

CORONAVIRUS INFORMATION & UPDATES

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UPDATED: Key Considerations for COVID-19 Emergency Triage Policies in Florida

Ropes & Gray offers immediate practical guidance on how to navigate the legal and ethical issues raised by the need to have a clear plan for allocating scarce resources as COVID-19 strains Florida hospitals in unprecedented ways. Below are key considerations as hospitals and academic medical centers evaluate policies and procedures to guide these challenging decisions.

1. **Review your written disaster plan to ensure it addresses the anticipated shortages.** Florida law requires hospitals to have disaster plans. In preparation for a health care “surge,” this includes a plan for allocating scarce resources in cases of extreme shortages. A triage plan should include a clear statement of goals, be developed in an open and transparent manner, provide appropriate accountability for all decisions made, and clearly indicate the parties responsible for developing and updating the plan. At a minimum it should address:
 - What triggers the plan,
 - How treatment and supplies are allocated,
 - Whether the plan may result in withdrawing or withholding care, or in any combination of the two, and
 - Who will make allocation decisions for and among specific patients, and
 - How and when the policies will be communicated to patients and their families.
2. **Your plan should comply with non-discrimination laws.** The federal Office for Civil Rights (OCR) has recently issued guidance warning that supply shortages do not suspend federal and state anti-discrimination laws. Your triage plan should account for the following:
 - The triage plan should be facially neutral, meaning it does not discriminate against any protected class as written, and that its various measures and procedures are justified by necessity. Any plan should include a statement explaining why that specific plan is necessary to provide the applicable standard of care and the rationale behind it.
 - The greatest discrimination risk in triage plans is that they unfairly – and perhaps illegally – distinguish among patients based on underlying disabilities. In some cases, disabling conditions are co-morbidities that are appropriately considered in allocation of scarce medical resources, but those priorities should be established by clinical experience and ratified by senior medical staff, preferably by reference to professional or government guidelines.
3. **Confirmation of the need to transition to alternate or crisis standards of care.** Transition to an alternate or crisis standard should not occur until allocation or rationing becomes necessary. A triage plan should be followed only as long as the circumstances require. Before implementing your plan, the hospital should confirm and document:
 - Which resources and infrastructure are critically limited;

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- The hospital has maximized its efforts to conserve, reuse, adapt, and substitute conventional therapies;
- Available supply is insufficient to meet demand for conventional standard of care therapy;
- Patient transfer is not feasible or creates undue strain, with provisions made for discussing individual cases with, and gaining consent from, patients and/or legally authorized representatives; and
- The hospital has requested necessary resources from appropriate government health officials.

When the hospital is ready to implement its triage plan, be sure to check local laws and regulations for any mandates to coordinate with local authorities.

4. **Liability protection under state or federal emergency declarations.** In developing triage policies and procedures, it could be important to understand the contours of potential legal liability for certain decisions. In Florida, providers are not generally civilly liable provided they act in accordance with generally accepted standards of care under the circumstances, and use such care, skill, and treatment recognized as acceptable and appropriate by other members of the profession. In addition, current emergency declarations applicable to Florida offer the following protections:¹

- The Florida Good Samaritan law grants immunity from civil liability to any person, including those licensed to practice medicine, who gratuitously and in good faith renders emergency care or treatment arising out of a declared public health emergency or state of emergency, or at the scene of an emergency outside of a hospital. The state of emergency will expire on September 5, 2020, unless renewed by the Governor. The public health emergency was re-declared by the Surgeon General on June 29, 2020, with no designated end date.
- Protection from tort claims may be available under the federal Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C. § 247d-6d. The PREP Act protects the manufacture, distribution, administration, or use of medical countermeasures. Key questions are whether the hospital and its agents are “covered persons” and whether the specific care being providing is a “covered countermeasure.” Any protection that is available under the PREP Act is expected to extend until 2024.

¹ These are the March 1, 2020, Executive Order establishing a Coronavirus protocol and declaring a public health emergency by Governor DeSantis, extended on July 7, 2020; the June 29, 2020, Renewal of Declaration of Public Health Emergency by Florida Surgeon General Scott Rivkees; and the March 13, 2020, National Emergency Determination by President Trump.