

## COVID-19 Liability

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# Liability Uncertainty Remains for Businesses Even After COVID-19 Civil Immunity Laws Are Enacted

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Nearly a dozen states have passed laws and even more have considered legislation purporting to grant immunity to businesses against lawsuits arising out of the spread of COVID-19.<sup>[1]</sup> Businesses may be tempted to view these civil immunity laws as providing protection and certainty in these difficult times. However, on closer review, the limited benefits of these laws require that caution and vigilance must remain a top priority.

Enactments establishing COVID-19 immunity vary in the breadth of industries covered, extent of retroactivity, and the range of acts which are immune from suit. However, all of these provisions preserve liability for certain types of particularly egregious or intentional conduct (e.g., gross negligence, recklessness, or willfulness).<sup>[2]</sup> Consequently, businesses should be cognizant of the lingering risks and uncertainties which remain, even in the presence of a civil immunity law. The concerns should include:

- 1. Immunity from liability does not mean immunity from litigation.** Laws purporting to grant statutory immunity for COVID-19 exposure do not preclude a plaintiff from filing a lawsuit—that is, statutory immunity means immunity from *liability*, not immunity from being sued. Even in states that have enacted broad immunity statutes, businesses may still face allegations of COVID-19-related misconduct in accord with heightened pleading standards and would, at a minimum, be responsible for defense costs.
- 2. Adherence to public health guidance could be difficult to establish when the guidance is unclear or contradictory.** Many state COVID-19 civil immunity laws purport to grant immunity to businesses which adhere to public health guidance. Confusion may arise, however, because the myriad applicable state, federal, local, and agency regulations may conflict with one another, thereby blurring the contours of a business's duty of care. Under Oklahoma's civil immunity law, for example, a business is immune from suit if it acts in compliance with written guidelines in effect at the time of the alleged COVID-19 exposure, such as federal or state regulations, or guidance from authorities such as OSHA and the Centers for Disease Control ("CDC").<sup>[3]</sup> There is no face-covering mandate in Oklahoma; however, CDC guidelines recommend wearing a face covering. An Oklahoma grocer which does not require its employees, customers, or other visitors to wear a face covering would be in compliance with state law and prevailing local attitudes but in conflict with CDC guidelines. In light of the conflicting authorities, it is unclear whether the store would be entitled to the benefits purportedly offered by the statute.
- 3. It is highly uncertain how jurors will determine what constitutes gross negligence in the context of a global pandemic.** Every state that has enacted a COVID-19 immunity statute does not purport to shield businesses or individuals from liability if they acted with some degree of recklessness or intentionality—

e.g., acts of gross negligence, “heedless indifference,” or wanton misconduct. In other words, a business may be liable for conduct that a jury deems to be sufficiently reckless. But public attitudes about the pandemic and the resulting obligations of individuals and businesses are constantly in flux. As a result, there is a material element of speculation in predicting what conduct a jury will deem to be reckless or grossly negligent (as opposed to merely negligent), and, therefore, subject to potential liability.

Even in the presence of a civil immunity statute, the best way for a business to protect against COVID-19 lawsuits and liability is to remain vigilant of state and local orders and regulations, to be mindful of changing public health guidance, and to keep watch on the outcomes and progress of COVID-19 litigation. Saul Ewing Arnstein & Lehr attorneys regularly assist businesses in strategizing, creating, and evaluating their policies to protect their operations. For more information, contact the authors or the attorney at the Firm with whom you are regularly in contact.

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1. To date, the following states have passed broad civil-immunity statutes purporting to protect businesses against COVID-19 related lawsuits: Iowa, Georgia, Kansas, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, Tennessee, Utah, and Wyoming. Yet other states, such as Alaska, Kansas, Kentucky, Massachusetts, New Jersey, and New York, have passed more legislation to provide liability protections to health care workers and health care facilities responding to the COVID-19 pandemic.
  2. For example, on September 14, the governor of Ohio, the most populous and recent state to enact a COVID-19 civil immunity law, signed a bill into law that purports to provide broad immunity (retroactive to the state’s March 9 declaration of a peacetime emergency) to individuals, businesses, schools, and health care providers for injuries or death related to COVID-19 exposure unless it can be shown that a defendant individual, business, or institution acted with “heedless indifference to the consequences” of their actions.
  3. See Act Relating to Civil Liability, Okla. S.B. 1496 § 1.B (May 21, 2020).

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