

## News & Trending

PUBLICATIONS & ALERTS

### HEALTH CARE SYSTEM AND ESSENTIAL BUSINESSES GRANTED IMMUNITY FROM COVID-19 CLAIMS

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The North Carolina General Assembly enacted the COVID-19 Recovery Act ([SB 704](#) “An Act to Provide Aid to North Carolinians in Response to the Coronavirus Disease 2019 (COVID-19) Crisis”) on May 2, 2020.<sup>[1]</sup> The legislation addresses a number of topics in response to the COVID-19 Crisis.

**This Client Alert explains the General Assembly’s grant of civil immunity to those who are providing health care services during the pandemic and the scope of the “limited business immunity” provided to businesses that are delivering essential goods or services during the crisis.**

#### Health Care Liability Protection for Emergency or Disaster Treatment

In Section 3D.7.(a), the “Emergency or Disaster Treatment Protection Act,” the General Assembly sought to “broadly protect[] the health care facilities and health care providers in [N.C.] from liability that may result from treatment of individuals . . . under conditions resulting from the circumstances associated with the COVID-19 public health emergency.” *G.S. 90-21.131*. The General Assembly has given real breathing room and protection to the state’s health care industry in light of our current exigent circumstances.<sup>[2]</sup>

- The immunity is for “civil liability for any harm or damages” caused by acts or omissions in the rendering of health care services, **if** those health care services are impacted directly or indirectly by decisions made “in response to or as a result of the COVID-19 pandemic” **and** are provided in good faith. *G.S. 90-21.133 (a)*. As long as those conditions are met, a health care provider or facility cannot be sued for money damages alleged to be the result of services rendered during the COVID-19 emergency.
- Generally, health care services are those that involve testing for, diagnosing, or treating suspected or confirmed cases of COVID-19. This would include clinical laboratory testing for COVID-19. It also includes treating people who seek medical care unrelated to COVID-19, if that care is impacted by the adjustments to the overall health care system made in response to COVID-19. For example, a patient who was scheduled to have a non-essential surgery could not sue for damages related to a delay of that operation resulting from the cancellation of all non-essential procedures in response to COVID-19.
- The immunity applies to acts or omissions that occur during the COVID-19 emergency,<sup>[3]</sup> regardless of when a lawsuit based upon those acts or omissions is filed.
- The immunity from civil law suits would not apply if the health care facility or provider intentionally harmed a patient, engaged in reckless misconduct or was grossly negligent in providing care to the patient. *G.S. 90-21.133(b)*.

## Limited Business Immunity for Essential Businesses

In Section 4.14.(a) entitled “Limited Business Immunity,” the General Assembly sought to “ensure that essential businesses can provide goods and services to the public during the COVID-19 pandemic” by granting limited immunity to *essential businesses* and *emergency response entities*.

- **Essential Businesses** are those identified by Governor Cooper in [Executive Order No. 121](#) or determined by the NC Department of Revenue to be essential. And SB704 empowers the Governor to further increase the list of Essential Businesses by amending his Order.
  - The immunity from civil liability afforded to an essential business is for claims by any customer or employee for injuries or death alleged to be due to contracting COVID-19 while doing business with or being employed by the essential business. *G.S. 66-460(a)(1)*.
  - Essential business immunity is for acts or omissions that occurred on March 27, 2020 or any later date during the COVID-19 emergency period<sup>[4]</sup> and the immunity applies to claims filed on or after March 27, 2020.
  - Immunity would not apply to acts or omissions constituting intentional harm, reckless misconduct or gross negligence. *G.S. 66-460(b)*. Essential business immunity does not prevent an employee from pursuing a claim under the North Carolina Workers’ Compensation Act.
- **Emergency Response Entities** are those entities that manufacture, produce or distribute PPE, testing equipment or ventilators, or process COVID-19 testing results. *G.S. 66-462(4)*.
  - The immunity from civil liability afforded to an emergency response entity is for claims by any “customer, user or consumer” for injuries or death alleged to be due to the COVID-19 pandemic or the “customer, user or consumer” doing business with the emergency response entity. *G.S. 66-460(a)(2)*.
  - Emergency response entity immunity is for acts or omissions that occurred on March 27, 2020 or any later date during the COVID-19 emergency period and applies to claims filed on or after March 27, 2020.
  - Immunity would not apply to acts or omissions constituting intentional harm, reckless misconduct or gross negligence. *G.S. 66-460(b)*. Emergency response entity immunity does not prevent an employee of an emergency response entity from pursuing a claim under the North Carolina Workers’ Compensation Act.

This recent legislation provides broad protection to health care and to “essential” businesses including those who are making emergency COVID-19 response equipment. Left unaddressed at this point are those businesses not labeled “essential” but faced with similar safety challenges (e.g., restaurants, retail establishments, entertainment venues and others) <sup>[5]</sup>.

If you have any questions related to this Alert, please feel free to reach out to the Smith Anderson lawyer with whom you work. Additionally, please visit and bookmark our firm’s [Coronavirus \(COVID-19\) Business Resource Center](#), which is continuously updated with useful materials and resources related to COVID-19. This tool has been made available to ensure that our clients and the broader business community stay informed on key issues that may impact their operations and to navigate the related business and legal issues during these challenging times.

Special thanks to contributing authors Dave Horne, Gerald Roach and Dana Simpson.

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[1] The Act awaits Governor Cooper's signature and will become effective once he signs it into law.

[2] Health care facilities, providers and services are defined in subsections (6), (7) and (8) of G.S. 90-21.132, respectively. An organization that is legally responsible for an individual health care provider has the same immunity as that health care provider. *G.S. 90-21.133(a)*.

[3] The COVID-19 emergency period began with Governor Cooper's declaration of emergency in Executive Order No. 116, on March 10, 2020, continues through any extension of that declaration and would apply if a subsequent emergency were declared at a later point during 2020.

[4] March 27, 2020 is the date the Governor issued E.O. No. 121.

[5] E.O. No. 121 contains a significant list of "Essential Businesses," which also includes businesses that practice social distancing. The language of SB 704 thus reads that a business practicing social distancing meets the "Essential Businesses" definition and therefore has the statutory immunity.

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