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We recently hosted a roundtable discussion of the immunity statute. If you are interested in viewing a recorded copy of the discussion, please contact Katy Lehman at [klehman@kslaw.com](mailto:klehman@kslaw.com).

## Florida Passes Law Limiting COVID-19 Lawsuits

On Monday, March 29, 2021, Florida Governor Ron DeSantis signed into law a bill that limits COVID-19 liability for Florida health care providers, health care facilities and other businesses.

### KEY PROVISIONS

Now known as sections 768.38 and 768.381 of the Florida Statutes, the new law addresses claims arising from or related to COVID-19 against health care providers, health care facilities, educational institutions, governmental entities, religious institutions, and other businesses. To maintain a COVID-19-related lawsuit, a plaintiff must file a complaint pled with particularity. This means that a plaintiff must specifically identify the acts or omissions causing the alleged damages as well as the time, place, and manner in which they occurred. Unlike claims against other types of businesses, claims against health care providers do not require a supporting affidavit.

The new law further increases the plaintiff's burden of proof at trial. To prevail, a plaintiff must prove by the greater weight of the evidence that the defendant engaged in intentional misconduct or was at least grossly negligent.

Beyond that, the new law considers a defendant's good faith efforts to comply with authoritative or controlling government-issued health standards or guidance or a defendant's inability to comply with such standards due to lack of time, resources, or personnel. For most businesses, the burden will be on the plaintiff to disprove the business' good-faith efforts to comply with the relevant health standards or guidance. For health care providers and facilities, the burden will be on the defendant to prove as an affirmative defense that it made good-faith efforts to comply with the relevant standards or that it could not comply due to a lack of time or resources.

Finally, the new legislation requires plaintiffs to file suit within one year of the effective date of the statute or the date the claim accrued, whichever is later. The new law is intended to apply retrospectively, except that it does not apply to cases that were commenced before its enactment.



## DOES NOT ELIMINATE ALL COVID-19 LIABILITY

The new law does not protect against all claims related to COVID-19. As indicated above, plaintiffs can still recover by proving that a defendant was grossly negligent or engaged in intentional wrongdoing. A health care facility that was slow to react to COVID-19 or failed to fully implement all guidelines may struggle to fully benefit from the new statute. This standard, borrowed from Florida's punitive damages statute, will likely mean that many surviving COVID-19 lawsuits will also include claims for punitive damages.

It remains unclear how trial courts will interpret and apply the different provisions.

## POTENTIAL CHALLENGES

Plaintiffs are expected to challenge the constitutionality of the new law in several ways.

*Access to Courts.* The access to courts provision of the Florida Constitution provides that the Legislature may not impair a preexisting right of access to the courts. Plaintiffs will likely argue that the heightened pleading requirements and higher standard of proof required by the law improperly impede their right to bring tort claims.

*Equal Protection.* Plaintiffs are expected to argue that the law protects specific classes of defendants, treating them differently than other similarly situated defendants, or that the law disadvantages some classes of plaintiffs over others.

*Retroactive Application.* Plaintiffs will likely argue the new law should not apply to causes of action that accrued before its passage, regardless of the legislature's intent for the new law to apply retrospectively. Under the due process clause of the Florida Constitution, a statute that substantively impairs rights that existed prior to the statute's passage is unconstitutional.

## STEPS TO TAKE NOW

Businesses can take several steps now to help protect themselves in the event of a lawsuit.

1. **Continue to follow local, state, and federal COVID-19 guidelines.** As the guidelines change, you should make similar changes so that you are following the state-of-the-art guidelines. If guidelines differ, you should follow the practice that provides the most protection.
2. **Document how you are following COVID-19 guidelines.**
3. **Contact a lawyer experienced in constitutional and COVID-19 litigation if you are served with a lawsuit or believe that a lawsuit is imminent.** Do not assume that this new law will provide automatic protection. Business who seek to invoke the protections of this new law will need sophisticated counsel to maximize the protections.

## CONCLUSION

Although the new statute provides several protections, plaintiffs have heavily advertised for clients injured by COVID-19 and have been filing an increasing number of such lawsuits in recent weeks. Businesses across Florida should proactively take steps to bring themselves under the umbrella of protection provided by the new statute.



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