

# Nursing & Assisted Living Facility Professional

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“NEWS AND VIEWS YOU CAN REALLY USE”

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SENT EACH MONTH TO YOU AS A MEMBER OF THE HEALTHCARE HEROES

## THE ADELMAN ADVANTAGE by Rebecca Adelman

# More Professional Liability Immunity News for Long-Term Care Providers – PREP Act Update



Flight #2021 has taken off and I feel confident that there will be less turbulence and blue skies ahead. Adelman Law Firm is honored to be advising and educating and collaborating with senior living care providers throughout the country as we make progress in the health

and safety of our caregivers and the elders in our communities.

I am also excited about beginning the 11<sup>th</sup> year as the legal contributor to this newsletter. We have some new programs in store for you in 2021 and beyond.

The New Year is already delivering some positive developments for long-term care providers and immunities and other protections from professional liability.

Since the pandemic began, we've been reporting on the Public Readiness and Emergency Preparedness Act (PREP Act), HHS Advisory Opinions and decisions from federal courts around the country (See, the October 2020 [Adelman Advantage](#) and [Deny Everything](#) Podcast Episode #3) regarding immunity from professional liability for long-term care providers. In lawsuits against nursing homes, our defense teams have been invoking the PREP Act to claim immunity from COVID-19 lawsuits and related claims. There have been several important developments that support immunity for nursing homes in COVID-19-related lawsuits.

### HHS Advisory Opinion 21-01 – January 8, 2021

Following the issuance by HHS on December 3, 2020, of the Fourth Amendment to the PREP Act, HHS received questions as to whether the PREP Act applies where a covered person declined to use a covered countermeasure when it arguably ought to have been used. The inquiries were stimulated by recent lawsuits, most involving nursing homes and other healthcare facilities, where patients or their estates allege that patients contracted COVID-19 because the facility, among other things, failed to provide its staff with personal protective equipment (“PPE”), failed to teach the staff how to properly use that equipment, or failed to ensure that its staff used the PPE that it had been given. This Advisory Opinion addressed these questions in the context of the administration of the PREP Act and clarified that the scope of the PREP Act is a “Complete Preemption” Statute.

### What Does This Mean for the Defense Nursing Home Litigation?

The key question answered by this opinion is “When is the PREP Act triggered”? This is the question that has perplexed District Courts.

The opinion iterates that the PREP Act provides that its immunity “...applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing,

promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of such countermeasure.”

Some district courts have interpreted the scope of the immunity as requiring “use” (as opposed to non-use). Under this view, if a covered countermeasure were not used, then there is no PREP Act immunity.

This is where the opinion gets good. It states “However, this “black and white” view clashes with the plain language of the PREP Act which extends immunity to anything “relating to” the administration of a covered countermeasure.

Prioritization or purposeful allocation of a Covered Countermeasure, particularly if done in accordance with a public health authority’s directive, can fall within the PREP Act and this Declaration’s liability protections. As the opinion states related to nursing homes, there can potentially be other situations where a conscious decision not to use a covered countermeasure could relate to the administration of the countermeasure. In contrast, the failure to purchase any PPE, if not the outcome of some form of decision-making process may not be sufficient to trigger the PREP Act.

Where a facility has been allocated a scarce therapeutic purchased by the federal government and that facility fails to administer that therapeutic to an individual who meets the requirements of the FDA’s authorization, approval, or license, and whose physician prescribes that therapeutic, then the facility’s refusal to administer that therapeutic could still trigger the PREP Act assuming the non-use of the therapeutic was the result of conscious decision-making. However, the facility may still be liable under the PREP Act, if the plaintiff alleges that the decision to deny him or her the therapeutic was wanton and willful and resulted in death or serious injury. While the opinion includes other important points, for nursing home defense, the opinion reinforces how the PREP Act (1) provides complete preemptive federal jurisdiction and invites jurisdictional discovery; and (2) applies to cases where the alleged harm results from failure to use (and even refusal to use) a covered countermeasure when that failure arises out of the conscious allocation and prioritization of the countermeasures.

Whether federal courts will follow HHS’s recent guidance and interpretation of the Act remains a key question in how broadly the PREP Act will apply to cases moving forward.

This leads to the next important development right here in Tennessee.

### Tennessee Nursing Home Lawsuit

The surviving children of a nursing home resident filed a Tennessee medical malpractice/wrongful death lawsuit against a nursing home in a state court alleging that the nursing home failed to prevent the transmission of COVID-19. Consistent with the long-term care litigation defense playbook, the lawsuit was removed to the Federal District Court on the grounds that the Federal Court has jurisdiction under the PREP Act and that the nursing home is entitled to the immunities afforded by the PREP Act. On January 19, 2021, the United States Attorney’s Office for the Middle District of Tennessee and the U.S. Department of Justice issued a Statement of Interest in connection with the lawsuit arguing that the PREP Act completely preempts state tort claims related to liability and immunity from the administration of COVID-19 countermeasures. Along with the HHS Advisory Opinions, this Statement of Interest (Note: The United States does not take a position on the facts in the lawsuit. The Statement of Interest presented the United States’ position on the scope of the PREP Act).

The United State’s argues:

1. The PREP Act provides immunity “under federal and state law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration of countermeasures” by HHS citing the PREP Act;
2. The PREP Act establishes the “sole exception” to the grant of immunity in subsection (a), “an exclusive Federal cause of action” for claims of willful misconduct resulting in death or serious physical injury.
3. Complete preemption is consistent with the reasons Congress enacted the PREP Act. Any differing reading would derail the response to national health emergencies and “the prompt and willing cooperation of private partners”. If there is exposure to

liability arising in tort, the nation's ability to protect itself from epidemics and pandemics would be undermined.

4. Citation to legal cases relied upon by our defense teams against motions to remand to state court were made by the United States further enforcing the complete preemption of state court claims.

The District Court has not made a ruling on the Motion to Remand and additional defense filings were made January 19, 2021 submitting additional authority to the District Court. No hearing date has been set. We are hopeful Chief Judge Waverly Crenshaw denies the Motion to Remand and there is now additional support through the HHS Advisory Opinion and the United States' State of Interest. We will keep you closely advised.

Stay tuned for Episode #4 of Deny Everything coming soon! Stay well.



Rebecca Adelman is an entrepreneur, influencer, thought leader and founder of Adelman Law Firm and Claims Management, a Women's Business Enterprise National Council (WBENC) certified Women Business Enterprise (WBE) established in 2001. For nearly 30 years, Rebecca has concentrated her practice in insurance defense and business litigation. The firm's practice extends through the Tri-States of Arkansas, Mississippi and Tennessee. Rebecca's insurance defense practice includes representation of insurance companies and long-term care providers and their insurers, both regionally and nationally. She also provides consulting services and educational programming to healthcare professionals and business associates. She has active practices in the areas of general liability, professional liability, premises, and employment law. She is a listed mediator serving all areas of business and healthcare litigation. Contact Rebecca at [rebecca@adelmanfirm.com](mailto:rebecca@adelmanfirm.com) and visit [www.adelmanfirm.com](http://www.adelmanfirm.com).

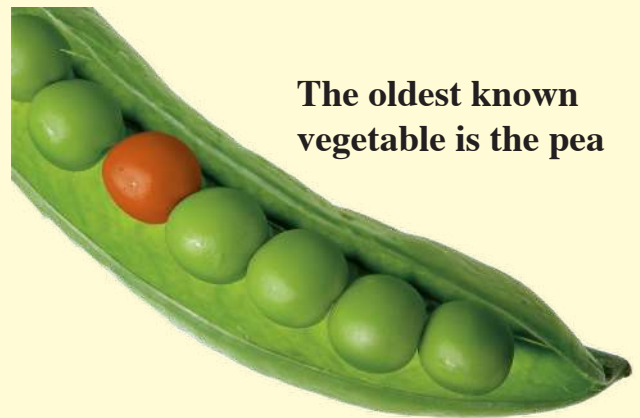
## DID YOU KNOW?



**Americans eat 35,000 tons of pasta a year**



**Hawaii is the only US state that grows coffee**



**The oldest known vegetable is the pea**



**There are over 2,500 different types of mushrooms**



## Increasing Staff Vaccine Acceptance



The vaccines are here and by this point, you've likely administered several doses. While many people are eager to be vaccinated, some are more hesitant, perhaps even refusing to be vaccinated. Understanding the nuances of why people make a choice to be vaccinated or not will

be crucial to the success in your facility, which ultimately impacts the greater community. Ann Christiano, Director of the Center for Public Interest Communication at the University of Florida and postdoctoral research associate, Jack Barry, wrote an excellent article titled, "How to Overcome Vaccine Skepticism". They point out that the decisions around vaccinations can be complex and are influenced by social, behavioral, and cognitive factors. Crafting your vaccine administration program around these influences will predictably increase staff vaccine acceptance as well as impact overall social change.

The authors identified eight principles based on research to increase trust, acceptance, and demand for vaccination. To help put these principles into action, I composed questions based on each principle that may be helpful as you develop and revise the vaccine program in your facility.

1. Identities, worldviews, and moral values influence our choices and behaviors, as well as what we believe to be true. *What is the connection*

*between what you hope to achieve (vaccination) with what matters to staff (e.g., returning to activities)? What things are important to staff that are not possible now because of the pandemic? If everyone gets vaccinated, how will that move us closer to doing the things we enjoy?*

2. Timing is important and people usually trust the version of information they hear first. Also important is that the same message be repeated multiple times from many sources. *How does this information help you proceed with developing a vaccination program in your facility? How will you ensure consistent and frequent messaging?*



3. People take action when they trust the messenger, someone with deep expertise **or** someone who people see as being like themselves with shared values. Messaging from a trusted insider of a group is also powerful. *Who is this person(s) in your facility and how*

*will you engage them in the program? How is this person similar to the group? What are the shared values and how can you incorporate that into the message? How will you support staff identified as messengers (e.g., if they are asked questions they can't answer)?*

4. Messaging must provide value, utilize story and be concrete (e.g., rather than "we're in stage 3", state the number of people who have participated in the trials). *What concrete information will you include in your messaging? What stories will you include that will be impactful for staff?*

5. Some people may distrust authority, especially in some societies that have been mistreated or exploited. When people trust authority, they are more likely to accept direction, even if they don't support it. *How does this knowledge help guide your vaccination program and messaging?*
6. Reinforce positive behaviors. People are deeply affected by the behavior and choices of people in their networks (even people they do not know). *Who are the trusted influencers in your facility/community and how can they help impact staff perceptions? What are the positive behaviors that need to be reinforced?*
7. Evoke emotions that inspire people to act (e.g., hope, fulfillment, gratefulness). Do not activate fear or shame to get people to take the vaccine. *What emotions do you think will resonate with staff at your facility? How will you incorporate an emotional component in your messaging? How might getting a vaccine increase their own sense of working with a team, helping each other, and protecting others?*
8. Perceptions of motivations of the messenger matter. If staff do not trust the motives, they will not be as likely to get vaccinated. An individual's motivation in seeking information is just as important. *What are the motives of the messengers in your facility? What makes them trustworthy? Why might an individual seek out more information about the vaccine or process and what information might they ask for?*

Vaccination will help lead us out of this crisis and generating high levels of acceptance is a crucial step. Beyond the immediate round(s) of vaccination, we must remain committed to comprehensive vaccination programs and messaging that are integral to the facility culture. This is not, as they say, a one-shot deal.

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# CYBER ATTACK!

## How to Protect Your Residents' and Facility's Private Information in These Challenging Times

You hear and read about it with alarming frequency-sensitive, classified data has been stolen and with it peoples' lives are turned upside down! It's happened in government, in banking ... and in healthcare - here it could be resident identity theft, facility financial information stolen, or some other horror!

At this very moment, how safe is your nursing or assisted living facility's stored data? Is residents' personal medical information, social security numbers, financial information, and other critically important data at risk? Do you accept credit card payments for services - how secure are payers' stored credit card numbers in your system?

FYI: your facility will be sued if a resident's identity is stolen, or a family's credit card number falls prey to a hacker because your building's negligence. What about the facility's information on file (i.e. bank account numbers, other classified data); is it vulnerable to today's ultra-sophisticated and savvy hackers?



Extended Care Products, the leader in nursing and assisted living discovery education, presents a power-packed program for the times we live! You may have IT help; however how well versed are they

safeguarding classified data within your system? You may have firewalls, but is this enough?

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