Dear Governor Beshear,

Collectively, we represent hundreds of healthcare facilities and senior housing communities across the Commonwealth of Kentucky that care for the most vulnerable of our citizens—the thousands of elderly residents in skilled nursing and rehabilitation facilities, assisted living communities and personal care homes. These important elder care services need to be prioritized with the tools necessary to protect the individuals that they serve on a daily basis.

Skilled nursing facilities, assisted living communities, and personal care homes—as well as—healthcare workers, professionals, and providers across Kentucky need reasonable limited liability protections now in order to recognize their heroic efforts during the COVID-19 pandemic emergency. As you are well aware, these providers and their employees are being asked to care for our elderly without appropriate personal protective equipment (“PPE”), wide spread testing, and without additional funding resources. They have been set up to fail.

Despite the failings of our health care and governmental systems, the elder care providers across Kentucky are rising to the challenge by working extra hours under dangerous conditions. These health care workers and senior housing caregivers and showing up to work every day, through no fault of their own, without adequate equipment, including appropriate protective equipment, such as gloves and masks. To make matters worse, although hospitals and other health care providers have been prioritized for additional Medicare funding—skilled nursing facilities, which are heavily dependent on Medicaid have been left out. Neither the Commonwealth of Kentucky nor the federal government have prioritized skilled nursing facilities for additional Medicaid reimbursement, which has made it even more difficult for them to acquire the necessary tools to deal with this unprecedented health care crisis.

The dangerous conditions created by the lack of appropriate equipment and additional funding is further compounded by the lack of testing kits, as healthcare workers are not only putting themselves at risk treating infected patients and residents, but also possibly unknowingly spreading the infection to the same individuals that they are charged with caring for. As employees become exposed and infected, difficult staffing challenges are only exacerbated. Unlike hospitals who have furloughed thousands of workers due to the ban on elective surgeries and other medical procedures, skilled nursing facilities, assisted living communities, and personal care homes have had to maintain current staffing levels and even increase staffing levels to address the COVID-19 pandemic. Again, they have risen to the challenge without the necessary support and supplies to do so.

RE: Request for emergency civil immunity protections through executive order
We simply ask that you recognize that elder care workers should not be held liable for the spread of the COVID-19, unless due to reckless misconduct or flagrant indifference to the guidance issued by governmental agencies as the standards for infection control (which are evolving in the face of well documented equipment shortages). This protection should be extended to skilled nursing facilities, assisted living communities, and personal care homes. All anyone needs to do is review Kentucky’s data—Kentucky’s elders are dying at a higher rate due to the pandemic and Kentucky has been unable, to date, to “flatten the curve” in skilled nursing facilities.

If we fail to provide reasonable immunity or liability limitation, given the current Kentucky legal environment and the attractiveness of fees for mass tort, plaintiff attorneys will be encouraged to file suit. This in turn will create a huge increase in costs for our providers and a shortage of facilities and workers willing to provide care at the time the most vulnerable members of society need it most. Unfortunately, the plaintiff’s bar is already positioning itself to profit from this tragic situation by organizing mass tort actions.

As evidenced in the attached Legal Memorandum, without question you have the authority under KRS 39A.100, the emergency gubernatorial Executive Order (EO) powers, to protect our healthcare providers, our healthcare professionals and their employees. Governors across this country are issuing Executive Orders to protect these institutions and their employees from litigation and the attendant costs during this pandemic. To date well over a dozen Governors from New York, Illinois, Michigan, Vermont, Oklahoma, Arizona, Michigan, New Jersey, Connecticut, Massachusetts, and others are using their executive emergency powers to protect the frontline providers in this crisis.

We have attached a Model Executive Order that can quickly be implemented in Kentucky to afford the protection. The relief requested is in recognition that our provider community, as you well know, is engaged in heroic efforts. The recently passed SB 150 does not provide any real relief. As passed, it is essentially a re-codification of the already existing tort law in Kentucky. In order to create an environment where our long term care provider community can continue to serve, provide both public and private pay options for our elderly, we are urging you to act by issuing an Executive Order.

We stand arm in arm with you in this fight. We need your help to keep us standing as we fight this pandemic.

Sincerely,

Elizabeth “Betsy” Johnson
KAHCF/KCAL

Timothy L. Veno
LeadingAge Kentucky

Bob White
KSLA