



The COVID-19 Recovery Act and Limited Immunity for Essential Businesses

Whether your business has remained fully open during Governor Cooper’s “stay-at-home” order, is providing reduced services and offerings, or has temporarily closed, the business community at large has expressed concerns about future legal claims by customers and employees related to COVID-19 illness. This is a topic that has been discussed at the federal level and by several states, including North Carolina. On May 2, 2020, the General Assembly ratified Senate Bill 704: the COVID-19 Recovery Act, and on May 4, 2020, Governor Cooper signed it into law.

North Carolina’s COVID-19 Recovery Act contains a number of provisions in its 70 pages, including several provisions dealing with limitations on liability for health care workers, essential businesses, and emergency response entities. As essential businesses, let’s look at what this means for restaurant and lodging industry in North Carolina:

Who is covered?

Section 4.14(a) of the Act specifically amends the Commerce and Business Chapter of the North Carolina General Statutes (Chapter 66) by adding an Article entitled “Limited Business Immunity”. This new provision provides immunity from civil liability to an essential business for certain claims for COVID-19 related injuries and deaths. Under this new provision, an “essential business” is defined to include businesses, non-profits, educational institutions and governmental entities that were identified in Executive Order No. 121, issued by Governor Cooper on March 27, 2020 (the “Stay-at-Home Order”) as well as any amendments and extensions¹. It also includes any business that the North Carolina Department of Revenue considers essential, and it appears this catchall is intended to cover businesses that were excluded from Executive Order No. 121 but that have been designated as “essential” upon a request to the NCDOR.²

What Protections Are Provided?

The Limited Business Immunity provides immunity to essential businesses from civil liability for certain claims. In, particular, the limited immunity under this new law only applies to claims:

- Made by a customer or employee;
 - For injuries or death;
 - Allegedly caused as a result of the person contracting COVID-19 while doing business with the essential business *or* while employed by the essential business;
- and

¹ <https://governor.nc.gov/documents/executive-order-no-121>

² <https://www.ncdor.gov/home/ncdor-actions-covid-19/covid-19-essential-businesses>

- Arising from acts or omissions taking place between March 27, 2020, when the “stay-at-home” order was issued and the date Executive Order 116³, in which Governor Cooper declared a State of Emergency, is rescinded or expires.

The limited immunity provided for in the COVID-19 Recovery Act applies to any claims filed on or after March 27, 2020.

Complying with Best Practices

While the limited immunity in the COVID-19 Recovery Act provides some protection to essential businesses that have been operating throughout the duration of the “stay-at-home” order and will provide some protection to essential businesses as our state works towards reopening the economy, it does not provide for complete immunity. You should be mindful that no immunity is available to an essential business if the customer’s or employee’s injuries or death were caused by the gross negligence, reckless misconduct or intentional infliction of harm by the essential business. The provisions of the Act sought to balance the need for protection for essential businesses from COVID-19 related claims with the need for those same businesses to follow guidelines set forth by our state government and its various agencies and to use reasonable care in their day-to-day operations given the pandemic.

Why do these limitations on immunity under the COVID-19 Act matter to you? The most common type of claim for personal injuries in North Carolina is a claim for negligence – the breach of a duty of care owed to your customer. This new limited immunity provides a shield for essential business from civil liability for ordinary negligence. However, a customer only has to claim that their injury arose from the gross negligence or reckless misconduct of the restaurant or other essential business in order to create a question of fact that will have to be litigated – i.e., whether or not there is any evidence that the business’ conduct went beyond ordinary negligence. This is why it is so important that operators in the restaurant and lodging industries continue to not only comply with the regulations that have been in place and have nothing to do with COVID-19, but also to pay close attention to the recommendations issued by our state government and its various agencies for best practices now and as we enter the COVID-19 recovery period.

As you all know, the North Carolina Restaurant and Lodging Association’s development of the NC Promise program⁴ was designed to set out best practices and training for restaurant operators during the COVID-19 recovery. This program highlights all the things that our industry members already do on a day-to-day basis that provide sanitation and safeguards in their businesses for the benefit of customers and employees – and then goes further in outlining suggested standards for use as our state begins allowing reopening of restaurants and bars. Operators should stay tuned for Governor Cooper’s response to the proposed NC Promise program in conjunction with possible reopening of restaurants for patio and dine-in service during the COVID-19 recovery period.

What About Worker’s Compensation Claims?

³ <https://governor.nc.gov/documents/executive-order-no-116>

⁴ <https://www.ncrla.org/training/ncrestaurantpromise/>

The limited immunity provided under the COVID-19 Recovery Act does not preclude an employee from seeking workers' compensation benefits under Chapter 97 of the North Carolina General Statutes. There are two House Bills that were filed in the General Assembly on May 1, 2020, that propose to amend North Carolina's workers' compensation laws to include coronavirus infection or pandemic infection as an "Occupational Disease" under Chapter 97.5. Under the proposed legislation, a "covered person" who contracts a coronavirus or pandemic infection "shall be presumed" to have contracted it "due to exposure in the course of the covered person's employment". House Bill 1056 limits a "covered person" to certain employees of state or local government, its agencies and certain health care workers, while House Bill 1057 includes employees of an essential business that are required to work during a pandemic, "including food service, retail, and other essential personnel". Clear and convincing evidence would be required to rebut this presumption. This is certainly legislation to watch as we move forward.

Conclusion

A full copy of the Limited Business Immunity provisions in the COVID-19 Recovery Act can be found [here](#), with the provisions beginning at the very bottom of the first page. If you have questions or need further information, reach out to the Retail, Restaurant & Hospitality Practice Group at CSH Law. Restaurant and Hospitality Industry-Specific resources can be found through the North Carolina Restaurant & Lodging Association's site.

⁵ See House Bill 1056 <https://www.ncleg.gov/BillLookUp/2019/H1056> and House Bill 1057 <https://www.ncleg.gov/BillLookUp/2019/H1057>.