

PUBLICATION

Tennessee Joins States Extending Immunity to Businesses for COVID-19 Liability Issues

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On August 17, 2020, Tennessee Governor Bill Lee signed legislation (S.B. 8002 / H.B. 8001) passed in a special session called by the Governor to address a stalemate between the Tennessee House and Senate on the scope of liability protection for businesses (including health care providers and schools) for COVID-19-related claims. The separate Houses of the Legislature were unable to agree upon retroactivity provisions in competing versions of the bill during the regular session. The leadership in both Houses, working with the Governor, were able to resolve their differences in a special session, which resulted in legislation providing a broad array of protections to Tennessee health care providers, businesses and schools on this issue. The legislation became effective on August 18, 2020.

New Liability Protections

The new law, at Section 1, the "Tennessee COVID-19 Recovery Act," prohibits claims "against any person for loss, damage, injury, or death arising from COVID-19 unless the claimant proves by clear and convincing evidence that the person proximately caused the loss, damage, injury, or death by an act or omission constituting gross negligence or willful misconduct."¹ The protections are applicable to claims pursued against a broad category of "persons" associated with health care providers, business entities and schools, as well as to claims pursued against governmental entities or employees.

The term "arising from COVID-19" is very broadly defined as "caused by or resulting from the actual, alleged, or possible exposure to or contraction of COVID-19, or caused by or resulting from services, treatment, or other actions in response to COVID-19."² The Act provides that "arising from COVID-19" "include[es], but [is] not limited to:

Implementing policies and procedures to prevent or minimize the spread of COVID-19;

Testing;

Monitoring, collecting, reporting, tracking, tracing, disclosing, or investigating COVID-19 exposure or other COVID-19-related information;

Using, designing, manufacturing, providing, donating, or servicing precautionary, diagnostic, collection, or other health equipment or supplies, such as personal protective equipment;

Closing or partially closing to prevent or minimize the spread of COVID-19;

Delaying or modifying the schedule or performance of any medical procedure; or

Providing services or products in response to government appeal or repurposing operations to address an urgent need for personal protective equipment, sanitation products, or other products necessary to protect the public."³

"Person" is also defined broadly as an individual, health care provider, corporate entity, trust, religious organization, association, non-profit organization, "or any other legal entity whether formed as a for-profit or not-for-profit entity."⁴

To make a claim under the Tennessee COVID-19 Recovery Act for acts "arising from COVID-19," a claimant must file a verified complaint that pleads "specific facts with particularity from which a finder of fact could reasonably conclude that the alleged loss, damage, injury, or death was caused by the defendant's gross negligence or willful misconduct."⁵ In addition, for any claim "based on exposure to or contraction of COVID-19," a claimant "must also file a certificate of good faith" stating that a qualified expert physician "has provided a signed written statement that the physician is competent to express an opinion on exposure to or contraction of COVID-19 and, upon information and belief, believes that the alleged loss, damage, injury, or death was caused by an alleged act or omission of the defendant or defendants."⁶ The failure to meet these requirements makes the action subject to dismissal with prejudice.⁷

Sections 2 and 3 of the new law amend the existing Tennessee Governmental Tort Liability Act (GTLA). These Sections recognize immunities for governmental entities and employees for injuries arising out of "or in connection with any loss, damage, injury, or death arising from COVID-19," "unless the claimant proves by clear and convincing evidence that the loss, damage, injury, or death was proximately caused by an act or omission by the entity or its employees constituting gross negligence."⁸ They further prohibit claims against governmental employees "for any loss, damage, injury, or death arising from COVID-19 ... and proximately caused by an act or omission of the employee within the scope of the employee's employment for which the governmental entity is immune, unless the claimant proves by clear and convincing evidence that the loss, damage, injury, or death was caused by an act or omission that was willful, malicious, criminal, or performed for personal financial gain."⁹

Similarly, Section 4 of the law, which applies to claims raised in the Tennessee Claims Commission, acknowledges a potential waiver of sovereign immunity for state entities and employees if a claimant "proves by clear and convincing evidence that the loss, damage, injury, or death was proximately caused by an act or omission of the state or an employee or agent of the state constituting gross negligence."¹⁰ These Sections of the new law also extend the stringent pleadings requirements of the Tennessee COVID-19 Recovery Act to such actions under the GTLA and before the Tennessee Claims Commission.¹¹

Section 5 of the new law extends similar protections of the Tennessee COVID-19 Recovery Act to postsecondary and higher education providers. It provides that no cause of action exists against a public institution of higher education "for any loss, damage, injury, or death arising from COVID-19 ... unless the claimant proves by clear and convincing evidence that the loss, damage, injury, or death was proximately caused by an act or omission of the institution or its employee or agent constituting gross negligence or willful misconduct."¹² In addition, under the new law, the heightened pleadings requirements from the Tennessee COVID-19 Recovery Act are extended to actions against postsecondary and higher education providers.

Section 7 resolved the previous disagreement between the legislative branches on retroactivity by establishing that the new legislation applies to all claims arising from COVID-19 except when a complaint or civil warrant was filed on or before August 3, 2020, or when notice for the claim was given or satisfied, pursuant to either Tenn. Code Ann. § 9-8-402 or Tenn. Code Ann. § 29-26-121(a)(3), on or before August 3, 2020.¹³ The new law is scheduled to repeal on July 1, 2022, but it will continue to apply to any claims occurring before that date and pursuant to the noted exceptions.

Comparison of the Tennessee Law to Proposed Federal Legislation

In a previous [Client Alert](#), we summarized the provisions of the [SAFE TO WORK Act](#), federal legislation that is presently pending before the Senate Judiciary Committee. The SAFE TO WORK Act provides extremely broad

liability immunity protection to individuals and entities engaged in businesses, services, "activities," or accommodations.

It is important to compare the level of immunity protection provided under the new Tennessee law to the proposed federal legislation because, if the immunity protections presently set forth in federal legislation are enacted into law, the federal law will provide an "exclusive" federal cause of action for all COVID-19-related claims. The level of federal protection built into the current version of the SAFE TO WORK Act exceeds even the expansive protections of Tennessee's new law (as well as of new laws being enacted in several other states) in several respects, particularly as related to the procedural obstacles a claimant would face in pursuing a cause of action.

The SAFE TO WORK Act preempts "weaker" protections under state law, but explicitly permits states to provide **more expansive** immunity protections. For that reason, a close comparison of Sections of Tennessee's recently enacted legislation with the pending federal SAFE TO WORK Act on certain specific aspects of the law is instructive.

The federal SAFE TO WORK Act, in its current form, provides **more** protection than the Tennessee statute in a number of ways, and examples of these are described as follows:

Compliance with Governmental Standards

The proposed federal legislation, for claims against non-health care provider entities, requires as an essential element of the claim whether or not the defendant "made reasonable efforts in light of all the circumstances to comply with...applicable government standards." This is not an essential element of a claim under the Tennessee statute.

Statute of Limitations

Tennessee's one-year statute of limitations for personal injury claims¹⁴ starts to run when the "cause of action accrues." Case law has established that cause of action accrual can be measured from the date a claimant knew, or with the exercise of reasonable diligence should have known, of the claim.¹⁵ There are exceptions to a strict interpretation of when that is for cases involving fraudulent concealment.¹⁶ The proposed federal SAFE TO WORK Act, on the other hand, arguably starts the clock on a claim against a non-health care provider person or entity sooner than that, when the "potential for exposure to coronavirus" occurred. For claims against health care providers, the statute of limitations starts to run when an alleged "breach" or "tort" occurs. Thus, the accrual of a cause of action under the proposed federal legislation might be sooner than it would otherwise be under Tennessee law.

Gross Negligence and Willful Misconduct

Tennessee law defines "gross negligence" as a "total disregard for the safety and rights of others," which can include "blatant indifference to the potential consequences of one's actions."¹⁷ The term "willful misconduct" is encompassed in the concept of gross negligence.¹⁸

The proposed federal SAFE TO WORK Act, in comparison, defines these terms more specifically, making them more difficult to establish. "Gross negligence" is defined as a "conscious, voluntary act or omission in reckless disregard of: 1) a legal duty; 2) the consequences to another party, **and** 3) applicable government standards and guidance." The term "willful misconduct" is even more specifically defined as an act or omission taken "intentionally to achieve a wrongful purpose, knowingly without legal or factual justification, **and** 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." The distinction between the two terms under the proposed federal legislation is important because the Act, in its current form, permits noneconomic damages and punitive damages **only when** the injuries are caused by willful misconduct.¹⁹ Perhaps even more significantly, the proposed federal Act provides that "acts, omissions, or decisions resulting from a resource or staffing shortage **shall not** be considered willful misconduct or gross negligence."

Collateral Source Rule

Tennessee's Supreme Court recently upheld adherence to the longstanding "collateral source" rule, allowing plaintiffs to offer into evidence the gross amount of medical bills incurred from an injury and disallowing evidence of source of reimbursement such as disability insurance coverage.²⁰ In comparison, the proposed federal SAFE TO WORK Act explicitly requires that any award of damages be "reduced by the amount of compensation received by the plaintiff from another source."

Procedural Hurdles for Claims Filed in or Removed to Federal Court

The proposed federal SAFE TO WORK Act establishes an "exclusive" federal cause of action. While claims do not have to be filed in federal court, they can be removed if brought in state court. Once in federal court, the procedural hurdles for claimants are many, and high. Complaints must be sworn or verified, and extensive pleading showing how and why other potential sources of coronavirus are not the real cause of contraction of the virus is required. In addition, no discovery is permitted until defendants have an opportunity to file and have resolved – with a specific right to interlocutory appeal – a motion to dismiss. Class actions and multi-district litigation are limited. The federal legislation also includes significant potential cost-shifting provisions for so called "meritless" claims (which are not specifically defined under the Act), and the Attorney General of the United States is given the authority to pursue civil fines against "any person or group of persons [who] is engaged in a pattern or practice of transmitting demands that are...meritless."

There are a few instances where the Tennessee statute, some of which is in combination with already existing statutes, may provide **broader** protections than those offered in the pending federal SAFE TO WORK Act. Section 29-34-802(c)(2) of Tennessee COVID-19 Recovery Act, for example, requires a certificate from a physician licensed in Tennessee or a "contiguous border state" supporting both the "fault" and causation elements of the claim. The federal statute requires a physician certificate only for causation, and it does not restrict the states from which such a physician can be licensed. The proposed federal statute creates an "exclusive" federal cause of action for COVID-19-related claims, while the Tennessee statute explicitly provides, at Section 29-34-802(d)(1) of Tennessee COVID-19 Recovery Act, that it does not "create a cause of action," thus leaving open the question of whether certain COVID-19-related claims, such as those by non-customers or patients, are in fact actionable under Tennessee law.

There are a number of procedural requirements already in existence under Tennessee law for claims against health care providers, including detailed pre-suit notice and Certificate of Good Faith prerequisites, which should be applicable to any claim against a health care provider made under the federal legislation. The interplay between the new Tennessee legislation and the currently proposed federal legislation, with respect to greater protections offered to defendants, is likely to be the subject of litigation for those claimants desiring to pursue COVID-19-related claims.

Finally, while the proposed federal legislation restricts noneconomic damages to cases of willful misconduct, it does not place a cap on compensatory damages. Existing Tennessee law, however, does cap noneconomic damages, except in certain instances.

Retroactivity

In contrast to earlier versions, the enacted new legislation in Tennessee contemplates prospective application except when statutory pre-suit notice was provided, or a claim was filed, on or before August 3, 2020.²¹ In comparison, the proposed federal SAFE TO WORK Act establishes that actions can be brought for claims occurring on or after December 1, 2019.

We will continue to monitor developments related to the new Tennessee legislation. If you have any questions regarding ways to limit business liability, contact [Buckner Wellford](#) or a member of Baker Donelson's Tennessee litigation team. In addition, please visit our [Coronavirus \(COVID-19\): Navigating the Path Ahead](#) information page on our website.

¹ Tenn. Code Ann. § 29-34-802(b).

² Tenn. Code Ann. § 29-34-802(a)(1).

³ Tenn. Code Ann. § 29-34-802(a)(1)(A)-(G).

⁴ Tenn. Code Ann. § 29-34-802(a)(3)-(4).

⁵ Tenn. Code Ann. § 29-34-804(c)(1).

⁶ Tenn. Code Ann. § 29-34-804(c)(2).

⁷ Tenn. Code Ann. § 29-34-804(c)(3).

⁸ Tenn. Code Ann. § 29-20-205(10).

⁹ Tenn. Code Ann. § 29-20-310(f)(1).

¹⁰ Tenn. Code Ann. § 9-8-307(j).

¹¹ Tenn. Code Ann. §§ 9-8-307(j), 29-20-205(10), and 29-20-310(f)(2)-(3).

¹² Tenn. Code Ann. Title 49, Chapter 7, Part 1 (new section to be added).

¹³ August 3, 2020 is the date on which the Tennessee Governor called for the special session related to this legislation.

¹⁴ See [Tenn. Code Ann. 28-3-104](#).

¹⁵ *McCroskey v. Bryant Air Conditioning*, 524 S.W.2d 487 (Tenn. 1975).

¹⁶ See *Soldano v. Owens-Corning Fiberglass Corp.* (Tenn. 1985) 696 S.W.2d 887, 889.

¹⁷ *Gross v. Nashville Gas Co.*, 608 S.W.2d 860 (Tenn. Ct. App. 1980).

¹⁸ *Conroy v. City of Dickson*, 49 S.W.3d 868, 872 (Tenn. Ct. App. 2001).

¹⁹ Because the recently upheld Tennessee statutory caps on noneconomic damages (*McClay v. Airport Mgmt. Svs., LLC*, 596 S.W.3d 686 (Tenn. Feb. 26, 2020)) provides **more** protection to defendants for a COVID-19-related claim, Tennessee law on this issue would presumably be applicable. *See infra*.

²⁰ *Dedmon v. Steelman*, 535 S.W.3d 431, 467 (Tenn. 2017).

²¹ The extent to which this limited retroactive applicability to actions instituted in some manner before the enactment of the new Tennessee law is a “procedural” or “substantive” action, with the former being a permissible legislative action and the latter being improper, is beyond the scope of this Client Alert.