

PUBLICATION

Florida's Broad New COVID-19 Liability Protections

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April 01, 2021

On March 29, 2021, when Governor Ron DeSantis signed Senate Bill 72 into law, Florida became the largest of a growing number of states to implement broad COVID-19 liability protections applicable to businesses, health care providers, schools, and non-profit and governmental entities. The law became effective upon signing. It applies, with an exception for existing defendants in already-commenced litigation, to all past and future claims related to COVID-19.

Liability Protections for Business Entities, Educational Institutions, Governmental Entities, and Religious Institutions

Liability protections applicable to business entities, educational institutions, governmental entities, and religious institutions are set forth under the newly codified Florida Statutes § 768.38. The law provides that, for a civil action based on a "COVID-19-related claim," a complaint must be pled with particularity, and it must be verified by a contemporaneously-filed sworn affidavit of an actively-licensed Florida physician, attesting that, within a reasonable degree of medical certainty, the claimed injuries or damages were the result of defendant's acts or omissions. A "COVID-19-related claim" is defined as a claim for damages, injury, or death that "arises from or is related to COVID-19." "Any such claim, no matter how denominated, is a COVID-19-related claim for purposes of this section." The statute of limitations for such a claim is one year from accrual or, for already-accrued claims, one year from the date of legislative enactment.

The law requires a plaintiff, at the outset of litigation, to demonstrate that the defendant failed to make a good faith effort to substantially comply with health standards or guidance that applied at the time the cause of action accrued. This essentially designates the court as a "gatekeeper" to make initial determinations on whether a COVID-19-related action can move forward at all. A court's determination of the defendant's good faith efforts immunizes the defendant from civil liability. Even if the court does not find that the defendant made such a good faith effort, thereby allowing the plaintiff to proceed with the cause of action, a defendant will still not be liable for any act or omission relating to a COVID-19-related claim unless "at least gross negligence" is proven at trial by the plaintiff through clear and convincing evidence.

Liability Protections for Health Care Providers

Liability protections applicable to health care providers are separately set forth under Florida Statutes § 768.381. This section defines a "COVID-19-related claim" as arising from:

1. The diagnosis or treatment of, *or the failure to diagnose or treat*, a person for COVID-19;
2. The provision of novel or experimental COVID-19 treatments;
3. The transmission of COVID-19;
4. The delay or cancellation of a surgery, medical procedure, test, or appointment based on COVID-19 health standards or guidance;
5. An act or omission with respect to an "emergency medical condition" that resulted from "a lack of resources directly caused by the COVID-19 pandemic;" or

6. The provision of treatment to a COVID-19 patient "whose injuries were directly related to an exacerbation of the patient's preexisting conditions by COVID-19."

The law specifically excludes from the definition of "COVID-19-related claim" any claims alleging viral contraction unless the person was a resident or patient of, or was seeking care or treatment from, the provider.

A defendant health care provider is deemed to have no liability for a COVID-19-related claim if the provider proves an affirmative defense for the claim. Proper affirmative defenses for health care provider defendants include substantially complying with applicable government-issued health standards related to preserving or prioritizing supplies, materials, or equipment, substantially complying with applicable government-issued health standards for infectious diseases when COVID-19-specific standards do not exist, and substantially complying with *any* applicable government-issued health standards *when applicable standards were in conflict*. Additional affirmative defenses available to health care provider defendants include when it is "not possible" to substantially comply with applicable government-issued health standards either "due to the widespread shortages of necessary supplies, materials, equipment, or personnel," or "because there was insufficient time to implement the standards."

The statute of limitations for a COVID-19-related claim against a health care provider which "arises out of transmission, diagnosis, or treatment of COVID-19" is one year from the later of the date of death due to COVID-19, the date of hospitalization related to COVID-19, or the first diagnosis of COVID-19 that forms the basis of the cause of action. Other claims must be commenced within one year after the accrual of the cause of action. For already-accrued claims, this statute of limitations is extended to one year from the date of legislative enactment. Further, while a complaint under this provision must be pled with particularity, there is no requirement for filing a physician affidavit.

Planning Ahead

The new law does not preclude claimants from bringing COVID-19-related lawsuits. There are, however, strong procedural safeguards in place for defending such claims. Florida businesses, health care providers, schools, non-profit organizations, and government entities – all covered under the new law – would be well advised to consider taking proactive measures now that can serve to protect their future procedural and substantive interests, including:

7. Ensuring appropriate documentation and retention of records relating to good faith efforts to comply with federal, state, and local COVID-19 laws, orders, and guidance, including any practical difficulties encountered in making such efforts;
8. Identifying potential incidents that may give rise to claims within the one-year statute of limitations; and
9. Taking appropriate action upon notification of potential or actual claims alleging damages related to COVID-19.

For additional information about the best ways to protect yourself and your business from COVID-19-related liability, please contact any of the authors or your Baker Donelson attorney.