



## Ohio Nears Passage of Legal Immunity Legislation for COVID-19-related Cases

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The COVID-19 pandemic has challenged medical providers in ways not seen in a hundred years. As providers continue to meet those challenges in providing needed health care to the public, concerns about downstream legal liability have begun to emerge. Could physicians be held liable for a patient's death even though the standard of care for treating COVID-19 has often changed on a week-to-week basis? Will hospitals and nursing homes be subjected to lawsuits because of a COVID-19 outbreak in their facilities? What about patients forced to forgo chemotherapy, surgeries deemed "elective," and similar procedures? Will a resulting delay in diagnosis or adverse impact on their course of treatment lead to legal action against those same medical providers? The picture remains murky across the country, with proposals for varying degrees of immunity-from-liability legislation stalled in Congress but advancing in some states. In Ohio, the General Assembly appears poised to enact some form of qualified immunity from COVID-19-related litigation, both for medical providers and for businesses in general.

Ohio House Bill 606, introduced by Rep. Diane Grendell, passed the House on May 28, 2020 by an overwhelming bipartisan margin (84-9). Even the Ohio Association for Justice, which advocates on behalf of the plaintiffs' bar, supported the bill. Once the bill arrived in the Senate, the House provisions were stripped out and replaced with the text of a related bill, S.B. 308. This substitute bill passed on a party-line vote (23-6), meaning that the two chambers must now negotiate as to what the final version will look like. Given the legislative calendar, it is unlikely the General Assembly will take up a final bill until after Labor Day. Regardless, both bills as drafted would be enacted as emergency measures to take effect immediately upon the governor's signature.

The House version includes four basic provisions: (1) state immunity from liability for COVID-19-related issues; (2) a temporary presumption that COVID-19-related ailments qualify as workplace injuries for workers in certain industries for purposes of making workers' compensation claims; (3) temporary immunity for health care providers from both tort actions (including wrongful death) and in professional disciplinary actions, if those actions arise from a disaster or emergency, inclusive of an epidemic (subject to certain exceptions discussed below); and (4) temporary immunity from general tort actions (including wrongful death) for any person if the injury is based in part on exposure to COVID-19, unless the defendant's action was reckless or intentional. The last provision is not limited to health care providers,

and it expressly states that a government order or guideline does not create a duty of care and is presumed to be inadmissible as evidence that a duty of care is owed. The temporary provisions in the legislation cover any conduct or exposures occurring between March 9 and December 31, 2020.

While the sections of the Senate's version of the bill covering immunity for health care providers and general torts are essentially the same, the Senate removed the state immunity and workers' compensation provisions of the House bill. It also added a provision that, if the immunity provided by the bill (either health care or general tort) does not apply, a claimant is still prohibited from bringing a class action for those injuries. This means that, even if a defendant had acted recklessly or intentionally, that person or entity still would not be subject to a class action lawsuit.

The details of the health care provider immunity section, as found in both versions of the bill, are as follows:

- "Health care provider" is broadly defined, encompassing not only physicians and nurses, but an entire list that includes athletic trainers, licensed counselors, dental hygienists, federally qualified health centers, home health, long term care, and hospice services, among others.
- The bill states that it supersedes R.C. 2305.2311 (the disaster-related qualified immunity statute passed in last year's H.B. 7 legislation) for events taking place from March 9 through December 31, 2020. Importantly – and unlike R.C. 2305.2311 – the bill provides immunity from wrongful death actions.
- The immunity applies to any health care services provided "as a result of or in response to a disaster or emergency," whether for "an act or omission" in providing care, any "decision related to the provision" of care, or any "[c]ompliance with an executive order or director's order" issued in response to the disaster/emergency.
- Importantly, the bill provides immunity for claims arising because the provider was unable to treat, diagnose, or test a patient for a condition "due to an executive or director's order or an order of a board of health ... issued in relation to an epidemic or pandemic." It expressly covers elective procedures that were delayed or cancelled.
- Tort immunity and immunity from professional discipline will not apply in situations where the health care provider's actions constituted reckless disregard for the patient's health, intentional misconduct, or willful or wanton misconduct. Immunity also will not apply if the provider acted beyond the scope of his/her training unless done "in good faith and in response to a lack of resources caused by a disaster or emergency."
- Immunity from professional disciplinary action will not apply if the provider's actions constitute "gross negligence," defined in the bill as "lack of care so great that it appears to be a conscious indifference to the rights of others."

Since these health care-related proposals appear in both the House and Senate bills, one would expect them to remain intact through the House-Senate negotiations and become law. The same can be said for the general tort liability provisions, which carry great importance for businesses across the state. The real question is whether the class action bar and/or the workers' compensation section will survive – the answer to which will likely turn on how bipartisan an approach the negotiators take.

In terms of timing, new House Speaker Bob Cupp wrote last year's H.B. 7 tort reform legislation, so he may make passage of H.B. 606 a priority this fall. Until then, uncertainty remains as to the legal protection available to Ohio's physicians, hospitals, nursing homes, dialysis centers, and other health care providers.

#### **Additional Information**

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