

New Law Offers Protections from COVID-19 Liability

Impacts health care providers, businesses and producers/sellers of COVID-19 supplies

By Kevin K. Peek, JD, and Killian R. Walsh, JD

On July 7, Missouri Gov. Mike Parson signed into law SB 51, passed by lawmakers earlier this year intended to solidify the protections afforded to individuals, businesses and organizations from liability to COVID-19 exposure actions. The law will take effect on August 28, adding six sections to Chapter 537 of the Missouri Revised Statutes. The additional language, which largely mirrors similar federal protections already in place, will impact individuals who own a business, practice health care, or manufacture, distribute, or sell health care products.

Anyone who wishes to bring a COVID-19 claim against health care providers will be required to prove recklessness or willful misconduct on the part of the health care provider. This is a higher standard than ordinary medical malpractice.



Simply put, the law can be used to block most COVID-19 exposure actions. Only those actions alleging exposure to the virus by **reckless or willful misconduct** will be able to proceed. The law will shield health care providers from COVID-related lawsuits unless that high standard of proof is met. In instances of medical malpractice, patients will have up to one year after discovery of the exposure to pursue legal action. Actions



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Missouri Gov. Mike Parson signs the COVID-19 liability law as legislators and business leaders look on. (Missouri Gov. Parson Facebook page)

involving product liability can be filed up to two years after an alleged exposure, such as a claim that the virus was contracted on the premises of the business. The law also permits limited punitive damages in COVID-19 related actions. All sections of the law will expire four years after the legislation is passed unless extended.

New section 537.1005 addresses premises liability and declares businesses cannot be held liable to a plaintiff for COVID-19 exposure unless the plaintiff can prove by clear and convincing evidence that: (1) The business engaged in recklessness or willful misconduct that caused an actual exposure; and (2) The actual exposure caused personal injury. Section 537.1005 further protects employers and business owners by creating a rebuttable presumption that the plaintiff assumed the risk of a COVID-19 exposure by entering an employer or business owner's premises where the employer or business owner had provided a substantially similar warning notice as the warning notice provided in the statute. The notice must be "clearly visible" upon entering the location or must be provided in written form to those coming to the location. Any change to a policy or practice internally to address or mitigate the spread of COVID-19 after an exposure is not considered evidence of liability.

Pursuant to Section 537.1010, anyone who wishes to bring a COVID-19 claim against health care providers will be required to prove recklessness or willful misconduct on the part of the health care provider. This is a higher standard than ordinary medical malpractice, which typically requires only negligence. It will substantially limit the number of lawsuits brought against health care providers.

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or no additional resources from CARES Act dollars. In short, we have good people who are battle tested that can serve as a foundation for transformation.

Obviously, transformation is a complicated process with numerous moving parts, so where do we start? Let us begin with some higher-level concepts:

Workforce: The last decade has seen sharp declines in staffing levels, and the workers that are in place do not always look like the communities that they serve. Investing in the development of the current workforce and developing a pipeline that will bring new, diverse and talented workers to the profession is critical.

Data and analytics: Many state and local public health data systems are built on antiquated platforms that perpetuate siloed approaches to data analysis. The profession has also struggled to integrate other data sets from the communities they serve. These data sets can help to flesh out the broader causal relationships driving poor public health outcomes. The inability to readily access sub-county level data that is timely, accurate and accessible is inexcusable in the digital age and needs to be remedied.

Foundational capabilities and accreditation: Moving forward, we will need to find ways to measure the effectiveness of the current public health system, agree on a minimum set of standards that we can live with as a state, and focus on pathways to performance and quality improvement. Fortunately, there are models that exist that can help facilitate this process. The Foundational Public Health Services² is a framework that defines a minimum set of fundamental capabilities and areas

of public health expertise that should be available in every community. Research recently completed by #HealthierMO tells us that currently, less than half of our local public health departments can meet this minimum set of capabilities. This knowledge provides us with immediate pathways to begin rebuilding our public health infrastructure.

Additionally, some states have embraced public health accreditation to improve public health department performance. Currently, 21 of 114 local public health agencies in Missouri have been conferred accreditation by either the Missouri Institute for Community Health or the Public Health Accreditation Board. It is my personal belief that the public health accreditation process is the most transformative tool available to help public health departments evolve.

It is time to roll up our sleeves and begin the hard work necessary to bring much needed transformation to Missouri's public health system. We know it will be challenging and that it will create discomfort for some. Even so, this is our moment, and we can use the pandemic to inform and drive this much-needed change. There is a Japanese proverb that states, "the frog in the well knows nothing of the sea." Let's be aspirational. We have an opportunity to get out of our wells and explore the possible if we choose to. —

References

1. Weber L, Ungar L., Smith R, Recht H, Associated Press. Hollowed-Out Public Health System Faces More Cuts Amid Virus. Kaiser Health News. July 1, 2020. <https://khn.org/news/us-public-health-system-underfunded-under-threat-faces-more-cuts-amid-covid-pandemic/#:~:text=Since>
2. Missouri's Foundational Public Health Services Model Overview. #HealthierMO. https://clphs.health.mo.gov/lphs/adminorientation/81120/fphs_overview.pdf

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Pursuant to Section 537.1015, product manufacturers, sellers, distributors and the like will not be liable in a COVID-19 products liability action if the entity either:

1. Does not make the covered product in the ordinary course of business;
2. Does make the covered product in the ordinary course of business but the COVID-19 emergency requires modification of the manufacturing process; or
3. Does make the covered product in the ordinary course of business, and the use of the covered product is different than its recommended purpose and used in response to the COVID-19 emergency.

While providers and insureds are afforded significant protections under the new law, they must be mindful that reckless or willful conduct will strip them of such defenses. That said, many insurance policies exclude intentional conduct, and courts are split on whether willful and reckless conduct is the same as intentional conduct. In the years ahead, the new law and its application to insurance policies will be heavily scrutinized and dissected in the Missouri courts. —

The full text of the new law can be found at:
<https://www.senate.mo.gov/21info/pdf-bill/tat/SB51.pdf>