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Blog Post

Do the Business Liability Shield Laws Give Employers Immunity From COVID-19 Lawsuits

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Not really. Like the COVID-19 vaccines, these "business liability shields" may provide a layer of protection for some employers, but they in no way guarantee immunity from lawsuits. Since early last year, business leaders expressed concerns about continuing with operations amidst the COVID-19 pandemic—mainly because they feared exposing their businesses to lawsuits arising from the transmission of the virus. Indeed, it was this growing business concern that caused Congress to propose the SAFE TO WORK Act (S. 4327) in July 2020. Although the bill ultimately did not pass, many states (30 and counting) have enacted some form of legal protections from COVID-19 liability claims through either legislation or executive orders.

We recently discussed the increase in COVID-19 lawsuits, as well as what employers can do to minimize exposure. But do these business liability shield laws (or business immunity laws) provide **employers** with some form of relief from these lawsuits? The answer depends on the type of claim, and on the respective state where the lawsuit is brought.

Although these business immunity laws generally vary from state to state, there are some common traits. For one thing, none of these business immunity laws provide **absolute** immunity.

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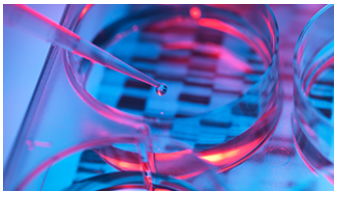

Specifically, these immunity laws expressly exclude claims that are based on an employer's conduct that is intentional, willful, fraudulent, or conduct that amounts to gross negligence. Practically speaking, business immunity laws only protect employers from lawsuits that are based on simple or ordinary negligence.

Additionally, these business immunity laws apply to COVID-19 **transmission** claims. In other words, these immunity laws only offer protection from lawsuits where the plaintiffs allege that they contracted COVID-19 while working or visiting a work area operated and/or controlled by the employer. Therefore, it would be a mistake for employers to quickly assume they are protected by immunity laws simply because a lawsuit contains allegations relating to COVID-19. For instance, if an employee sues an employer after being discharged for complaining about safety concerns related to the spread of COVID-19 in the workplace, the business immunity laws would **not** protect an employer from such a whistleblower claim. In fact, these business immunity laws do not apply to a vast number of employment-related claims that have resulted from the pandemic, such as alleged violations of the Americans with Disabilities Act (e.g., for failing to accommodate, such as a request to telework), or for allegedly interfering with an employee's right to take leave under the Families First Coronavirus Response Act. For the most part, business immunity laws only protect employers from tort-based personal injury claims—assuming employers are not already protected by a workers' compensation exclusivity provision in their respective state. (The workers' compensation exclusivity issue is currently being litigated in various courts.)

Although there are several similarities among these business immunity laws, some states provide a greater level of protection from COVID-19 lawsuits than others. For instance, in states like Alaska and Arkansas, legal immunity is offered only to healthcare providers or emergency responders—

namely to protect them from lawsuits arising from treatment rendered to patients with COVID-19. Therefore, employers who do **not** belong to those industries cannot avail themselves of these business immunity laws. On the other hand, states like Indiana and Iowa, provide **all** types of corporations and legal entities with business immunity from COVID-19 transmission claims.

Other states have opted to protect businesses by eliminating the type of monetary damages that individual can recover in COVID-19 lawsuits. For example, the State of Iowa does not recognize any cause of action resulting from a COVID-19 infection unless the infection resulted in an individual's hospitalization or death. Similarly, in Alabama, a plaintiff suing for contracting COVID-19 is limited to "purely economic damages" in the event the plaintiff cannot show he or she sustained a "serious injury," which is defined as a minimum 48-hour hospitalization or death. A likely intended effect of this limitation on damages is that it may disincentivize individuals (and plaintiffs' attorneys) from bringing these types of lawsuits since it may not be worth the litigation costs.

Other states have taken a more aggressive approach by adding more legal hurdles before bringing COVID-19 lawsuits, such as requiring a higher standard of proof or stricter pleading requirements. For example, just last week, the State of Florida passed its own business liability shield law that requires plaintiffs to attach a physician's affidavit to their legal complaint, in which the physician affirms "with a reasonable degree of medical certainty that the alleged injuries or damages were the result of the defendant's acts or omissions." Failure to attach this affidavit results in a permanent dismissal of the COVID-19 lawsuit. One of the intended purposes of Florida's law was to make it easier for businesses to dismiss these lawsuits in an early stage of litigation. For this reason, there has been much criticism surrounding this law, including that this law protects "big business" by making it impossible for

customers or workers to successfully assert these claims in a court of law. However, there has also been criticism that Florida's new law may instead be a trap for businesses because these stricter pleading requirements may likely result in pre-discovery "evidentiary hearings," which can easily rack up legal costs at a much earlier stage of the case. As a result, businesses may be forced into very early settlement discussions to avoid incurring attorneys' fees.

In contrast to states like Florida, there are a number of states, like Michigan, that have passed business immunity laws requiring businesses to first show substantial compliance with a state or federal health guidance at time of the exposure. These types of business immunity laws were intended to protect businesses, while at the same time incentivizing them to exert their best efforts in mitigating the spread of COVID-19. Similarly, North Carolina requires employers to reasonably notify the public of the specific steps they are undertaking to reduce the risk of transmission of COVID-19. Without such notice, an employer in North Carolina may not be able to avail itself of the state's business immunity law.

So what steps can employers take right now to make sure that they can avail themselves of these business shield laws in the future?

- **Follow local, state, and federal guidance on COVID-19 mitigation strategies.** As mentioned above, claims based on gross negligence are not protected under business immunity laws. One easy way for individuals to show that a business has been reckless or grossly negligent is by showing a total lack of effort to follow federal, state, and local health officials' recommendations on avoiding the spread of COVID-19 in the workplace. Although most employers have become familiar with the guidance issued by the Center of Disease Control (CDC) and the Occupational Safety and Health Administration

(OSHA), as well as guidance or requirements from state executive orders, many businesses fail to take into account that some cities, counties and municipalities have stricter safety practices. For this reason, employers should spend time reviewing city or county "emergency orders" to determine whether they are in substantial compliance with any local safety recommendations or requirements. Even if local recommendations are not ultimately incorporated to any existing policy or practice, documenting these research efforts will serve as strong evidence against allegations of "gross negligence." In any event, in some states, substantial compliance with local and state guidance is required before an employer can invoke the legal protections of a business liability shield law.

- **Consider designating a COVID-19 Coordinator to stay apprised of the latest COVID-19 guidance.** In addition to staying on top of state and local health recommendations (or requirements), businesses should continue to monitor guidance from federal agencies like OSHA and the CDC. However, as most business know by now, guidance—particularly issued by the CDC—is constantly changing. Moreover, the COVID-19 pandemic has raised other employment-related issues, such as paid leave and requests for accommodations. So employers should also closely review guidance from agencies like the Department of Labor and the Equal Employment Opportunity Commission. With all that said, it can be hard for employers to keep up! For this reason, it may be a wise decision to assign a management-level employee (typically within Human Resources) to serve as the "COVID-19 Coordinator," whose duty would include checking for the most recent guidance from federal, state, and local agencies. Indeed, OSHA recommends that employers designate a COVID-19 Coordinator as part of a COVID-19 mitigation program.
- **Implement a written COVID-19 Mitigation Plan or Policy.** By now, many employers have

implemented some form of COVID-19 policy or procedure, which may address a range of issues including but not limited to: (i) requesting any paid leave resulting from COVID-19; (ii) requesting accommodations such as teleworking; or (iii) modified operating hours or staggering shift schedules. Any written COVID-19 plan also should include the employer's efforts in trying to mitigate the spread of the virus, such as: (i) increasing cleaning and sanitation of the workplace; (ii) offering to provide employees and customers with personal protection equipment, such as masks or face shields; (iii) posting signage encouraging regular handwashing or socially distancing with others; and (iv) taking other steps to limit the spread based on the particular work space and work force. Some businesses may be required by state law to have such a written plan or policy, but even where not required, a COVID-19 Plan is recommended because it establishes the business took steps to protect its workforce consistent with local, state, and federal guidance. Such evidence will help employers defend against claims alleging negligence or worse.

- **Consult legal counsel upon notice of a potential COVID-19 lawsuit.** Employers should notify and consult legal counsel upon receipt of any threatened claim relating to COVID-19. Because of the passage of these business immunity laws, plaintiffs (and their attorneys) may craft their allegations in a manner to try to bypass these legal protections, or add to otherwise legally-barred claims in an effort boost their alleged damages arising from other legally-permissible claims. An experienced attorney can help employers understand the appropriate scope and limitations of any applicable business immunity laws and whether there is potential legal exposure.

Contact your Akerman attorney if you need help navigating these and other employment issues.

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