



STATE OF MAINE
OFFICE OF THE GOVERNOR
1 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0001

Form to Request Temporary Emergency Waiver, Suspension or Adjustment of a Law

Please accept this request on behalf of the following organizations:

- Maine Hospital Association
- Maine Health Care Association
- Maine Association for Community Service Providers
- Maine Optometric Association
- Maine Independent Colleges Association
- Maine Osteopathic Association
- Maine Medical Association
- Maine Chapter, American Academy of Pediatrics
- Maine Chapter, American College of Emergency Physicians
- Maine Neurological Society
- Maine Chapter, American College of Surgeons
- Maine Society of Orthopedic Surgeons
- Maine Association of Psychiatric Physicians
- Maine Radiological Society
- Maine Urological Association
- Maine Gastroenterology Society
- Maine Rheumatology Society
- Maine Society of Eye Physicians & Surgeons
- Maine Chapter, American College of Physicians
- Dirigo Maine Geriatrics Society
- Maine Society of Anesthesiologists
- Maine Academy of Family Physicians

A. Purpose

Use this form to request that the Governor exercise an emergency power to:

1. Make, amend and rescind a necessary order or rule related to the emergency;
2. Adjust a time frame or deadline imposed by law for state, county or municipal governments or other entity;
3. Suspend the enforcement of a statute prescribing the procedures for conduct of state business;
4. Suspend the enforcement of a statute, agency rule, agency regulation, agency order, or emergency rule that is inconsistent with emergency management and to the extent that the inconsistency exists;
5. Modify or suspend the requirements for professional or occupational licensing or registration by any agency, bureau, board or commission; or
6. Take other action (specify) necessary to mitigate an effect of the emergency.

B. Required Information

Provide the following information as part of your request:

1. Identify and explain briefly which of the above actions you are requesting;

We are requesting that the Governor exercise an emergency power to:

4. Suspend the enforcement of a statute, agency rule, agency regulation, agency order, or emergency rule that is inconsistent with emergency management and to the extent that the inconsistency exists; and
6. Take other action (specify) necessary to mitigate an effect of the emergency.

We request three waivers, suspensions or adjustments of state laws with the goal of limiting licensing, civil and criminal liability for healthcare providers who are doing the best they can with what they have to care for the people of Maine during the COVID-19 pandemic.

For purposes of these three requests, the term “healthcare providers” shall include both: (1) licensed hospitals, nursing facilities, residential care and assisted living facilities, and mental health and behavioral health facilities and services, Private Non-Medical Institutions, Intermediate Care Facility for Individuals with Intellectual Disabilities; and (2) those individuals who are employed by, or are agents or independent contractors of, such facilities and health services.

First, that criminal liability that might otherwise attach to actions taken by health care providers be waived if the actions were associated with providing healthcare services during the period of the current state of emergency declared by Governor Mills on March 15, 2020. If the actions taken were consistent with a policy that seeks to allocate or re-allocate resources during the period of the current state of emergency declared by Governor Mills on March 15, 2020.

Second, we request that professional licensing liability that might otherwise attach to actions taken by healthcare providers (both facilities and individuals) be waived if the actions taken were not gross negligence and were associated with providing healthcare services during the period of the current state of emergency declared by Governor Mills on March 15, 2020.

Third, we request that these healthcare providers and any entity, including any public or private nonprofit institution of higher education including its trustees, directors, officers, employees, students, volunteers, and other representatives or agents, responding to the emergency (e.g. civic centers serving as field hospitals, university, college, or secondary schools providing facilities for housing for first responders or healthcare workers, COVID wards, etc.), be immune from civil liability for any injury or death alleged to have been sustained directly as a result of an act or omission by such healthcare providers or entities in the course of providing services in support of the State’s response to the COVID-19 outbreak, unless it is established that such injury or death was caused by the gross negligence of such healthcare providers or entities.

These healthcare providers shall be immune from civil liability for any injury or death alleged to have been caused by their acts or omissions or due to a cancellation, delay, or denial of care resulting from a governmental or healthcare facility order, directive, guidance, policy, or procedure, or otherwise in support of the State's response to the COVID-19 outbreak, unless it is established that such injury or death was caused by the gross negligence of such healthcare providers.

The liability protections that we are seeking were contemplated by the State.

2. Explain briefly why the requested action is necessary to mitigate the effects of the emergency;

As the American Medical Association [notes](#), “the COVID-19 pandemic created a public health emergency that is rapidly altering the provision of healthcare services across the country based on guidance and recommendations from the Centers for Disease Control and Prevention and other federal, state and local government directives. Although necessary, these measures have raised concern about the potential liability of physicians and other healthcare professionals who are responding to the pandemic and continue to provide high-quality patient care while adhering to these guidance and recommendations.”

Due to this liability concern, it is important that Maine alleviate this threat to the greatest extent possible in order to allow our frontline healthcare professionals to focus their time and attention on meeting patients' needs.

We are also aware of a draft plan of the State of Maine entitled:

DHHS/Maine CDC: All Hazards Emergency Operations Plan, Annex: Crisis Standards of Care” dated June 2017.

This [plan](#), to our knowledge, is only in draft form and has never been fully adopted.

However, on page 22 it reads:

“Criminal liability. In addition to civil liability some parts of the CSC Plan require consideration of criminal liability. Parts of the plan set up a method for “re-allocating” scarce resources during an extreme public health emergency. These “re-allocations” can result in “withdrawing a critical resource” from a person who is likely not going to survive, and giving that resource to someone else who is both more likely to survive with the resource, and who would most likely die without it. An example is taking a patient off a ventilator to give it to another patient, when the person doing so knows it will result in the death of the first patient. This process would result in considered actions that would result in death to the individual who is removed from the critical resource. Maine, like most states, has criminal statutes designed to criminalize such behavior, and there are no exceptions or defenses that would cover the re-allocation of a critical medical resource during an extreme public health emergency. 17-A MRS §§35, 201, & 203. Such activity would normally require the consent of the patient or their authorized representative.

- *Before this part of the CSC Plan can be activated, statutes providing improved immunity to health care providers (whether employed, volunteer, or*

governmental) from civil or criminal liability for actions taken pursuant to the CSCs need to be enacted.

- *Such laws also need to protect professionals taking such “re-allocation” actions from complaints regarding their licenses to practice.”*

It appears the State believes that civil and criminal liability may attach in the circumstance described above and the draft plan contemplates providing immunity, both criminal and civil, to healthcare providers.

It is these liability protections that we are seeking.

3. Identify and provide copies of the specific statute(s) and/or rule(s), and the specific sections therein, that you are requesting be waived, suspended or otherwise adjusted;

The statutes we are requesting be suspended under the very limited circumstances described above are:

Criminal

Title 17-A, Chapter 9: OFFENSES AGAINST THE PERSON

17-A §201. Murder

17-A §203. Manslaughter

17-A §207. Assault

17-A §208. Aggravated assault

17-A §209. Criminal threatening

17-A §211. Reckless conduct

And with reference to §35 (Definitions of Culpable States of Mind).

Professional

Healthcare professions licensed under Title 32.

We are also requesting the initiation of the Maine Emergency Management Agency statute (37-B MRS Chapter 13) by “calling up” individuals “considered necessary to assist with emergency management activities.” (Sec. 784-A). Once called up, these persons and entities are to be considered employees of the state for purposes of immunity from liability under Sec. 822. Additionally, under Sec. 834, any existing law, rule, or regulation that is “inconsistent with this chapter” shall be suspended during the state of emergency. Specifically, criminal and tort statutes that would be inconsistent during this time should be suspended.

4. Identify and provide copies of any directly related statutes or rules that might aid the review;

- 5. Identify the cost, if any, that may be incurred a department or agency if the request is granted, which may include (but not be limited to) the cost of continued compliance with the subject statute or rule as written;**

None.

- 6. The urgency and other timing issues of the request;**

Extremely urgent given the projected peak of the crisis in the next 10 days.

- 7. Provide copies, if any, of executive orders or other like action that other state(s) have taken; and**

While liability protections available through Executive Order are dependent on that state's existing statutory provisions, many states are taking action to protect their healthcare facilities and staff during this pandemic. In addition to those states able to pursue legislative changes at this time, the following hyperlinks are to some states' Executive Orders:

[Illinois](#) [Alabama](#) [Connecticut](#) [Connecticut 2nd EO](#) [Michigan](#) [New Jersey](#) [New York](#)
[North Carolina](#)

We believe that the Governor, if unable to provide a limited waiver of criminal liability, may use her office to influence the Maine Attorney General's Office and the Maine District Attorneys to use prosecutorial discretion for healthcare providers during these unprecedented circumstances.

- 8. Provide succinctly any additional information or related materials that help explain the request.**

The circumstances of a shortage of supplies was outside the control of the individuals who will have to make difficult decisions regarding care. These individuals should not face professional or criminal charges for acting reasonable and responsibly in a situation they did not create. The stress for medical professionals that must respond to this pandemic, as well as specifically implement CSC, is great and forces each provider to confront ethical, professional and personal choices. As one provider succinctly put it in trying to keep providers coming to work every day and being safe, these sought-after waivers are simply a component of a provider's personal protection equipment (PPE).

We know that an asymptomatic person can unknowingly spread the lethal COVID-19 virus to loved ones, co-workers, patients, and strangers. And Maine, like all states, has limited testing ability and increasingly extreme shortages of PPE in the midst of a pandemic caused by a highly infectious virus. This situation forces our healthcare providers, who take every precaution they can possibly take, to still expose themselves and others to the potentially fatal illness. As you know, it is absolutely impossible for healthcare workers to maintain social distancing to protect themselves. We hope that our healthcare heroes do not have to resort to Crisis Standards of Care, but if they do, the civil, professional and criminal liability exposure will dramatically increase. The events

leading to these circumstances were completely outside the control of the individuals who will have to make difficult decisions regarding care. These healthcare professionals and the facilities who employ them should not face civil, professional or criminal charges for acting reasonably and responsibly in a situation they did not create.

C. Submission

Submit your request in a single email to emergency.requests@maine.gov. Please use the code [EXTERNAL REQUEST] in the subject line of the email.