



# COVID-19: Insurance, risks and possible liabilities

Briefing note for care providers

Distributed to CPA members - 15 May 2020

## Introduction

This note is provided by the Care Provider Alliance (CPA) to assist members in considering the potential risks and liabilities arising from the Covid-19 pandemic. It is not intended to be legal advice. Providers should seek independent legal advice if they have any concerns arising from the matters discussed in this note.

## Risks and liabilities

As the Covid-19 pandemic continues, social care providers are concerned that legal and regulatory risks and liabilities may arise in relation to Covid-19. Possible risks and liabilities that providers should consider could include (but are not limited to):

- Criminal liability and regulatory enforcement for registered providers under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014
- Criminal liability and regulatory enforcement as an employer under health and safety legislation (eg the Health and Safety at Work Act 1974)
- Other criminal offences under s44 Mental Capacity Act 2005, the Corporate Manslaughter and Corporate Homicide Act 2007, etc.
- Civil liability for personal injury/professional negligence/breach of contractual duty of care to service users/residents
- Civil liability for personal injury/breach of contractual duty of care to staff
- Liability relating to deprivation of liberty, mental capacity and best interests
- Liabilities (civil/criminal) relating to “DNA CPR” notices and other treatment escalation plans
- Human Rights Act 1998 damages claims (publicly funded residents)

## Situations resulting in prosecution or legal claim

Situations that may arise potentially resulting in a prosecution or legal claim against a provider could include:

- A resident or service user is infected with Covid-19 in the setting and becomes seriously ill or dies as a result. The person or their estate alleges that they were infected by staff or through intra-community transmission.
- A resident or service user with Covid-19 dies in the setting and their estate alleges that the provider negligently failed to arrange medical care for them/arrange for their transfer to hospital.
- A member of staff becomes infected with Covid-19 and become seriously ill or dies as a result. The staff member/their estate alleges that they were not provided by their employer with appropriate PPE and were infected as a result.
- A resident/service user who does not have Covid-19 alleges that a provider has breached its contract with them due to a failure to provide care as a result of Covid-19-related staff shortages.
- The Care Quality Commission alleges that due to insufficient infection control, care and treatment is not provided in a safe way for service users.
- The Health and Safety Executive/Local Authority alleges that a provider has failed to maintain a safe working environment for staff due to inadequate infection control.

Where liability requires proof of how a person was infected with Covid-19 (e.g. proof of intra-community transmission), this may be difficult to establish unless for example the person is shielding and only in contact with the care provider staff. Causation in negligence may be difficult to establish (i.e. but for the provider's negligence, the person would not have been made ill or died).

However notably, some forms of liability above – under health and safety legislation and the Regulated Activities regulations – do not depend on death or injury but only a fault in how care is provided, or failure to maintain a safe workplace.

## Insurance

Care providers should have in place both employers' liability insurance and public liability insurance. However, insurance will not protect against prosecution (although it could possibly cover fines and costs – providers should confirm) and in addition,

there may be relevant exclusions in providers' policies. Even where insurance can protect providers, insurance companies may exclude Covid-19 or pandemic-related claims at the point that policies come up for renewal, or hugely increase premiums for the sector in order to cover Covid-19 related risk.

## Indemnity

The Coronavirus Act 2020 has responded to the risk of NHS medical negligence liability in England and Wales by providing for an indemnity scheme in section 11 for tortious claims relating to death, personal injury or loss arising from the Covid-19 pandemic (including by staff and non-Covid-19 patients) where neither existing indemnification schemes nor insurance will cover health service providers.

Indemnity, for the avoidance of doubt, means that the government would financially indemnify (put providers back in the position that they would have been in) providers in relation to the relevant claim, covering damages and settlements and we would expect, legal costs. It is distinct from immunity which refers to circumstances where no claims can be brought.

### CPA position

**For this reason, the Care Provider Alliance is asking the Department for Health and Social Care to set up an indemnity scheme for the social care sector equivalent to that provided by section 11 of the Coronavirus Act 2020 in combination with other NHS indemnities, for health service providers.**

**Any such indemnity scheme should cover tortious claims and breaches of contract arising from the Covid-19 pandemic. It should be noted that no indemnity scheme could protect against all the forms of liability outlined above and that providers should continue to mitigate risk and follow relevant law and guidance.**

### Regulation, insurance and indemnity

CQC guidance on the Care Quality Commission (Registration) Regulations 2009, reg 13, provides that:

“The provider must have insurance and suitable indemnity arrangements to cover potential liabilities arising from death, injury, or other causes, loss or damage to property, and other financial risks.”

Regulatory action can be taken by CQC for breach of this reg 13. If providers are unable to obtain insurance cover in relation to Covid-19, and are not indemnified by government, then not only might they decide to withdraw from the care market, they might also be subject to regulatory enforcement by CQC if they do not withdraw.

Providers are not able to contractually exclude liability for death or injury in relation to Covid-19 from their own contracts with service users. Employers also commit a criminal offence if they do not have in place employers' liability insurance for injury or disease (under s1 of the Employers' Liability (Compulsory Insurance) Act 1969).

### **Market fragility**

CPA is aware that the market in both domiciliary care and care homes is fragile in that domiciliary care providers are operating on tight margins that are already being stretched by the need to purchase additional PPE. Care homes are also being affected by reductions in occupancy. If providers are forced to pay a lot more for insurance, and/or are not indemnified against tortious and/or contractual legal claims related to Covid-19 not covered by insurance, they are unlikely to be able to remain in the market – particularly in relation to publicly funded care.

In relation to self-funders, the additional costs relating to insurance and/or risk of liability may be passed on to the consumer, resulting in care becoming unaffordable to many people.

The Coronavirus Act 2020 does not provide an obvious power to make secondary legislation extending the scope of the s11 immunity to cover social care. Primary legislation may be required, although it may be possible to identify a suitable regulation making power in other health and social care legislation.

### **CPA position**

**The CPA believes that what is needed is an indemnity that covers registered providers of both publicly and privately funded care, for tortious and/or contractual claims for death, injury, loss or damage arising during the pandemic, relating to Covid-19 – brought by either staff or residents/service users (or their estates), where employers' liability insurance and/or public liability insurance does not provide cover.**

## **Further information**

[See CPA web pages on Coronavirus](#)

[Coronavirus and customers in temporary financial difficulty: draft guidance for insurance and premium finance firms – updated 7 May 2020 - FCA](#)