

Insights: Alerts

The North Carolina Legislature Grants Limited, Civil Immunity to Certain Companies (But What is the Impact of Subsequent Executive Orders?)

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force page](#) and/or your email for updates.

We [previously wrote](#) about limited products liability immunity for certain companies under the federal PREP Act. Although a number of states have recently enacted legislation or issued executive orders providing limited immunity to health care providers, North Carolina has extended civil immunity beyond healthcare, although it is still limited in scope. North Carolina's May 4, 2020 COVID-19 Recovery Act (Session Law 2020-3) ("Act") grants limited, civil immunity to three groups in connection with acts or omissions in the course of responding to the current pandemic. Those three groups are (1) health care facilities and providers, (2) essential businesses, and (3) emergency response entities. Executive Order No. 138 subsequently ushered in Phase 1 of North Carolina's Reopening Plan, allowing more businesses to reopen and eliminating any express distinction between "essential" and "non-essential" businesses.

Health Care Facilities and Providers

The Act extends liability protection for emergency or disaster treatment by amending Chapter 90 of the North Carolina General Statutes. New § 90-21.133 grants limited immunity from civil liability "for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services" to health care facilities, health care providers, and entities that have legal responsibility for the acts or omissions of health care providers. However, such immunity only applies if certain conditions are met. First, the arranging for or providing of health care services must have occurred during the period of North Carolina's COVID-19 emergency declaration, which was issued on March 10, 2020. Second, the arranging for or providing of health care services must have been directly or indirectly impacted by decisions or activities in response to, or as a result of, the COVID-19 pandemic. Third, the health care facility or provider must have arranged for or provided the health care services in good faith. Volunteer organizations providing health care services also are granted limited, civil immunity for any harm or damages occurring at their facilities arising from the State's response and activities under the COVID-19 emergency declaration, and such volunteer organizations do not have to meet the foregoing three conditions.

Immunity does not apply to certain actions. Acts or omissions constituting gross negligence, reckless misconduct, or intentional infliction of harm will not be immune from civil liability. However, acts, omissions, or decisions resulting from a resource or staffing shortage are not considered to be gross negligence, reckless misconduct, or intentional infliction of harm.

The grant of immunity in new § 90-21.133 is effective as to acts or omissions occurring as of March 10, 2020 and continuing as long as a state of emergency is in effect during the current calendar year.

Essential Businesses and Emergency Response Entities

The Act also extends limited, civil immunity to certain essential businesses that provide goods or services in the state and emergency response entities. Amended § 66-462 of the North Carolina General Statutes defines an “essential business” as a business, not-for-profit organization, educational institution, and governmental entity identified in the Governor’s March 27, 2020 Executive Order (No. 121) including any amendments issued by executive order, as well as any business deemed essential by the Department of Revenue. Executive Order No. 138, issued on May 5, 2020 and effective on May 8, 2020 at 5 p.m., allows “most” businesses to re-open and no longer expressly refers to “essential” businesses. Companies that were not previously deemed “essential” should consider whether Executive Order No. 138 (and any future order) is an “amendment” to Executive Order No. 121 that extends civil liability to them under the Act. “Emergency response entities” are defined as “[b]usinesses, not-for-profit organizations, educational institutions, and governmental entities that manufacture, produce, or distribute personal protective equipment, testing equipment, or ventilators, or process COVID-19 testing results.”

New § 66-460 grants limited immunity from civil liability to essential businesses that provide goods or services in North Carolina “with respect to claims from any customer or employee for any injuries or death alleged to have been caused as a result of the customer or employee contracting COVID-19 while doing business with or while employed by the essential business.” Emergency response entities have limited immunity from civil liability “with respect to claims from any customer, user, or consumer for any injuries or death alleged to have been caused as a result of the COVID-19 pandemic or while doing business with the emergency response entity.” The immunity extends to acts or omissions occurring on or after the issuance of the Governor’s stay-at-home executive order on March 27, 2020, and lasts until the COVID-19 emergency declaration is rescinded or expires.

Again, the immunity granted by the Act is limited and does not apply to injuries or deaths caused by an act or omission constituting gross negligence, reckless misconduct, or intentional infliction of harm. Nor does the Act preclude employees of essential businesses or emergency response entities from seeking worker’s compensation for any injuries or death alleged to have been caused as a result of contracting COVID-19 while employed by the essential business or emergency response entity.

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