

TOP TEN ISSUES IN HEALTH LAW 2021: #10 Risk Management and Professional Liability

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The COVID-19 pandemic affected every aspect of health care, creating clinical, operational, financial, and legal challenges. The emergent nature and speed with which the pandemic hit created significant risk management and liability concerns. Many facilities approached this challenge through the lens of Enterprise Risk Management, incorporating all aspects of risk and assessing the organization as a whole. The evolving pandemic required daily evaluation. As one surge appears to be leading to yet another, facilities utilize lessons learned but now also face court interventions.

Risk Management. Clinical patient safety risks involve the risks associated with caring for patients, including failing to meet the standard of care, medical errors, hospital acquired infections, and serious safety events. Operational risks are risks resulting from inadequate or failed internal processes, people, or systems that affect business operations. The two classifications collided during the pandemic.

The most prevalent risk challenges included triaging and isolating positive patients; monitoring the supply of beds, personal protective equipment (PPE), ventilators, and medication; addressing staffing shortages and capabilities; disallowance of visitors pursuant to local and federal recommendations; and disposition of bodies with all the attendant risks. Of these, the most difficult to address have been the visitors and staffing issues.

The Centers for Disease Control and Prevention (CDC) and local governments provided instruction and guidance on how and when visitors could enter hospitals, recommending that visitors be limited to only those deemed “essential.” Keeping essential caregivers safe required the quick development of new policies and procedures, including segregation, temperature taking, and mask wearing, as well as refusing to let some visitors into facilities. The limitations on visitors allowed for some patient mishaps, such as falls of patients unable to navigate the new surroundings, as well as failures to notice signs of pressure sores or other afflictions that family members often notice and report to providers.

Likewise, having appropriate personnel proved difficult for all facility sizes. Inadequate staffing jeopardized patient care when staff refused to treat positive patients, when staff

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was absent due to contracting COVID-19, or when the number of patients exceeded the availability of staff. Health care systems balanced patient need with staff availability by moving staff between facilities or by moving nurses who primarily worked in “elective” areas of the hospital into higher acuity settings. Agency staff relieved those on the front lines, requiring the necessary onboarding that took time from patient care. These changes, performed on an expedited basis, led to potentially inexperienced or unqualified staff caring for extremely sick patients.

Ultimately, the problems associated with lack of PPE, ventilators, and other life-saving equipment eased to some extent. The continuing issues of staff shortages and visitation persist.

Strategic Risks. Strategic risks relate to the focus and direction of the organization. These types of risks involve an organization’s brand, reputation, competition, and failing to adjust to changing times. In the context of COVID, many health care providers were viewed as heroes as they tirelessly treated patients, month after month. Some entities, however, now face significant negative press due to patients being exposed and dying. In fact, COVID’s destruction has caused many rural hospitals to fall into bankruptcy, compromising access to health care for some communities.

Court Filings. With respect to direct liability theories arising from COVID-19, nursing homes are currently the primary targets of malpractice actions, but other providers also face exposure. Liability theories include failing to prevent exposure to COVID-19, operating without sufficient equipment, or failing to provide medication. In addition to patient claims, there could be exposure for employees who contracted COVID-19 while treating patients. Many employee claims involve inadequate PPE. Workers’ compensation governs many but not all of these types of claims. While less than half of the states have enacted immunity for health care providers who treated COVID-19 patients, there is no federal immunity at present.

Other Liability Risks. While the majority of liability risks are either directly or indirectly related to COVID-19, there are a few other areas of liability worth mentioning. In addition to the usual gamut of medical negligence claims, there is potential liability for the use and integration of health technology, digital health, and artificial intelligence. While technology can improve health care, it is imperative that entities understand all of the risks associated with such technology and make sure they have systems in place to preserve the copious amounts of data generated by such devices.

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