

States Enact Statutes that Protect Landlords from COVID-19 Premises Liability Claims

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A minority of states have enacted statutes and taken other action to protect business owners from claims by persons who allegedly were infected by COVID-19 on their premises.¹ The purpose of this article is to compare these statutes and discuss some of the differences between them. This article addresses statutes in effect as of October 27, 2020. The article does not address pending legislation. Readers interested in states not addressed below should research any pending statutes in those states.

States that provide broad protection

Twelve states have enacted statutes that provide owners with relatively broad protection: Georgia², Idaho³, Iowa⁴, Kansas⁵, Louisiana⁶, Mississippi⁷, Nevada⁸, Ohio⁹, Oklahoma¹⁰, Tennessee¹¹, Utah¹² and Wyoming¹³. In some of these states, a business owner including a landlord is immune from civil liability as long as the owner attempted in good faith to comply with guidance from public health agencies: Iowa, Kansas, Louisiana, Mississippi, Nevada, Oklahoma and Wyoming. In these states, the owner will have the burden of proving that it attempted to comply with public health guidance. In most of the twelve states, the owner is immune from civil liability as long as the owner did not act with willful misconduct or gross negligence: Georgia, Idaho, Iowa, Louisiana, Mississippi, Nevada, Ohio, Tennessee, Utah and Wyoming. In these states, the claimants will have the burden to prove that the owner acted with willful misconduct or gross negligence.

In states in which immunity exists if the owner made a good-faith effort to follow public health guidelines, one issue may be which public health guidelines the owner should have followed. Some of these statutes use only general language about public health guidelines, while others provide more specific guidance. The application of different public health guidelines could result in very different standards of care required by the owner. For example, the Oklahoma statute provides that the owner shall not be liable if the owner was “in compliance or consistent with federal or state regulations, a Presidential or Gubernatorial Executive Order, or guidance

¹ Resources that the authors have found helpful include the 50-state surveys of state laws of Akin Gump Strauss Hauser & Feld, <https://www.akingump.com/en/experience/industries/national-security/covid-19-resource-center/50-state-survey-coronavirus-related-stay-at-home-orders.html>; and Ogletree Deakins, <https://ogletree.com/app/uploads/covid-19/COVID-19-liability-shield-50-state-survey.pdf?Version=17>.

² S.B. 359, 2019-2020 Reg. Sess. (Ga. 2020)

³ H.B. 6, 2020 Extra. Sess. (Idaho 2020)

⁴ S.F. 2338, 88th Gen. Assemb. (Iowa 2020)

⁵ H.B. 2016, 2020 Spec. Sess. (Kan. 2020)

⁶ H.B. 826, 2020 Reg. Sess. (La. 2020)

⁷ S.B. 3049, 2020 Reg. Sess. (Miss. 2020)

⁸ S.B. 4, 32nd (2020) Spec. Sess. (Nev. 2020)

⁹ H.B. 606, 133rd Gen. Assemb. (Ohio 2020)

¹⁰ S.B. 1946, 2020 Reg. Sess. (Okla. 2020)

¹¹ S.B. 2, 2020 Spec. Sess. (Tenn. 2020)

¹² S.B. 3007, 2020 3rd Spec. Sess. (Utah 2020)

¹³ S.B. 1002, 2020 1st Spec. Sess. (Wyo. 2020)

applicable at the time of the alleged exposure.” The Ohio statute, on the other hand, includes findings that the recommendations from the government have not been consistent. It provides that governmental guidelines shall not create a duty of care, and further provides that a presumption exists that any government order is not admissible as evidence that a duty of care exists.

In addition to legislation, governors in two states have issued executive orders addressing liability of businesses. In Alabama, Governor Kay Ivey issued an executive order that states that a business shall not be liable for COVID-19 transmission unless the claimant shows by clear and convincing evidence that the claimant’s injury was caused by the business owner’s wanton or intentional misconduct.¹⁴ In Arkansas, the governor issued an executive order that provides that a person is immune from civil liability for damages caused by exposure to COVID-19 on premises owned or operated by the person unless the damage resulted from willful, reckless or intentional misconduct.¹⁵

States that provide narrower protection

In North Carolina, the statute only grants immunity from civil liability for “essential businesses” as defined by an executive order.¹⁶

Special provisions

Several states have special provisions that are unique to that state. For example, in Georgia, except for cases of gross negligence or intentional infliction of harm, a rebuttable presumption exists that a claimant assumed the risk of infection if a waiver of liability is on a receipt or proof of purchase for entry to premises, or if the owner has posted at the point of entry to the premises a written warning that the person entering the premises waives civil liability against the premises owner and operator. The Mississippi statute provides that any suit must be brought within two years of when the cause of action accrued, which is shorter than the general three-year statute of limitations. The Alabama executive order limits a claimant’s damages to actual damages unless the claimant experiences a serious physical injury as defined in the executive order and limits punitive damages to wrongful death claims.

Limitations on damages

While most of the state statutes that have been enacted provide a complete shield against liability, some only prohibit certain types of damages. For example, the statutes enacted in Louisiana, Mississippi and Nevada provide owners against claims for injuries or death. These statutes arguably do not provide protection against claims for economic damages.

Effective dates and retroactivity

Some of the statutes apply retroactively. For example, Iowa’s statute is retroactive to January 1, 2020, and the statutes enacted by Kansas, Louisiana, Mississippi and Ohio provide protection for owners retroactive to mid-March 2020. The statute enacted by Tennessee, on the other hand, is effective only as to claims arising after August 3, 2020, and the statute enacted by Georgia did not become effective until August 5, 2020. Some of the statutes have a specific expiration date. For example, the Kansas statute expires on January 26, 2021, and the Ohio statute

¹⁴ Eighth Supp. Emerg. Proclamation (Ala. May 8, 2020)

¹⁵ Exec. Order 20-33 (Ark. June 15, 2020)

¹⁶ S.B. 704, 2019-2020 Reg. Sess. (N.C. 2020)

expires on September 30, 2021. In other states, like Mississippi and North Carolina, the expiration date is tied to the end of the state of emergency.

Other defenses

In states that do not have statutes granting immunity to owners for civil liability, the owners may still have defenses based on other statutes or common-law doctrines. For example, the parameters of an owner's duty, if any, to ensure that tenants, customers and invitees will not be exposed to airborne viruses have not been established. Also, in order to establish a cause of action against an owner, a claimant will have to establish a causal connection between becoming infected with the virus and the owner's premises.

Federal legislation

Senate Republicans have filed a bill, the Safe to Work Act¹⁷, that would provide protection for businesses from lawsuits related to COVID-19 and that would pre-empt conflicting state laws. The bill would not bar claims based on exposure to the virus, but it would require a high standard of proof and impose monetary penalties for claims deemed meritless. The bill has not been enacted. According to an article in the *New York Times*, organized labor has opposed liability shields for employers out of fear that liability shields will lead to laxer protections for employees.¹⁸

Conclusion

With only a relatively small number of states having enacted liability shields for owners, and some of these liability shields being less than complete, it appears that most owners will not have the benefit of a liability shield and will be left to battle COVID-19 claims in court.

¹⁷ S.B. 4317, 116th Cong. (2020)

¹⁸ Ana Swanson and Alan Rappeport, *Businesses Want Virus Legal Protection. Workers are Worried.*, N.Y. Times, June 12, 2020.