



Liability in the Era of COVID-19

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Bradley COVID-19 Resources

- <https://www.bradley.com/practices-and-industries/practices/coronavirus-disease-2019-covid-19>
- A collection of FAQs, blog posts, and webinar recordings addressing common COVID-19 issues facing businesses, along with a compilation of COVID-19 statutes, regulations, orders, and guidance

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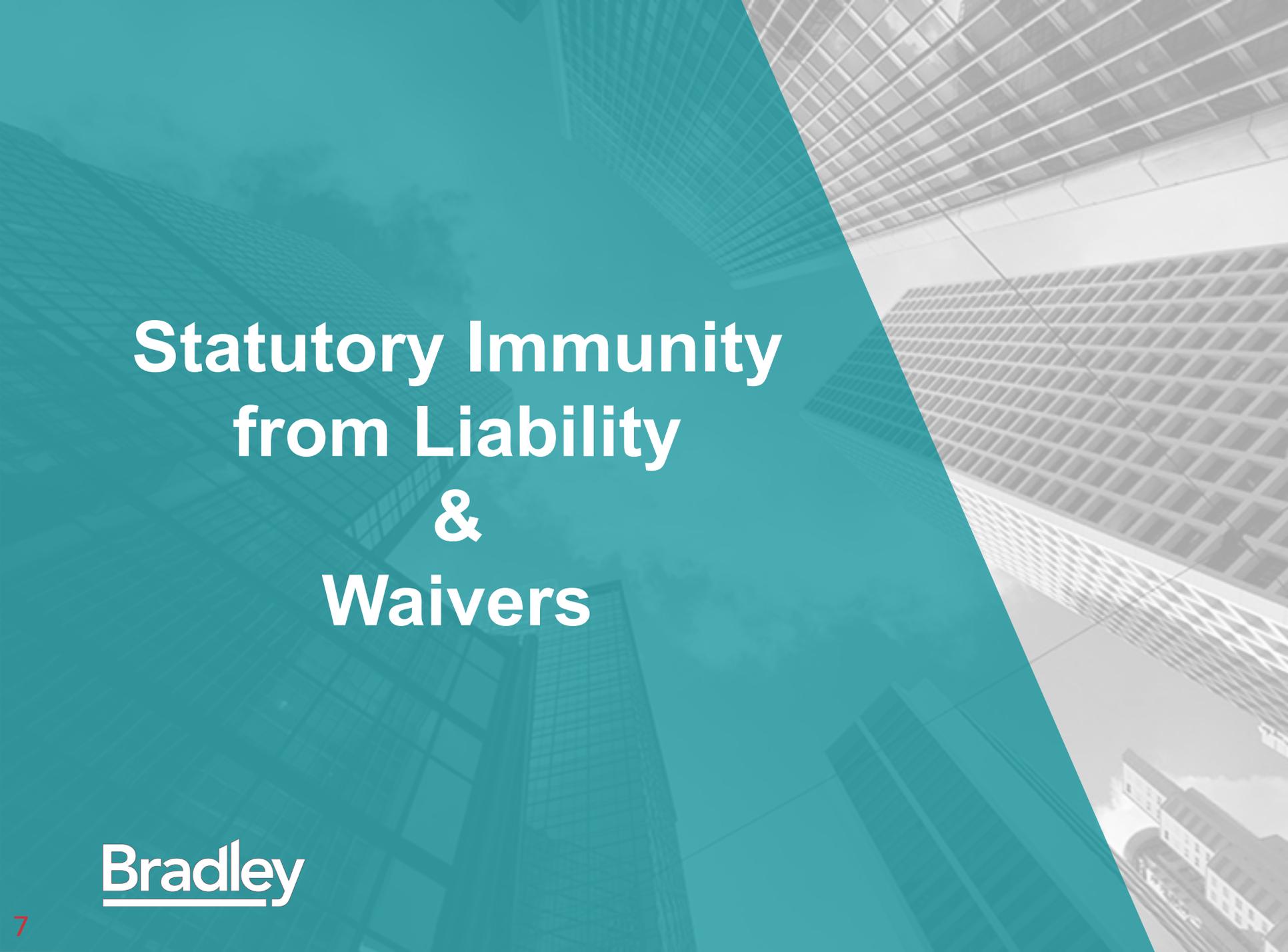
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Liability in the Era of COVID-19

Agenda Items

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Statutory Immunity from Liability & Waivers

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State Statutes Providing COVID-19 Liability Immunity

- Many states have passed legislation providing blanket immunity from COVID-19 negligence liability
 - A number of states, including Alabama and Tennessee, have provided blanket immunity from negligence claims to *all* businesses
 - Other states have extended such blanket immunity to *only* health-care providers, essential businesses, and personal protective equipment manufacturers

States with Liability Immunity for All Businesses

- Alabama, Arkansas, Georgia, Iowa, Kansas, Louisiana, Mississippi, North Carolina, Oklahoma, Utah, Tennessee, Utah, and Wyoming, among others
- Requirements to maintain immunity and the scope of immunity provided vary from state to state
- Generally speaking, immunity is limited to negligence – the statutes do not extend immunity to gross negligence, recklessness, or intentional conduct
 - Nor do they extend to statutory claims
- To maintain immunity, businesses generally must show they made reasonable and good faith efforts to comply with applicable federal, state, and local COVID guidelines
 - Guidelines issued by the CDC, OSHA, state agencies and local governments
 - Keep good records!

States with Liability Immunity for Certain Businesses

- Kentucky, Massachusetts, New Jersey, New York, and Wisconsin, among others
- These states generally offer immunity to healthcare providers and PPE suppliers, but not businesses generally

My State Didn't Pass an Immunity Shield. How do I Limit my Liability Risk?

- Businesses generally have a duty to (1) ensure their premises are reasonably safe; and (2) use reasonable care to learn of dangerous conditions
- You must follow all federal, state, and local regulations, orders, and guidelines related to COVID-19
 - This will show your business took steps to ensure it was reasonably safe
 - This will also make it more difficult for a claimant to prove causation – i.e., that the business's negligence caused the claimant to contract COVID-19

My State Didn't Pass an Immunity Shield. How do I Limit my Liability Risk?

- Waivers may provide additional protection
 - Employees, vendors, patrons
- Some states hold waivers are unenforceable – Connecticut, Louisiana, Montana, and Virginia
- The scrutiny with which courts examine waivers in other states varies
- Generally speaking, for a waiver to be enforceable, it must be:
 - Clear;
 - Unequivocal;
 - Conspicuous; and
 - Not against public policy

Waivers

- The waiver must be clear
 - Acknowledge COVID-19 is highly contagious
 - Lay out the risks associated with COVID-19
 - Lay out the preventative measures your business has taken, but clearly state those preventative measures do not guarantee patrons cannot contract COVID-19 while on the premises
 - Clearly state the patron acknowledges the risks of COVID-19 exposure and recognizes the business cannot guarantee safety from such exposure

Waivers

- The waiver must be *unequivocal*
 - The signer expressly intends to assume all risk associated with COVID-19 exposure while visiting the business
 - Expressly releases the business from liability for *negligence*

Waivers

- The waiver must be *conspicuous*
 - ALL CAPS
 - **BOLDED**
 - **UNDERLINED**

Waivers

- The waiver must **not be against public policy**
 - Broadly speaking, this is about the importance of the business to the public and bargaining power
 - For example, an emergency room likely won't be able to enforce a waiver against a patient. An amusement park likely can against a patron.

Limitations of Waivers

- Waivers will not:
 - Protect you from liability based on conduct more culpable than negligence, like gross negligence, recklessness, and intentional acts
 - Protect you if you aren't following guidelines – failing to follow guidelines may be considered grossly negligent, reckless, or willful



Employee and Customer Policies – ADA Risks

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ADA and Employers

- The ADA prohibits private employers, with 15 or more employees, from discriminating against qualified individuals with disabilities
- The EEOC has issued extensive guidance on what employers can and cannot do in light of COVID-19
 - Available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Allowed Under the ADA

- Employers may:
 - Institute a mandatory mask requirement
 - Subject to reasonable accommodations
 - Require symptomatic employees to stay home
 - Screen employees before entering the workplace
 - Asking employees about symptoms or diagnosis
 - Asking employees about contact with infected individuals
 - Requiring testing or taking temperature

Not Allowed Under the ADA

- Employers may not:
 - Require employees to take an antibody test before returning to work
 - Ask employee's whether their family members have symptoms or have been diagnosed with COVID-19
 - NOTE: an employer may ask generally whether an employee has been in contact with a symptomatic person

An employee is Medically Compromised and Doesn't Want to Return to Work. What now?

- First, find out if you can provide a *reasonable* accommodation for returning to work
 - Consider the feasibility of the employee's request
 - Consider physical changes to the workspace
 - Plexiglass barriers
 - Reconfigure workspace
 - Consider a modified schedule
 - Key word is reasonable
 - Not required to provide an accommodation that is too expensive, substantial, or disruptive

Cont.

- Second, if a reasonable accommodation can't be made at work, can the employee perform essential functions remotely?
 - If an employee isn't getting the job done at home or performing their "essential function," you can still counsel or discipline the employee
- Third, if working remotely isn't an option, consider leave
 - Paid time off, FMLA leave, short term disability benefits

ADA and Customers

- Under the ADA, a place of public accommodation—like many businesses that are open to the public—cannot discriminate against a customer or visitor on the basis of the individual’s disability in the access and enjoyment of the business
- This means: Accessibility
 - Ramps
 - Elevators
 - Wide aisles

Can I Require Customers or Visitors to Wear a Mask Before Entering My Business?

- YES
- Direct threat exception
 - If a disabled individual poses a “direct threat to the health and safety of others,” the ADA does not require the business to allow access to that individual
- EEOC has taken the position that an individual with COVID-19 is a direct threat to the health and safety of others

Tips for Enforcing a Mask Policy

- Publicize the requirement
 - Online
 - At the entrance
- Train employees on mask policies
- Don't question a customer's claimed disability
- Try to accommodate if you can
 - Face shields
 - If feasible, have free masks at the entrance

The Families First Coronavirus Response Act (FFCRA)

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Background on Families First Coronavirus Response Act (FFCRA)

- Congress passed and Trump signed the FFCRA in March 2020
- FFCRA Became Effective April 1, 2020 and expires December 31, 2020
 - Likely to be extended
- Applies to employers with fewer than 500 employees
 - Employees working in a foreign country don't count
 - Independent contractors don't count
 - Integrated Employer Test Can Be Used to Exceed 500 Employee Threshold
 - Joint Employer Test Can Be Used to Exceed 500 Employee Threshold
- May be exemption for employers with less than 50 employees

Background on FFCRA

- What Employees Are Eligible:
 - Employee employed for at least 30 calendar days
 - Traditional FMLA Eligibility Is Not Applicable for Both Employees and Employers
- “Health Care Providers” and “Emergency Responders” Can Be Excluded
- Eligible employees can receive up to 12 weeks of paid time off if meet eligibility criteria
- Private companies may be eligible for tax credits to help offset cost of providing emergency sick leave

Eligibility for FFCRA Leave – Threshold Question & Different Ways to Qualify for Leave

- Threshold Question: Must Be Unable to Work or Telework Due to a Need for Leave for a Qualifying Reason
 - If Able to Telework Effectively = Then Not Eligible for Leave

- 2 Different Leave Entitlements Under FFCRA
 - 1. Emergency Paid Sick Leave
 - Six (6) Different Ways to Qualify
 - Up to 80 Hours Total. Not 80 hours for each way.
 - 2. Expanded FMLA
 - Only one (1) Way to Qualify. Up to 10 weeks.

Emergency Paid Sick Leave

- Six (6) Different Ways to Qualify
 - (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19
 - (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
 - (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
 - (4) The employee is caring for an individual who is subject to a government isolation order as described in subparagraph (1) or has been advised by a health care provider to self-quarantine
 - (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions
 - (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor

Paycheck Protection Plan (PPP) Loans

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Paycheck Protection Plan (PPP) Loans

- Applications for forgiveness are being processed now
- Landscape is shifting as to whether SBA's application process will be significantly more lenient or provide blanket forgiveness for loans at certain threshold
- Tips for application process
 - Application available at:
<https://www.sba.gov/sites/default/files/2020-05/3245-0407%20SBA%20Form%203508%20PPP%20Forgiveness%20Application.pdf>

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Workouts & Restructuring

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Workouts & Restructuring

- Potential Changes to Bankruptcy Code
 - Small business reorganization
 - Chapter 13s
- Boom in Refinancing

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