



Novel Coronavirus (COVID-19)

Health Law

March 2020

New Emergency Powers for Long-Term Care Homes Have Arrived Not a Minute Too Soon

By Lisa Corrente and David M. Golden

The global COVID-19 pandemic is undoubtedly a time of angst and uncertainty for everyone. However, one certainty which we have learned since the outbreak began is that the elderly are the most vulnerable to the virus. In China, 80 percent of the deaths were among people in their 60s or older and the general trend is playing out elsewhere. To date, 14 long-term care homes in Ontario have confirmed outbreaks of COVID-19 accounting for one-third of the province's deaths.

With the rapid rise in COVID-19 cases within the province generally, the number of infected residents and staff members will increase in our long-term care homes. As a result, on March 27, 2020, an Emergency Order was enacted by the Ontario government pursuant to the *Emergency Management and Civil Protection Act* ("EMCPA") giving long-term care homes the much needed authority to take "any reasonably necessary measure" to respond to, prevent and alleviate the outbreak of COVID-19.

During the declared emergency, despite the requirements of the *Long-Term Care Homes Act, 2007* (the "Act") and other applicable legislation, long-term care homes are authorized to:

- Fill any staff position with a person who, in their reasonable opinion, has the adequate skills, training and knowledge to perform the duties required of that position;
- Use flexible processes for the admission, transfer and discharge of residents; and
- Adopt flexible practices related to the administration of drugs to residents as long as the practices are consistent with and within the scope of practice of the person administering the drug.

Additionally, pursuant to the Emergency Order, homes are not required to:

- Report complaints or other information to the Director of the Ministry of Long-Term Care (the "Ministry"), other than critical incident reports and mandatory reports under the Act;

- Document information unless it involves an incident of a “significant nature” or is required to ensure the proper care and safety of a resident;
- Immediately document changes to a resident’s plan of care unless they involve changes of a “significant nature” or of which staff members and others need to be immediately aware;
- Ensure that the minimum number of staffing hours are met for a position provided that all of the care requirements associated with that position are met;
- Comply with prescribed screening measures (e.g. criminal record checks) provided that they adopt other measures that ensure resident care and safety (e.g. requiring disclosure of charges and offences);
- Comply with training and orientation requirements provided that staff and volunteers take measures to ensure resident care and safety;
- Hold care conferences at prescribed intervals provided that they ensure care conferences take place based on the clinical needs of the resident;
- Ensure that a physical examination of a resident occurs annually, but must ensure that a physical examination occurs within a reasonable period of time after the resident’s last examination;
- Conduct surveys (e.g. satisfaction surveys);
- Post information in the home except essential information, such as material related to COVID-19 from the Ministry or others;
- Certify regulated documents (e.g. consent forms, accommodation and unfunded services agreements); and
- Follow the statutory steps when seeking approval from the Director to obtain a licence or management contract, unless otherwise required by the Director.

These emergency powers give long-term care homes critical flexibility with resources needed to respond quickly, safely and effectively to the growing crisis, while still ensuring the care and well-being of residents. They permit long-term care homes to hire additional capable staff and put them to work without delay during a time when staffing resources are diminishing due to infection, required isolation, or child care obligations. They also allow homes to focus the duties of staff on resident care, as opposed to administrative tasks.

Long-term care homes should note that under the Emergency Order, they remain responsible to ensure a safe and secure environment for residents. Further, they must continue to comply with orders or directives issued by public health officials under the *Health Protection and Promotion Act*. Although long-term care homes will not be issued non-compliances with the Act by the Ministry while acting under the authority of the Emergency Order, they will still need to provide resident care in accordance with an expected “reasonable” standard. Clearly, this is not business as usual for long-term care homes and we encourage them to seek guidance from and work collaboratively with industry associations, Ministry advisors, public health officials, medical professionals, legal experts, and most importantly, with each other.

Under the EMCPA, the Emergency Order remains in effect only for two weeks. However, it may be extended for periods of an additional 14 days if necessary to deal with the pandemic. Whether the Emergency Order will be extended will depend on the progress of the pandemic, but also on the feedback which the provincial government receives from long-term care homes, industry associations, Ministry advisors and other key stakeholders.

Yesterday, the Emergency Order came under criticism by various media outlets which cited concerns about the quality of care which would be provided to residents. However, as noted by an open letter endorsed by a broad coalition of long-term care stakeholders, the reality is that the regulatory framework of the Act was not designed to cope with a pandemic of this scale, and the flexibility of the Emergency Order is absolutely vital in empowering homes and their staff to manage under unprecedented pressure and staff shortages. Industry associations which support the Emergency Order include the Ontario Long-

Term Care Association, AdvantAge Ontario, Ontario Long-Term Care Clinicians, Family Councils Ontario and the Ontario Association of Residents' Councils.

On a related note, we commend and applaud the front-line staff and others working in long-term care for their tireless dedication to our seniors during these very trying and uncertain times.

If you have any questions about COVID-19 and your long-term care home, please contact a member of our team. For more information about dealing with COVID-19, please visit our COVID-19 Resource Center.

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