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FHMS COVID-19 Resource Center:
UPDATE: EFFORTS TO PROVIDE IMMUNITY FROM COVID-19 EXPOSURE CLAIMS

FHMS has been actively monitoring the efforts to provide essential businesses with immunity from COVID-19 exposure and related claims. Below is an update on the immunity laws related to COVID-19 that have been enacted to date, and an overview of what was discussed during the U.S. Senate Judiciary Committee's hearing on same.

Federal COVID-19 Immunity Laws:

Below are the federal laws that provide immunity related to COVID-19 claims:

- *Public Readiness and Emergency Preparedness Act (PREP Act)*: As we previously reported, under certain fact-specific circumstances, there may be immunity from tort claims connected to the administration or use of countermeasures to COVID-19 under the PREP Act.

- *Families First Coronavirus Response Act:* This act included liability protection for manufacturers of some respiratory masks.

State COVID-19 Immunity Laws for Businesses:

Below are the states that have immunity laws to protect businesses from COVID-19 exposure claims:

- *Alabama:* An Executive Order issued on May 8, 2020 provides that a business is not liable for injury, death, or property damage arising from any act or omission related to COVID-19 transmission or a covered COVID-19 response activity. There is an exception for wanton, reckless, willful, or intentional misconduct if same is proven by clear and convincing evidence. Liability is limited to actual economic and compensatory damages unless there is a serious physical injury. Noneconomic and punitive damages are not available; punitive damages are the only relief available in a wrongful death action. "Serious physical injury" is defined as "a death or an injury that requires either in-patient hospitalization of at least 48 hours, permanent impairment of a bodily function, or permanent damage to a body structure."

- *Kentucky:* On March 30, 2020, Kentucky enacted SB 150 which provides immunity from negligence and product liability claims to businesses that make or provide protective equipment or personal hygiene supplies in response to COVID-19. This protection **applies only if (a) the business does not make or provide such products in the normal course of its business;** (b) the business has acted in good faith; and (c) the business acted in an ordinary, reasonable, and prudent manner under the same or similar circumstances. Takes effect immediately. Does not address application to conduct prior to enactment.

- *North Carolina:* On May 4, 2020, North Carolina enacted SB 704 ("Emergency or Disaster Treatment Protection Act"). This law provides that essential businesses are not subject to liability for harms to customers or employees who contract COVID-19. The immunity does not apply to injuries or death caused by an act or omission of the essential business or emergency response entity constituting gross negligence, reckless misconduct, or intentional infliction of harm. Employees of essential businesses or emergency response entities are not precluded from seeking workers' compensation benefits for an injury or death alleged to be the result of contracting COVID-19 while employed by the essential businesses or emergency response entity. The immunity protections apply until the COVID-19 emergency declaration ends.

- *Utah*: On May 4, 2020, Utah enacted SB 3007 which provides a person immunity from civil liability for damages or an injury result from exposure of an individual to COVID-19 on the premises owned or operated by the person, or during an activity managed by the person. The immunity does not apply to willful misconduct, reckless infliction of harm, or intentional infliction of harm. Also, the law does not modify application of Utah's Workers' Compensation Act, Occupational Disease Act, Occupational Safety and Health Act, or Governmental Immunity Act.

U.S. Senate Judiciary Committee Hearing on Examining Liability During the COVID-19 Pandemic:

On May 12, 2020, the U.S. Senate Judiciary Committee held a hearing on "Examining Liability During the COVID-19 Pandemic." The witnesses were representatives of business, tourism, universities, and employee advocacy groups. Although this was a very preliminary discussion, there was a consensus that a set of standards on how to safely operate businesses is needed from the federal government. All identified the challenge in navigating the guidance from the CDC, the President's Coronavirus Taskforce, the states, the local governments, and industry groups. Businesses are facing something they have never seen before and there is no playbook. Businesses have not only incurred the cost of keeping up with the quickly changing guidance, but also they have had difficulty in creating policies that apply uniformly to all stores. The employer advocates argued that the current guidance was not enforceable by employees and encouraged businesses not to comply with same.

The discussion centered on trying to find a solution that would meet the following goals:

- Protect businesses and employers from frivolous litigation and bankruptcy;
- Protect employees from businesses that may jeopardize workers' rights under blanket liability protections;
- Give businesses and employers uniform guidance as to what should be done to avoid liability; and
- Allow for economic recovery by providing the guidance and protections needed for businesses to safely open.

Need for Temporary, Targeted, and Limited Tort Immunity: The business representatives requested a temporary, targeted, and limited tort protection for companies that take protective measures. They made it clear that they were not asking for complete immunity, and they were not looking to protect bad actors. The business representatives described the challenges with trying to safely operate a business when faced with vague and changing guidance from many different sources. For example, a truck driver may be compliant when driving through one state, but not compliant when driving through the next state. Businesses had difficulty getting masks when the whole country was suddenly told to start using them. They expressed needing certainty as to what businesses should do to comply and avoid liability. All of the business representatives agreed that predictability in the legal system directly related to our economic recovery from the pandemic.

Regulatory Compliance Defense is Not a Solution: One of the witnesses, a professor from Georgetown University Law Center, argued that if federal agencies issued science-based, industry-specific regulations as to how to safely operate a business, then businesses who complied would have a "regulatory compliance" defense. The professor further stated that "every state recognizes that defense…in many states it's an affirmative defense."

This defense is not a solution to the issue and protections are still needed for businesses. First, we do not know if or when any such standards will be issued by the federal government. Second, any such future standards would not address the potential liability faced by the life-sustaining businesses that have remained open during the pandemic. Third, and most importantly, **federal regulations are not a defense to tort liability in Pennsylvania, where non-binding agency guidance regarding the standard of care is given less deference.** Moreover, "[u]nder the majority rule, regulatory compliance is presumed to be only some evidence that the defendant acted reasonably; compliance does not usually afford the defendant a complete defense." *See* Geisfeld, *Tort Law in the Age of Statutes*, 99 Iowa L. Rev. 957, 991 (citing Restatement (Second) of Torts § 288C). Thus, compliance with regulations is ***not*** a complete bar to tort claims or a solution to this issue.

As recently as 2014, the Pennsylvania Supreme Court rejected a regulatory compliance defense to tort liability. *See Lance v. Wyeth*, 85 A.3d 434, 457 (Pa. 2014) ("We have no intent here to endorse any criticism of the FDA; our only point is that Wyeth — as the proponent of a contraction of existing tort law — has failed to persuade us that federal regulatory involvement warrants a departure from Pennsylvania's system of civil redress, where there is a demonstrated lack of due care in the face of an existing duty."); *see also Kovacevich v. Reg'l Produce Coop. Corp.*, 172 A.3d 80, 86 (Pa. Super. 2017).

Although evidence of compliance is admissible in negligence cases, those regulations alone do not create a duty where none exists. *See Morello v. Kenco Toyota Lift*, No. 09-4412, 2015 U.S. Dist. LEXIS 39048, at *7-8 (E.D. Pa. Mar. 25, 2015). Defendants may offer their compliance with industry standards as evidence of reasonable action, but not as a defense to tort liability. *Cloud v. Electrolux Home Prods.*, No. 15-00571, 2017 U.S. Dist. LEXIS 221306, at *2-3 (E.D. Pa. Jan. 26, 2017); *see also Rotshteyn v. Agnati, S.P.A.*, 149 F. App'x 63, 65 (3d Cir. 2005) (In affirming the order granting summary judgment, the Third Circuit held that the OSHA standards did not apply because there was no basis for holding that the OSHA regulation cited by the plaintiffs imposed a duty on defendant.)

Truax v. Roulhac, 126 A.3d 991 (Pa. Super. 2015), exemplifies how regulatory compliance is not a defense to tort liability. The defendants in that case claimed that their property complied with zoning code and building ordinances. The Pennsylvania Superior Court held that trial was necessary to determine whether a reasonable person would have taken additional precautions. *Id.* at 1001 (citing Restatement (Second) of Torts § 288C).

Difficulty in Proving Causation is not a Deterrent: Additionally, the law professor argued that there would be very few tort cases, because causation would be difficult to prove given the transmissibility of the virus.[1] If that is the case, then providing the limited immunity for those businesses making reasonable efforts to comply with the safety guidance should not be an issue if it can be done constitutionally. As identified by the business representatives, this protection would give them the certainty and stability needed to continue operating and investing in their businesses without the vague threat of litigation. Also, causation issues would not deter meritless or frivolous cases, which businesses already under financial stress from the pandemic would need to incur the costs to defend.

[1] We note that the law professor identified that causation would be difficult to prove absent rigorous and effective contact tracing. Several states are planning to hire contact tracers and Johns Hopkins University created an online training course. Although contact tracing is critical to containment and recovery, we expect to see contact tracing experts used to establish causation in the exposure cases.

Amount of Exposure Cases Unknown and Not Determinative: Accordingly to Senator Durbin, there were 958 lawsuits filed related to COVID-19 and 1.3 million people diagnosed with COVID-19 as of the date of the hearing. Of those suits, 27 were related to personal injury, 9 were for medical malpractice, 264 related to prisons, and 171 related to insurance. Most of the lawsuits filed to date involve businesses suing other businesses. Senator Tillis identified that there were approximately 130 class actions and witness Larry Tyner, Jr. referenced that there were approximately 50 lawsuits against universities. Although some members argued that immunity is not needed because we do not have a "tidal wave" exposure cases, the current numbers do not take into account the fact that people have several years to file those claims based on the applicable statute of limitations. Also, the number of cases filed to date does not reflect what will happen once businesses start to reopen. As discussed above, if the argument is that these cases will not manifest, then there should not be any harm in providing the temporary, targeted, and limited immunity that the businesses need for economic recovery.

Concerns about Impact of Broad Immunity: Some members and witnesses expressed concern that providing broad immunity would discourage businesses and employers from taking reasonable measures to protect customers and employees. They further speculated that it would incentivize irresponsible conduct and bad actors that would no longer be fearful of litigation. However, broad immunity was not requested and this argument ignores the majority of businesses that care about their employees and customers and take steps every day in furtherance of their safety. Also, it ignores the market pressure that incentivizes businesses to comply, i.e. customers are more likely to shop at a store that follows the safety precautions. Finally, there was a concern that broad immunity would also preclude workers' compensation claims; however, there could be language confirming that the immunity would not apply to those claims.

Exceptions for Gross Negligence and Reckless Conduct: All agreed that there should be exceptions to the immunity so that bad actors are not protected. However, there were questions as to what conduct would be considered gross negligence. Although not directly discussed, exceptions to immunity provide an avenue for cases to be filed and deter frivolous cases. Because gross negligence and recklessness would not be determined until after discovery, those cases could still be filed and litigated to determine if the conduct meets those exceptions.

Constitutionality and Involvement of Federal Courts: Senator Lee inquired as to whether the federal government can play a role in providing immunity without violating federalism. Also, he questioned whether the removal statute could be amended to expand diversity jurisdiction so that these cases could be given some uniformity by being heard in federal courts. There was also a question as to whether the federal government could supplement a state's substantive law with a safe harbor.

The law professor identified that the removal statute could not be expanded and that the Commerce Clause would not permit supplementing a state's substantive law. Also, there would likely be due process issues if there was no substitute for the protections. Turning to preemption, and referring to *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000), the law professor suggested that it may be constitutionally sufficient if the federal government establishes a uniform standard of care for COVID-19 and provides an exclusive remedy for same. However, to satisfy the Commerce Clause, there would still need to be evidence that litigation from COVID-19 exposure has a substantial effect on interstate commerce. Currently, there is no such evidence and the cases will likely be intrastate disputes. Additionally, there are no federal regulations for COVID-19 at this time.

State Issue: Some members argued that this is an issue to be decided by the states as each state has had a different experience with the virus and tort law is created by the states. Several states have already created immunity through legislation or executive orders. However, leaving it to the states would not alleviate the current challenge of figuring out which guidance should be followed. Also, it overlooks the fact that most businesses cross state lines and are not isolated to one state or area. Given the nature of our commerce and the virus, we have already seen how the activities in one state can directly impact the spread of the virus to other states.

Additional Resources:

- A guide to all legislative activity related to **workers' compensation** can be found here.
- A guide to all legislative efforts to provide immunity for **manufacturers, healthcare providers, and businesses** can be found here.

Plan for Reopening and Next Steps:

We understand the frustration in navigating the guidance and creating policies on how to safely open and operate your business. As closure orders begin to be lifted, we recommend that companies create a plan for reopening that is specific to your business and region. It should be a living document that is specific to your business and able to address the new guidance and laws that are issued as areas are permitted to reopen. Please contact us if you have any questions about creating a reopening plan for your business.

We will continue to monitor the efforts to provide immunity from COVID-19 exposure claims and the cases that are being filed. As a precaution, it will be important to consider asserting immunity and preemption defenses in responsive pleadings so that these potential defenses are not waived should immunity or preemption subsequently be provided.

As always, we are available to discuss your questions or concerns. Please do not hesitate to contact us.

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At FHMS, we focus on moving each matter to resolution at the earliest practical opportunity, whether by risk transfer, trial, dispositive motion, ADR or direct negotiation with the opposition. Our approach is dependent on the facts of each case and the goals of our client. We view discovery as a toolbox and not a checklist. We find the issues in dispute and address them. Our team consists of 28 attorneys with offices in Philadelphia, Allentown, Lancaster, and New Jersey. We recognize that the best pre-trial resolutions are driven by firms with the capacity to try the most difficult cases. Our lawyers have shown that ability in catastrophic cases across Pennsylvania and New Jersey.