A Perspective on Duty to Patients by the Healthcare Entity during a Pandemic Event

Empower Results®

Gisele Norris, DrPH
Aon National Healthcare Practice

Amy Norris, Esq.
Clif Bar & Company

Duty to Patients

Providing a Safe Environment

The primary mission of the healthcare facility is to provide safe and constructive care to its patients. Not only is this an ethical duty, but a legal requirement, as well. For example, state and federal government regulations require hospitals to provide a safe environment. The infectiousness of pandemic, however, threatens the very safety of the hospital environment. The healthcare facility must make every effort to mitigate this risk and, for this reason, an infection control program that consciously addresses pandemic must be in place.

Because influenza is primarily spread through human-to-human contact, the pandemic infection control procedures should, first and foremost, address the provision of adequate numbers of disease-free staff and/or volunteers. As mentioned above, healthcare workers will be in short supply and hospitals will be pressured to reorient workers and stretch capacity however possible. For this reason, hospitals need to understand which local, state, and federal agencies may have control in coordinating various medical personnel during a pandemic and how this may affect a healthcare facility's workforce.

More traditional infection control procedures must also be revisited and refreshed, including:

- promotion of respiratory etiquette and hand washing among patients, staff, and visitors;
- provision of Personal Protective Equipment (PPE) and masks for patients, staff, and visitors;
- appropriate disinfection of surfaces;
- air filtration; and
- disinfection of equipment.

CDC and others have published guidelines for infection control in the event of a pandemic, and healthcare institutions should be diligent about documenting any change in policy. Furthermore. To the extent possible, patients entering the healthcare facility during a pandemic should understand the additional risk. To this end, care providers should consider whether current informed consent and release provisions are adequate or require revision. During 2009, many facilities quickly created policies to restrict visitor access. Effective visitor restrictions are key to infection control during a pandemic.

As healthcare facilities consider stretching their workforce through use of volunteers, retired health professionals, and out-of-state health professionals, they must also consider the legal ramifications of

See, e.g., *Murillo v. Good Samaritan Hospital*, 99 Cal. App. 3d 50, 56- 57 (1999), imposing on hospitals duty to provide safe environment in which to diagnose and treat patients.

strategies including: licensure requirements, provision of workers' compensation, professional general liability coverage, and proof of adequate training.

The use of volunteer services gives rise to several legal issues. Facilities should examine minimum wage and overtime laws to determine whether they apply to volunteers. The Fair Labor Standards Act defines *volunteer* rather broadly for purposes of wage and hour laws. A person who performs activities without a promise or expectation of compensation for his or her personal pleasure falls outside the Fair Labor Standards Act. State labor codes may, however, have a more narrow definition of *volunteer* for purposes of wage and hour laws. In addition, healthcare facilities should analyze the applicable state workers' compensation laws to determine what coverage, if any, is extended to volunteers.

Another consideration is the possibility that volunteers will expose themselves to liability by offering their services. The potential liability exposure may discourage volunteers. Hospitals should strategize how best to limit the liability exposure of volunteers. To address this concern during Hurricane Katrina, one commentator reports that medical personnel were appointed as temporary uncompensated federal employees. They were thus classified as employees of the United States and qualified for the protections of the Federal Tort Claims Act (28 U.S.C. § 2671 et seq.)

Isolation and Quarantine

States and counties may impose isolation and quarantine during a pandemic. Isolation refers to the separation of persons who have specific infectious illness from those who are healthy. Quarantine refers to the separation and restriction of movement of persons who, while not yet ill, have been exposed to an infectious agent and therefore may become infectious.

Many levels of government have basic authority to compel isolation of sick people to protect the public. States and local jurisdictions have primary responsibility for isolation and quarantine within their borders, whereas the federal government has responsibility for preventing the introduction of communicable, diseases from foreign countries. A state's authority to compel isolation and quarantine Within its borders is derived from its inherent "police power." As a result of this authority, individual states are responsible for isolation and quarantine practices within their state.

Excerpted from: Enterprise Risk Management Handbook for Healthcare Entities; Second Edition; Chapter 7 An Enterprise Risk: Pandemic Influenza; Copyright 2013; American Health Lawyers Association

Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947). See also Pandemic Flu and the Fair Labor Standards Act: Questions and Answers, https://www.dol.gov/whd/healthcare/flu_FLSA.htm

A California law defines *volunteer* very narrowly. A person is a volunteer and not an employee subject to minimum wage and overtime provisions only if he or she intends to donate his or her services to religious, charitable, or similar nonprofit corporations without contemplation of pay and for public service, religious, or humanitarian objectives. (See Division Labor Standards Enforcement's 2002 Update of the DLSE's *Enforcement Policies and Interpretations Manual* 43.6.5·43.6.7 O.L. 1988-10.27).

Public Health Emergency Legal Preparedness: Legal Practitioner Perspectives, Demetrios L. Kouzoukas. JOURNAL OF LAW, MEDICINE & ETHICS.

See 42 U.S.C. § 264 for source of federal authority.

Contact

Gisele Norris, DrPH
Aon plc
1.415.458.2973
gisele.norris@aon.com

Disclaimer: This document has been provided as an informational resource for Aon clients and business partners. It is intended to provide general guidance on potential exposures, and is not intended to provide medical advice or address medical concerns or specific risk circumstances. Due to the dynamic nature of infectious diseases, Aon cannot be held liable for the guidance provided. We strongly encourage visitors to seek additional safety, medical and epidemiologic information from credible sources such as the Centers for Disease Control and Prevention and World Health Organization. As regards insurance coverage questions, whether coverage applies or a policy will respond to any risk or circumstance is subject to the specific terms and conditions of the insurance policies and contracts at issue and underwriter determinations.

About Aon

Aon plc (NYSE:AON) is a leading global professional services firm providing a broad range of risk, retirement and health solutions. Our 50,000 colleagues in 120 countries empower results for clients by using proprietary data and analytics to deliver insights that reduce volatility and improve performance.

www.aon.com

GDM11720 030420

Empower Results®