

UPDATED: Kansas Act Purports to Provide Immunity from COVID-19 Related Claims

Alert

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UPDATE: On June 8, 2020 Governor Laura Kelly signed the COVID-19 Response and Reopening for Business Liability Protection Act. The act went into effect June 9, 2020.

On June 4, 2020, the Kansas Legislature passed the COVID-19 Response and Reopening for Business Liability Protection Act. It now goes to Governor Laura Kelly for signature. The act establishes protections from civil liability for certain groups, including:

- Health care providers, whose provision of care is impacted by a COVID-19 emergency declaration
- Product sellers and manufacturers of qualified products related to the COVID-19 pandemic
- Adult care facilities, in connection with COVID-19 positive residents
- Immunity from civil liability to any Kansas business acting in substantial compliance with a public health directive from COVID-19 related claims

While the act is particularly important for Kansas businesses, it is important nationally as well. Only a handful of states have passed liability protections to date, but many more are expected to come to fruition in the coming weeks. Kansas' act could be a starting point or sign of things to come.

Specifically, the act provides:

- Immunity for healthcare providers from civil liability from damages, administrative fines or penalties for claims arising out of acts, omissions, healthcare decisions or the rendering of or the failure to render healthcare services, including services that are altered, delayed or withheld, as a direct response to any state of disaster emergency declaration related to COVID-19.

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- Immunity from liability to any person who designs, manufactures, labels, sells, distributes, provides or donates a qualified product in response to COVID-19 if the person was acting at the specific request of, or in response to, a written order or other directive finding a public need for a qualified product issued by the governor, adjutant general, or the division of emergency management. The act defines "qualified product" to include personal protective equipment, medical devices, equipment and supplies used to treat or prevent the spread of COVID-19, medications used to treat COVID-19, tests used to diagnose or determine immunity to COVID-19, disinfecting or cleaning supplies, certain clinical laboratory services, and components of qualified products.
- An affirmative defense in a civil action for adult care facilities if the facility treats a resident who has tested positive for COVID-19 in compliance with a statute, rule or regulation or was caused by compliance with a statute, rule or regulation to reaccept a resident who had been removed from the facility for treatment of COVID-19 and the facility acted pursuant to and in substantial compliance with public health directives.

And most broadly applicable, the act purports to provide immunity from civil liability to any person conducting business in Kansas from a COVID-19 claim, so long as the person was acting in substantial compliance with public health directives when the cause of action accrued. Under the act's broad definition of "person," immunity would be available to any business, individual, government agency or political subdivision conducting business in Kansas. These provisions of the act apply retroactively to any cause of action accruing on or after March 12, 2020 and expire on January 26, 2021.

The act defines "public health directives" to include any of the following that are required by law to be followed related to public health and COVID-19:

1. State statutes, rules and regulations or executive orders issued by the governor
2. Federal statutes or regulations from federal agencies, including the U.S. Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA)
3. Any lawful order or proclamation issued under authority of the Kansas emergency management act by a board of county commissioners, the governing body of a city or a local health officer

While "public health directive" is defined in the act, there is likely to be disagreement concerning what qualifies as a public health directive for purposes of eligibility for immunity. Currently, the Governor's Office, Kansas Department of Health and Environment (KDHE) and some localities have issued orders that could be considered public health directives under paragraphs (1) or (3) of the definition. These include:

- The travel and exposure related isolation/quarantine mandates of the KDHE

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- The current [Kansas Executive Order 20-34](#), which focuses on reopening and implementing the Ad Astra plan. The executive order “strongly encourages” following specified guidance, consistent with the CDC’s guidance, which includes (for employers): encouraging telework where possible, avoiding gatherings of 15 or more employees where six-foot distances cannot be maintained, gradually phasing in employees while maintaining six-foot distances between workstations, requiring employees with COVID-19 symptoms to stay home, minimizing or eliminating non-essential travel and adhering to CDC/KDHE guidelines regarding quarantine and isolation following travel, and strongly considering accommodations for vulnerable populations
- Some Kansas counties, such as [Shawnee County](#), have issued orders imposing additional restrictions and requirements for its residents. Contact your Stinson attorney to determine whether any county orders are applicable to your business

At the federal level, neither the CDC nor OSHA have promulgated any regulations related to COVID-19. However, both the CDC and OSHA have released guidelines and recommendations both generally and for specific industries. These may be construed as industry standards and could be enforceable under mechanisms like OSHA’s General Duty Clause, the statutory catch-all for areas where there is no specific regulatory standard.

There will likely be legal disputes about what constitutes “substantial compliance” with such public health directives as well. Due to the heavily factual nature of compliance with public health directives, it is unlikely the act will prevent litigation altogether or provide an airtight legal defense that will keep lawsuits from proceeding to trial. But Kansas businesses would be well served by identifying the federal and state COVID-19 health and safety guidance applicable to their businesses. Best practices for avoiding liability include creating policies and practices consistent with applicable state and federal directives and guidance, following and enforcing them. If compliance is not possible or feasible, businesses should document why compliance is not possible and what safeguards are being used to promote a safe and healthful work environment and a safe environment for customers, clients and other business visitors as well.

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