

How Legislators Adapted Liability Protections for PPE Suppliers in Age of COVID

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In March 2020, the coronavirus (COVID-19) pandemic rapidly spread to every corner of our globe. As grocery store shelves were completely cleared of masks, hand sanitizer and gloves overnight, there suddenly became an extraordinary need for personal protective equipment (PPE) for every person in the world. Health care systems across the United States reported unprecedented shortages of PPE, which severely crippled their ability to keep health care professionals and patients safe. As rates of infection surged on a global scale, the world suddenly faced a seemingly insurmountable production challenge. Fortunately, a generous amount of assorted companies rose to the occasion. Some of these companies had no previous experience manufacturing, supplying and distributing PPE, but they understood the critical need for these supplies and adjusted their expertise. But, as they say, no good deed goes unpunished. With these acts of valor, a new problem arose—these companies needed legal protection in order to perform their altruistic services without fear of excessive exposure to liability claims. As the COVID-19 pandemic continued to spread, the pressure to implement legal safeguards for these philanthropic entities steadily mounted.

With a lack of federal guidance on this issue, states were left to fend for themselves and create their own guidelines as to how manufacturers of PPE would be protected from end users alleging they became infected with COVID-19 after utilizing their protective equipment. Pennsylvania has attempted to create its own legislation to address these issues.

On May 6, 2020, Gov. Tom Wolf issued an order appointing licensed, certified, registered or otherwise authorized health care professionals engaged in providing COVID-19 care as "agents of the commonwealth." This designation grants certain groups immunity from civil liability for their good-faith acts taken in response to the call for an increased health care workforce during the pandemic. There are a few caveats, however. First, the civil liability immunity does not extend to acts or omissions that constitute a crime, gross negligence, fraud, malice or other willful misconduct. Second, this grant of immunity only relates to the commonwealth's COVID-19 disaster emergency response and excludes entities that do not qualify as authorized health care providers. Many felt this order was too narrow as it excluded many of the

other professionals that had recently become involved in efforts to protect Pennsylvania citizens from COVID-19.

In July 2020, Pennsylvania Sen. Lisa Baker (R, Dist. 20) introduced Senate Bill 1239 to provide certain protections for health care employees, manufacturers, distributors and suppliers of PPE. This bill broadened the definition of "health care providers" under Wolf's May 6, 2020, order to include manufacturers, suppliers, distributors and donors of PPE in certain circumstances. The proposed bill also included a provision granting liability protection to those who simply believe their good-faith act or omission complied with the applicable state safety guidelines. Further, this bill also required the elevated standard of "clear and convincing evidence" in order to subject these groups to liability for acts of gross negligence, recklessness, willful misconduct or intentional infliction of harm in connection with their COVID-19 efforts. Some legislators, however, felt this bill provided unrestrained liability protection. The bill eventually died after it was referred to the Senate Judiciary Committee.

In November 2020, there was another attempt to create fitting legislation to address liability protections for PPE manufacturers in Pennsylvania. Approved by the Pennsylvania House and Senate, H.B. 1737 applied to health care providers, PPE manufacturers, schools, universities and childcare providers, as well as business and government service providers. It even provided certain liability protections for farmers who wanted to host agritourism attractions (i.e., hayrides). On Nov. 20, 2020, the Pennsylvania General Assembly passed H.B. 1737.

House Bill 1737 was subsequently vetoed by Wolf, who authored a veto message providing further clarification on his decision. Specifically, Wolf stated that, in his view, House Bill 1737 provided "broad, overreaching immunity from civil liability during the current pandemic." Wolf also noted that he supported and provided protections against liability for emergency and disaster services activities taken by health care practitioners under his prior executive order of May 6, 2020. Based on his message, it appears that Wolf has attempted to take the position that while he supports protections for manufacturers of PPE, he felt that the bill went too far in expanding protections, exposing a risk that entities could act with a disregard for public safety.

Wolf has faced both criticism for his decision to veto House Bill 1737, as well as praise from those who agree that the bill simply went too far. Those who opposed his actions have primarily expressed concerns that his veto will leave businesses across the commonwealth completely unprotected despite their best efforts to efficiently produce effective PPE. Others expressed concern that his actions could benefit unscrupulous attorneys looking to take advantage of the situation by filing lawsuits against manufacturers who may not have been taking the same kind of protective measures they would have previously, given the COVID-19 emergency. Conversely, a majority of those in support of Wolf's decision appear to agree that the proposed liability protections discussed in House Bill 1737 were too extensive and would make it difficult or impossible for individuals who were harmed by deficient manufacturing of PPE to bring their claims in a court of law. They also appear to be highlighting, as Wolf did himself, his executive order signed May 6, 2020, that affords protections for health care providers

and practitioners providing care in response to the COVID-19 pandemic.

Ultimately, the question now is, where do PPE manufacturers stand with regard to legal protections that might shield them from potential lawsuits? At the present time, it does not appear that significant measures have been taken to make these entities immune from suit or to provide protections that make it more difficult for fruitful claims to be brought against them. While some will take the position that this is a good thing, as the average consumer should not be unnecessarily prevented from having their day in court due to arguably defective or faulty PPE, others will raise concerns that those manufacturers who are making good

faith efforts to move quickly in a time of crisis may face significant subsequent litigation. Going forward, it remains to be seen whether there will be a true increase in PPE-related claims over the next year, how judges will rule on these issues, and whether we will see any additional action from the legislature to attempt to increase protections for PPE manufacturers.



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