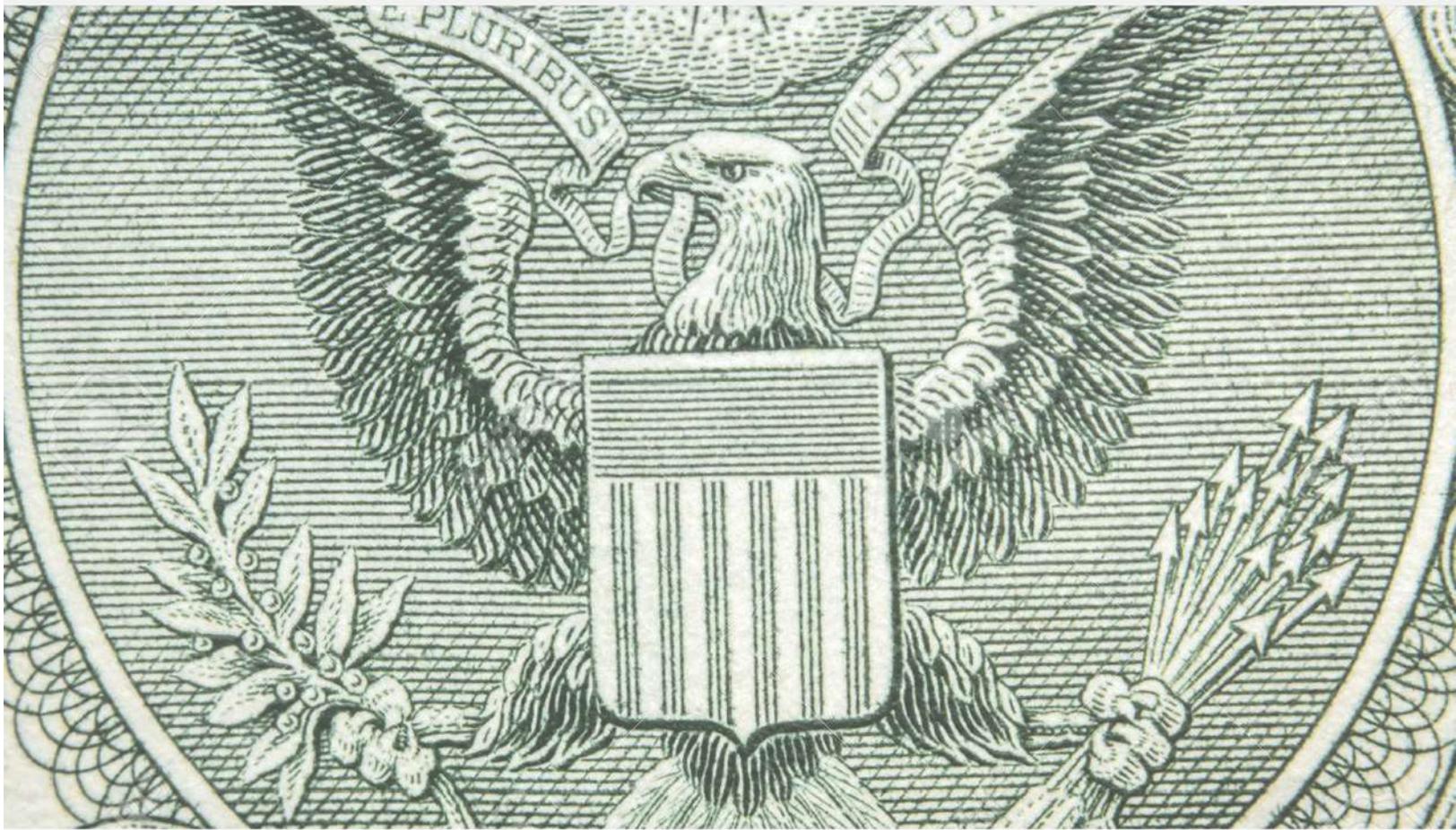


FISCAL BRIEF

COVID-19 Liability Legislation



As the COVID-19 pandemic persists into 2021, legislators continue to raise concerns regarding potential liability for exposure to and injuries from coronavirus. Among the primary concerns:

- Should policymakers limit the liability of businesses, schools and other organizations, particularly if they follow public health guidelines and don't engage in grossly negligent behavior or willful misconduct?
- With hospitals running out of bed space, should health care professionals and facilities be protected?
- Should manufacturers of personal protective equipment (PPE) face potential liability if the PPE doesn't work as intended as manufacturers had to ramp up production to meet demand?

Federal law may limit some COVID-19-related tort liability even under state tort law. For example, the [Public Readiness and Emergency Preparedness \(PREP\) Act](#) authorizes the U.S. Health and Human Services (HHS) secretary to issue a declaration providing immunity from liability for persons or entities covered under the Act for losses relating to the administration or use of specified countermeasures against COVID-19, unless the death or serious physical injury was caused by willful misconduct or by activities that fall outside the scope of the PREP Act declaration. The PREP Act created a compensation fund for injuries and deaths, which requires a congressional appropriation. The HHS secretary invoked the PREP Act on March 10, 2020, authorizing PREP Act immunity for the manufacture, testing, development, distribution, administration and use of covered countermeasures. The declaration has been amended by broadening the immunity scope to include respiratory protective devices and other items as covered countermeasures.

Further, [§3215 of the Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#) makes individual volunteer healthcare professionals immune from liability for acts or omissions they commit while providing COVID-19 healthcare services during the COVID-19 public health emergency, but the section does not protect hospitals or healthcare professionals providing COVID-19 healthcare for profit.

The U.S. Chamber of Commerce and its Institute for Legal Reform advocate in favor of liability limitations. According to their poll, 67% of small businesses with 20 to 500 employees and 51% of small businesses with five to 19 employees are worried about the possibility of lawsuits related to coronavirus. In contrast, polls conducted by the American Association for Justice found that 60% of voters believe companies would not take proper precautions if the companies knew they could not be held accountable and 61% of voters believe business immunity in coronavirus cases would result in more people getting sick.

The law firm Hunton Andrews Kurth LLP set up a [COVID-19 complaint website](#) to track lawsuits filed in response to COVID-19. As of Jan. 25, 2021, 8,076 total complaints have been filed, with 151 focused on health care or medical malpractice and wrongful death and 147 complaints focused on the conditions of employment, including exposure to COVID-19 at work, wrongful death and personal injury. Thirty-seven complaints relate to personal injury or wrongful death from consumer exposure to COVID-19 in a public place. Fourteen complaints have been filed for wrongful death or personal injury arising from situations other than employment, consumer or healthcare settings.

In the 2020 regular and special legislative sessions, 32 states, Guam, Puerto Rico and the District of Columbia introduced 184 bills to address COVID-19 liability issues. From those proposed measures, 21 states, Puerto Rico and the District of Columbia enacted legislation in 2020. In these states, 27 enacted

bills addressed health or medical liability, 28 addressed business or general liability and 11 addressed PPE liability.

Here are examples of state COVID-19 liability legislation:

Georgia

- The text of [2020 SB 359](#), codified at Ga. Code §51-16-1 *et seq.*, provides “No healthcare facility, healthcare provider, entity, or individual, shall be held liable for damages in an action involving a COVID-19 liability claim against such healthcare facility, healthcare provider, entity, or individual, unless the claimant proves that the actions of the healthcare facility, healthcare provider, entity, or individual, showed: gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm. Provides a rebuttable presumption of assumption of the risk by claimants when the premises provide a warning statement or posts a warning sign with specified language. A COVID-19 liability claim is defined as a cause of action for: (A) Transmission, infection, exposure, or potential exposure of COVID-19 to a claimant: (i) At any healthcare facility or on the premises of any entity, individual, or healthcare provider, resulting in injury to or death of a claimant; or (ii) Caused by actions of any healthcare provider or individual resulting in injury to or death of a claimant; (B) Acts or omissions by a healthcare facility or healthcare provider in arranging for or providing healthcare services or medical care to the claimant resulting in injury or death of the claimant for COVID-19 or where the response to COVID-19 reasonably interfered with the arranging for or the providing of healthcare services or medical care at issue to the claimant; or (C) Manufacturing, labeling, donating, or distributing personal protective equipment or sanitizer that is directly related to providing such personal protective equipment or sanitizer to claimant by any entity during a public health state of emergency for COVID-19, which departs from the normal manufacturing, labeling, donating, or distributing personal protective equipment of such entity that proximately results in injury to or death of a claimant.

Idaho

- The text of [2020 HB 6a](#), Extraordinary Session, provides (1) Subject to the other provisions of this section, a person is immune from civil liability for damages or an injury resulting from exposure of an individual to coronavirus. (2) Immunity as described in this section shall not apply to acts or omissions that constitute an intentional tort or willful or reckless misconduct as defined in §6-1601, Idaho Code. (3) Nothing in this chapter shall be construed to modify the application of title 72, Idaho Code, worker's compensation and related laws of the industrial commission. The legislation defines “person” to mean any entity recognized in this state and shall include but not be limited to an individual, corporation, limited liability company, partnership, trust, association, church or religious organization, city, county, school district, college, university or other institution of higher education, or other unit of local government. However, "person" shall not include any Idaho public health district; the federal government or any of its agencies; the state of Idaho or any of its agencies, except colleges, universities, and other institutions of higher education; nor any foreign government or foreign jurisdiction.

Michigan

- The text of [2020 HB 6031](#) provides “Notwithstanding any other provision of this act, an employer is not liable under this act for an employee’s exposure to COVID-19 if the employer was operating in compliance with all federal, state, and local statutes, rules, and regulations, executive orders, and agency orders related to COVID-19 that had not been denied legal effect at the time of the exposure. An isolated, de minimis deviation from strict compliance with such statutes, rules, regulations, executive orders, and agency orders unrelated to the employee’s exposure to COVID-19 does not deny an employer the immunity provided in this section.”

New Jersey

- The text of [2020 SB 2333](#) provides that “a health care professional shall not be liable for civil damages for injury or death alleged to have been sustained as a result of an act or omission by the health care professional in the course of providing medical services in support of the State's response to the outbreak of coronavirus disease during the public health emergency and state of emergency declared by the governor in Executive Order 103 of 2020; and (2) a health care facility or a health care system that owns or operates more than one health care facility shall not be liable for civil damages for injury or death alleged to have been sustained as a result of an act or omission by one or more of its agents, officers, employees, servants, representatives or volunteers, if, and to the extent, such agent, officer, employee, servant, representative or volunteer is immune from liability pursuant to paragraph (1) of this subsection.” The legislation includes engaging in telemedicine or telehealth, and diagnosing or treating patients outside the normal scope of the health care professional's license or practice during the state of emergency in support of efforts to treat COVID-19 patients and to prevent the spread of COVID-19.

Oregon

- The text of [2020 HB 4402](#), Third Special Session, provides (1) A person may not bring a claim for damages related to COVID-19 infection suffered as a result of acts or omissions performed by a school: (a) In the course of operating an education program; and (b) When the school is operating in compliance with COVID-19 emergency rules in effect at the time of the act or omission. (2) A person engaged in activities on school property that are not operated by a school may not bring a claim against the school for damages related to COVID-19 infection. (3) The immunity provided by this section does not apply to reckless, wanton or intentional misconduct.

In the 2021 legislative session, 24 states have introduced 69 bills as of Jan. 25.

For additional information regarding the ways states are addressing COVID-19 liability, please review the NCSL database, [State Action on Coronavirus \(COVID-19\)](#).

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