The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 74
INTRODUCER:	Senator Brandes
SUBJECT:	COVID-19-related Claims Against Health Care Providers
DATE:	February 9, 2021
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bond	Cibula	JU	**Pre-meeting**
2.			HP	
3.			RC	

I. Summary:

SB 74 limits civil claims against health care providers related to the COVID-19 pandemic. The bill requires that the initial complaint in a COVID-19-related lawsuit be pled with particularity. The trial court must dismiss a case if not pled with particularity. The bill requires the claimant to prove that the health care provider was grossly negligent or engaged in intentional misconduct in failing to substantially comply with government health standards or guidance, in interpreting or applying the standards or guidance, or in the provision of a novel or experimental treatment. Additionally, a health care provider is immune from civil liability if supplies or personnel were not readily available to comply with the standards or guidance. A COVID-19-related claim against a health care provider must be commenced within 1 year.

The bill is effective upon becoming law and applies retroactively.

II. Present Situation:

In general, the purpose of the tort law is to compensate a person injured by the fault of another. It reflects society's general and common moral belief that we all should take reasonable steps not to harm our fellow humans and their property. The tort law is mostly common law, found by the judiciary and slowly developed and changed over centuries of practice to reflect the changing mores of the times. In modern times, tort law has been tweaked, modified, defined, and changed by statutory law, but remains in large part based on the common law.

COVID-19

The COVID-19 pandemic has affected the state of Florida in ways that were unimaginable 1 year ago. The toll on individuals, businesses, and the economy has been catastrophic. According to

the Department of Health, 1,744,619 positive COVID-19 cases have been diagnosed in the state, 73,266 residents have been hospitalized, and 27,019 Florida residents have died of the virus.[1]

As the pandemic forced businesses to close, millions of Americans lost their jobs. The U.S. economy contracted at the greatest rate since World War II. In Florida, general revenue collections for Fiscal Year 2019-20 were down nearly $1.9 billion from the forecast projections made in January 2020. The vast majority of the loss, 84.7 percent, came from a loss of sales tax revenues, the largest component and category most affected by the pandemic. The Revenue Estimating Conference adopted a forecast for sales tax revenues in December 2020, as compared to the January 2020 forecast, that anticipates a loss to General Revenue of approximately $2.0 billion in Fiscal Year 2020-21 and $1.0 billion in Fiscal Year 2021-22. The sales tax losses are attributable to a substantial loss in the tourism and recreation areas, often driven by out-of-state tourism, and also by reduced sales to local residents at restaurants and venues, including leisure activities impacted by the pandemic.[2]

Governor DeSantis issued Executive Order No. 20-52 on March 9, 2020, declaring a state of emergency and issuing guidelines to halt, mitigate, or reduce the spread of the outbreak. The order has been extended 5 times,[3] most recently by Executive Order No. 20-316, issued on December 29, 2020.

During the pandemic, government-issued health standards and guidance detailing how to best combat the virus have sometimes been in conflict. They sometimes changed rapidly, making appropriate responses difficult. Health care entities and professionals often scurried to provide appropriate responses based upon the information they received at any given time.

As health care entities struggle to re-open or keep their doors open, a growing concern has been expressed that unfounded or opportunistic lawsuits for COVID-19-related claims could threaten their financial survival. The concern is that time, attention, and financial resources diverted to respond to the lawsuits could be the difference between entities and professionals succeeding or failing as they attempt to emerge from the pandemic. One protection that has been offered is the provision of heightened legal immunity from COVID-19 claims to fend off meritless lawsuits, preserve scant resources, and encourage health care providers to continue to provide vital health care services.

COVID-19-Related Lawsuits

According to the Congressional Research Service,[4] a growing number of plaintiffs have filed tort lawsuits in hopes of being compensated for personal injuries that resulted from alleged exposure

[1] Florida Department of Health, Division of Disease Control and Health Protection, Florida's COVID-19 Data and Surveillance Dashboard (arcgis.com) (last visited Feb. 3, 2021).
[2] *Executive Summary, Revenue Estimating Conference for the General Revenue Fund & Financial Outlook Statement*, August 14, 2020, and subsequently updated. http://edr.state.fl.us/Content/conferences/generalrevenue/archives/200814gr.pdf.
[3] A state of emergency declared under the State Emergency Management Act may not last for more than 60 days unless it is renewed by the Governor. Section 252.36(2), F.S.
[4] The Congressional Research Service works solely for the U.S. Congress and provides policy and legal analysis to both members and committees of the House and Senate. It is a legislative branch agency housed within the Library of Congress. https://www.loc.gov/crsinfo/.

to COVID-19 or from the failure of a defendant to properly treat the virus. Some examples of the lawsuits include:

- The relatives of deceased family members, who allegedly contracted the virus in the workplace, have filed cases stating that the employers caused the decedents' deaths because they failed to implement workplace safety measures.
- Many cruise ship passengers have filed lawsuits against cruise lines alleging that the cruise line exposed them to the virus or caused them to contract the virus while on a cruise.
- Plaintiffs have sued assisted living facilities and nursing homes. They allege that their relatives died because these entities negligently exposed their relatives to the virus or failed to diagnose them in a timely or appropriate manner, and then treat the symptoms.
- Businesses that folded have sued their insurance companies challenging the denial of their coverage for claims of business interruptions.
- Consumers have filed suits seeking financial reimbursement for travel, events, and season passes at recreational venues which were cancelled or closed because of the pandemic.
- Employees have sued their employers alleging that the employer unlawfully terminated them because they contracted the virus.
- Stockholders have sued public companies alleging that the companies violated federal securities laws when they did not accurately state the pandemic's toll on the companies' finances as required in mandatory disclosure statements.[5]

The Congressional Research Service states that proponents of COVID-19 liability protections assert that litigation and the cost of legal fees will cripple businesses, individuals, schools, and non-profit organizations, and deter the organizations from reopening. Proponents are concerned that these entities will shape their business decision-making to avoid liability. This unwillingness to continue or reopen businesses will delay the national economic recovery. Others believe that many COVID-19-related claims "are generally meritless, and therefore serve primarily to benefit plaintiffs' lawyers rather than vindicate injured person's legal rights."[6]

In contrast, opponents of liability protections disagree. They maintain that organizations would encounter only minimal legal exposure for COVID-19 liability. The opponents also contend that providing a shield for defendants would harm the public by permitting defendants to commit negligent acts with legal protections. It would also remove any incentives for businesses to take precautions against the spread of the virus.[7]

Lawsuits Filed

It is difficult to determine how many COVID-19-related lawsuits have been filed in the state. Staff contacted the Office of the State Courts Administrator to ask if it could determine how many claims have been filed in the state courts. The office did not have that data available. Staff is aware that claims have been filed in the federal district courts of the state. Many of those federal claims are suits against cruise ship lines where passengers allege that they contracted the virus while on the cruise.

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[5] Congressional Research Service, *COVID-19 Liability: Tort, Workplace Safety, and Securities Law* (Sept. 24, 2020) *available at:* https://crsreports.congress.gov/product/pdf/R/R46540.
[6] *Id*. at 2.
[7] *Id*. at 3.

Legislative and Executive Responses of Other States

Currently, 34 states are known to have in place or have recently enacted some form of liability protection for health care entities and/or professionals related to the pandemic, through either legislation, executive order, or application of existing law.[8]

Tort Law - In General

A tort is a civil legal action to recover damages for a loss, injury, or death due to the conduct of another. Some have characterized a tort as a civil wrong, other than a claim for breach of contract, in which a remedy is provided through damages.[9] When a plaintiff files a tort claim, he or she alleges that the defendant's "negligence" caused the injury. Negligence is defined as the failure to use reasonable care. It means the care that a reasonably careful person would use under similar circumstances. According to the Florida Standard Jury Instructions, negligence means "doing something that a reasonably careful person would not do" in a similar situation or "failing to do something that a reasonably careful person would do" in a similar situation.[10]

When a plaintiff seeks to recover damages for a personal injury and alleges that the injury was caused by the defendant's negligence, the plaintiff bears the legal burden of proving that the defendant's alleged action was a breach of the duty that the defendant owed to the plaintiff.[11]

Negligence Pleadings

To establish a claim for relief and initiate a negligence lawsuit, a plaintiff must file a "complaint." The complaint must state a cause of action and contain: a short and plain statement establishing the court's jurisdiction, a short and plain statement of the facts showing why the plaintiff is entitled to relief, and a demand for judgment for relief that the plaintiff deems himself or herself entitled. The defendant responds with an "answer," and provides in short and plain terms the defenses to each claim asserted, admitting or denying the averments in response.[12]

Under the Florida Rules of Civil Procedure, there is a limited group of allegations that must be pled with "particularity." These allegations include allegations of fraud, mistake, and a denial of performance or occurrence.[13] Pleading with particularity means that the complaint must clearly and concisely set out the essential facts of the claim, and not just legal conclusions. The elements of the claim are required to be alleged with sufficient particularity so that the trial judge, in reviewing the ultimate facts alleged, may rule as a matter of law whether or not the facts alleged

[8] American Tort Reform Assn., *Summary of COVID-19 Executive Orders and Enacted Legislation*, https://www.atra.org/wp-content/uploads/2020/10/Summary-of-COVID-19-Executive-Orders-and-Enacted-Legislation-2.pdf Data through December 17, 2020.
[9] BLACK'S LAW DICTIONARY (11th ed. 2019).
[10] Fla. Std. Jury Instr. Civil 401.3, *Negligence*.
[11] Florida is a comparative negligence jurisdiction as provided in s. 768.81(2), F.S. In lay terms, if a plaintiff and defendant are both at fault, a plaintiff may still recover damages, but those damages are reduced proportionately by the degree that the plaintiff's negligence caused the injury.
[12] Fla. R. Civ. P. 1.110.
[13] Fla. R. Civ. P. 1.120(b) and (c).

are sufficient as the factual basis for the inferences the pleader seeks to draw and are sufficient to state a cause of action.[14]

Errors in the initial complaint are common. A defendant discovering such error will file a motion to dismiss in lieu of an answer. Where the trial court agrees with the defendant's motion to dismiss based on a defective complaint, the court must typically give the plaintiff the opportunity to file an amended complaint.[15] An amended complaint does not require personal service and relates back in time to the filing of the original complaint for purposes of calculating a limitations period.[16] A court-ordered dismissal of a lawsuit does not bar refiling of the case unless the court specifies that the dismissal is "with prejudice."

Four Elements of a Negligence Claim

To establish liability, the plaintiff must prove four elements:
- Duty – That the defendant owed a duty, or obligation, of care to the plaintiff;
- Breach – That the defendant breached that duty by not conforming to the standard required;
- Causation – That the breach of the duty was the legal cause of the plaintiff's injury; and
- Damages – That the plaintiff suffered actual harm or loss.

Burden or Standard of Proof

A "burden of proof" is the obligation a party bears to prove a material fact. The "standard of proof" is the level or degree to which an issue must be proved.[17] As mentioned above, the plaintiff carries the burden of proving, by a specific legal standard, that the defendant breached the duty that was owed to the plaintiff that resulted in the injury. In civil cases, two standards of proof generally apply:
- The "greater weight of the evidence" standard, which applies most often in civil cases, or
- The "clear and convincing evidence" standard, which applies less often, and is a higher standard of proof.[18]

However, both of these standards are lower than the "reasonable doubt" standard which is used in criminal prosecutions."[19] Whether the greater weight standard or clear and convincing standard applies is determined by case law or the statutes that govern the underlying substantive issues.[20]

Greater Weight of the Evidence

The greater weight of the evidence standard of proof means "the more persuasive and convincing force and effect of the entire evidence in the case."[21] Some people explain the "greater weight of the evidence" concept to mean that, if each party's evidence is placed on a balance scale, the side that dips down, even by the smallest amount, has met the burden of proof by the greater weight

[14] *Cedars Healthcare Grp., Ltd. v. Mehta*, 16 So. 3d 914, 917 (Fla. 3rd DCA 2009).
[15] "Leave of court [to amend a pleading] shall be given freely when justice so requires." Fla. R. Civ. P. 1.190(a).
[16] Fla. R. Civ. P.1.190(c).
[17] 5 Fla. Prac. Civil Practice s. 16.1, (2020 ed.)
[18] *Id*.
[19] Thomas D. Sawaya, *Florida Personal Injury Law and Practice with Wrongful Death Actions*, s. 24.4 (2020).
[20] 5 Fla. Prac. Civil Practice s. 16.1 (2020 ed.).
[21] Fla. Std. Jury Instr. 401.3, *Greater Weight of the Evidence*.

of the evidence. The greater weight of the evidence standard was formerly known the preponderance of the evidence standard.

Clear and Convincing

The clear and convincing standard, a higher standard of proof than a preponderance of the evidence, requires that the evidence be credible and the facts which the witness testifies to must be remembered distinctly. The witness's testimony "must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue." The evidence must be so strong that it guides the trier of fact to a firm conviction, to which there is no hesitation, that the allegations are true.[22]

Standards of Care and Degrees of Negligence

Courts have developed general definitions for the degrees of negligence.

Slight Negligence

Slight negligence is generally defined to mean the failure to exercise a great amount of care.[23]

Ordinary Negligence

Ordinary negligence, which is also referred to as simple negligence, is the standard of care applied to the vast majority of negligence cases. It is characterized as the conduct that a reasonable and prudent person would know could possibly cause injury to a person or property.[24]

Gross Negligence and Intentional Misconduct

Gross negligence means the failure of a person to exercise slight care. Florida courts have defined gross negligence as the type of conduct that a "reasonably prudent person knows will probably and most likely result in injury to another" person.[25] In order for a plaintiff to succeed on a claim involving gross negligence, he or she must prove:

- Circumstances, which, when taken together, create a clear and present danger;
- Awareness that the danger exists; and
- A conscious, voluntary act or omission to act, that will likely result in an injury.[26,27]

Intentional misconduct means that the defendant had actual knowledge of the wrongfulness of the conduct, that there was a high probability of injury or damage to the claimant and, despite that knowledge, the defendant intentionally pursued that course of conduct, resulting in injury or damage.[28]

[22] *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983); Sawaya, *supra* note 19.
[23] Sawaya, *supra* note 19, at s. 2:12.
[24] *Id*.
[25] *Id.*
[26] *Id*.
[27] Culpable negligence is a fourth degree of negligence but is not discussed in this analysis.
[28] Fla. Std. Jury Instr. 503.1, *Punitive Damages - Bifurcated Procedure*.

Tort Laws Applicable to COVID-19 Lawsuits against Health Care Providers and Professionals

There is no established tort law specific to claims related to the COVID-19 pandemic. Absent legislative action, it will take years before the appellate courts hear and resolve the outstanding cases related to COVID-19 in order to develop common law principals applicable to COVID-19. In a case involving tuberculosis, an airborne disease, one federal trial court has found that "negligent transmission of a contagious disease is not actionable under Florida common law."[29] Absent current clear directions from the courts, there are two likely theories of common law negligence that are likely to be used by plaintiffs seeking damages from health care providers: premises liability and medical malpractice. It is also possible that a claim could be made on a contract theory.

Premises Liability

Premises liability refers to the duty of an individual or entity that owns or controls real property to reasonably operate and maintain such property for the safety of those who enter or remain on such property. There are different standards of negligence for premises liability based on the legal status of the injured party. However, in most cases related to health care providers the patient or client or supplier is a legal invitee, and so that standard is appropriate for discussion here. As to an invitee, a landowner or possessor is liable if he/she/it:

- Negligently failed to maintain the premises in a reasonably safe condition, or
- Negligently failed to correct a dangerous condition about which the defendant either knew or should have known, by the use of reasonable care, or
- Negligently failed to warn the claimant of a dangerous condition about which the defendant had, or should have had, knowledge greater than that of claimant; and, if so,
- Such negligence was a legal cause of loss, injury or damage.[30]

Medical Negligence

Negligence of a medical provider is the failure to use reasonable care. Reasonable care on the part of a physician, hospital, or health care provider is that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful physicians, hospitals or health care providers. Negligence on the part of a physician, hospital, or health care provider is doing something that a reasonably careful physician, hospital, or health care provider would not do under like circumstances or failing to do something that a reasonably careful physician, hospital, or health care provider would do under like circumstances.[31]

Procedures for the filing and prosecution of a medical negligence claim are found in ch. 766, F.S. One such requirement is that the plaintiff's attorney certify that he or she has investigated the claim and found a good faith belief that grounds exist for an action against each named

[29] *Quezada v. Circle K Stores, Inc*., No. 204CV190FTM33DNF, 2005 WL 1633717, at 2 (M.D. Fla. July 7, 2005) (convenience store patron contracted tuberculosis because store employee known to have tuberculosis was allowed to work).
[30] Fla. Std. Jury Instr. 401.20 *Issues On Plaintiff's Claim — Premises Liability*.
[31] Fla. Std. Jury Instr. 402.4 *Medical Negligence*.

defendant. A lawyer may support the good faith finding by way of a reviewing physician affidavit. The affidavit is not attached to the complaint or available in discovery.[32]

Breach of contract is not a tort claim. The cause of action is similar, in that the injured party must show duty, breach and damages. In contract law, the parties have a relationship defined by a contract. The contract spells out the duties owed to one another, and the potential damages recoverable. However, duties beyond those specifically listed in the contract may be implied based on industry custom, regulation, or mutual understanding of the parties. So, for instance, it is unlikely that a nursing home contract would say how the nursing home would deal with the unique challenges of COVID-19. Still, most courts would find that a nursing home has the implied contractual duty to undertake commercially reasonable measures for infection control consistent with applicable laws and regulations, and as such a nursing home may be found to be in breach of contract for failing to do so.

Employee Tort Claims Against Their Employer

When an employee suffers a personal injury or death at work, it is often due the negligence of his or her employer or co-worker, or most commonly, the employee's own negligence. Worker's compensation laws do not care who is at fault. Under worker's compensation law, an injured employee's medical bills and (a portion of) lost wages are covered, regardless of fault but with a caveat: the employee may not file a traditional tort lawsuit against the employer or fellow employee except under very limited circumstances.

An employee may sue his or her employer in a traditional tort action only if one of these situations apply:

- The employer failed to have required worker's compensation coverage.[33]
- The employer commits an intentional tort that causes the injury or death of the employee. An intentional tort is where:
  - The employer deliberately intended to injure the employee; or
  - The employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.[34]

An employee may sue a fellow employee only if one of these situations apply:

- The fellow employee acted with willful and wanton disregard, unprovoked physical aggression, or with gross negligence, and such acts result in injury or death; or
- The fellow employee is an employee of the same employer but each was assigned primarily to unrelated works within private or public employment.[35]

[32] Section 766.104, F.S.
[33] Section 440.11(1)(a), F.S.
[34] Section 440.11(1)(b), F.S.
[35] *Id*.

Limitations Periods

A limitations period is a limit upon the time that a plaintiff or petitioner has to file a complaint. Expiration of a limitations period is an absolute defense to the action. There are two forms of limitation periods, known as a statute of limitations and a statute of repose. A statute of limitations is a "law that bars claims after a specified period; . . . a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)."[36] A statute of limitations may be tolled, such tolling being commonly available to minors and incompetents. By contrast, a statute of repose is a "statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury."[37] The expiration of either form of limitations is a bar to the case. The purpose of limitations periods is to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh.

The statute of limitations for a general tort claim is 4 years from when the cause of action accrued.[38] There is no statute of repose applicable to general tort claims. The statute of limitations for a medical negligence action is 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence. The statute of repose for medical negligence is 4 years from the date of the incident or occurrence out of which the cause of action accrued, except that this 4-year period does not bar an action brought on behalf of a minor on or before the child's 18th birthday. However, where fraud, concealment, or intentional misrepresentation of a medical provider can be shown the statute of limitations is 2 years from discovery, and the statute of repose is 7 years from the date of the incident.[39]

III. Effect of Proposed Changes:

SB 74 creates s. 768.381, F.S., to govern COVID-19-related tort claims against health care providers.

WHEREAS Clauses

According to the "Whereas Clauses" the State is suffering from the outbreak of the novel coronavirus identified as COVID-19, a potentially deadly virus. A national emergency was declared on January 3, 2020, and a corresponding state emergency declared March 1, 2020. In that same month, federal guidelines first recommended the deferral of nonessential medical procedures to, in part, conserve critical health care resources. On March 20, 2020, the Governor in turn issued an executive order prohibiting certain non-urgent or non-emergency medical procedures. This order was modified on April 29, 2020, to allow such procedures, but only if the medical provider had adequate supplies of personal protective equipment. While still learning how to slow the spread of the virus and how to treat the afflicted, various measures have been

[36] BLACK'S LAW DICTIONARY (11th ed. 2019).
[37] *Id*.
[38] Section 95.11(3)(a), F.S.
[39] Section 95.11(4)(b), F.S.

taken by governments to regulate individuals, businesses, and health care providers. Health care providers have struggled to acquire adequate personal protective equipment and sufficient staffing levels. Health care providers are essential to the state's survival. Health care providers have stayed open despite the risks. Actions that seem reasonable during an emergency may be construed differently in hindsight. Health care providers facing the continuation of this pandemic should focus on patient care and not on the fear of unfounded lawsuits. The Legislature finds that there is an overpowering public necessity to enact legislation to deter unfounded lawsuits against health care providers, considering the extraordinary circumstances of this public health emergency.

Legislative findings are given great weight by the courts in determining the constitutionality of a law. The Florida Supreme Court ruled that "legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous."[40]

Definitions

The term "COVID-19" is defined to mean the novel coronavirus identified as SARS-CoV-2; any disease caused by SARS-CoV-2, its viral fragments, or a virus mutating therefrom; and all conditions associated with the disease which are caused by SARS-CoV-2, its viral fragments, or a virus mutating therefrom.

The term "COVID-19-related claim" is defined to mean a civil liability claim, whether pled as negligence, breach of contract, or otherwise, against a health care provider which directly, indirectly, or in effect alleges that:

- The health care provider failed to follow clinical authoritative or government-issued health standards or guidance relating to COVID-19;
- The health care provider failed to properly interpret or apply the standards or guidance with respect to the provision of health care or related services, or lack thereof, or the allocation of scarce resources, or assistance with daily living;
- The health care provider was negligent in the provision of a novel or experimental COVID-19 treatment; or
- In the absence of applicable standards and guidance specific to COVID-19, the health care provider failed to follow clinical authoritative or government-issued health standards or guidance relating to infectious diseases in preventing the transmission of COVID-19 or in diagnosing or treating a person for COVID-19.

The term "government-issued health standards or guidance" means any of the following that are related to COVID-19 or other infectious diseases and that describe the manner in which a health care provider must operate at the time of the alleged act or omission:

- A federal, state, or local law, regulation, or ordinance;
- A written order or other document published by a federal, state, or local government or regulatory body;
- Standards or guidance issued by the Agency for Health Care Administration or the United States Centers for Disease Control and Prevention, the National Institutes of Health, the

[40] *University of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993) (finding a medical malpractice tort reform constitutional).

United States Food and Drug Administration, or the Centers for Medicare and Medicaid Services; or
- Guidance issued by a clinical professional organization which was used by the Federal Government in developing a response to COVID-19.

The term "health care provider" includes the following entities and individuals:
- The following regulated entities:
  - Laboratories authorized to perform testing under the Drug-Free Workplace Act
  - Birth centers
  - Abortion clinics
  - Crisis stabilization units
  - Short-term residential treatment facilities
  - Residential treatment facilities
  - Residential treatment centers for children and adolescents
  - Hospitals
  - Ambulatory surgical centers
  - Nursing homes
  - Assisted living facilities
  - Home health agencies
  - Nurse registries
  - Companion services or homemaker services providers
  - Adult day care centers
  - Hospices
  - Adult family-care homes
  - Homes for special services
  - Transitional living facilities
  - Prescribed pediatric extended care centers
  - Home medical equipment providers
  - Intermediate care facilities for persons with developmental disabilities
  - Health care services pools
  - Health care clinics
  - Organ, tissue, and eye procurement organizations
- A federally-certified clinical laboratory providing services in this state or services to health care providers in this state
- A federally qualified health center
- Any site providing health care services which was established for the purpose of responding to the COVID-19 pandemic pursuant to any federal or state order, declaration, or waiver
- A health care practitioner, which means individuals practicing in the following professions:
  - Acupuncture
  - Medicine (Physician)
  - Osteopathy (Osteopathic Physician)
  - Chiropractic
  - Podiatry
  - Naturopathy
  - Optometry
  - Nursing
  - Pharmacy

- Dentistry, including dental hygienists and dental labs
- Midwifery
- Speech-Language Pathology and Audiology
- Nursing Home Administration
- Occupational Therapy
- Respiratory Therapy
- Dietetics and Nutrition Practice
- Athletic Trainers
- Orthotics, Prosthetics and Pedorthics
- Electrolysis
- Massage
- Clinical Laboratory Personnel
- Medical Physicists
- Dispensing of Optical Devices
- Dispensing of Hearing Aids
- Physical Therapy
- Psychological Services
- Clinical, Counseling and Psychotherapy Services
- Radiology

- A Home Health Aide

Procedural Requirements

The bill requires that a complaint in a civil action against a health care provider based on a COVID-19-related claim must be pled with particularity. The complaint must allege facts supporting the claim in sufficient detail to support each element of the claim. Where the complaint does not meet this standard, the case must be dismissed.

The bill does not specify how the courts should treat this dismissal. If the courts treat this like a dismissal for failure to state a cause of action upon which relief may be granted, the dismissal would ordinarily be with leave to amend.[41] However, while there is no magic number of attempts at crafting an amended complaint, a trial court may find that dismissal with prejudice is warranted where the plaintiff has made repeated failing attempts at properly crafting a complaint and the complaint clearly cannot be fixed.[42]

The bill specifies that a physician's affidavit (a provision in the mandatory pre-suit investigation in a medical negligence action) is not required for a claim under this section.

Standard of Proof Required for Claim

The bill requires a plaintiff to prove negligence "by the greater weight of the evidence." This is the standard of proof required in most civil actions.

[41] Fla. R. Civ. P. 1.190(a) (Leave of court to amend shall be given freely when justice so requires).
[42] *Kohn v. City of Miami Beach*, 611 So. 2d 538, 539 (Fla. Dist. Ct. App. 1992) ("as an action progresses, the privilege of amendment progressively decreases to the point that the trial judge does not abuse his [or her] discretion in dismissing with prejudice.")

Liability Standard and Limited Absolute Defense

The bill requires a plaintiff to prove that the health care provider was grossly negligent or engaged in intentional misconduct:

- By failing to substantially follow authoritative or applicable government-issued health standards or guidance relating to COVID-19;
- In interpreting or applying the standards or guidance with respect to the provision of health care or related services, or lack thereof, or the allocation of scarce resources or assistance with daily living; or
- In the provision of a novel or experimental COVID-19 treatment.

This liability standard is more stringent than that applicable to an ordinary negligence case.

Additionally, a health care provider is fully immune from liability for a COVID-19-related claim if supplies, materials, equipment, or personnel necessary to comply with the applicable government-issued health standards or guidance at issue were not readily available or were not available at a reasonable cost. The bill does not define the standards for readily available or reasonable cost.

Limitations Period

The bill creates a statute of repose requiring that a case be filed the later of 1 year after:

- The death of the injured individual due to COVID-19;
- Hospitalization due to COVID-19;
- First diagnosis of COVID-19; or
- The effective date of this bill.

Relationship to Other Laws

The bill provides that s. 768.381, F.S., created by this bill, prevails over any conflicting provision of law, but only to the extent of such conflict. This provision does not apply to conflicts related to claims under the worker's compensation law, thus preserving worker's compensation benefits together with the worker's compensation liability shield protecting employers and fellow employees from tort claims.

Applicability

The bill applies to COVID-19-related causes of action that accrue before the later of 1 year after the termination or expiration of:

- The state public health emergency relating to COVID-19 which was declared by the State Surgeon General; or
- Any nationwide emergency declaration by the Federal Government.

The bill provides for severability.

The bill is retroactive, except that it does not apply in a civil action against a particular named health care provider filed before the effective date of the bill.

The bill is effective upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

As to tort law in general: In 1973, the Florida Supreme Court found that:

> where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the [1968 Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. s 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[43]

A law that merely alters the standards of care in a tort action does not abolish the right and thus does not impair access to courts.[44] The bill contains findings of fact that may be evidence of an overwhelming public necessity for the passage of this bill.

As to a shortened limitations period: This bill reduces the amount of time that a plaintiff has to bring an action. If, however, the cause of action accrues before the effective date of the bill, which is the date it becomes law, the plaintiff has 1 year from the effective date of the bill to bring a claim. While this could be a reduction in the amount of time that a

[43] *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).
[44] *Abdin v. Fischer*, 374 So. 2d 1379, 1381 (Fla. 1979). See also, *Eller v. Shova*, 630 So. 2d 537 (Fla. 1994) (increasing fellow worker exception in worker's compensation law from gross negligence to culpable negligence is constitutional).

plaintiff has to bring a COVID-19-related claim, there is precedent for this. Court opinions have held that a reduction in the statute of limitations is not unconstitutional if the claimant is given a reasonable amount of time to file the action.[45]

As to retroactivity: Most bills apply prospectively to actions occurring after their effective date; although, the Legislature may pass a retroactive law unless prohibited. Section 3 of the bill states:

> This act applies retroactively. However, this act does not apply in a civil action against a particular named health care provider which is commenced before the effective date of this act.

Legislation may not be applied retroactively if it "impairs vested rights, creates new obligations, or imposes new penalties."[46] Therefore, if a court found that the bill did any of these prohibited things, the court would have to reject any retroactive application of the bill. However, a mere change to procedure such as requiring certain pleadings or changing the burden of proof may be applied retroactively to existing causes of action.[47]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector fiscal impacts of this bill are indeterminate and speculative. If the effect of the bill is to codify what the courts would have found to be the common law of the state, then the bill will have a significant positive impact on the private sector in general through the avoidance of needless litigation and its attendant costs. If the effect of the bill is to limit lawsuits that otherwise would have yielded recoveries for injured parties, the bill will have a positive fiscal impact on the healthcare industry and a corresponding negative fiscal impact on injured individuals.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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[45] *Foley v. Morris*, 339 So. 2d 215 (Fla. 1976).
[46] *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1955).
[47] *Litvin v. St. Lucie County Sheriff's Department*, 599 So. 2d 1353 (Fla. 1st DCA 1992) (changing the burden of proof).

VIII. Statutes Affected:

This bill creates section 768.381 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.