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Potential Provider Protections: How the Proposed SAFE TO WORK Act Impacts Liability Claims Against Health Care Providers

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On July 27, 2020, Senate Republicans unveiled the "Safeguarding America's Frontline Employees To Offer Work Opportunities Required to Kickstart the Economy Act," or the "SAFE TO WORK Act" (the Act).[1] The proposed legislation is intended to "establish necessary and consistent standards for litigating certain claims specific to the unique coronavirus pandemic," to "prevent the overburdening of the court system with undue litigation," to "encourage planning, care, and appropriate risk management" by businesses, health care providers, and others, to "prevent litigation brought to extract settlements and enrich trial lawyers rather than vindicate meritorious claims," and to "protect interstate commerce from the burdens of potentially meritless litigation," among other purposes. The Act offers extremely broad liability and immunity protections to businesses, schools, and, in a separate section, "health care providers."

Title I of the proposed Act addresses liability relief. Within Title I, Subtitle A addresses "Liability Limitations for Individuals and Entities Engaged in Businesses, Services, Activities, or Accommodations." Subtitle B is specifically dedicated to "Liability Limitations for Health Care Providers." The legislation sets forth an "exclusive" cause of action against the entities covered. This Client Alert focuses primarily on the scope of protections that the proposed legislation offers to health care providers.

The scope of liability protections and immunities for health care providers, with limited exceptions noted *infra*, generally tracks what is provided to other business entities and schools. Health care facilities facing claims from individuals other than patients can take advantage of the defenses offered to businesses and schools offered in Subtitle A, including broad liability protections from federal labor and employment law claims, except for cases of "intentional discrimination."

Federal Preemption

Noting the importance of establishing uniformity for coronavirus-related claims rather than "a patchwork of local and state rules governing liability," the Act creates an "exclusive" federal cause of action for claims of personal injuries arising from "an actual, alleged, feared, or potential for exposure to coronavirus." It does not mandate that such actions be filed in federal courts, but permits removal to federal court of any claim filed in a state or Tribal court within the parameters of the legislation. For reasons explored below, any defendant sued in a forum other than federal court would be well-advised, barring extraordinary circumstances, to remove the lawsuit and take advantage of the many procedural hurdles associated with pursuing a COVID-related claim for personal injuries in federal court actions.

Although establishing a federal cause of action which preempts state or Tribal laws providing no liability protection or weaker protections, the Act permits state and Tribal laws to provide ***greater*** levels of protection. The scope of federal protections set forth in the Act, however, exceeds the scope of protections available in most state law executive orders or legislation applicable to coronavirus-related immunity.[2]

Generally, under the Act, businesses, including health care providers, are liable for coronavirus-related claims only if they are demonstrated, through "clear and convincing evidence," to have acted with "gross negligence"

and/or "willful misconduct." For non-health care provider businesses and schools, an essential element of a cause of action is whether a defendant made "reasonable efforts in light of all the circumstances to comply with…applicable government standards." This is not a specific element of the cause of action allowed by Title I, Subtitle B, specifically focusing on COVID-related claims against health care providers, which are called "coronavirus-related medical liability actions." Instead, the focus of those claims is solely on whether the actions of the provider(s) meets the exacting "gross negligence" and/or "willful misconduct" standards of behavior.

The Act applies liability protections for actions starting December 1, 2019, and continuing through the latter of either October 1, 2024, or the end of the emergency declaration, as set forth under the March 17, 2020 Department of Health and Human Services Declaration Under the Public Readiness and Emergency Preparedness Act.

The health care provider liability section of the Act has a one-year statute of limitations that begins on the date of "harm, damage, breach, ***or*** tort" (with common tolling exceptions provided). This is different from the statute of limitations for claims against businesses generally, as included in Subtitle A of Title I, which sets the one-year statute of limitations to begin on the date of "the actual, alleged, feared, or potential for exposure to coronavirus." The statute of limitations for health care providers, as presently defined, by using the connector "or" with the words "breach" or "tort," describes actions that may be committed days or even weeks before an injured person receives a diagnosis related to coronavirus. Effectively, this is a one-year statute of limitations from the act eventually causing injury for medical liability claims against health care providers, which is shorter than many state statutes of limitations and probably shorter than the one-year statute applicable to claims against non-health care provider entities.

Health Care Provider Protections

The definition of "health care provider" under the Act includes health care facilities licensed or certified under applicable state law, as well as non-medical administrators, supervisors, executive leadership and Board members, and, as a broad catch-all, "[other individuals] responsible for directing, supervising, or monitoring the provision of coronavirus-related health care services in a comparable role."

Liability protections under the Act extend even to claims by patients who are not diagnosed with or suspected of having COVID-19. The term "coronavirus-related health care services," as defined, broadly covers services of a "health care provider" that "relate to" "the care of ***any individual*** who is admitted to, presents to, receives services from, or resides at, a health care provider for any purpose during the period of a Federal emergency declaration concerning coronavirus, ***if such provider's decisions or activities*** with respect to such individual ***are impacted as a result of coronavirus***." Accordingly, the Act protects against claims made by non-COVID patients when their care was tangentially "***impacted as a result of coronavirus***," such as by a shifting of resources or staff. Most state immunity statutes and executive orders addressing COVID-19-related immunities do not provide such a breadth of immunity protections.[3]

Claimants in actions governed by the proposed legislation may recover only if they prove "gross negligence" or "willful misconduct" as defined in the Act. Borrowing from several state statutes defining such terms, and establishing a heightened burden of proof in proving such conduct, the Act requires "clear and convincing evidence" of such misconduct. Specifically, Subtitle B of Title I, at Section 142, states, "no health care provider shall be liable in a coronavirus-related medical liability action unless the plaintiff can prove by clear and convincing evidence— 1) gross negligence or willful misconduct by the health care provider; and 2) that the alleged harm, damage, breach, or tort resulting in the personal injury was directly caused by the alleged gross negligence or willful misconduct." The Act then specifically provides that, "[f]or purposes of this section, acts, omissions, or decisions resulting from a resource or staffing shortage shall not be considered willful misconduct or gross negligence."

The term "gross negligence" is defined to mean a "conscious, voluntary act or omission in reckless disregard of— a) a legal duty; b) the consequences to another party; ***and*** c) applicable government standards and guidance." The connector "and," rather than "or," raises the issue of whether a claimant must demonstrate all of these things in order to establish gross negligence, even when there are no applicable government standards or guidance on a particular issue.[4]

"Willful misconduct" is narrowly defined under the Act as "an act or omission that is taken— A) intentionally to achieve a wrongful purpose; B) knowingly without legal or factual justification; and C) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit." Most state law definitions of heightened misconduct, often used in connection with describing when punitive damages may be appropriate, lump terms such as "gross negligence," "willful misconduct," "recklessness," and "wanton" behaviors together. In this proposed legislation, however, the distinctions between gross negligence and willful misconduct are important because Section 162(b), of Subtitle C of Title I of the Act, addresses limitations on damages available in coronavirus-related litigation, and states that "noneconomic losses" and punitive damages (which cannot exceed compensatory damages) can be awarded in medical liability actions ***only when*** injuries are "caused by the willful misconduct of the individual or entity."

As noted above, a claim involving "acts, omissions, or decisions resulting from a resource or staffing shortage ***shall not*** be considered willful misconduct or gross negligence." Accordingly, since the scope of immunity under the proposed Act extends to non-coronavirus patient care that is "impacted as a result of coronavirus," and since staffing and allocation of resources is the most likely "connector" to coronavirus issues for health care facilities, the exclusion of staffing and resource allocation as a basis for liability may make it more difficult for claimants in certain instances to recover on non-coronavirus patient claims than it would be for coronavirus-related claims.

General Provisions

Subtitle C of Title I of the Act sets forth "Substantive and Procedural Provisions for Coronavirus-related Actions Generally." Under this Subtitle, federal courts are designated as having "concurrent," not "exclusive," jurisdiction for coronavirus-related claims. As a practical matter, because rigorous procedural hurdles exist in federal courts for plaintiffs, the great majority of such claims should be removed by defendants. The Act also provides some removal rights in addition to those already existing under federal law, such as the right to appeal a remand back to state or Tribal court following removal.

The Subtitle limits the exposure of a defendant in an action under the Act to that defendant's percentage of fault, except for instances where the defendant "specifically intended" to cause injury or "knowingly committed fraud." This stands in contrast to some states' imposition of "joint and several liability" on any defendant found to be at fault in a lawsuit. Many if not most states have abrogated joint and several liability in negligence-based actions.

The potential fault of the plaintiff, as well as of third parties, is measured by the factfinder. Measuring the "fault" of a plaintiff or a third party to a defendant found to be, in the words of the Act, "responsible" for a percentage of damages, where the standard of culpable conduct for the defendant is gross negligence or willful misconduct, will present some challenges. The legislation appears to distinguish between a defendant's "responsibility" and a plaintiff's or a third party's "fault," indicating that the Act seeks to allow a finding of "fault" on the part of an individual or entity, other than the defendant, based on a less rigorous negligence standard. In measuring such plaintiff or third party "fault," presumably state law for the jurisdiction where the wrongful act occurred for potential defenses, such as intervening or superseding cause, would be used for purposes of analyzing the fault of a claimant or third party.

The Act also allows any monetary recovery to "be reduced by the amount of compensation received by the plaintiff from another source" (such as governmental and private insurance benefits, etc.). This provision abrogates the laws in most states that prevent such setoffs under the common law "collateral source" rule.

Federal Court Procedure

Section 163 of the same Subtitle establishes procedures for lawsuits in federal court under the Act. It imposes stringent pleading requirements, which will be difficult to meet in many cases, that are intended to force claimants to identify other potential sources of coronavirus contraction. The Act essentially makes plaintiffs conduct rigorous due diligence to exclude any individuals or entities where the plaintiff has had contact within 14-days of the alleged wrongdoing of the defendant from being a source of the infection.

Complaints must be "verified" (sworn or affirmed) by the plaintiff as to the factual allegations. In addition, an affidavit from a non-treating physician, which certifies causation for the claims raised, must be filed with the Complaint. Unlike some state immunity laws that require medical certification of both "fault" and causation as a precursor to filing a malpractice claim, the physician need not certify gross negligence or willful misconduct under the Act. Also, along with the Complaint, claimants must file their "certified" medical records that "document[] the alleged personal injury, harm, damage, breach, or tort."

After the Complaint is filed, no discovery is allowed until defendants are given an opportunity to file and resolve a motion to dismiss. Discovery itself is then limited "to matters directly related to material issues contested in the coronavirus-related action." Moreover, any ruling that denies a motion to dismiss can be immediately appealed, during which discovery is to be stayed. Notably, the Act does not clarify whether the courts of appeal must accept these "interlocutory" appeals, as opposed to denying them on grounds ordinarily used to deny discretionary interlocutory appeals in other actions.

Section 163 would have the effect of limiting or discouraging class actions and multidistrict litigation. In class actions, detailed information about class counsel's fee arrangements and sources of litigation funding must be sent to potential class members as part of any class notice, and class members must affirmatively elect, or opt-in, to be a member of the class in the proposed action. In addition, for multidistrict litigation, a trial cannot take place in the transferred forum "unless all parties to that coronavirus-related action consent."

Cost-Shifting Provisions

Section 164 of the same Subtitle contains an unusual provision allowing a potential or actual defendant in a coronavirus-related claim to recover "damages," including punitive damages and attorneys' fees, associated with a settlement demand, "if the claim … was ***meritless***" – a term not defined in the Act. Individuals or entities wanting to take advantage of this section of the Act are allowed to pursue a finding of "meritless" claims through a declaratory judgment action.

Even more ominously, certainly for plaintiffs' attorneys, the provision allows the Attorney General to enforce, through the imposition of civil fines, a proliferation of settlement demands where "any person of group of persons is engaged in a pattern or practice of transmitting demands…that [are] meritless."

Anticipated Legal Challenges

The provisions in the proposed Act that seek to establish procedural guidelines for federal court actions, such as limitations on discovery as well as on class action or multidistrict litigation, and even the provision allowing recovery for defendants incurring expenses associated with "meritless" claims, are likely to be challenged on the grounds that such provisions seek to override already existing Federal Rules of Civil Procedure. As such, these will likely be challenged as unenforceable under the Federal Rules Enabling Act, at 28 U.S.C. §§ 2071-2072. Specifically, Section 2072 of the Rules Enabling Act contains a provision stating that "[a]ll laws in conflict with such rules shall be of no further force and effect after such rules have taken effect."[5] In addition, the

provision of the proposed Act that empowers the Attorney General to pursue civil fines against those responsible for pursuing "meritless" claims will likely be challenged under a similar theory, but also potentially under a constitutional claim that the provision impermissibly chills and restricts the First Amendment's rights to free and open access to the courts and to freedom of expression.

It is also likely that the retroactive applicability of the immunity protections to December 2019, as contained in the proposed Act, will be challenged. The resolution of such a challenge will depend on whether courts consider such a provision to be "procedural" in nature, thus a permissible legislative enactment, or "substantive" in nature, which would result in the retroactive aspect of the legislation to be stricken.[6]

Conclusion

The proposed SAFE TO WORK Act establishes broad liability protections to businesses and schools, as well as to health care providers. If passed substantially in this form, health care providers will have a wide variety of substantive and procedural protections against legal claims under all but the most egregious circumstances. The procedural protections and fee-shifting provisions (assuming they withstand legal challenges) will make it unlikely that there will be a flood of COVID-related litigation because of the low risk-to-reward ratio of pursuing such claims.

We will continue to monitor developments with the proposed SAFE TO WORK Act. If you have any questions regarding ways to limit health care provider liability, contact Buckner Wellford or a member of Baker Donelson's Health Care Litigation team. In addition, please visit our Coronavirus (COVID-19): Navigating the Path Ahead information page on our website.

[1] As of the time of publication of this Client Alert, the Act has been referred to and is pending before the Senate Judiciary Committee.

[2] While a significant number of states have taken executive or legislative actions to limit health care provider liability during the COVID-19 pandemic, many of these state actions, including those taken by Kansas, Kentucky, and Nevada, protect providers from liability only when their care is specifically rendered to diagnosed or suspected coronavirus patients, and are not broad enough to protect for care provided to non-coronavirus patients. None of the state law provisions of which we are aware offer the panoply of procedural protections, including a "fee-shifting" provision discussed *infra,* which would discourage plaintiffs from pursuing all but the most obvious cases of liability. For additional information about specific state executive and legislative actions related to immunity protections for health care providers during the COVID-19 pandemic, see the Client Alerts we previously published: "Health Care Provider Liability During the COVID-19 Pandemic: Ways to Ensure Protection" and "COVID-19 Health Care Provider Immunity Update."

[3] *See* fn. 2, above.

[4] "Applicable government standards and guidance" are defined under the Act as "A) any mandatory standards or regulations specifically concerning the prevention or mitigation of the transmission of coronavirus issued by the Federal Government, or a State or local government with jurisdiction over an individual or entity, whether provided by executive, judicial, or legislative order; and B) with respect to an individual or entity that, at the time of the actual, alleged, feared, or potential for exposure to coronavirus is not subject to any mandatory standards or regulations described in subparagraph (A), any guidance, standards, or regulations specifically

concerning the prevention or mitigation of the transmission of coronavirus issued by the Federal Government, or a State or local government with jurisdiction over the individual or entity."

[5] *See Henderson v. United States,* 517 U.S. 654 (1996).

[6] *See generally Cannon v. Sec'y, U.S. Dept. of Agric.*, 649 F. App'x 892, 894 (11th Cir. 2016).