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Business Liability Alert

States Enact COVID-19 Business Liability Protections as Congress Deadlocks

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UNCERTAINTY OF FEDERAL COVID-19 LIABILITY PROTECTION

Back in the summer of 2020, Congress began debating the next round of coronavirus relief packages. One of the sticking points was liability reform. On July 27, 2020, Senate Republicans introduced the SAFE TO WORK Act (S.4317). Republicans argued that for the economy to get back on track, businesses should be shielded from meritless COVID-19-related lawsuits.

If passed, the Act would govern "coronavirus exposure actions," defined as any civil action brought by any person who has suffered (or is at risk of suffering) coronavirus-linked personal injury against an individual or entity engaged in businesses, services, activities, or accommodations. This would create a new exclusive federal cause of action that would preempt and supersede all other laws related to recovery for personal injuries caused by actual, alleged, feared, or potential exposure to COVID-19.

Under this scenario, a claimant would be required to provide specific factual details about all the places and persons the claimant interacted with 14 days before the onset of their first coronavirus symptoms, and why the interaction with the defendant was the sole cause of exposure. The claimant would also need to provide a factual basis for damages claimed, a medical expert affidavit on the claimed injury, and certified medical records.

The standard of proof for coronavirus exposure actions would be *clear and convincing evidence* of the following:

i. No reasonable effort was made to comply with government standards and guidance at the time of exposure;

ii. The defendant engage in gross negligence or willful misconduct that caused actual exposure; and

iii. The actual exposure caused personal injury.

If a defendant's written policies are more protective than government guidelines, there would be a presumption that the defendant made reasonable efforts to comply with government standards. The claimant could rebut the presumption by showing that the defendant was not complying with its published standards.

Lastly, this Act would serve as a financial deterrent for "meritless" complaints. The defendant can pursue both compensatory and punitive damages if a claimant sends a meritless letter demanding money in exchange for a release.

As of the date of this Alert, Congress has not come to an agreement on either a second coronavirus relief package or a federal COVID-19 liability standard for businesses. While the potential for such legislation is dim for 2020, some form of this legislation may find its way into a "SAFE TO WORK" legislative initiative, or a future coronavirus relief package.

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STATES' RESPONSE FOR COVID-19 LIABILITY PROTECTION

While there is uncertainty under federal law, states have adopted initiatives on COVID-19 liability protections that vary widely in scope and coverage by jurisdiction. At the time of this Alert, at least 16 states - Alabama, Arkansas, Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Tennessee, Utah, and Wyoming – have enacted legislation to narrow the liability limits related to and stemming from COVID-19. To varying degrees, businesses are protected from liability unless their actions were the result of "intentional," "grossly negligent" or "reckless" behavior, or otherwise failed to substantially comply with COVID-19 federal, state, or local procedures. These protections also do not prevent employees from filing workers' compensation claims related to actual or potential workplace exposure to COVID-19.

The most likely claim a business would face is a claim under premises liability. The following provides a short summary of what businesses should keep in mind given the elements of a premises liability claim and the COVID-19 liability laws passed in 2020.

WHAT CONSTITUTES GROSS NEGLIGENCE OR WILLFUL MISCONDUCT?

These Covid-19 shield laws do not define legal terms such as "gross negligence" or "willful misconduct," so businesses will have to rely on the governing state's common law and/or statutory definition. By way of example, under the Georgia COVID-19 Pandemic Business Safety Act, businesses cannot be held liable for damages involving a COVID-19 liability claim, unless the claimant can show that the entity's actions involved "gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm." Georgia businesses, however, are allowed a rebuttable presumption of compliance if they either provide written waivers or post a sign at the point of entry to notify patrons that there is no liability for COVID-19 related injuries upon entering the premises.

Georgia's willful or wanton standard imports "deliberate acts or omissions, or such conduct that discloses an inference of conscious indifference to consequences." Georgia defines wanton conduct as "so reckless or so charged with indifference to the consequences as to be the equivalent in spirit to actual intent to do harm or inflict injury." Willful or wanton conduct may also be shown where a landowner fails to exercise ordinary care to prevent injury from a "hidden peril" on one's premises. Other states have very similar definitions and descriptions for what constitutes gross negligence and willful misconduct. As long as a business is actively following state or federal guidelines on how to safely operate during the pandemic, it may be burdensome for a claimant to prove that the business was intentionally creating an environment that disregards the infectious nature of COVID-19 on its premises.

PROVING A CAUSAL LINK

In addition to proving that a business acted with such indifference as to infer intent to infect its own patrons, a claimant in any state must also prove a causal link between their COVID-19 diagnosis and their presence within the business premises. There is a lengthy incubation period between exposure to the virus and the development of symptoms. Even if a visitor had been scrupulously following government directives, it will be difficult for that individual to pinpoint exactly when and where he or she was exposed to the virus and, thus, who is responsible.

Some states have heightened the requirements of a causal link to prevent frivolous lawsuits. For example, the Tennessee COVID-19 Recovery Act requires a claimant to file a "certificate of good faith" that states the claimant's counsel consulted with a licensed physician who provided a signed written statement that the COVID-19-related injury was caused by the alleged conduct of the business.

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It is safe to say, that when it comes to alleging a causal link, the airborne transmission and incubation period of COVID-19 could be significant hurdles for any claimant to prove against a business.

NO ADDITIONAL DUTY TO DISCLOSE OR NOTIFY

Under these sixteen state COVID-19 liability laws, there is no duty to disclose or notify clients/customers/visitors if an employee tests positive for the virus or if that client/customer/visitor may have come into contact with an employee who tested positive. A business also does not have a duty to close or implement any cleaning procedures in order to benefit from the liability shields.

Surprisingly, there appears to be no additional duty set forth by the state statutes to notify a health or government agency should an employee test positive. OSHA, however, has separate policies for reporting an employee's COVID-19 related hospitalization or death.

ENFORCEABILITY OF LIABILITY WAIVERS

While courts have not directly addressed the enforceability of a liability waiver in the context of a patron contracting a communicable disease on a business's premises, the case law on liability waivers in other situations provides a reasonable expectation that a well-drafted COVID-19 liability waiver may be enforceable.

Courts generally disfavor exculpatory clauses, but waivers shielding a party against liability for its own negligence may be enforceable in many states under certain circumstances. While the requirements for an enforceable liability waiver are state specific, the general consensus is that a waiver must be easily identifiable and understandable to the party against whom enforcement is sought and must not be against public policy. The factual circumstances surrounding the waiver will be key in determining whether the waiver offends public policy. A liability waiver from a business with a recreational purpose (i.e., movie theatre, gym, etc.) is more likely to be considered enforceable compared to a liability waiver from an essential business (i.e., doctor, dentist, public services, etc.). Public policy in some states militates against enforceability where physical harm results, such as in Virginia, Montana and Louisiana.

BUSINESS PREPARATION AS COVID-19 CASES CONTINUE TO RISE

The best available data shows that the majority of COVID-19 related lawsuits do not involve personal injury from COVID-19 exposure. As of December 1, 2020, approximately 6,400 civil lawsuits nationwide have been filed related to COVID-19. Only 29 of those are personal injury/wrongful death claims by business patrons for COVID-19 exposure. Most of the claims involved other issues, such as insurance disputes and alleged civil rights violations.

Even if fears of a "flood" of liability litigation have not yet come to pass, it is better for any business to be proactive so as not to be caught off guard. Businesses should anticipate more COVID-19 liability shield laws and review those laws with legal counsel so that they can at least answer the following:

- Is my business in a jurisdiction with a liability shield law?
- Is my business one covered by the law?
- When does the law expire?
- What are the protections from potential claimants such as visitors or customers?

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- Is there a standard other than gross negligence or willful misconduct?
- Should notices be posted outside the premises and if so, what should they say?
- If operating in a state without any liability shield law, what other steps should be taken beyond basic COVID-19 health and safety steps as recommended by federal or state guidelines?

The treatment of COVID-19 liability remains a serious concern for businesses operating in these uncertain times. The status of liability shield laws, both federal and state, remains in flux. These are all inquiries that the Eckert Seamans COVID team are prepared to provide guidance.

This Business Liability Alert is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact authors Edward J. Longosz, II at 202.659.6619 or elongosz@eckertseamans.com, Mark A. Johnston at 202.659.6624 or mjohnston@eckertseamans.com, Jessica Arena at 202.659.6670 or jarena@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.

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