



To: Board Members of FJRI
From: Florida Justice Reform Institute
Date: July 10th, 2020
Re: State responses to COVID 19 liability

Florida Businesses Need COVID-19 Liability Protections

After weeks of business closures and stay-at-home orders aimed at curbing the spread of COVID-19, most states including Florida are beginning to reopen for business. Businesses, however, face substantial uncertainty and ever-changing guidance in how to safely and expediently reopen while in the midst of an ongoing pandemic. A large part of that uncertainty stems from the threat of legal liability from customers and employees alike who might assert claims that a business exposed them to COVID-19 or failed to take adequate action to guard against the risk of exposure.

Unfortunately, that risk of legal liability is not theoretical, as the pandemic is proving to be fertile ground for lawsuits. These lawsuits span from disputes about whether COVID-19 triggers business interruption insurance coverage¹ to whether an employer has failed to provide sufficiently safe working conditions to prevent the virus's spread² to whether universities must issue partial tuition refunds to students who have been forced to shift their coursework online.³ Unsurprisingly, nursing homes have become targets for lawsuits premised on their response to the pandemic.⁴

But this is just the start, and the next wave of litigation will be personal injury tort actions premised on claimed COVID-19 exposure.

The Institute has surveyed several of its members regarding the legal impact of COVID-19 thus far on their businesses. Members are commendably responding to the pandemic with rigorous proactive measures designed to ensure the safety of employees, patrons, and others. Some members report they have not yet been threatened with tort liability related to COVID-19. But others have. For example, one member recounted threats of class action lawsuits premised on the

¹ See, e.g., *Café Int'l Holding Co. v. Chubb Ltd.*, No. 1:20-cv-21641-MGC (S.D. Fla. 2020); *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, No. 2:20-cv-03619 (C.D. Cal. 2020).

² See, e.g., *Rural Cmty. Workers Alliance v. Smithfield Foods, Inc.*, No. 5:20-cv-06063 (W.D. Mo. 2020).

³ See, e.g., *Egleston v. Univ. of Fla. Bd. of Trs.*, No. 1:20-cv-106 (N.D. Fla. 2020).

⁴ See, e.g., *Marshall v. Accordius Health LLC*, No. 20-cvs-728 (N.C. Super. Court 2020); Nikki Ross, *Coronavirus: Morgan & Morgan plans lawsuit against Opis Coquina Center*, Daytona Beach News-Journal, May 14, 2020, <https://www.news-journalonline.com/news/20200514/coronavirus-morgan--morgan-plans-lawsuit-against-opis-coquina-center>.

member’s purported failure to follow “best practices” for sanitation and/or failure to enforce requirements that customers wear masks or socially distance. But what are the applicable “best

practices”? Members indicate there is a patchwork of sometimes inconsistent or vague regulations, ordinances, and guidance documents regarding what they must do to prevent the spread of COVID-19—guidance issued by different counties and municipalities, the state and its agencies, the Occupational Safety and Health Administration, and the Centers for Disease Control and Prevention, among others. Members are understandably concerned that they will be forced to litigate the applicability of and their compliance with such guidance. All members surveyed confirmed the need for liability protections.

Although all lawsuits will face the substantial hurdle of showing the plaintiff’s illness was caused by the business’s conduct, even weak legal claims may stigmatize the business and be persuasive to juries, on top of being costly to defend. If the goal of reopening Florida is to jumpstart the economy, Florida’s businesses need greater assurance that they may continue to do so without risking an onslaught of litigation tied to COVID-19.

Below we discuss the most likely legal basis for COVID-19 exposure tort claims. We then outline several legislative options for limiting COVID-19 liability, based on the numerous legislative efforts being considered and enacted across the country.

Current Law on Communicable Disease Liability

COVID-19 presents a novel circumstance for tort liability in Florida and elsewhere.⁵ But other states have recognized the possibility of such an action; as the Supreme Court of Pennsylvania reasoned, “To be stricken with disease through another’s negligence is . . . no different from being struck with an automobile through another’s negligence.”⁶ For example, in an 1884 case, the court found a defendant liable for the negligent transmission of whooping cough after the defendant took his children infected with the highly contagious disease to the plaintiff’s boardinghouse, infecting the plaintiff’s child and causing the plaintiff’s business to lose profits.⁷

Although there is no Florida case on point, it is likely that a customer asserting a cause of action for negligent transmission of COVID-19 would attempt to state a claim for negligence based on premises liability.

To state a claim for negligence, a plaintiff must prove: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the plaintiff was injured as a result

⁵ Florida law does recognize “negligent transmission of a sexually transmissible disease” as a “variant” on the traditional tort of negligence. *See, e.g., Kohl v. Kohl*, 149 So. 3d 127, 135 (Fla. 4th DCA 2014). Florida courts have also considered whether a communicable disease allegedly contracted at work is compensable under worker’s compensation. *Anderson v. Anderson*, 60 So. 2d 160, 160 (Fla. 1952). But the transmission of a respiratory disease like COVID-19 as the basis of a negligence action against a business appears to be a matter of first impression in Florida.

⁶ *Billo v. Allegheny Steel Co.*, 195 A. 110, 114 (Pa. 1937).

⁷ *Smith v. Baker*, 20 F. 709 (S.D.N.Y. 1884).

of that breach; and (4) the injury was proximately caused by the defendant's breach.⁸ With respect to the first element, the duty of care, Florida courts have recognized a special relationship exists between businesses and their customers.⁹ A business has two duties of care to its customers: (1) a duty to warn of perils that were known or should have been known to the business owner and which the customer could not discover; and (2) a duty to keep the premises reasonably safe.¹⁰ Even where a risk is obvious, a business owner has a duty to maintain the safety of the premises.¹¹

There is no analogous Florida case which would illustrate how this standard would apply when a customer claims a business failed to keep its premises reasonably safe from COVID-19.

In the context of negligent transmission of sexually transmitted diseases, Florida courts have emphasized that transmission must be foreseeable by the defendant; in other words, "[t]he linchpin of liability for imposing a legal duty to avoid negligent transmission of a sexually transmissible disease is the defendant's knowledge that he or she harbors the disease. A duty will not lie where the defendant is unaware of the condition, since the risk created by his or her sexual activity is unforeseen."¹² Similarly, in COVID-19 cases, if a business knows one or more of its employees has tested positive for COVID-19, the plaintiff may be able to show that the risk of injury—contraction of or exposure to COVID-19 by customers—was reasonably foreseeable.

The success of such a claim, however, will likely come down to whether the plaintiff has satisfied the element of proximate causation. To establish proximate cause for any negligence action, the plaintiff must prove that the defendant's negligence more likely than not caused the plaintiff's injury.¹³ The mere possibility of causation is not enough; there must be a "reasonable basis for the conclusion that it is more likely than not that the [defendant's] conduct . . . was a substantial factor" in bringing about the plaintiff's injury.¹⁴

It remains to be seen how a plaintiff will show that his contraction of COVID-19 more likely than not came from exposure on the business's premises—and not at the post office, at home, or elsewhere. Although establishing proximate causation will be difficult, it will not be

⁸ *Denson v. SM-Planters Walk Apartments*, 183 So. 3d 1048, 1050 (Fla. 1st DCA 2015).

⁹ See *Ramirez v. M.L. Mgmt. Co.*, 920 So. 2d 36, 38 (Fla. 4th DCA 2005).

¹⁰ *Denson*, 183 So. 3d at 1050.

¹¹ *De Cruz-Haymer v. Festival Food Mkt., Inc.*, 117 So. 3d 885, 888 (Fla. 4th DCA 2013).

¹² *Kohl*, 149 So. 3d at 135.

¹³ *Aragon v. Issa*, 103 So. 3d 887, 892 (Fla. 4th DCA 2012); see, e.g., *Sudbeck v. Sunstone Hotel Props., Inc.*, No. 2:04-cv-1535, 2006 WL 2728624, at *8 (D. Ariz. July 26, 2006) (finding plaintiff failed to establish proximate cause and reasoning that even where the evidence established that plaintiff contracted Legionnaires' disease sometime prior to July 8, 2002, and stayed at the defendant's resort between June 25 and 27, 2002, i.e., within the incubation period of the *Legionella pneumophila* bacteria, and even where there was evidence that *Legionella* bacteria were found in water samples collected at the resort in May 2003, "it would be sheer speculation to say that it is more likely than not that the bacteria was present at the resort in June 2002 when [plaintiff] was a guest").

¹⁴ *Murphy v. Sarasota Ostrich Farm/Ranch, Inc.*, 875 So. 2d 767, 769 (Fla. 2d DCA 2004).

insurmountable, particularly if the plaintiff can offer persuasive expert testimony on the point.¹⁵

¹⁵ *Cf., e.g., Russell v. Call/D, LLC*, 122 A.3d 860, 872-73 (D.C. App. 2015) (absent expert testimony, plaintiff could prove no more than the “bare possibility” that he contracted Legionnaires’ disease from sewage-contaminated water at his apartment complex).

Proposed Liability Protections for Businesses

Several states are debating or have already enacted COVID-19 liability protections for businesses and others, including Alabama,¹⁶ Arizona,¹⁷ Arkansas,¹⁸ Georgia,¹⁹ Iowa,²⁰ Kansas,²¹ Louisiana,²² Mississippi,²³ North Carolina,²⁴ Ohio,²⁵ Oklahoma,²⁶ South Carolina,²⁷ Utah,²⁸ and Wyoming.²⁹

These proposals generally fall into one or more categories: (1) legislation authorizing a cause of action premised on transmission of or exposure to COVID-19 but subject to a heightened burden of proof—i.e., the clear and convincing evidence standard rather than the preponderance of the evidence standard; (2) legislation authorizing such a cause of action but only for redressing the most culpable conduct—e.g., gross negligence, recklessness, or intentional harm; and (3) legislation authorizing such a cause of action when the defendant failed to substantially comply with a duty of care imposed by a governmental rule or regulation or other public health guidance.

Below we describe the proposals being considered or enacted in these states. We also provide draft bills modeled on each state’s proposed solution.

¹⁶ Ala. SB 330 (2020).

¹⁷ Ariz. HB 2912 (2020).

¹⁸ Ark. Executive Department Proclamation 20-33 (2020).

¹⁹ Ga. HB 167 (2020).

²⁰ Iowa S. 2338 (2020).

²¹ Kan. HB 2016 (2020).

²² La. Act No. 336 (HB 826) (2020).

²³ Miss. SB 3049 (2020).

²⁴ N.C. Session Law 2020-3.

²⁵ Ohio HB 606 (2020).

²⁶ Okla. SB 1946 (2020).

²⁷ See Emily Bohatch, *SC lawmakers to weigh legal protections for businesses reopening in COVID-19*, The State, June 22, 2020, <https://www.thestate.com/news/politics-government/article243660157.html>.

²⁸ Utah SB 3007 (2020).

²⁹ Wyo. Senate File 1002 (2020).

Alabama

Under the proposal introduced in Alabama, covered entities—defined to include business entities—would be immune from “health emergency claims,” including claims based on the “actual, alleged, or feared exposure to or contraction of Coronavirus from the premises of a covered entity or otherwise related to or arising from its operations, products, or services provided on or off-premises.” Immunity would not apply, however, if the claimant is able to prove by clear and convincing evidence that the covered entity: (1) caused the damages, injury, or death by acting with wanton, reckless, willful, or intentional misconduct; or (2) did not reasonably attempt to comply with public health guidance.

Importantly too, the legislation would limit the damages claimants may recover. Specifically, where the acts or omissions complained of do not result in serious physical injury, a covered entity’s liability is limited to actual economic compensatory damages; thus, a covered entity is not liable for noneconomic damages (such as mental anguish or emotional distress damages) or punitive damages.

Finally, the legislation would require that a health emergency claim must be filed not later than one year after the date of the claimant’s damages, injury, or death.

The legislation’s key language is provided below; discussion of the legislation’s major provisions follows.

Notwithstanding any . . . law to the contrary, . . . a covered entity shall not be liable for any damages, injury, or death suffered by any person or entity as a result of, or connection with, a health emergency claim that results from any act or omission of the covered entity.

[The above] does not apply if the claimant proves by clear and convincing evidence that the covered entity caused the damages, injury, or death by acting with wanton, reckless, willful, or intentional misconduct.

. . . .

Notwithstanding any other provision of law, as a matter of law, a covered entity shall not be liable for negligence, premises liability, or for any non-wanton, non-willful or non-intentional civil cause of action to which this subsection applies, unless the claimant shows by clear and convincing evidence that the covered entity did not reasonably attempt to comply with the then applicable public health guidance.

Heightened Evidentiary Standard. Legislation modeled after Alabama’s would impose a heightened burden of proof: clear and convincing evidence. Ordinarily, in order for a plaintiff to prevail on a tort claim, the “greater weight of the evidence”—meaning “the more persuasive and convincing force and effect of the entire evidence in the case”—must support the plaintiff’s claim.³⁰ Practically speaking, this means that the evidence must more likely than not confirm the plaintiff’s case.³¹

In contrast, under the clear and convincing evidence standard, “the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.”³²

Requiring plaintiffs to prove their claims with clear and convincing evidence would decrease the likelihood that plaintiffs would pursue frivolous claims.

Heightened Culpability Standard. In addition to a heightened standard of proof, legislation modeled after Alabama’s would limit the cause of action to conduct that is wanton, reckless, willful, or intentional, or the failure to “reasonably attempt to comply” with public health guidance.

Wanton, reckless, willful, or intentional conduct represents culpability greater in degree than that of mere negligence. In Florida, wanton, willful, and reckless conduct is often defined to mean conduct illustrating a clear and conscious disregard for the safety of others, or acting in a way which a person knows imposes a substantially greater risk of harm, although not deliberately intending that harm will result.³³ In contrast, conduct is intentional when a person is substantially certain or intends that harm will result; e.g., the “defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.”³⁴

In addition to imposing a heightened burden of proof, limiting liability generally to wanton, reckless, willful, and intentional conduct would ensure only the most culpable defendant conduct related to COVID-19 is the subject of costly litigation.

Under the Alabama model, a defendant may be liable for conduct that is not wanton, reckless, willful, or intentional if the claimant proves by clear and convincing evidence that the defendant did not “reasonably attempt to comply with the then applicable public health guidance.”

Although the burden would remain with the claimant to prove by clear and convincing evidence that a business failed to “reasonably attempt to comply” with public health guidance, this may be the weakest part of the Alabama model. This is because authorizing such claims will force Florida trial courts to enter the quagmire of public health guidance and decide what guidance applied to the conduct at issue and whether or not the defendant “reasonably attempt[ed]” to

³⁰ Fla. Std. Jury Instr. (Civ.) 401.3, 401.21.

³¹ *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000).

³² *Inquiry Concerning Davey*, 645 So. 2d 398, 404 (Fla. 1994).

³³ *Dyals v. Hodges*, 659 So. 2d 482, 484 (Fla. 1st DCA 1995); *Williams v. City of Minneola*, 619 So. 2d 987 (Fla. 5th DCA 1993).

³⁴ § 768.72(2)(a), Fla. Stat.; *see also* Restatement (Second) Torts § 500 comment f.

comply with that guidance. Litigating such issues will prove expensive, and courts may decide such issues are best left to juries to decide. Consequently, the allowance of such a claim will dramatically increase the cost of defending COVID-19 lawsuits, even if the claimant is required to prove causation.

Limited Damages. To the extent a claimant is successful, under the Alabama model they will be limited to recovering economic, compensatory damages and foreclosed from recovering noneconomic or punitive damages purportedly resulting from their COVID-19 health emergency claim.

Under Florida law, compensatory damages are generally those tort damages necessary to restore the financial loss sustained by the plaintiff as a result of the defendant's conduct. The goal of such damages is not to punish defendants or to bestow a windfall on plaintiffs, but to simply make plaintiffs whole.³⁵ In contrast, noneconomic damages compensate nonfinancial losses, including, for example, suffering, mental anguish, loss of capacity for enjoyment of life, and inconvenience.³⁶ An award of noneconomic damages can often far eclipse the amount of compensatory damages awarded to a plaintiff. Punitive damages are designed to punish the defendant and/or to deter the defendant and others from committing wrongful conduct in the future.³⁷ To even sustain a claim for punitive damages under current Florida law, a plaintiff must demonstrate by clear and convincing evidence that the defendant was personally guilty of intentional misconduct or gross negligence.³⁸

Limiting the damages recoverable by plaintiffs for COVID-19 claims will ensure that plaintiffs are able to recover for non-frivolous claims while defendants maintain some control over the extent of their liability.

Shortened Statute of Limitations. Finally, under the Alabama model, claimants will have only one year in which to assert COVID-19 health emergency claims. In other words, a claimant must file a health emergency claim under the Alabama model "not later than one year after the date of the injury or death." Ordinarily, tort claims, including negligence claims, are subject to a four-year statute of limitations in Florida.³⁹ A shortened limitations period would ensure businesses are not facing COVID-19 claims years into the future, long after the pandemic has ceased.

³⁵ *Deauville Hotel Mgmt., LLC v. Ward*, 219 So. 3d 949, 954 (Fla. 3d DCA 2017).

³⁶ *See, e.g., Wald v. Grainger*, 64 So. 3d 1201, 1207 (Fla. 2011); § 766.202(8), Fla. Stat.

³⁷ *See, e.g., Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 247 (Fla. 1st DCA 1984).

³⁸ § 768.72(2), Fla. Stat.

³⁹ § 95.11(3)(a), (o), (p), Fla. Stat.

Arizona

Under legislation modeled after Arizona’s approach, a claimant would have to prove by clear and convincing evidence that the business’s conduct amounted to gross negligence:

A . . . person, including a person who owns or operates a business, corporation, [or] limited liability company . . . in this state during a state of emergency order related to the COVID-19 outbreak or before April 1, 2021, whichever is later, is not liable to a person who contracts COVID-19 during the state of emergency or before April 1, 2021, whichever is later, including after entering and remaining on the premises of the business, . . . if the action is based on strict liability, premises liability or negligence unless the . . . person or owner or operator of the business, corporation, [or] limited liability company . . . acted with gross negligence.

The burden of proof in a civil action that is based on the plaintiff contracting COVID-19 and that is filed pursuant to [this law] is clear and convincing evidence.

Similar to Alabama’s legislation, in addition to imposing a heightened standard of proof, Arizona’s model would foreclose simple negligence claims premised on COVID-19 and require a greater level of culpability—gross negligence—before liability would attach. Under Florida law, “gross negligence” refers to conduct “so reckless or wanting in care that it constitute[s] a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.”⁴⁰ As contrasted with simple negligence, which is “conduct which a reasonable and prudent person would know *might possibly* result in injury to persons,” “gross negligence” means conduct “that a reasonable, prudent person would know is *likely* to result in injury to another.”⁴¹

⁴⁰ § 768.72(2)(b), Fla. Stat.

⁴¹ *Boston ex rel. Estate of Jackson v. Publix Super Mkts., Inc.*, 112 So. 3d 654, 658–59 (Fla. 4th DCA 2013) (internal quotation marks, omissions, citations, and alterations omitted; emphasis added).

Arkansas

Under legislation modeled on Arkansas’s executive order providing liability protection, COVID-19 liability would only lie for willful, reckless, or intentional conduct:

All persons including any person’s employees, agents, and officers shall be immune from civil liability for damages or injuries caused by or resulting from exposure of an individual to COVID-19 on the premises owned or operated by those persons or during any activity managed by those persons.

This immunity does not apply to willful, reckless, or intentional misconduct resulting in injury or damages. It is presumed that a person and person’s employees, agents, or officers are not committing willful, reckless, or intentional misconduct if the person and the person’s agents and officers are (a) substantially complying with health and safety directives or guidelines issued by the Governor or Department of Public Health or (b) acting in good faith while attempting to comply with such health and safety directives or guidelines.

As noted above, reserving liability for a higher level of culpability than negligence—willful, reckless, or intentional misconduct—will discourage frivolous claims. Under legislation modeled after Arkansas’s proposal, a presumption arises that a business has not committed willful, reckless, or intentional misconduct if the business substantially complies with health and safety directives or acts in good faith while attempting to comply with such directives.

Florida recognizes a somewhat similar defense in the context of products liability. Under the “government rules defense,” a product manufacturer or seller is not liable if, at the time the claimed defective product was sold or delivered to the plaintiff, the product complied with relevant federal or state codes, statutes, rules, regulations, or standards designed to prevent the type of harm at issue.⁴²

But the viability of such a presumption is questionable given the ever-shifting and vague guidelines provided to businesses concerning prevention and containment of COVID-19. There is also the question of what represents “substantial compliance” or “good faith” when it comes to compliance with public health directives. Absent concrete, easy-to-follow, and clearly applicable guidelines, immunity premised upon compliance with governmental rules or regulations will likely not offer much immunity at all. Further, even with such a safe harbor in place, enterprising plaintiff’s attorneys will test the limits of the cause of action.

⁴² See § 768.1256(1), Fla. Stat.

Georgia

Georgia has enacted the Pandemic Business Safety Act, which generally immunizes all entities from COVID-19 liability claims except for when the claimant shows the entity was grossly negligent or its conduct was willful and wanton, reckless, or intended to cause harm. Notably, the legislation also creates a rebuttable presumption regarding a potential claimant's assumption of risk; the operative language of Florida legislation based on Georgia's would be as follows:

Except for gross negligence, willful and wanton conduct, reckless infliction of harm, or intentional infliction of harm, in an action involving a COVID-19 liability claim against an individual or entity for transmission, infection, exposure, or potential exposure of COVID-19 to a claimant on the premises of such individual or entity, there shall be a rebuttable presumption of assumption of the risk by the claimant when:

(a) Any receipt or proof of purchase for entry, including but not limited to an electronic or paper ticket or wristband, issued to a claimant by the individual or entity for entry or attendance, includes a statement in at least ten-point Arial font placed apart from any other text, stating the following warning:

Any person entering the premises waives all civil liability against this premises owner and operator for any injuries caused by the inherent risk associated with COVID-19 at public gatherings, except for gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm, by the individual or entity of the premises.

or

(b) An individual or entity of the premises has posted at a point of entry, if present, to the premises, a sign in at least one-inch Arial font placed apart from any other text, a written warning stating the following:

Under Florida law, there is no liability for any injury or death of an individual entering these premises if such injury or death results from the inherent risks of contracting COVID-19. You are assuming this risk by entering these premises.

Healthcare facilities under the law would also be permitted to avoid liability using similar warnings.

This immunity is premised on the doctrine of assumption of risk. Under Florida law, the doctrine of express assumption of the risk totally bars recovery for a tort claim when the injured party consents to a known risk.⁴³ It typically arises in express contracts where a party agrees not to sue for injury as well as where one voluntarily participates in a contact sport.⁴⁴ Legislation modeled after Georgia's would significantly limit litigation associated with COVID-19 where business entities follow its parameters and put potential claimants on notice of the risks inherent in venturing out to businesses during the pandemic. However, there still remains a risk that plaintiffs' attorneys will test the limits of this defense, likely arguing that a plaintiff has rebutted the presumption because he or she failed to subjectively understand the risks of contracting COVID-19 as a result of entering the entity's premises, or that he or she did not actually assume the risk.⁴⁵

⁴³ *McNichol v. S. Fla. Trotting Ctr.*, 44 So. 3d 253, 257 (Fla. 4th DCA 2010).

⁴⁴ *Id.*

⁴⁵ *See, e.g., Van Tuyn v. Zurich Am. Ins. Co.*, 447 So. 2d 318, 320-21 (Fla. 4th DCA 1984) (despite the fact that patron signed waiver before riding mechanical bull, court held that defendants failed to carry their burden at summary judgment to establish that the plaintiff fully understood the risks and dangers involved in riding mechanical bull or that plaintiff understood and agreed to assume the risks of defendants' negligence in operating bull).

Iowa

Iowa has enacted legislation which would significantly limit causes of action related to COVID-19 exposure or potential exposure and provide a safe harbor for compliance with applicable public health guidance:

A person shall not bring or maintain a civil action alleging exposure or potential exposure to COVID-19 unless one of the following applies:

(a) The civil action relates to a minimum medical condition [defined to mean a diagnosis of COVID-19 that requires inpatient hospitalization or results in death].

(b) The civil action involves an act that was intended to cause harm.

(c) The civil action involves an act that constitutes actual malice.

A person who possesses or is in control of a premises . . . who directly or indirectly invites or permits an individual onto a premises, shall not be liable for civil damages for any injuries sustained from the individual's exposure to COVID-19, whether the exposure occurs on the premises or during any activity managed by the person who possesses or is in control of a premises, unless any of the following apply to the person who possesses or is in control of the premises:

(a) The person . . . recklessly disregards a substantial and unnecessary risk that the individual would be exposed to COVID-19.

(b) The person . . . exposes the individual to COVID-19 through an act that constitutes actual malice.

(c) The person . . . intentionally exposes the individual to COVID-19.

A person in this state shall not be held liable for civil damages for any injuries sustained from exposure or potential exposure to COVID-19 if the act or omission alleged to violate a duty of care was in substantial compliance or was consistent with any federal or state statute, regulation, order, or public health guidance related to COVID-19 that was applicable to the person or activity at issue at the time of the alleged exposure or potential exposure.

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Thus, under legislation modeled after Iowa’s, a claimant would be limited to suing on the basis of only the most serious COVID-19 claims, including claims based upon acts of actual malice. Actual malice under Florida law generally arises in the context of defamation claims, and means the defendant published a statement knowing it was probably false or with reckless disregard for its truth.⁴⁶ In contrast, Iowa also employs “actual malice” for purposes of determining whether an award of punitive damages is appropriate; in those cases, “[a]ctual malice is shown by such things as personal spite, hatred, or ill will.”⁴⁷ Florida does not have a clear analogue for this type of culpability in the context of tort cases.⁴⁸ Under the Iowa model, premises liability would likewise be limited to a premises owner’s reckless or intentional conduct or acts of actual malice.

Finally, like other states, Iowa would offer additional liability protection if the defendant acted in substantial compliance with or acted consistently with public health guidance, although such a provision has drawbacks as discussed previously.

⁴⁶ *Times Publ’g Co. v. Huffstetler*, 409 So. 2d 112, 112-13 (Fla. 5th DCA 1982).

⁴⁷ *Larson v. Great W. Cas. Co.*, 482 N.W.2d 170, 174 (Iowa Ct. App. 1992).

⁴⁸ Florida law does recognize the concept of “legal malice” in the context of malicious prosecution claims; the phrase is defined to mean gross negligence “or great indifference to persons, property, or the rights of others.” *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1357 (Fla. 1994). Otherwise, outside of defamation, “actual malice” appears primarily reserved for criminal cases, requiring “proof of evil intent or motive.” *Reed v. State*, 837 So. 2d 366, 368-69 (Fla. 2002) (internal quotation marks omitted).

Kansas

Kansas has enacted legislation which would grant immunity to a business from COVID-19-related claims if the business acted in substantial compliance with public health directives, defined to include directives in state statutes or regulations or executive orders, federal statutes and regulations, and any lawful order or proclamation issued under authority under the state emergency management act. Of course, as noted above, there is reason to be concerned with legislation affording immunity based on “substantial compliance” with ever-shifting public guidance issued by different authorities on how best to respond to the pandemic. The operative language of the Kansas legislation is as follows:

Notwithstanding any other provision of law, a person, or an agent of such person, conducting business in this state shall be immune from liability in a civil action for a COVID-19 claim if such person was acting pursuant to and in substantial compliance with public health directives applicable to the activity give rise to the cause of action when the cause of action accrued.

Legislation modeled after Kansas’s would also impose a shortened statute of limitations of one year.

Notably too, draft legislation modeled on Kansas’s proposal would apply “retroactively to any cause of action accruing on or after March 1, 2020.” In Florida, legislation that applies retroactively usually contravenes constitutional limitations on legislative power when it “impairs vested rights, creates new obligations, or imposes new penalties,” as such legislation violates due process.⁴⁹ Vested rights include accrued causes of action; thus, “[w]hen a cause of action has accrued, a statute that becomes effective subsequently may not be applied to eliminate or curtail the cause of action.”⁵⁰ Consequently, legislation applying retroactively to pending COVID-19 claims may not pass constitutional muster in Florida.

⁴⁹ See *State Farm Mut. Auto. Ins. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) (holding that statute expanding damages recoverable in statutory bad faith action against insurer could not constitutionally be applied to causes of action accruing prior to enactment of statute).

⁵⁰ *R.A.M. of S. Fla., Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210, 1220 (Fla. 2d DCA 2004).

Louisiana

Louisiana's proposed liability protection would turn on whether the defendant substantially complied with applicable COVID-19 procedures and whether the defendant was grossly negligent or acted wantonly or recklessly:

A person or a state or local government shall not be liable for any civil damages for injury or death resulting from or related to actual or alleged exposure to COVID-19 in the course of, or through the performance or provision of, the person's or government's business operations unless the person or government failed to substantially comply with the applicable COVID-19 procedures established by the federal, state or local agency which governs the business operations and the injury or death was caused by the person's or government's gross negligence or wanton or reckless misconduct. If two or more sources of procedures are applicable to the business operations at the time of the actual or alleged exposure, the person or government shall substantially comply with any one applicable set of procedures.

Legislation modeled after Louisiana's approach would helpfully clarify that if there are two or more sets of COVID-19 procedures applicable to a business's operations, the business need only comply with one. Regardless, however, parties will likely be forced to litigate the issue of what amounts to substantial compliance.

The Louisiana model would also provide that event planners and the like are not liable for any civil damages for an injury or death resulting from or related to actual or alleged exposure to COVID-19 in the course of hosting, promoting, producing, or otherwise organizing, planning, or owning a tradeshow, convention, meeting, or other event unless the damages were caused by gross negligence or willful or wanton conduct.

This approach would also impose a one-year statute of limitations upon COVID-19 related claims, shortening the applicable statute of limitations in Florida from four years.

Mississippi

Mississippi's approach offers two major protections: (1) essential businesses would not be liable for COVID-19 claims "in the time before applicable public health guidance was available"; and (2) all individuals who own or occupy or are otherwise in control of a premises who attempt, in good faith, to follow applicable public health guidance would not be liable for COVID-19 claims. However, these liability limitations would not apply where the claimant proves—by clear and convincing evidence—that the defendant acted willfully or intentionally or with actual malice. Certain protections are also given to healthcare professionals and facilities and those that design, manufacture, label, sell, distribute, or donate certain products, like personal protective equipment.

The key language is provided below:

An essential business, or agent of that essential business, shall not be held liable for civil damages for any injuries or death resulting from or related to actual or alleged exposure or potential exposure to COVID-19 in the course of or through the performance or provision of its functions or services in the time before applicable public health guidance was available.

An owner, lessee, occupant or any other person in control of a premises, who attempts, in good faith, to follow applicable public health guidance and directly or indirectly invites or permits any person onto a premises shall not be held liable for civil damages for any injuries or death resulting from or related to actual or alleged exposure or potential exposure to COVID-19.

The limitations on liability provided . . . shall not apply where the plaintiff shows, by clear and convincing evidence, that a defendant, or any employee or agent thereof, acted with actual malice or willful, intentional misconduct.

Thus, many businesses would be protected so long as they attempted "in good faith" to comply with applicable public health guidance. Under Florida law, however, there is no universal definition of good faith in the tort context; generally it means acting honestly and diligently.⁵¹ Consequently, such a nebulous standard may prove difficult to apply in Florida, although the legislation would seem to foreclose negligence claims.

North Carolina

⁵¹ See, e.g., *Continental Cas. Co. v. City of Jacksonville*, 550 F. Supp. 2d 1312, 1337 (M.D. Fla. 2007).

North Carolina’s proposal would extend certain immunity protections to essential workers and health care providers:

Notwithstanding any general or special law to the contrary . . . an essential worker or health care provider shall be immune from civil liability with respect to claims from any customer, client, patient or employee for any injuries or death alleged to have been caused as a result of the customer, client, patient or employee contracting COVID-19 while interacting with the essential worker or health care provider.

The immunity from civil liability . . . shall not apply if the injuries or death were caused by an act or omission constituting gross negligence, reckless misconduct, or intentional infliction of harm.

The legislation defines an “essential worker” to mean “any individual employee or independent contractor performing an essential service or selling or leasing an essential good, whether for-profit or not, as authorized by and defined by a COVID-19 executive order.” Under such legislation, the numerous businesses that have been open throughout the pandemic subject to executive orders would be protected from liability. For essential workers, liability associated with COVID-19 would only attach if the claimant’s injuries or death were caused by conduct amounting to gross negligence, reckless misconduct, or intentional infliction of harm. As explained previously, such a standard would ensure only the most culpable defendant conduct is the subject of COVID-19 litigation.

Ohio

Under Ohio’s proposal, COVID-19 liability would be limited to actions based on reckless, intentional, willful, or wanton conduct. Furthermore, the legislation would helpfully clarify that public health guidance does not create a duty of care that may be enforced in negligence actions or otherwise:

No civil action for damages for injury, death, or loss to person or property shall be brought against any person if the cause of action on which the civil action is based, in whole or in part, is that the injury, death, or loss to person or property is caused by the exposure to, or the transmission or contraction of, MERS-CoV, SARS-CoV, or SARS-CoV-2, or any mutation thereof, unless it is established that the exposure to, or the transmission or contraction of, any of those viruses or mutations was by reckless or intentional conduct or with willful or wanton misconduct on the part of the person against whom the action is brought.

A government order, recommendation, or guideline shall neither create nor be construed as creating a duty of care upon any person that may be enforced in a cause of action or that may create a new cause of action or substantial legal right against any person with respect to matters contained in the government order, recommendation, or guideline. A presumption exists that any such government order, recommendation, or guideline is not admissible as evidence that a duty of care, a new cause of action, or a substantive legal right has been established.

Such draft legislation would also expressly define “reckless conduct” to mean a person’s “heedless indifference to the consequences” and “disregard[of] a substantial and unjustifiable risk that the person’s conduct is likely to cause an exposure to, or a transmission or contraction of,” COVID-19 or any mutation.

The legislation would also impose a shortened, one-year statute of limitations for any COVID-19 claims.

Oklahoma

Oklahoma has approved liability protections for businesses when acting in compliance with applicable public health guidance; the key language is provided below:

A person or agent of the person who conducts business in this state shall not be liable in a civil action claiming an injury from exposure or potential exposure to COVID-19 if the act or omission alleged to violate a duty of care of the person or agent was in compliance or consistent with federal or state regulations, a Presidential or Gubernatorial Executive Order, or guidance applicable at the time of the alleged exposure. If two or more sources of guidance are applicable to the conduct or risk at the time of the alleged exposure, the person or agent shall not be liable if the conduct is consistent with any applicable guidance.

Thus, a business under Oklahoma’s model is not liable for a COVID-19 claim if the business acted in compliance or consistent with applicable public health guidance, including federal or state regulations, executive orders, and the like. Guidance is further defined to mean written guidelines related to COVID-19 issued by the Centers for Disease Control and Prevention, the Occupational Safety and Health Administration, the state department of health, “and any other state agency, board or commission.” The legislation also adds, like Louisiana’s does, that if two or more sources of guidance are applicable, acting consistent with one of those sets is sufficient. Again, however, the questions as to what guidance applies and whether the defendant’s conduct was consistent with that guidance will be heavily litigated.

South Carolina

South Carolina legislators are entertaining proposals that would limit business liability generally to a claim either that: (1) injury, death, or property damage resulted from the business's use of a product to address or respond to COVID-19 and the business or agent for the business had actual knowledge the product was defective when used, acted with deliberate indifference to or with a conscious disregard of a substantial and unnecessary risk that the product would cause serious injury to others, or acted with a deliberate intent to cause harm; or (2) the COVID-19-related claim (defined to include actual, alleged, or feared exposure to or contraction of COVID-19) arose from a party's act or omission constituting gross negligence. Such legislation would also provide that a claim for injury or wrongful death related to exposure or potential exposure to COVID-19 is subject to a one-year statute of limitations. The operative language of the legislation is as follows:

A government entity, health care facility, health care provider, first responder, or any business, or the employer or agent of any business, that utilizes cleaning supplies, personal protective equipment, or a qualifying product . . . shall not be liable in a civil action alleging personal injury, death or property damage caused by or resulting from the selection, distribution or use of such product.

The immunity provided in this subsection shall not apply to any person, or any employee or agent thereof, who had actual knowledge that the product was defective when put to the use for which the product was manufactured, sold, distributed, or donated, and acted with deliberate indifference to or conscious disregard of a substantial and unnecessary risk that the product would cause serious injury to others; or who acted with a deliberate intention to cause harm.

A party to a COVID-19 related claim arising from the party's act or omission is not liable for civil damages unless the party's act or omission constitutes gross negligence, except as provided [above].

Utah

Like other states, Utah has enacted legislation providing immunity for COVID-19 claims so long as the conduct at issue was not willful misconduct, reckless infliction of harm, or intentional misconduct:

All persons are immune from any civil liability for any damages arising from exposure to COVID-19 on their premises, and any injury or death resulting therefrom, whether such exposure is the result of:

(a) Conditions and activities occurring on said premises;

(b) The acts and omissions of any agent, employee, officer, director, or independent contractor of said person; or

(c) The acts and omissions of other persons on the premises whether present as invitees, licensees, or trespassers.

The immunity provided does not apply to willful misconduct; reckless infliction of harm; or intentional infliction of harm.

Wyoming

Wyoming has enacted legislation which offers protection for businesses acting in good faith in responding to the COVID-19 crisis:

During a public health emergency, any health care provider or other person, including a business entity, who in good faith follows the instructions of a state or county health officer or who acts in good faith in responding to the public health emergency is immune from any liability arising from complying with those instructions or acting in good faith. . . . This immunity shall not apply to acts or omissions constituting gross negligence or willful or wanton misconduct.

As noted above, however, “good faith” is an elusive standard that may prove costly to litigate for plaintiffs and defendants alike, although the legislation clarifies that immunity should apply so long as the acts or omissions complained of do not amount to gross negligence or willful or wanton misconduct.