Insights: Alerts

COVID-19 Reopening Issues: Taking Advantage of the State Immunities Whether or Not Your State Has Enacted COVID-19 Immunities Legislation

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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.

Reopening the economy has had mixed results. Many types of businesses have reopened without triggering outbreaks in COVID-19. But, bars and other businesses are being linked to the June and July spikes in COVID-19 cases causing new closure orders. One consequence is the likelihood businesses are sued for failing to protect customers, employees, and other visitors from contracting COVID-19 while at these reopened business premises.

COVID-19 Immunities Legislation

Several states have anticipated the potential legal issue against businesses by enacting special COVID-19 immunity from liability legislation that protect businesses against tort claims because of COVID-19. Georgia, Iowa, Kansas, North Carolina, Oklahoma, and Wyoming have enacted COVID-19 immunity laws.[1] What these states have done is effectively codify the common law defense of "assumption of risk" with respect to tort claims related to COVID-19 for any claims arising during a limited time set forth in each statute.

The Georgia statute, O.C.G.A. § 51-16-1 *et seq*., is particularly specific in its "safe harbor" requirements to gain the benefit of the immunities. Businesses operating outside of Georgia should consider these requirements as suggestions of steps to take to show customers and visitors to business premises knew of COVID-19 risks and assumed those risks when entering the premises. (See Georgia statute and our recent Legal Alert) The Georgia law establishes a presumption that a non-healthcare business has an "assumption of risk" defense to any tort liability claim arising from the plaintiff directly or indirectly contracting COVID-19 because of a visit to the premises of the business defendant(s). The defense is available provided the business has posted the statutory warning about COVID-19 at the point of entry and has tried to follow public health guidelines to reduce the risk of spreading COVID-19 – e.g., practicing safe distancing, wearing masks, and promoting proper hygiene. Notably, in Georgia, the defense would not apply to conduct deemed to be gross negligence, willful or wanton misconduct, or other egregious conduct.

Common Law "Assumption of Risk" Defense

The common law “assumption of risk” defense is, or should be, available in states that have yet to enact COVID-19 immunities legislation. The specifics and contours of the “assumption of risk” defense are matters of state law. A 50-state survey on the intricacies of this defense is beyond the scope of this Legal Alert, particularly in states that recognize comparative negligence where the degree fault is allocated between plaintiffs and defendants.

“Assumption of risk” is a well-recognized defense in tort actions that is addressed in the Restatement (Second) of Torts § 496A and further explained in Sections 496B through 496G. Section 496A states: “*A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover from such harm*.” [2]

As Comments (c)(1) through (c)(3) explain, the defense applies (1) where a plaintiff has executed a written acknowledgement of the risk and has waived the right to pursue claims against the defendant because of those risks; (2) where the nature of the relationship and known risks, the plaintiff has impliedly accepted risk, such as spectators or participants in high-risk events such as at sporting events; or (3) where the risks on the premises was known to the plaintiff who entered anyway.[3]

Steps That May Help to Preserve the “Assumption of Risk” Defense

These illustrations together with the Georgia statute offer steps businesses should consider to protect visitors to their premises, provide adequate warning of risks, and provide evidence to support application of the “assumption of risk” defense in the event of a COVID-19 related lawsuit. Here are several steps to consider:

- Post a warning about the risks of COVID-19 at points of entry. The Georgia statute includes adequate warning language for non-healthcare businesses that is deemed sufficient in that state and specifies the size and font of the warning (at least 1 inch Arial font), so you might consider building on that language. The Georgia language is:

Warning

Under Georgia law, there is no liability for an injury or death of an individual entering these premises if such injury or death results from the inherent risks of contracting COVID-19. You are assuming this risk by entering these premises.

- You might consider posting similar language in the same size and font:

Warning

By entering these premises, you are assuming liability for an injury or death if such injury or death results from the inherent risks of contracting COVID-19.

- This language could be posted at points of entry or included in a waiver of liability the business requires visitors to sign as a condition of entering the business premises, where that is practical.

In addition to posting warnings and signing waivers, businesses should take steps to limit the risks. These safeguards might include undertaking one or more of the following actions:

- You should follow CDC and state/local public health guidelines for your business and premises, including:
  - Wear masks in public spaces
  - Practice safe “social distancing”
  - Limit the number of people in the premises (employees and visitors), and in particular impose limits on the number of people allowed in any one area
  - Establish reasonable traffic flow and elevator rules to avoid bottlenecks
  - Provide hand sanitizers and wipes to keep hands and surfaces clean
  - Implement cleaning protocols for “high touch” areas

- You should take affirmative steps to confirm the health of the visitor through:
  - Temperature, smell and/or taste tests at the point of entry
  - General questions about the visitors health that day
  - General questions about contacts the visitor may have had with anyone known to have tested positive for COVID-19
  - General questions about travel to COVID-19 hot spots

Footnotes

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[1] The governors of Alabama and Arkansas have issued executive orders creating immunities from tort lawsuits.

[2] Restatement (Second) of Torts § 496A (1965).

[3] *Id.*, cmts. (c)(1) – (c)(3).

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