Assess legal risk, payer policies to head off hidden dangers of COVID-19 reopening

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If you're reopening your practice during the COVID-19 pandemic, make sure that, along with the clinical and logistical steps you're taking to protect staff and patients, you've also taken steps to protect your practice from legal and insurance issues related to its fallout.

Following state and federal guidelines, many businesses have begun reopening after COVID-related shutdowns. This includes medical practices that have either begun calling patients back to their exam rooms or made plans to do so, with special attention to infection control measures that afford staff and patients the maximum protection possible under the circumstances (PBN 5/4/20).

Your practice is ahead of the game in protecting itself from legal claims if it meets government guidelines — which generally involve reopening only when infection rates in the area subside, having sufficient stocks of personal protective equipment (PPE) and modifying operations by, for example, segregating COVID and non-COVID patients, experts tell Part B News. That puts you in a good position to avoid a situation that may arise from a post-reopening patient becoming infected with COVID-19 and blaming it on the practice.

But experts also believe you should look beyond your logistical defense and consider your legal and insurance exposure involving claims of negligence leading to infection, as well as non-coverage for unanticipated situations.

What does the law protect?

You may have heard about government actions to protect providers legally in the public health emergency (PHE), such as the Executive Order issued by Pennsylvania Gov. Tom Wolf on May 6.

Wolf's and many other state governments have acted to "afford immunity for health care facilities and health care professionals providing care during the COVID-19 pandemic, in good faith during the COVID-19 state of emergency, and in support of the respective states' response to the COVID-19 outbreak," says Abbye Alexander, partner with Kaufman Dolowich & Voluck and chair of the firm's managed care practice group.

"Generally, such immunity orders limit civil liability for injury and death alleged to have been sustained directly as a result of an act or omission by such medical facility or professional," Alexander adds.

But these orders don't cover negligence or malpractice — nor do they necessarily protect providers who are delivering non-COVID-related services during the PHE from any possible COVID-related liability.

"What's been done so far [in terms of immunity orders] is to support governments in response to the pandemic; if you go to get your hip replaced and something happens to you, you'd be hard-pressed to say it was related to the state managing the COVID-19 crisis," says Robert H. Iseman, a partner in the health services practice group at Rivkin Radler in Albany, N.Y.

The good news, at the moment, is that the chance of legal action against health care providers for COVID-19-related liability is probably low now, as health care workers are considered heroes, says Tina Willis, an Orlando personal injury and medical malpractice attorney and owner of Tina Willis Law. And in any case, "practically speaking, when we accept any medical malpractice case, we are accepting a very high time and money risk," she adds. "We reject [more than] 99% of [medical malpractice] cases."

But that doesn't mean there can't be trouble down the line, when the pandemic eases or is forgotten. And don't count on courts treating COVID-19 like a natural disaster or an Act of God before which you were helpless — especially since it's been headline news for months.

"There is a good argument that, while COVID-19 might have been unforeseeable several months ago, it is clearly foreseeable now that businesses are reopening," says Katharine Van Tassel, visiting professor of law at Case Western Reserve University School of Law in Cleveland.

If you're following legal and regulatory precautions in seeing patients, that should protect you from legal scrutiny — at least at first. But bear in mind that "a lot will be litigated over a long time," says M. Michael Zuckerman, J.D., associate professor in risk and insurance management at Temple University's Fox School of Business in Philadelphia.

"It's safe to say that in this environment, society may not have a tolerance for COVID-related lawsuits for medical professional liability grounds because it's a crisis," Zuckerman says. "Plus, the courts are [effectively] closed now. But three years from now, which may be within the statute of limitations [in your state], they could still bring action. So this could be a very long-tail crisis."

Also, with the emphasis in some jurisdictions on contact tracking and tracing of COVID-19 victims and the increasing sophistication of those measures over time, potential litigants might be able to more credibly pinpoint your practice as the source of their infection, Iseman warns.

Record your precautions

It's great that you're social distancing patients, triaging them and your staff for COVID-19 symptoms, wiping down exam rooms and performing other COVID-19 due diligence. But in safety measures, as in medical record-keeping, if it's not documented, it didn't happen. If there's an issue with a patient, you'll want your COVID procedures documented: disinfecting schedules, temperature checks, waiting room capacity — the works.

"Litigation can take years to present itself, so you should not rely on memory," advises Heather Macre, an attorney and director of the business litigation department at the Fennemore Craig law firm in Phoenix, Ariz. "Make sure that you fully and completely document any measures intended to inhibit COVID-19 infection and spread. Medical records and patient files should be kept up to date and include details on what services were provided in legible forms."

Patients should sign off

Normal boilerplate on your policies and procedures is no longer adequate, Van Tassel says. Practices should have each patient attest "that the patient understands the materials and the instructions for risk mitigation, that the patient agrees to follow the instructions designed to mitigate the risks to all patients and all others at the practice, and finally, that a failure to follow instructions may mean that the practice may be unable to provide treatment," she says.

If a patient isn't cooperating, you're within your rights to deny them access to non-emergent care, as you would be with any disruptive patients (*PBN 4/19/18*). "All reasonable steps should be taken to accommodate a patient's reasonable needs before refusing to provide care as there is a risk that this refusal could be seen as abandonment," Van Tassel says.

What about non-patients?

"A lot of practices aren't thinking about potential liability with regard to people other than patients — for example, someone who accompanies a patient," Iseman says. "If someone came in and was able to trace an infection to the practice, the physician has to ask what policy would respond. Probably not professional liability; maybe public liability, like with a guest's slip-and-fall."

Some practices are strongly limiting access to patient companions. But, asks Iseman, "what about a FedEx or UPS guy? You want to make sure your public liability policy covers it." While that policy probably covers accidents that befall a delivery person, infection may be a new one — and if a jury buys it, you could have trouble. "The standard for public liability claims is that you only have to establish them by a 'preponderance of evidence' — that is, if you're a football fan, you just have to get past the 50-yard-line, not past the goal line."

Check your policies

Speaking of insurance, the law may grant you new flexibilities in the COVID-19 era, but your insurers may not have followed suit. Zuckerman suggests you confer with them to make sure and, if necessary, get them to rewrite coverage.

Take, for example, the flexibility the feds have given providers to practice in states other than the ones in which they're enrolled during the emergency (*PBN blog 3/23/20*). You and CMS may be OK with your treating a New Jersey patient by telehealth from Pennsylvania Ð but is your insurer?

"My concern here is denial of coverage," Zuckerman says. "The underwriter may claim that they were not given the opportunity to underwrite this cross-border telemedicine exposure, and unable to charge additional premiums, if applicable. Therefore the underwriter may assert that this is a material omission that would have altered their underwriting."

Checking with insurers isn't just a matter of adjusting coverage to suit your COVID-altered circumstances Ð it can also give you guidance for staying safe in general, financially and clinically.

"Professional liability carriers have risk management consultants, usually nurses trained in clinical risk management hired by the carrier to consult with MDs," Zuckerman says. "It's in their own best interest — they don't want the physician to slip up." As always in these cases, consult with your own attorney, too.

Resources

- "Order of the Governor of the Commonwealth of Pennsylvania to Enhance Protections for Health Care Professionals," May 6: www.governor.pa.gov/wp-content/uploads/2020/05/20200506-GOV-health-care-professionals-protection-order-COVID-19.pdf

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