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COVID-19

CORONAVIRUS: COVID-19 RESPONSE AND REOPENING FOR BUSINESS LIABILITY PROTECTION

June 26, 2020

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On June 8, 2020, Governor Laura Kelly signed the COVID-19 Response and Reopening for Business Liability Protection (House Bill 2016) into law. Sections 8 through 15 define various immunities. Section 10 provides immunity to healthcare providers (as defined in the Act) against liability for claims related to services as a "direct response" to the COVID-19 public health emergency. A separate provision (Section 13) specific to adult care facilities — defined as nursing, residential care or assisted living facilities — provides a defense, but not immunity, to claims arising from care to COVID-19 patients if in compliance with applicable statutes, regulations, and executive orders. A third provision provides immunity to a person or entity "conducting business" if such person or entity was acting pursuant to and in substantial compliance with applicable public health directives.

The Act was adopted during the early June special session of the Kansas Legislature. The immunity provisions were controversial, and the final language is likely to generate disputes as to its exact meaning and the scope of the immunity. Challenges on constitutional grounds can also be expected. In particular, the immunity provisions of the Act are to be applied retroactively to any claim accruing on or after March 12, 2020 (even though the Act did not become effective as law until June 8, 2020). On other occasions, the Kansas Supreme Court has held that an attempt to retroactively impact or eliminate liability is unconstitutional as a denial of due process. In addition, immunity is likely to be challenged on more substantive constitutional grounds based on Kansas Supreme Court decisions addressing limitations on damages and other aspects of tort reform.

Also of note is that the Kansas immunity provisions do not coordinate with the immunity provided under the federal Public Readiness and Emergency Preparedness Act, generally referenced as the PREP Act. It broadly provides immunity against claims (except for willful misconduct) arising out of, relating to, or resulting from administration or use of countermeasures to diseases, threats, and conditions encompassed by a PREP Act declaration by HHS. A more complete analysis of the PREP protections is available in a recent advisory opinion issued by HHS here.

The Kansas Act provides immunity to all healthcare providers licensed or otherwise authorized to provide healthcare services in Kansas, including hospices certified by Medicare, but does not apply to any entity licensed under Chapter 39 of the Kansas statutes, such as adult care homes. The immunity applies to care that is a "direct response" to a state COVID-19 disaster emergency declaration so long as there was no gross negligence or willful, wanton, or reckless conduct. This could be a source of dispute as, for example, potentially a claim that an ED patient with COVID-19 was not appropriately diagnosed and admitted. On the other hand, the language should be sufficient to protect against claims resulting from medical care that was not rendered because of a pandemic directive to cancel, delay, or not provide nonurgent care. Protecting against liability for ill effects from delayed care has been a principal concern of the AMA.

A separate provision of the Act provides immunity to any person "conducting business" in the state against any claim arising out of or based on exposure or potential COVID-19 exposure, if the business was acting in substantial compliance with applicable public health directives. While the term "conducting business" is not defined, it presumably would apply to healthcare providers with reference to claims not specifically arising from the provision of healthcare, such as an exposure claim not involving a patient. This provision expires January 26, 2021.

In contrast to the immunity provided for all other types of healthcare providers, an "affirmative defense" is provided to an adult care facility — defined as a nursing facility, assisted living facility, or residential healthcare facility. Immunity is typically regarded as an affirmative defense and so the distinction that the legislature intended to make lacks clarity. Under this provision, an adult care facility establishes a defense to a claim for exposure or potential exposure to COVID-19 by showing:

- The claim was caused by the facility reaccepting a resident who had been removed from the facility for treatment of COVID-19 or treating a resident who has tested positive for COVID-19 in such facility in compliance with a statute or rule and regulation; and
- The facility was acting pursuant to and in compliance with public health directives, including state statutes, rules and regulations, and executive orders and federal statutes or regulations from federal agencies.

This language may, in the end, provide broader protection than the immunity for other healthcare providers.

In addition, the Act states that facilities licensed under Chapter 39 of the Kansas statutes are not entitled to the immunity afforded to other healthcare providers and limits the definition of adult care facilities entitled to an affirmative defense to only some of the Chapter 39 licensed entities. The definitions of licensed entities in Chapter 39 include nursing facilities for mental health, intermediate care facilities for people with intellectual disability, home plus, boarding care homes, and adult daycare, which are not included under any provision in the Act.

The COVID-19 pandemic has placed healthcare providers in unprecedented situations. The COVID-19 Response and Reopening for Business Liability Protection Act reflects the uncertainties of the effects and questions raised by the pandemic. The common theme throughout the immunities and affirmative defense provided by the Act is compliance with governmental directives. As with so many other healthcare issues, this is likely to focus on documentation. Policies and procedures should thus reference specific directives with which compliance is intended and provide guidance as to documenting compliance in individual circumstances.

FOR MORE INFORMATION

If you have questions or want more information regarding COVID liability, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. Foulston's healthcare lawyers maintain a high level of expertise regarding federal and state regulations affecting the healthcare industry. At the same time, our healthcare practice group's relationship with Foulston's other practice groups, including the taxation, general business, labor and employment,

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and commercial litigation groups, enhances our ability to consider all of the legal ramifications of any situation or strategy. For more information, contact **Dick Hay** at 785.354.9413 or dhay@foulston.com, or **Lisa Brown** at 785.354.9414 or lbrown@foulston.com. For more information on the firm, please visit our website at **www.foulston.com**.

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