
An Invisible Shield: States Begin Enacting COVID-19 Liability Protections

Article By:

Seth Pierce Johnson

Laura G. Hester

Although top officials in the U.S. Senate have insisted that liability protections are a top priority for future COVID-19 relief legislation from the federal government, the current onus remains on the states to limit liability and provide COVID-19-related protections to healthcare services and business entities. As a result, in the absence of federal protections, states across the country are beginning to pass legislation that provides liability protections for companies and healthcare providers against COVID-19-related lawsuits. These “liability shields” are intended to provide certain immunities from liability claims regarding COVID-19 and prevent lawsuits brought by people who contract the virus under a specific set of circumstances.

At the time of this article, at least 12 states—including Alabama, Arkansas, Georgia, Iowa, Kansas, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, Utah, and Wyoming—have begun enacting such legislation to narrow the liability limits related to and stemming from COVID-19. Although the various pieces of legislation may contain similarities, each law differs from state-to-state in a manner that leaves healthcare providers, businesses, and individuals vulnerable to differing rules and regulations related to COVID-19 liability across their respective footprints. In this alert, we look specifically at the Georgia COVID-19 Pandemic Business Safety Act and other still-emerging issues with liability shield legislation.

The Georgia COVID-19 Pandemic Business Safety Act

On June 26, 2020, the Georgia General Assembly passed Senate Bill 359, also known as the “Georgia COVID-19 Pandemic Business Safety Act.” The Act, which currently awaits final approval by Governor Brian Kemp pending his office’s legal review, intends to protect healthcare providers and certain other businesses, entities, and individuals in the State of Georgia from legal liability arising from COVID-19. However, the Act allows lawsuits to proceed if the claimant can prove “gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm” by one of the Act’s covered parties. In other words, if the Act becomes law, the covered parties operating in Georgia would be shielded from lawsuits related to COVID-19 exposure, absent one of the carve-outs for gross negligence or wanton misconduct.

The Act makes Georgia one of the most recent states to have enacted legislation or issued an executive order acting as a “liability shield” for COVID-19. However, the Act’s recent passage and broad language serves as a reminder that navigating state-specific legislation may come with more complexity than a blanket federal shield across all 50 states. To serve as a compass for navigating these uncharted waters, we take some of the Georgia-specific provisions in turn.

Broad Language

The language of the Act was written intentionally broad to serve as all-encompassing legislation for COVID-19 liability. Nevertheless, the broader the language, the more room for error in interpretation. For example, the term “COVID-19” is comprehensive under the Act. In particular, the Act includes “any mutation or viral fragments thereof, or any disease or condition caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which were the subject of the public health state of emergency declared by the Governor on March 14, 2020.”

Although the broader definition tends to protect healthcare providers, businesses, and the rest of the covered parties from a wider array of claims, it remains to be seen how “any mutation or viral fragments” will be interpreted by a Georgia court. Rather than assume that a complainant’s disease or condition is covered by the Act, proper measures are necessary to ensure that the complainant’s condition constitutes a nonactionable injury under the Act.

Not a Blanket Liability Shield

As with legislation in other states, the Act helps—but does not absolve—employers of their duty to maintain safe operations for workers and customers. In other words, the Act is not intended to serve as a “blanket shield from liability.” The text of

the Act is clear on this point. If a healthcare provider, businesses, or individual acts with the requisite “gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm,” then a claimant may succeed in an action against such party.

State liability shields such as the Georgia Act are meant to protect healthcare providers, businesses, entities, individuals, and the remaining covered parties from virus-related lawsuits brought by customers, members of the public, and employees. That does not mean, however, that the shields go so far as to allow businesses to blatantly disregard the safety of their employees or customers and avoid liability. In other words, the Act is not a “get out of jail free card” for all circumstances.

For example, states generally preempt workplace injury lawsuits already—requiring that complaints be brought instead as worker’s compensation claims. Nevertheless, claimants can sometimes find a way to get their claims into and heard by a court, a phenomenon that is beginning to occur with COVID-19-related wrongful death lawsuits. Although it remains to be seen exactly how the Georgia Act will shield healthcare providers and businesses, or funnel such wrongful death lawsuits out of courts absent gross negligence, the Act is intended to prevent businesses from facing a litany of lawsuits from employees or customers crying foul for COVID-19-related risks.

Given the fluid circumstances surrounding COVID-19 and business operations, attorneys and their clients will want to check the requirements and guidelines in effect that are applicable in each case when forging ahead under the protection of the Act in Georgia.

The Rebuttable Presumption

The Act’s biggest protection for businesses may come in the form of Georgia’s rebuttable presumption. Absent gross negligence or willful misconduct, the Act creates a rebuttable presumption that a potential claimant assumes the risk when he or she enters certain premises that provide express warning disclaimers. The Act itself provides two such disclaimers.

The first can accompany “any receipt or proof of purchase for entry.” In this instance, to trigger the Act’s protection, the business may include a statement “in at least ten-point Arial font placed apart from any other text” that states:

‘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 contracting 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.’

In the second instance, a business may post—at a point of entry to its premises, if present—a sign “in at least one-inch Arial font placed apart from any other text” that contains the following warning statement:

‘Warning

Under Georgia law, there is no liability for an 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.’

The inclusion of either warning in the proper location in the requisite form and substance will trigger the rebuttable presumption that the claimant assumed the risks associated with COVID-19 infection, injury, or death when he or she entered the premises.

Given that the Act has not yet been enacted as law, Georgia’s healthcare providers, businesses, and individuals should not proceed with the assumption that these precautions will protect them from liability just yet. The Act will only become effective at the earlier of Governor Kemp’s signature or its passage without his approval on August 7, 2020. In either case, the legal protections of the Act would cover anyone who contracts COVID-19—and subsequently, their causes of action—until July 14, 2021, and would sunset for any causes of action arising thereafter.

Given the fast pace of legislation across the nation—varying by jurisdiction—to implement these liability shields from COVID-19 infections, attorneys and their clients will want to check the requirements and guidelines that are applicable in their jurisdiction when operating their business. As the Georgia Act demonstrates, knowing if there is an applicable act in your jurisdiction is just the beginning. Here is a list of questions that can assist you and your attorney as you begin navigating the re-opening phase of the pandemic:

- Does my local jurisdiction have a liability shield? What protections does it afford my business from potential claimants, such as employees, customers, or others?

- What constitutes a covered party in my jurisdiction? Is the shield limited to healthcare providers and certain businesses, or are other entities and individuals protected as well?
- What types of injury or infection does my jurisdiction cover? Is it any mutation of COVID-19—like Georgia—or is the application of the law much narrower?
- Are there carve-outs for gross negligence and willful misconduct? What is the minimum standard by which I have to operate my business to avoid liability?
- Does my jurisdiction—like Georgia—have a rebuttable presumption? What does it require?
- Are there appropriate warnings and notices that I can post to protect my business from a lawsuit? What should they say, and in what form should I provide them to my employees and customers?
- If my state does not have a liability shield, what additional information do I need to know and what steps should I take to protect my business from a lawsuit?

Although not exhaustive, this list of questions will serve as a starting point to additional inquiries that will—at least in the near term—allow businesses and other covered parties to appropriately manage their litigation and liability exposure during the re-opening process without the specter of a lawsuit looming overhead.

Copyright © 2020 Womble Bond Dickinson (US) LLP All Rights Reserved.

National Law Review, Volume X, Number 202

Source URL: <https://www.natlawreview.com/article/invisible-shield-states-begin-enacting-covid-19-liability-protections>