

Immunity from Civil Liability during the Pandemic – State and Federal Protections Available to Healthcare Providers

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With the uncertainty and ever-changing policies and guidance related to COVID-19, healthcare providers are struggling to keep up with the recommendations while also providing care in a difficult situation. Due to the continuous changes in guidelines, many providers fear potential liability. This is true for many business as well as states as they start to re-open. In response, many states, if not all, have attempted to address potential liability issues by issuing executive orders and passing legislation that protects healthcare providers and businesses acting in good faith during the pandemic. On May 8, 2020, Governor Kay Ivey issued an executive order providing immunity for businesses and healthcare providers to protect them from lawsuits related to COVID-19. Additionally, there is state legislation drafted and federal legislation under discussion regarding immunity for healthcare providers.

Summary of Alabama Executive Order

Governor Ivey's Executive Order grants civil immunity to businesses and healthcare providers who are responding to or impacted by the COVID-19 national pandemic. The immunity provisions are fairly broad and apply to "covered response activities" and transmissions, including businesses or healthcare providers engaged in

- testing, distribution of testing materials, monitoring, collecting, reporting, tracking, tracing, investigating or disclosing exposures;
- performance of any healthcare service or treatment by healthcare provider resulting from, negatively affected by, negatively impacted by, lack of resources, caused by or done in response to the COVID-19 pandemic;
- any design, manufacture, distribution, allowance, use or non-use of precautionary equipment such as PPE; or
- any design, manufacture of testing materials done under the direction of ADPH or in accordance with ADPH's specifications.

As indicated, a healthcare provider who is performing a healthcare service or treatment would be entitled to immunity even if the care and treatment was not directly related to COVID-19. The immunity applies to a business or healthcare provider unless the entity or healthcare provider acts with willful, wanton, reckless or intentional misconduct. In other words, a person claiming a physician or healthcare provider acted negligently during the pandemic should be granted immunity from any lawsuit. Additionally, businesses and healthcare providers receive the same level of immunity related to actual, alleged or feared exposures during the state of emergency. However, if the acts or omissions are found to be willful, wanton, reckless or intentional misconduct, the damages for non-serious physical injury are limited to actual economic damages.

A cause of action that accrued prior to the enactment of the proclamation is preserved, but in those cases, the standard of care requires that the claimant prove by clear and convincing evidence that the business or healthcare provider was acted wantonly, willfully, recklessly or intentionally or failed to reasonably attempt to comply with applicable health guidance. Additionally, the limitation on damages for non-serious physical injury are actual economic damages. For example, a person who sues a business or healthcare provider because he contracted COVID-19 but who is not hospitalized for more than 48 hours can only claim out-of-pocket expenses, not damages for mental anguish or punitive damages.

The proclamation is effective and retroactive to March 13, 2020 and continues until the State COVID-19 public health emergency is terminated.

Proposed Alabama Legislation

The Alabama Legislature is also considering legislation that would protect businesses and healthcare providers. Like the Executive Order, the proposed legislation in Alabama would provide immunity for business entities, healthcare providers, educational entities, churches, governmental entities and cultural institutions. Senate Bill 330 was introduced by Senator Orr during the regular session that ended on May 18. It was not introduced in the House due to an agreement that the House would only reconvene during the COVID pandemic to address budgets.

Under the proposed legislation, certain business activities are covered by the immunity provisions with the intent to protect businesses who choose to re-open. Furthermore, immunity is provided for a healthcare provider who is performing a provision of healthcare treatment that "results from, negatively affected by, negatively impacted by, lack of resources caused by or was done in response to the Coronavirus pandemic or the State's response to the pandemic." Similar to the Executive Order, the broad language does not require that the person suing the healthcare provider to have contracted the virus or been exposed to the virus. It would apply to any lawsuit where the healthcare provider was impacted by COVID-19.

Neither the legislation nor the Executive Order affect an employee's right to seek worker's compensation for contracting the virus while performing a job duty. If, however, an employee makes an allegation related to the contraction of the virus outside of a job duty, those claims should be covered by the immunity provisions.

Proposed Federal Legislation

Under current federal law, there is some liability protection for healthcare providers. For instance, as part of the CARES Act, Congress added protections for healthcare providers who provide volunteer services during the pandemic. Additionally, the PREP Act, the Public Readiness and Emergency Preparedness Act, provides immunity protection for healthcare professionals who administer or use countermeasures. The PREP Act is applicable to the COVID-19 pandemic pursuant to the March 17th declaration by the Secretary of Health and Human Services deeming antiviral medications, other drugs or biologics, and vaccines related to COVID-19 as countermeasures covered by the Act.

There has been additional talk at the congressional level suggesting Congress may also consider immunity protections in the next round of relief packages. Many senators are pushing for federal legislation that provides some level immunity for healthcare professionals beyond those volunteering.

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