

Updated: Florida Legislature Advancing COVID-19 Liability Shield Bills

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On March 5, 2021, Florida's House passed HB 7. If ratified by the Senate and signed by the Governor, the bill will make proving a personal injury case arising from COVID-19 liability in Florida all but impossible. In so doing, Republican House legislators overcame six proposed amendments largely aimed at reducing the burden of proving such a case. The vote was along party lines. Governor DeSantis has voiced his support for the bill.

If finally signed into law, which is likely, HB 7 will provide liability defense to companies from claims brought by their employees arising from contracting COVID-19. A similar bill-Senate Bill 74-has been introduced in the Senate and it is aimed at providing enhanced protections for healthcare providers.

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Among other things, the Preamble to HB 7 cites to a "strong and vibrant economy" as being "essential," explains that "Floridians must be allowed to earn a living and support their families without unreasonable government intrusion," and explains that

"the legislature recognizes that many businesses, entities, and institutions accept significant risk in order to provide their services to the public".

Essentially, HB 7 requires claims arising from or related to COVID-19 to be "pled with particularity" which is a higher standard than a typical negligence or intentional tort claim. Likewise, accompanying the complaint must be an affidavit of a "physician actively licensed in the state" that states that within a reasonable degree of medical certainty the damages, injury, or death to/of the claimant "occurred as a result of the defendant's acts or omissions."

While not entirely clear, HB 7 then appears to require that a judge, not a jury, determine as a matter of law at the outset of the case if the plaintiff (i) complied with the pleading requirements, (ii) whether the defendant made a good faith effort to substantially comply with "authoritative or controlling government-issued health standards or guidance the time the cause of action accrued," and (iii) limits evidence to that which tends to demonstrate whether the defendant made such a good faith effort. Should the court find the required good faith effort then the defendant is immune from civil liability.

Failing to find immunity, the case then presumably is to proceed as a normal case; however, the plaintiff must meet a heightened proof burden to prevail. In essence, the plaintiff must show by clear and convincing evidence (which is greater than the standards for most torts which only require preponderance of the evidence) that the defendant was at least grossly negligent (and most cases only require "simple" negligence, not gross). HB 7 then goes on to shorten the usual tort statute of limitations down to one year from injury accrual. The act is intended to be retroactive but does not apply to cases that may already have been filed.

The proposed law then goes on to provide coverage for business, non-profits and charitable organizations, educational institutions, government entities, and religious institutions. HB 7 excludes healthcare providers even if they meet one of the other definitions of a business, non-profit or charity, and the like.

Should HB 7 pass, it will provide a powerful deterrent to suits filed arising from or related to COVID-19. Notably, even without HB 7, proof of liability for COVID claims is challenging largely due to the difficulty of proving causation. In other words, can you prove that you contracted COVID-19 from this person's or entities' negligence, and not from some other source? Business and insurance companies should take comfort; employees and private claimants, perhaps not.

While recently filed, the Florida Senate will begin working on Senate Bill 74, which will provide a similar liability shield for healthcare providers. In particular, the preamble to SB 74 cites to healthcare providers' difficulty in providing ideal staffing levels and expresses concern that healthcare providers' decisions during the pandemic may be viewed differently after the pandemic.

SB 74 then explains that the Legislature finds it necessary to provide shielding from "unfounded lawsuits". To address this cited issue, SB 74 applies to all claims regardless of legal theory that relate to a healthcare provider's (i) failure to follow

clinical authority of government-issued health standard or guidance related to COVID-19, (ii) or that a healthcare provider failed to interpret such guidance correctly, (iii) that a healthcare provider was negligent in providing novel or experimental treatment, or (iv) a healthcare provider failed to follow clinical authoritative or government-issued health standards or guidance relating to infectious disease in preventing transmission or diagnosing or treating a person for COVID-19.

Like HB 7, SB 74 requires a plaintiff to plead their complaint with particularity. SB 74 then requires proof via "greater weight of the evidence" that the healthcare provider was grossly negligent or intentional engaged in misconduct with respect to (i)-(iv) described above. SB 74 goes on to provide immunity for claims arising from a lack of "supplies, materials, equipment, or personnel" necessary to comply with the extant guidance, or if they were not available at a reasonable cost. SB 74 also provides for a one-year statute of limitations but only applies to claims arising for up to one year following the cessation of the Florida Surgeon General's declaration of emergency or similar federal declaration.

Unlike HB 7, SB 74 does not appear to require a preliminary finding by a judge or a stand-alone (i.e., derived from SB 74 rather than perhaps existing medical malpractice law) requirement that the complaint be accompanied by an affidavit. That said, one would question whether the current Florida medical malpractice schema which requires such an affidavit would apply. One argument could be that this section by implication removes such a requirement. Point being, that while on the one hand it increases the burden of proof for liability, it may also reduce the requirements necessary to get such a claim into court.

In any event, both bills are clearly designed to reduce overall liability for COVID-19 claims and thereby (taking a non cynical view of either side of the debate) illustrates the classic tension between who is liable and making the injured whole.