

Practice Update

# COVID Liability Legislation Moving in Florida

February 4, 2021

And all things COVID keep on coming...

During the first few committee weeks leading up to Florida's 2021 Legislative Session, one of the most important pieces of legislation the Florida Legislature will enact this year has made it through the first of several committees in the Florida House and Senate.

The legislation, HB 7 by Representative Lawrence McClure (R-Plant City) and SB 72 by Senator Jeff Brandes (R-St. Petersburg), would provide protection to businesses, colleges, non-profits, and other institutions from COVID-related lawsuits, provided they have made "a good-faith effort" to follow guidelines during the pandemic.

With Republican control of both chambers of the Florida legislature, the odds of the bill getting passed are high. But, as the bills work their way through the process, the bills will be amended and changed, which provides both a treat and an opportunity for clients to get in provisions — to make sure their particular circumstance are covered and delete provisions that could hurt them. Time, of course, is of the essence! Three committee weeks remain before the official start to the 60-day session, which runs from Tuesday, March 2, 2021 to Friday, April 30, 2021.

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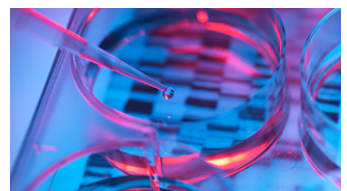
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At this early-stage of the legislative process, the bills, which are identical, are already proving to be heavily-partisan issues in both chambers.

Republicans, per Representative McClure, “want to protect already hurting businesses from the potential of frivolous lawsuits by raising the standard of gross-negligence due to the uncertainty of the virus as the pandemic evolves.” And, the crux for Democrats is the preliminary requirements plaintiffs must complete prior to proceeding with a case and then bearing the burden of proof once the courts review those requirements and determine them to be complete.

Preliminary requirements include:

- The plaintiff pled the complaint with particularity.
- The plaintiff simultaneously submitted with the complaint a physician’s affidavit stating that, within a reasonable degree of medical certainty, the physician believed that the defendant caused, through acts or omissions, the plaintiff’s damages, injury, or death. If the plaintiff does not meet these requirements, the court must dismiss the action, but the plaintiff is not barred from correcting the deficiencies and refiling the claim.
- The defendant made a good faith effort to substantially comply with authoritative or controlling health standards when the action accrued. If the court determines that the defendant made the requisite good faith effort, the defendant is immune from civil liability. If, in contrast, the court determines that the defendant did not make the requisite good faith effort, the action may proceed.

According to the bill sponsors, as of January 31, 2021, fewer than 10 lawsuits have been filed in Florida for COVID-related damages against businesses. This statistic raised a number of questions from their opponents. When asked during the first committee-stop in the House, “If the legislation was premature?” Rep. McClure noted the

strong fear among the business community of “the lawsuits-to-come,” when they have done everything in their power to comply and create a safe environment — “this legislation is intended to ease some of those fears.”

So far, all amendments filed, which were either withdrawn or failed, were filed by Democrats and pushed, primarily, by the Trial Bar. Specific concerns raised by the amendments pertained to preventing access to the courts and the need for physicians affidavits to be reviewed and approved prior to the discovery process.

If approved by the Legislature, as currently drafted, the legislation would become law upon Governor DeSantis’ signature, and be retroactively applicable to any COVID-related civil action filed after the legislation takes effect, regardless of whether the cause of action accrued beforehand. However, any COVID-related civil action filed prior to the effective date will not qualify.

Please note: Protections for healthcare providers are not included in these bills and will be addressed in separate legislation.

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