COVID-19: SHIELDING BUSINESSES AND HEALTH CARE PROVIDERS ACTING IN GOOD FAITH, FLORIDA PASSES PROTECTIONS FOR CIVIL LIABILITY RELATING TO COVID-19

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Labor, Employment, and Workplace Safety Alert

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As Florida employers continue to operate or start to reopen and employees return to the workplace, many businesses fear an avalanche of litigation from employees and customers related to COVID-19 infections. To remedy this fear, on 29 March 2021, Florida Governor Ron DeSantis signed into law “An Act Relating to Civil Liability for Damages Relating to COVID-19”[1] (the Act).

The Act provides “heightened legal protections against liability as a result of the COVID-19 pandemic”[2] for business entities, educational institutions, government entities, and religious institutions. Specifically, a plaintiff seeking to bring a civil action based on a COVID-19-related claim must submit an affidavit signed by a physician actively licensed in the state of Florida. The affidavit must attest to the physician's belief, within a “reasonable degree of medical certainty,” that the plaintiff's COVID-19-related damages, injury, or death occurred *as a result* of the defendant's acts or omissions. The Act places the burden of proof on the plaintiff to show that the defendant did *not* make a good faith effort to comply with applicable government-issued health standards or guidance. Additionally, if more than one set of standards applied at the time, a defendant need not have complied with all such standards, as long as the defendant made a good faith effort to substantially comply with at least one set of authoritative or controlling standards.

In addition, under the Act, a court must initially determine whether: (1) the complaint has been pled with particularity, (2) the plaintiff has submitted the required medical affidavit, and (3) the defendant made “a good faith effort to substantially comply with authoritative or controlling government-issued health standards or guidance…” If a complaint is not pled with particularity or if the required medical affidavit is not submitted, then it must be dismissed without prejudice.

In contrast, if a plaintiff submits the required medical affidavit and pleads the complaint with particularity, then the court must determine whether the defendant made a “good faith effort” to comply with applicable health standards or government guidance. If the court determines that the defendant did make such an effort, then the defendant is immune from civil liability, and the lawsuit cannot proceed. On the other hand, if a court determines that the defendant did not make a “good faith effort,” the case then simply proceeds, and the plaintiff must prove by clear and convincing evidence that the defendant acted in a grossly negligent manner. Notably, the Act applies retroactively (excluding, however, civil cases with named defendants pending prior to the effective date of the Act) and provides a one-year statute of limitations for COVID-19-related claims brought against business entities, educational institutions, government entities, and religious institutions.

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Separately, the Act provides protections for health care providers from civil liability for COVID-19-related claims.[3] Similar to claims against business entities, educational institutions, government entities, and religious institutions, a plaintiff's complaint against a health care provider must be pled with particularity by alleging facts in sufficient detail to support each element of the claim. Unlike claims against other entities, however, claims against health care providers do not need to be accompanied by a medical affidavit. Moreover, a plaintiff must prove by the greater weight of evidence that the health care provider was grossly negligent or engaged in intentional misconduct. The Act provides several affirmative defenses (in addition to other affirmative defenses already recognized by law) that a health care provider may assert, including the affirmative defense of "substantial compliance" with government-issued health standards throughout the COVID-19 pandemic.

Claims against health care providers that arise out of the transmission, diagnosis, or treatment of COVID-19 must be brought within one year after (1) the date of death due to COVID-19, (2) hospitalization related to COVID-19, (3) or the first diagnosis of COVID-19 that forms the basis for the claim—whichever comes sooner. Comparatively, claims against health care providers that do not arise out of the transmission, diagnosis, or treatment of COVID-19 (such as those arising out of a delayed or cancelled surgery or medical procedure) must begin within one year after the cause of action accrues. Importantly, *all* claims against a health care provider that have accrued prior to 29 March 2021—the effective date of the Act—must be brought within one year thereafter.

Omitted from the Act is any definition of "substantial compliance" or "good faith effort" for business entities, educational institutions, government entities, religious institutions, or health care providers.[4] Irrespective of the liability protections under the Act, immunity does not extend to grossly negligent, reckless, or willful misconduct. Thus, employers should carefully review whether their workplace procedures comply with local, state, and federal guidance, including updated guidance from the CDC and OSHA. Both agencies routinely update their guidelines for creating a safe workplace for employees. Additionally, many localities throughout Florida have issued detailed orders on reopening (or staying open) requirements for businesses.

While guidance on creating a safe workplace in the time of COVID-19 seemingly changes on a daily basis, employers should remain up to date on all applicable guidelines in order to minimize the risk of employee exposure to COVID-19 in the workplace and best protect against future liability.

FOOTNOTES

[1] From a practical standpoint, employers should maintain compliance with all federal, state, and local guidelines, including guidelines from the Center for Disease Control (CDC) and the Department of Labor, including the Occupational Safety and Health Administration (OSHA).

[2] The Act broadly defines a "COVID-19-related claim" as a "civil liability claim against a person, including a natural person, a business entity, an educational institution, a governmental entity, or a religious institution, which arises from or is related to COVID-19, otherwise known as the novel coronavirus. The term includes any such claim for damages, injury, or death."

[3] With respect to health care providers, a "COVID-19-related claim" is defined as a claim against a health care provider that arises from (1) diagnosis or treatment of, or failure to diagnose or treat, a person for COVID-19; (2) provision of a novel or experimental COVID-19 treatment; (3) transmission of COVID-19; (4) delay or cancellation of a surgery or a delay or cancellation of a medical procedure, a test, or an appointment based on a health care

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provider's interpretation or application of government-issued health standards or authoritative guidance; (5) an act or omission with respect to an emergency medical condition as defined in Fla. Stat. 395.002, and which act or omission was the result of a lack of resources directly caused by the COVID-19 pandemic; or (6) the provision of treatment to a patient diagnosed with COVID-19 whose injuries were directly related to an exacerbation of the patient's preexisting conditions by COVID-19. Importantly, a “COVID-19-related claim” does not include a claim alleging that an “act or omission by a health care provider caused a person to contract COVID-19 or a derivative claim to such claim unless the person was a resident or patient of the health care provider or a person seeking care or treatment from the health care provider.”

[4] Also omitted from the Act is any reference to Florida's workers' compensation law. While several amendments related to Florida's workers' compensation scheme were proposed to the Act, none made it into law. Thus, it remains to be seen how, if at all, the Act will impact employee claims brought under Florida's worker's compensation law.

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