



# GEORGIA STATE SENATE

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## Revisiting the Georgia COVID-19 Pandemic Business Safety Act

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The following reviews the possible expansion, extension, or other follow-up to the Georgia COVID-19 Pandemic Business Safety Act (“Act”) as enacted in 2020 by Senate Bill 359. This research document was prepared to assist in panel preparation and discussion for the 32nd Biennial Institute for Georgia Legislators.

### Overview

The COVID-19 pandemic led the General Assembly to enact protections for a variety of businesses and entities from liability stemming from the “transmission, infection, exposure, or potential exposure” of the virus, as well as distributing personal protective equipment.<sup>1</sup> The Act provides blanket immunity from civil liability stemming from COVID-19 for all claims except gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm.<sup>2</sup> The Act applies only to causes of action accruing until July 14, 2021 at which time, such immunities are no longer in effect.

Across the nation, states are enacting various immunities from civil liability stemming from the COVID-19 pandemic. Georgia appears to be in the majority of states by having immunities enacted, while also providing some of the strongest protections in the United States. However, two areas Georgia should consider updating or adding: (1) The **expiration date for current immunities and limitations to bring claims**; and, (2) Whether the **construction industry needs its own, specific immunities for issues related to contracts**.

### Distinctions in Immunities Legislation in Other States

Georgia appears to provide greater protections than some states but generally is in the majority of states that have enacted some degree of immunity. A review of states that have enacted immunity for civil liability from COVID-19 claims appear to be distinct in two areas:

1. Scope of entities covered; and
2. Length of time for which immunities are in place.

Other states, such as California, are struggling to pass any meaningful legislation to provide similar immunities from civil liability. The California Assembly has considered protections only for small businesses, but that so far has failed to reach final passage. New York is reportedly rolling back its civil liability protections for health care workers and facilities that previously covered breaches for a standard of care indirectly impacted by COVID-19.<sup>3</sup> For example, a non-

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<sup>1</sup> O.C.G.A. § 51-16-1.

<sup>2</sup> O.C.G.A. § 51-16-2.

<sup>3</sup> Chris DeMeo and Marlin Duro, *New York Eliminates Some Liability Protections For Health Care Facilities and Professionals Relating to the COVID-19 Emergency*, Seyfarth (Aug. 11, 2020)

COVID-19 patient admitted to a New York health care facility that subsequently suffers harm because they receive a less-than standard of care due to the health care facility's response to the COVID-19 emergency may be entitled to damages.

*1. Scope of entities covered.*

Georgia's SB 359 provides immunity from civil liability expressly for a "healthcare facility, healthcare provider, entity, or individual" in actions for damages involving COVID-19. These terms are defined so as to cover every conceivable body in government, private industry, not-for-profit, and all employees and officers of these bodies. The language of the Act would appear to cover actions for breach of the duty of care in premises liability, some occupational claims, medical malpractice, and in some manufacturing/products liability claims.

Some states have limited the scope of entities immune from civil liability to "essential business" (North Carolina<sup>4</sup>) or only to those entities that follow COVID-19-related health guidelines (Oklahoma<sup>5</sup>). **North Carolina's** immunities cover only "essential business" and gives the Governor and the state's Department of Revenue the authority to declare what is determined as essential. **Oklahoma** requires that in order for an entity conducting business in the state to be immune, it must operate "[in] compliance or consistent with federal or state regulations, a Presidential or Gubernatorial Executive Order, or guidance applicable at the time of the alleged exposure." The bill provides no guidance for the burden of proving non-compliance or if there is a rebuttable presumption of compliance.

**Idaho** enacted immunity from liability for architects, engineers, and contractors for losses "related to any architectural, structural, electrical, mechanical, construction, design, or other professional service provided by the architect or engineer, voluntarily or without compensation, or the contractor at the request or approval of a national, state, or local public official in response to a declared national, state, or local emergency, a disaster, or a catastrophic event."<sup>6</sup> The stated purpose of the bill is to protect architects, engineers, and contractors from liability for volunteer services rendered in connection to the COVID-19 emergency.

**Massachusetts** is considering a bill applying to construction contractors and subcontractors which shields them from liability for "[1] unforeseeable shortages in available workforce resulting from the COVID-19 pandemic; [2] unavoidable schedule changes resulting from federal, state or local government orders, or other measures to protect the public from COVID-19; and, [3] contractor/sub-contractor compliance with federal, state and local government orders, or measures to protect the public."<sup>7</sup> Additionally, the bill provides protections for unions from damages claims resulting from the unions advising its members of their right to refuse work due to abnormally dangerous conditions at the members' places of employment.

*2. Length of time for which immunities are in place.*

The immunities provided in SB 359 expire July 14, 2021. In this regard, Georgia is similar to Kansas which also has a set date for the expiration of its immunities.<sup>8</sup> A review of other states show immunities end with the expiration of a declared state of emergency (North Carolina), at

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<https://www.seyfarth.com/news-insights/new-york-eliminates-some-liability-protections-for-health-care-facilities-and-professionals-relating-to-the-covid-19-emergency.html>.

<sup>4</sup> North Carolina Senate Bill 704 (<https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v6.pdf>). Beginning at page 42.

<sup>5</sup> Oklahoma Senate Bill 1946 ([http://webserver1.lsb.state.ok.us/cf\\_pdf/2019-20%20ENR/SB/SB1946%20ENR.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2019-20%20ENR/SB/SB1946%20ENR.PDF)).

<sup>6</sup> Idaho House Bill 529 (<https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/H0529.pdf>).

<sup>7</sup> Massachusetts Bill S.2700 (<https://malegislature.gov/Bills/191/S2700>).

<sup>8</sup> Kansas House Bill 2016 ([http://kslegislature.org/li\\_2020s/b2020s/measures/documents/hb2016\\_enrolled.pdf](http://kslegislature.org/li_2020s/b2020s/measures/documents/hb2016_enrolled.pdf)).

various times after the end of declared state of emergency (Mississippi<sup>9</sup>), or provide no end date at all but provide immunity in perpetuity for COVID-19 related claims (Oklahoma).

The **Mississippi** bill provides immunity for up to one year after the expiration or termination of its declared COVID-19 emergency. Furthermore, the bill provides a statute of limitations specifically for COVID-19 claims of two years after the accrual of the claim.

### Considerations

The international law firm of Hunton Andrews Kurth developed a COVID-19 complaint tracker that details claims filed in every state, and categorizes the type of claim.<sup>10</sup> As of October 19, 2020 the tracker has recorded 68 COVID-19-related claims in Georgia that include claims in consumer cases, leave of absence and wrongful termination, and securities litigation. Nationwide, the tracker reports that insurance-related lawsuits are the most prevalent stemming from COVID-19, followed by “Civil Rights” cases likely concerning federal First Amendment questions brought on by business closures, stay-at-home orders, and group-gathering ban challenges. This tracker may be helpful to find where further immunities are needed, backed up by data illustrating the categories of cases being filed.

Depending on the end of the COVID-19 pandemic and/or availability of a usable vaccine, the legislature will want to consider extending current immunities from civil liability. Other states have the end of their respective immunities contingent upon an expiration of a governor’s declared state of emergency. Alternatively, some states provide that immunities are only in connection to COVID-19-related claims for damages, which by virtue of this language means there is no stated end to such protections until COVID-19 is completely eradicated. Mississippi’s inclusion of a time limitation for claims should be reviewed for possible enactment and should be considered further in the case of long-term effects of a vaccine.

Idaho and Massachusetts have shown a possible path for legislative action to protect the construction industry in the event they have or will be called on to rapidly standup health care facilities, or if construction projects are significantly delayed due to COVID-19. While such contingencies should be contemplated by contract between a construction firm, subcontractors, and clients/developers, it is possible that residential projects relying on less-than sophisticated means of contracting are susceptible to litigation. Furthermore, having clarity as to liability and rights of construction firms and clients may be a boon for businesses planning long term project expenditures. The complaint tracker indicates 19 cases regarding contract disputes in construction have been filed nationwide, with none in Georgia.

All states that were reviewed provide a caveat to its protections as extending only so far as to cover breaches of ordinary or reasonable care due to COVID-19. Unreasonable acts, willful and wanton conduct, intentional infliction of harm, and gross negligence are causes not provided protection from liability. While any legislative protection for such acts would likely be struck down if challenged in court as against public policy, it is important to include such caveat in any legislation.

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<sup>9</sup> Mississippi Senate Bill 3049 (<http://billstatus.ls.state.ms.us/documents/2020/pdf/SB/3000-3099/SB3049SG.pdf>).

<sup>10</sup> Find the tracker here: <https://www.huntonak.com/en/covid-19-tracker.html>.