the amendment.

On the other hand, a surge in COVID-19 cases in New York or a “second wave” will tax capacities and systems. Hopefully, the changes wrought will mitigate future damage. Right now, medical care systems in New York are no longer buried by the COVID-19 pandemic as they were from March to June 2020. That could change.

Removal of the immunity for “preparation,” hopefully, will not be troublesome because preparation has already happened. The “second wave” is anticipated and planned for.

Should this legislation become law, a thorough analysis of PREP Act immunity and existing EDTPA immunity remains crucial. Many claims will still benefit from the PREP Act, which remains in full force.

Defenses based on standard of care will grow in importance. In fact, we anticipate that establishing a “standard of care” will be the most nettlesome aspect of prosecuting a case in the COVID-19 environment: there was no “standard of care.” From institution-to-institution, things were done differently depending on established guidelines as applied to available resources.

Experts for the prosecution will need intimate knowledge of the particular institution in question, likely only known if the expert worked in that facility. We do not anticipate Attending Physicians to “turn” on their own institutions and act as a plaintiff’s expert. In this context, we continue to compile a day-by-day guidance “book,” outlining recommendations from the CDC, WHO, NIH, NY DOH and all other sources.

³ See Public Health Law §3081(5)(c).

CONCLUSION

The **VBPNP COVID-19 Team** will continue to analyze all developments and innovate defenses against anticipated claims.

Dated: July 24, 2020

Respectfully submitted,

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⁴ See Appendix.

⁵ Mr. Porter is former New York City Hospital Administrator.

⁶ Mr. Faillace is the immediate Past President of the New York State Medical Defense Bar Association (“NYSMDBA”) and longtime member of the NYSMDBA Board of Directors.

⁷ Mr. Braverman is the current President of the Association for Healthcare Risk Management of New York (“AHRMNY”) and a longtime member of the AHRMNY Board of Directors.

APPENDIX

Vigorito, Barker, Patterson, Nichols, & Porter, LLP (“**VBPNP**”) is at the apex of the medical-legal junction created by the unique COVID-19 emergency with a dedicated twelve-attorney **VBPNP COVID-19 Team** that was created to anticipate issues and design responses.

The strategic planning of the **VBPNP COVID-19 Team** will thrust VBPNP clients into industry leadership for Risk Management (claim prevention), assessing financial risks (claims response), handling healthcare/regulatory issues (societal and legislative issues), triggered coverage issues from intentional/criminal act claims and in providing claims defenses (litigation management).

This **VBPNP COVID-19 Team** has more than 250 years of collective litigation-healthcare-regulatory-coverage experience (including high-profile claims, mass torts and class actions), punctuated by decades of rigorous Trial and Appellate experience. The **VBPNP COVID-19 White Paper** you are holding is the fruit of that collective experience.

VBPNP consists of 85 attorneys with cutting edge technology and unparalleled integration into many of the most prominent New York legal, hospital Risk Management, judicial and political organizations. Amid the flickering environment created by COVID-19, **VBPNP** has the nearly unparalleled size/depth of litigation/healthcare experience, backed by a robust Appellate Department, needed to navigate the complex, intersecting and local/national mazes of legislative, regulatory, judicial, litigation, personnel and insurance challenges. The **VBPNP COVID-19 Team** stands ready to provide our knowledge, expertise and vast experience to promote favorable outcomes and forestall negative events.