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CALIFORNIA ASSOCIATION
CAHF
OF HEALTH FACILITIES

April 9, 2020

Governor Gavin Newsom
State of California
State Capitol
Sacramento, CA 95814

RE: Request for Executive Order Related to Liability Protection

Dear Governor Newsom:

California's health care workers and those serving in supporting roles are on the front lines of a crisis unlike any our state has ever faced. Every day, they are racing against time to prepare to treat and care for all in need. Sadly, in the coming days and weeks, they will face wrenching, life-threatening decisions in managing scarce resources amid arduous conditions.

The COVID-19 pandemic is projected to affect so many people that health care providers will be forced to allocate scarce medical resources among too many patients who need them.

Given this stark reality, we must have one goal: to save as many lives as possible. With that goal, we request the Governor issue an Executive Order including the following language, which will provide a level of liability protection adequate for care providers to save Californians' lives:

During the current COVID-19 state of emergency, health care facilities, residential care facilities, senior living providers, health care service plans, physicians and other health care professionals, and all employees thereof, are hereby requested to render services to Californians. In recognition of these extraordinary and unprecedented circumstances, such facilities, plans, physicians, professionals, and employees shall be immune from any administrative sanction or criminal or civil liability or claim for any injury, death, or loss alleged to have resulted from any act, omission, or decision made related to providing or arranging services, including but not limited to acts, omissions, or decisions undertaken because of a lack of resources, absent proof by no less than clear and convincing evidence of willful misconduct as measured by a standard of care that incorporates all of the circumstances of the emergency. All state statutes and regulations are hereby waived to the extent necessary to achieve this immunity. The unenforceability or invalidity of any part of this paragraph shall not have an impact on the enforceability or validity of any other part of this paragraph.

Effectively minimizing death and serious illness among the population as a whole entails distributing finite resources to those who have the greatest opportunity to benefit, thereby maximizing appropriate care for the greatest number of patients likely to benefit from these resources.

While the state is creating a framework to guide these difficult decisions, providers need assurance they will not later be judged or sued when abiding by this framework, or when making related care decisions based on their best judgment and determination at the time. In this time of crisis, care providers must be able to observe, evaluate, and respond to rapidly-changing conditions and events; the prospect of being subjected to future lawsuits would burden and slow these decisions, threatening greater loss of life throughout California. Basic ethical principles governing crisis triage decisions include accountability—not only for health care providers called upon to make such decisions, but also for the government in supporting the processes to make these decisions and protecting the providers who make them.

When providers approach their work in the coming weeks and months, we must give them the support they need to make the best possible decisions, including protections from future legal action, as long as that liability protection does not excuse willful misconduct. To help understand the magnitude of the situation, here are several examples of the kinds of situations our health care system will face:

1. Thirty patients require ventilators, but a hospital has only 25 ventilators.
2. A hospital has too few pulmonologists, so *obstetricians* agree to care for respiratory patients.
3. A hospital postpones a patient's elective surgery to accommodate a surge of COVID-19 patients, thus delaying care to the surgery patient.
4. A patient no longer needs acute care, and is moved to a skilled nursing facility, although the patient preferred to stay at the acute care facility and did not provide consent to be transferred.
5. An assisted living facility resident contracts COVID-19 from an employee, even though the facility used proper screening techniques when employees arrived at work.
6. An assisted living facility suspends group dining and activities as well as restricting visitors, due to social distancing requirements, and is sued for causing depression by isolating residents in their rooms.
7. A skilled nursing facility is sued for allegedly deficient care rendered by staff who had not received full training as a result of staffing shortages.
8. A facility cannot access N-95 masks, and health care providers are asked to deliver care using surgical masks.
9. A skilled nursing facility admits an asymptomatic patient in accordance with California Department of Public Health and Centers for Disease Control and Prevention guidelines. The patient later is determined to be COVID-19-positive, and the facility must manage a potential outbreak without full staff and without sufficient personal protective equipment.

In addition to the executive order language requested above, when considering the issue of liability protection, provisions of Government Code Section 8659 should be explicitly invoked; however these provisions are too limited for the unprecedented pandemic we are facing, which is why even broader liability protections is needed. Government Code Section 8659 does not help skilled nursing or assisted living facilities or health plans, and omits many types of health care workers (such as physician assistants, mental health providers, custodial staff, and managers). In addition, this statute does not provide protection for a willful act or willful omission, such as considered decisions to ration ventilators,

stop elective procedures, transfer a patient to an alternate care center, or assign an obstetrician to care for a pulmonary patient which has been the advice of the state or the standard of care in a crisis.

As our care providers make these difficult decisions, they need to know they will not be prosecuted or persecuted. *This request is made with the deep understanding that every care provider is doing all they can to protect all Californians during this unprecedented crisis.*

Respectfully,

Carmela Coyle, President and CEO
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Janus Norman, SVP, Government Relations
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