

UPDATE ON POTENTIAL IMMUNITY FROM COVID-19 CIVIL LIABILITY: ARIZONA BILL H2912

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The COVID-19 pandemic is sure to beget lawsuits filed by persons, or families of persons, who have contracted the virus. These are likely to be filed against businesses, employers, and others alleging that the defendant either negligently caused the virus to be transmitted to the plaintiff, or negligently failed to prevent the virus's transmission by others. Perhaps they will allege that the defendant failed to follow CDC guidelines, opened a business when it should have been closed, allowed too many people in too small a space at once, failed to ensure that those who work in or enter a store, workplace, or other location were virus-free or were following physical distancing protocols. The possibilities are endless, and the potential lawsuits are endless.

To stem the tide of litigation, House Bill 2912 was recently introduced into the Arizona legislature. The bill would limit civil liability during the Governor's declared state of emergency relating to the COVID-19 outbreak. Governor Ducey declared a state of emergency on March 11, 2020; and the bill would be retroactive to that date.

In essence, the House engrossed bill provides that beginning on March 11, 2020, a person who owns or operates a business in Arizona [defined below] during the state of emergency related to COVID-19 is **not liable** to a person who contracts COVID-19 during the state of emergency or before April 1, 2021, whichever is later—including after entering and remaining on the premises—**if the action is based on strict liability, premises liability or negligence unless the defendant acted with gross negligence**. The plaintiff must prove his or her case by "clear and convincing evidence." This means that if this bill is signed into law, the plaintiff alleging strict liability, premises liability or negligence would need clear and convincing evidence that the defendant knew or reasonably should have known that their actions or inactions created an unreasonable risk of harm to the plaintiff, and the risk of harm was so great that it was highly probable that the harm would result from the action or inaction. The bill would apply to claims that accrue "before, on, or after March 11, 2020." It also contains an emergency clause that would make it immediately effective upon passage.

The bill states that it applies specifically to "a school, church, religious institution, nonprofit organization or person, including a person who owns or operates a business, corporation, limited liability company, church, religious institution or nonprofit organization." Though this language is a bit unclear as to whether the bill applies only to persons who operate schools, religious institutions and nonprofits, or to all "persons who own or operate a business" *including* schools and religious institutions, other language in the bill more broadly refers to those who remain on the premises of a "business, corporation, limited liability company, church, religious institution, nonprofit organization or school." As such, the bill likely applies to all persons who operate businesses, etc., and is not limited to nonprofits, schools, and religious institutions. It seems likely that the phrasing is simply a bad grammatical choice. Indeed, the bill as originally introduced into the legislature used this language: "A school or person, including a person who owns or operates a business, corporation, limited liability company, church, religious institution or nonprofit organization. . . ." The bill also defines school to include public, private, charter, universities, community colleges and vocational schools.

Other parts of the bill provide that a person may not be criminally charged with an act prohibited by a COVID-19 executive order; that a person who knowingly fails to comply with such an order, after being provided notice and failing to cure the violation, is subject to a civil penalty of not more than \$100; and that a board, commission, or the state may not suspend or revoke a business license or permit based on the failure to comply with a COVID-19 executive order.

The Senate is considering the bill now, and will likely offer amendments and changes. We will of course continue to keep abreast of these legislative developments and post updates as appropriate.

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