

What State Laws On COVID-19 Liability Protection Look Like

By **Nicholas Blei** (June 8, 2020, 5:58 PM EDT)

As states across the nation begin lifting or modifying executive orders shuttering all but essential businesses, uncertainty remains as to how businesses might safely reopen, and to what extent they may be liable for COVID-19-related injuries sustained by clients, customers and employees.

State legislators and governors are increasingly considering and signing into law legislation and executive orders granting businesses and health care providers immunity from lawsuits alleging exposure to the novel coronavirus. A liability shield for businesses and health care providers is also being hotly debated at the federal level as part of a prospective next round of coronavirus-relief spending by Congress.



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The current patchwork of evolving health guidelines has created legal uncertainty for American businesses and health care providers. Without a liability shield, businesses face the choice of either remaining closed or reopening under threat of lawsuits by customers and employees who might contract COVID-19.

According to a U.S. Chamber of Commerce poll, more than six in 10 Americans say that Congress should extend some liability protections to businesses. Consumer advocacy groups, however, argue that removing the threat of liability would discourage Americans from resuming economic activity, and that current law provides sufficient protections for businesses acting in good faith.

While the federal government continues to debate immunity, many states have already taken action, offering a preview of the breadth and scope of potential federal legislation.

Massachusetts

In Massachusetts, Gov. Charlie Baker signed into law legislation granting health care professionals, facilities and related volunteer organizations immunity from civil liability for any damages alleged to have been sustained by an act or omission in the course of providing health care services during the COVID-19 emergency.

To receive the benefits of immunity, services must have been provided in good faith, meaning free of deception, fraud and discrimination. Immunity will not apply to acts or omissions constituting gross negligence, recklessness or intentionally harmful conduct. Likewise, the law does not grant immunity

from potential consumer protection actions brought by the attorney general.

The scope of the new law is extensive and provides immunity to public and private hospitals as well as skilled nursing facilities, assisted living residences, rest homes, community health centers, mental health centers and home health agencies. The law also covers sites designated to provide COVID-19 services, including emergency field hospitals and associated hotels utilized to house medical staff or patients.

Connecticut

Connecticut also recognized the need for liability protections for health care workers during the COVID-19 public health emergency. Connecticut Gov. Ned Lamont recently issued Executive Order 7U establishing immunity for health care providers' acts or omissions "in support of the State's COVID-19 response."

The executive order protects licensed health care professionals and licensed health care facilities, including hospitals, clinics, nursing homes and field hospitals, from civil liability for any injury or death allegedly caused by their acts or omissions while supporting Connecticut's COVID-19 response.

Notably absent, however, are protections for home health care and assisted living services agencies that lack a centralized treatment facility that receives patients. It is unclear if this omission was intentional, or oversight by the governor. Immunity protection does not insulate providers or facilities from civil liability for conduct that rises to the level of gross negligence, fraud, or willful misconduct.

The Connecticut executive order also goes beyond the scope of the law passed in Massachusetts by protecting covered medical professionals and facilities from acts or omissions undertaken due to a lack of resources caused by the COVID-19 pandemic. In theory, this could provide immunity for acts or omissions involving a patient whose care was impacted by a lack of resources regardless of whether that patient was diagnosed with COVID-19.

Rhode Island

Rhode Island has long provided statutory immunity from liability for disaster response workers. Pursuant to Rhode Island General Laws 30-15-15(a), disaster response workers shall not be liable for death or injury to persons, or for damages to property, as a result of disaster response activity. Gov. Gina Raimondo recently issued Executive Order 20-33 identifying all health care entities as disaster response workers, thereby extending immunity to the health care sector.

During the COVID-19 crisis all health care entities, health care professionals and health care workers providing community-based health care, long-term care, congregate care, services at alternative hospitals and services in existing hospitals, nursing facilities, assisted living residences, home health care, hospice and adult day care are now classified as disaster response workers entitled to immunity from civil liability.

Rhode Island's statutory immunity protects the health care industry from lawsuits alleging personal injury, wrongful death and property damage. Immunity effectively extends to the entire health care sector, the only limitation being in situations involving willful misconduct, gross negligence, or bad faith.

As in Massachusetts, volunteers who make alternative hospital sites available in Rhode Island are immune to the same extent as all other disaster response workers.

Other State Efforts

Outside of New England, states are actively debating and enacting legislation granting immunity to businesses in various sectors of the economy.

North Carolina recently passed pandemic aid legislation that includes temporary liability limitations for essential businesses and emergency response entities. Under this approach, all essential businesses identified by the governor's stay-at-home executive order are temporarily immune from civil liability to customers and employees for COVID-19 contraction claims. There is no immunity for gross negligence, but if an essential business makes a mistake, i.e., is negligent, it will be immune from claims by employees or customers who allege that the business caused them to contract COVID-19.

North Carolina's list of essential businesses is extensive, and includes grocery and hardware stores, pharmacies, banking, takeout restaurants, healthcare facilities, critical infrastructure and many others. Thus, a large swath of North Carolina's economy will remain immune to civil liability for the duration of the state's emergency declaration. Some other states, such as Ohio, Oklahoma and Louisiana have extended or proposed similar protections for a broad set of businesses.

Looking Ahead

While immunity protects the health care industries of Massachusetts, Connecticut and Rhode Island, it does not extend to any other industries or essential businesses, nor have there been significant steps taken toward extending immunity to a broader set of businesses in New England. Thus, the dining, hospitality, retail, education, business services and biotech industries, as well as all small businesses, are potentially liable for exposure of customers and employees to the novel coronavirus. Absent federal legislation, it appears that New England businesses will not enjoy the immunity extended broadly to the health care sector.

While partisans on both sides of the debate over federal immunity for businesses have drawn lines in the sand, there may still be room for compromise. There is broad consensus that the first step in protecting businesses, customers and employees hinges on the establishment of clear and robust safety standards from the Occupational Safety and Health Administration and the Centers for Disease Control and Prevention, which provide a standard of care for businesses to follow.

The Senate Judiciary Committee last month debated proposed business immunity, and while the prospect of broad immunity remains unlikely at this time, there is agreement that federal standards establishing safe business practices in the time of COVID-19 are necessary for a robust economic recovery.

In the months ahead, businesses, including those outside of the health care industry, must monitor the evolving landscape of state and federal regulations and guidelines for safely conducting business in the wake of COVID-19. Compliance with these much-anticipated safety standards will effectively determine whether a company has satisfied its duty of care to its customers and employees. In the absence of broad legislative immunity, strict compliance with rapidly evolving state and federal safety standards will be the strongest defense to COVID-19-related lawsuits.

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