

LONG-TERM CARE INSTITUTIONS AND COVID-19: STRATEGIES TO PROTECT YOUR FACILITY

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Owners and operators of long-term care facilities, skilled nursing facilities, rehabilitation facilities and assisted living facilities face many challenges in implementing social distancing protocols to decrease the risk of spreading COVID-19. Residents of long-term care facilities are at the highest risk for severe COVID-19 outcomes because they live in communal settings and tend to be older with chronic medical conditions. Understanding the challenges faced in these settings is key to implementing an organized approach to combat the risk.

Impact of COVID-19 in Long-Term Care

As of May 24, 2020, Arizona had a total of 16,783 cases of COVID-19 with 807 deaths—an astounding 633 (78%) of those deaths were of persons over the age of 65. According to the Maricopa County Department of Public Health, 191 long-term care facilities in Arizona have at least one case of COVID-19 in either a resident or a staff member. Among residents, there are a total of 1,245 COVID-19 cases with 262 deaths; and among staff members, there are 654 COVID-19 cases with 3 deaths. These statistics highlight the challenges that the owners and operators of long-term care facilities face in managing the health and safety of both their residents and their staff.

On March 11, 2020, Governor Ducey declared a Public Health State of Emergency to prepare for, respond to and mitigate the spread of COVID-19. On April 9, 2020, Governor Ducey signed Executive Order 2020-27, the “Good Samaritan” order, which was intended to maximize the participation of medical providers and healthcare institutions in providing access to care and treatment to persons with COVID-19. This order is in line with A.R.S. § 32-1471, which provides protections to healthcare providers who voluntarily provide care in an emergency situation. Executive Order 2020-27 protects licensed healthcare providers and licensed healthcare institutions, including long-term care facilities, from civil liability while they are providing COVID-19 healthcare services, unless the provider or institution acts with gross negligence or reckless or willful misconduct.

Groups of “patient advocates” have expressed concern that this Executive Order violates the constitutional rights of patients/families to bring suit and serves only to protect the profits of nursing homes. The concern is misplaced. Nothing in the order prevents plaintiffs from bringing suit against licensed healthcare institutions. The order simply provides that the lawsuit cannot be based on ordinary negligence; instead, the plaintiff must prove that the institution and/or its employees were grossly negligent or acted with reckless or willful misconduct. This means the plaintiff must prove that the institution/employee knew or reasonably should have known that their actions or inactions created an unreasonable risk of harm to the resident and the risk of harm was so great that it was highly probable that the harm would result from the action or inaction.

How to Reduce the Risk to Your Residents

The Arizona Department of Health Services has published guidelines for long-term care facilities to follow to prepare the facility, prevent introduction of the virus and prevent the spread of the virus in the facility. These strategies include, but are not limited to:

- Review/Update infection prevention and control policies;
- Screen residents and staff for fever and respiratory symptoms;
- Coordinate with the health department for testing;
- Ensure flexible sick leave policies to allow employees who are ill to stay home;
- Consider alternatives for residents to physically distance while continuing to connect socially; and

- Provide proper and sufficient personal protective equipment and educate on proper application.

How to Protect Your Institution

While there is no guarantee that there won't be lawsuits filed when long-term care residents are infected with COVID-19, facilities can improve their ability to defend these lawsuits by training, monitoring and, above all, keeping regular and open communication with the residents and their families. Some suggestions include:

- Provide updated training to all staff on infection control policies and document attendance at the training;
- Conduct routine audits to monitor staff compliance with the infection control policies and provide additional training/education for any staff who are not in compliance;
- Communicate with staff to ensure they are not working if they are showing symptoms or are ill;
- Implement a contingency staffing plan in the event that staff must be sent home due to illness;
- Communicate regularly with the residents and their family members about the measures you have implemented and how those measures are helping to reduce the risk of infection;
- If a resident has a fever or begins having respiratory symptoms, immediately implement infection control measures per your policy AND communicate that information to both the resident and his/her family; and
- Communicate with the residents and their families about the number of infections in the facility and what steps have been taken to reduce the spread. Keep the information general (i.e. total numbers but not names or even units) to avoid any HIPPA violations.

The goal of every licensed healthcare institution is to provide quality care to its residents to ensure that each resident attains and maintains his/her quality of life and health. The facility administration and staff must communicate and work in a coordinated manner with the resident and his/her family to meet this goal. Implementing these strategies and keeping open communication with residents and families will help ensure the continued ability to provide quality care and services to all who need it.

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Elizabeth Gilbert focuses her practice on defending health professionals, and health care entities, including, but not limited to hospital, nursing homes, assisted living facilities and group homes. In addition, she defends public entities against civil rights claims, such as excessive force claims, as well as discrimination claims made pursuant to both state and federal law, including sexual harassment, age discrimination, gender discrimination, retaliation and wrongful termination.

In her 25 years of practice, Liz has tried more than 75 jury trials in both criminal and civil matters. She practices in State and Federal courts throughout Arizona.

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