

# Legal Brief

## Limitations of Actions – COVID-19 Immunity

This Legal Brief was drafted for general informational purposes only. It is not meant to be a comprehensive guide, nor should it be construed as legal advice. The information in this brief is current as of July 1, 2021; readers should consult the most recent versions of referenced statutes, regulations, and cases to ensure there have been no material changes.

### Summary

*Generally speaking, a medical malpractice action may be commenced against either individual physicians or professional corporations only within two (2) years after the alleged malpractice occurred. However, a different rule applies to injuries to minors allegedly caused by medical malpractice. In most instances, immunity exists for treatment decisions made relating to COVID-19.*

### Discussion

Generally speaking, a civil action against a physician, hospital, or other practitioner of the healing arts for an error, mistake, or failure to cure, whether based upon contract or in tort, must be commenced within two (2) years after the alleged act or omission occurred, or it is barred. SDCL 15-2-14.1. The limitation period usually begins to run at the time of the alleged act or omission, and not when the patient discovers it. However, there are several important exceptions to these general rules.

First, a different rule applies to injuries to minors allegedly caused by medical malpractice. A person making a claim based on an alleged error or omission that occurred while he or she was a minor must commence an action within two (2) years of the alleged malpractice or before his or her 19<sup>th</sup> birthday, whichever period is longer. Because a minor need not bring a malpractice action until after they become an adult, all records pertaining to the treatment of minors should be kept beyond their 19<sup>th</sup> birthday. This rule should apply even if the physician-patient relationship has been terminated prior to that time.

Second, there is an exception for so-called “continuing injuries,” meaning that the act or omission continues to cause injury to the patient until it is corrected. An example of a “continuing injury” is leaving a foreign body, such as a surgical sponge, within the patient. It is important to note, however, that a device that is intended to be left in the body, such as an IUD, is generally not considered to be a “foreign body.”

A third exception is the “continuing treatment” rule. Under this exception, the limitation period will not begin to run as long as the physician continues to treat the patient for the condition which alleged arose from the physician’s claimed negligent act or omission.

Finally, the limitation period will not begin to run if the physician intentionally conceals the condition or act or omission leading to the condition. As noted above, the mere failure of the patient to discover the condition does not by itself stop the limitation period from running, but the period will not run if the physician intentionally withholds information or otherwise “covers up” the condition or the act or omission which led to the condition.

### **CIVIL IMMUNITY – COVID-19**

Except in cases involving gross negligence, recklessness, or intentional misconduct, a health care provider is not liable for damages for causing or contributing, directly or indirectly, to the death or injury of a person as a result of the health care provider's acts or omissions in response to COVID-19, including the following:

1. Injury or death resulting from screening, assessing, diagnosing, caring for, or treating persons with a suspected or confirmed case of COVID-19;
2. Prescribing, administering, or dispensing a pharmaceutical for off-label use to treat a patient with a suspected or confirmed case of COVID-19; and
3. Acts or omissions while providing health care to persons unrelated to COVID-19 if those acts or omissions support the state's response to COVID-19, including any of the following:
  - a. Delaying or canceling nonurgent or elective dental, medical, or surgical procedures, or altering the diagnosis or treatment of a person in response to any federal or state statute, regulation, order, or public health guidance;
  - b. Diagnosing or treating patients outside the normal scope of the health care provider's license or practice;
  - c. Using medical devices, equipment, or supplies outside of their normal use for the provision of health care, including using or modifying medical devices, equipment, or supplies for an unapproved use;
  - d. Conducting tests or providing treatment to any person outside the premises of a health care facility;
  - e. Acts or omissions undertaken by a health care provider because of a lack of staffing, facilities, medical devices, equipment, supplies, or other resources attributable to COVID-19 that renders the health care provider unable to provide the level or manner of care to any person that otherwise would have been required in the absence of COVID-19; and
  - f. Acts or omissions undertaken by a health care provider relating to the use or nonuse of personal protective equipment.

A “health care professional” is a physician and other health care practitioner who is licensed, certified, or otherwise authorized or permitted by the laws of this state to administer health care services in the ordinary course of business or in the practice of a profession, whether paid or unpaid, including persons engaged in telemedicine or telehealth, and includes the employer or agent of a health care professional who provides or arranges health care.

### **Conclusion**

*With a few exceptions, a medical malpractice action may be commenced against either individual physicians or professional corporations within two (2) years after the alleged malpractice occurred. A minor must commence an action within two (2) years of the alleged malpractice or before his/her 19<sup>th</sup> birthday, whichever period is longer. Exceptions also exist for continuing injury to the patient, continuing treatment of the condition, if the physician intentionally conceals the condition or the cause of the condition, and the treatment of patients in response to COVID-19.*