



LEGISLATIVE ACTION

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| Senate | . | House |
| Comm: RCS | . | |
| 03/11/2021 | . | |
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The Committee on Rules (Brandes) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Section 768.38, Florida Statutes, is created to
read:

768.38 Liability protections for COVID-19-related claims.-

(1) The Legislature finds that the COVID-19 outbreak in
this state threatens the continued viability of certain business
entities, educational institutions, governmental entities, and
religious institutions that contribute to the overall well-being



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12 of this state. The threat of unknown and potentially unbounded
13 liability to such businesses, entities, and institutions, in the
14 wake of a pandemic that has already left many of these
15 businesses, entities, and institutions vulnerable, has created
16 an overpowering public necessity to provide an immediate and
17 remedial legislative solution. Therefore, the Legislature
18 intends for certain business entities, educational institutions,
19 governmental entities, and religious institutions to enjoy
20 heightened legal protections against liability as a result of
21 the COVID-19 pandemic. The Legislature also finds that there are
22 no alternative means to meet this public necessity, especially
23 in light of the sudden, unprecedented nature of the COVID-19
24 pandemic. The Legislature finds the public interest as a whole
25 is best served by providing relief to these businesses,
26 entities, and institutions so that they may remain viable and
27 continue to contribute to this state.

28 (2) As used in this section, the term:

29 (a) "Business entity" has the same meaning as provided in
30 s. 606.03. The term also includes a charitable organization as
31 defined in s. 496.404 and a corporation not for profit as
32 defined in s. 617.01401.

33 (b) "COVID-19-related claim" means a civil liability claim
34 against a person, including a natural person, a business entity,
35 an educational institution, a governmental entity, or a
36 religious institution, which arises from or is related to COVID-
37 19, otherwise known as the novel coronavirus. The term includes
38 any such claim for damages, injury, or death. Any such claim, no
39 matter how denominated, is a COVID-19-related claim for purposes
40 of this section. The term includes a claim against a health care



41 provider only if the claim is excluded from the definition of
42 COVID-19-related claim under s. 768.381, regardless of whether
43 the health care provider also meets one or more of the
44 definitions in this subsection.

45 (c) "Educational institution" means a school, including a
46 preschool, elementary school, middle school, junior high school,
47 secondary school, career center, or postsecondary school,
48 whether public or nonpublic.

49 (d) "Governmental entity" means the state or any political
50 subdivision thereof, including the executive, legislative, and
51 judicial branches of government; the independent establishments
52 of the state, counties, municipalities, districts, authorities,
53 boards, or commissions; or any agencies that are subject to
54 chapter 286.

55 (e) "Health care provider" means:

56 1. A provider as defined in s. 408.803.

57 2. A clinical laboratory providing services in this state
58 or services to health care providers in this state, if the
59 clinical laboratory is certified by the Centers for Medicare and
60 Medicaid Services under the federal Clinical Laboratory
61 Improvement Amendments and the federal rules adopted thereunder.

62 3. A federally qualified health center as defined in 42
63 U.S.C. s. 1396d(1)(2)(B), as that definition exists on the
64 effective date of this act.

65 4. Any site providing health care services which was
66 established for the purpose of responding to the COVID-19
67 pandemic pursuant to any federal or state order, declaration, or
68 waiver.

69 5. A health care practitioner as defined in s. 456.001.



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70 6. A health care professional licensed under part IV of
71 chapter 468.

72 7. A home health aide as defined in s. 400.462(15).

73 8. A provider licensed under chapter 394 or chapter 397 and
74 its clinical and nonclinical staff providing inpatient or
75 outpatient services.

76 9. A continuing care facility licensed under chapter 651.

77 10. A pharmacy permitted under chapter 465.

78 (f) "Religious institution" has the same meaning as
79 provided in s. 496.404.

80 (3) In a civil action based on a COVID-19-related claim:

81 (a) The complaint must be pled with particularity.

82 (b) At the same time the complaint is filed, the plaintiff
83 must submit an affidavit signed by a physician actively licensed
84 in this state which attests to the physician's belief, within a
85 reasonable degree of medical certainty, that the plaintiff's
86 COVID-19-related damages, injury, or death occurred as a result
87 of the defendant's acts or omissions.

88 (c) The court must determine, as a matter of law, whether:

89 1. The plaintiff complied with paragraphs (a) and (b). If
90 the plaintiff did not comply with paragraphs (a) and (b), the
91 court must dismiss the action without prejudice.

92 2. The defendant made a good faith effort to substantially
93 comply with authoritative or controlling government-issued
94 health standards or guidance at the time the cause of action
95 accrued.

96 a. During this stage of the proceeding, admissible evidence
97 is limited to evidence tending to demonstrate whether the
98 defendant made such a good faith effort.



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99 b. If the court determines that the defendant made such a
100 good faith effort, the defendant is immune from civil liability.
101 If more than one source or set of standards or guidance was
102 authoritative or controlling at the time the cause of action
103 accrued, the defendant's good faith effort to substantially
104 comply with any one of those sources or sets of standards or
105 guidance confers such immunity from civil liability.

106 c. If the court determines that the defendant did not make
107 such a good faith effort, the plaintiff may proceed with the
108 action. However, absent at least gross negligence proven by
109 clear and convincing evidence, the defendant is not liable for
110 any act or omission relating to a COVID-19-related claim.

111 (d) The burden of proof is upon the plaintiff to
112 demonstrate that the defendant did not make a good faith effort
113 under subparagraph (c)2.

114 (4) A plaintiff must commence a civil action for a COVID-
115 19-related claim within 1 year after the cause of action accrues
116 or within 1 year after the effective date of this act if the
117 cause of action accrued before the effective date of this act.

118 Section 2. Section 768.381, Florida Statutes, is created to
119 read:

120 768.381 COVID-19-related claims against health care
121 providers.-

122 (1) DEFINITIONS.-As used in this section, the term:

123 (a) "Authoritative guidance" means nonbinding instructions
124 or recommendations from a federal, state, or local governmental
125 entity, a clinical professional organization, or another
126 authoritative source of clinical guidance.

127 (b) "COVID-19" means the novel coronavirus identified as



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128 SARS-CoV-2; any disease caused by SARS-CoV-2, its viral
129 fragments, or a virus mutating therefrom; and all conditions
130 associated with the disease which are caused by SARS-CoV-2, its
131 viral fragments, or a virus mutating therefrom.

132 (c) "COVID-19 emergency" means a public health emergency
133 relating to COVID-19 which is declared by an emergency
134 declaration of the Federal Government or an emergency order of
135 the State Surgeon General or a state of emergency due to COVID-
136 19 declared by executive order of the Governor.

137 (d) "COVID-19-related claim" means a civil liability claim
138 against a health care provider which arises from the:

139 1. Diagnosis or treatment of, or failure to diagnose or
140 treat, a person for COVID-19;

141 2. Provision of a novel or experimental COVID-19 treatment;

142 3. Transmission of COVID-19;

143 4. Delay or cancellation of a surgery or a delay or
144 cancellation of a medical procedure, a test, or an appointment
145 based on a health care provider's interpretation or application
146 of government-issued health standards or authoritative guidance
147 specifically relating to the COVID-19 emergency;

148 5. An act or omission with respect to an emergency medical
149 condition as defined in s. 395.002, and which act or omission
150 was the result of a lack of resources directly caused by the
151 COVID-19 pandemic; or

152 6. The provision of treatment to a patient diagnosed with
153 COVID-19 whose injuries were directly related to an exacerbation
154 of the patient's preexisting conditions by COVID-19.

155
156 The term does not include a claim alleging that an act or



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157 omission by a health care provider caused a person to contract
158 COVID-19 or a derivative claim to such claim unless the person
159 was a resident or patient of the health care provider or a
160 person seeking care or treatment from the health care provider.

161 (e) "Government-issued health standards" means federal,
162 state, or local laws, rules, regulations, or orders that
163 describe the manner in which a health care provider must
164 operate.

165 (f) "Health care provider" means any of the following:

166 1. A provider as defined in s. 408.803.

167 2. A clinical laboratory providing services in this state
168 or services to health care providers in this state, if the
169 clinical laboratory is certified by the Centers for Medicare and
170 Medicaid Services under the federal Clinical Laboratory
171 Improvement Amendments and the federal rules adopted thereunder.

172 3. A federally qualified health center as defined in 42
173 U.S.C. s. 1396d(1)(2)(B), as that definition existed on the
174 effective date of this act.

175 4. Any site providing health care services which was
176 established for the purpose of responding to the COVID-19
177 pandemic pursuant to any federal or state order, declaration, or
178 waiver.

179 5. A health care practitioner as defined in s. 456.001.

180 6. A health care professional licensed under part IV of
181 chapter 468.

182 7. A home health aide as defined in s. 400.462(15).

183 8. A provider licensed under chapter 394 or chapter 397 and
184 its clinical and nonclinical staff providing inpatient or
185 outpatient services.



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186 9. A continuing care facility licensed under chapter 651.

187 10. A pharmacy permitted under chapter 465.

188 (2) PRELIMINARY PROCEDURES.—

189 (a) In any civil action against a health care provider
190 based on a COVID-19-related claim, the complaint must be pled
191 with particularity by alleging facts in sufficient detail to
192 support each element of the claim. An affidavit of a physician
193 is not required as part of the pleading.

194 (b) If the complaint is not pled with particularity, the
195 court must dismiss the action.

196 (3) STANDARD OF PROOF.—A plaintiff who brings an action for
197 a COVID-19-related claim against a health care provider must
198 prove by the greater weight of the evidence that the health care
199 provider was grossly negligent or engaged in intentional
200 misconduct.

201 (4) AFFIRMATIVE DEFENSES.—If a health care provider proves
202 by the greater weight of the evidence the existence of an
203 affirmative defense that applies to a specific COVID-19-related
204 claim, the health care provider has no liability for that claim.
205 The affirmative defenses that may apply to a COVID-19-related
206 claim against a health care provider include, in addition to any
207 other affirmative defenses recognized by law, the health care
208 provider's:

209 (a) Substantial compliance with government-issued health
210 standards specifically relating to COVID-19 or other relevant
211 standards, including standards relating to the preservation or
212 prioritization of supplies, materials, or equipment;

213 (b) Substantial reliance upon government-issued health
214 standards specific to infectious diseases in the absence of



215 standards specifically applicable to COVID-19;

216 (c) Substantial compliance with government-issued health
217 standards relating to COVID-19 or other relevant standards was
218 not possible due to the widespread shortages of necessary
219 supplies, materials, equipment, or personnel;

220 (d) Substantial compliance with any applicable government-
221 issued health standards relating to COVID-19 or other relevant
222 standards if the applicable standards were in conflict; or

223 (e) Substantial compliance with government-issued health
224 standards relating to COVID-19 or other relevant standards was
225 not possible because there was insufficient time to implement
226 the standards.

227 (5) LIMITATIONS PERIOD.—

228 (a) An action for a COVID-19-related claim against a health
229 care provider which arises out of the transmission, diagnosis,
230 or treatment of COVID-19 must commence within 1 year after the
231 later of the date of death due to COVID-19, hospitalization
232 related to COVID-19, or the first diagnosis of COVID-19 which
233 forms the basis of the action.

234 (b) An action for a COVID-19-related claim against a health
235 care provider which does not arise out of the transmission,
236 diagnosis, or treatment of COVID-19, such as a claim arising out
237 of a delayed or canceled procedure, must commence within 1 year
238 after the cause of action accrues.

239 (c) Notwithstanding paragraph (a) or paragraph (b), an
240 action for a COVID-19-related claim that accrued before the
241 effective date of this act must commence within 1 year after the
242 effective date of this act.

243 (6) INTERACTION WITH OTHER LAWS.—



244 (a) This section is in addition to other provisions of law,
245 including, but not limited to, chapters 400, 429, 766, and 768,
246 and supersedes any conflicting provision of law but only to the
247 extent of the conflict.

248 (b) This section provides the exclusive cause of action for
249 a COVID-19-related claim against a health care provider.

250 (c) This section does not apply to claims governed by
251 chapter 440.

252 Section 3. If any provision of this act or its application
253 to any person or circumstance is held invalid, the invalidity
254 does not affect other provisions or applications of the act
255 which can be given effect without the invalid provision or
256 application, and to this end the provisions of this act are
257 severable.

258 Section 4. This act applies to causes of action that accrue
259 within 1 year after the effective date of this act and applies
260 retroactively. However, this act does not apply in a civil
261 action against a particular named defendant which is commenced
262 before the effective date of this act.

263 Section 5. This act shall take effect upon becoming a law.

264
265 ===== T I T L E A M E N D M E N T =====

266 And the title is amended as follows:

267 Delete everything before the enacting clause
268 and insert:

269 A bill to be entitled
270 An act relating to civil liability for damages
271 relating to COVID-19; creating s. 768.38, F.S.;

272 providing legislative findings and intent; defining



273 terms; specifying requirements for civil actions based
274 on COVID-19-related claims; requiring the court to
275 make certain determinations in such actions; providing
276 that plaintiffs have the burden of proof in such
277 actions; requiring plaintiffs to commence COVID-19-
278 related claims within specified timeframes; creating
279 s. 768.381, F.S.; defining terms; providing
280 preliminary procedures for civil actions based on
281 COVID-19-related claims; providing the standard of
282 proof required at trial for such claims; providing
283 affirmative defenses; requiring COVID-19-related
284 claims to commence within specified timeframes;
285 providing construction; providing that the act
286 provides the exclusive cause of action for COVID-19-
287 related claims against health care providers;
288 providing applicability; providing severability;
289 providing applicability and for retroactive
290 application; providing an effective date.

291
292 WHEREAS, an outbreak of the disease known as COVID-19,
293 which is caused by a novel coronavirus that was not previously
294 found in humans, occurred in Hubei province, China, in late
295 2019, and has currently been detected in more than 89 countries,
296 including the United States, and

297 WHEREAS, COVID-19 is a severe respiratory disease that can
298 result in illness or death and is caused by the person-to-person
299 spread of the novel coronavirus, and

300 WHEREAS, COVID-19, as a viral agent capable of causing
301 extensive loss of life or serious disability, is deadly, and



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302 WHEREAS, the transmission of COVID-19 is a threat to human
303 health in this state, and

304 WHEREAS, the Secretary of the United States Department of
305 Health and Human Services declared on January 31, 2020, that a
306 public health emergency exists in the United States due to
307 confirmed cases of COVID-19 in this country, and

308 WHEREAS, on March 1, 2020, the State of Florida Department
309 of Health, in coordination with Governor Ron DeSantis, first
310 declared a public health emergency based on the spread of COVID-
311 19, and

312 WHEREAS, throughout the declared state of emergency, the
313 Governor's executive orders included industry-specific
314 restrictions to prevent the spread of COVID-19 based on the best
315 information available at the time, allowing and encouraging
316 certain businesses to continue to safely operate, and

317 WHEREAS, a strong and vibrant economy is essential to
318 ensure that Floridians may continue in their meaningful work and
319 ultimately return to the quality of life they enjoyed before the
320 COVID-19 outbreak, and

321 WHEREAS, Floridians must be allowed to earn a living and
322 support their families without unreasonable government
323 intrusion, and

324 WHEREAS, the United States Centers for Disease Control and
325 Prevention has issued health guidance to all state and local
326 governments and all citizens, and

327 WHEREAS, in March 2020, the Centers for Medicare and
328 Medicaid Services recommended the deferral of nonessential
329 surgeries and other procedures, and

330 WHEREAS, the guidance from the Centers for Medicare and



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331 Medicaid Services to defer medical procedures was based in part
332 on its recognition that the conservation of critical health care
333 resources is essential, and

334 WHEREAS, on March 20, 2020, the Governor issued Executive
335 Order 20-72, which prohibited health care providers "from
336 providing any medically unnecessary, non-urgent or non-emergency
337 procedure or surgery which, if delayed, does not place a
338 patient's immediate health, safety, or well-being at risk, or
339 will, if delayed, not contribute to the worsening of a serious
340 or life-threatening medical condition," and

341 WHEREAS, on April 29, 2020, the Governor issued Executive
342 Order 20-112, which allowed health care providers to perform
343 procedures prohibited by the earlier order if the health care
344 provider had adequate supplies of personal protective equipment
345 and satisfied other conditions, and

346 WHEREAS, medical experts have been racing to develop
347 vaccines and to learn how COVID-19 is transmitted and how best
348 to treat those infected with the disease, and

349 WHEREAS, the Federal Government, along with state and local
350 governments, has sought to slow the spread of COVID-19 through
351 travel bans and restrictions, quarantines, lockdowns, social
352 distancing, and the closure of businesses or limitations on
353 business activities, including limitations on the provision of
354 medical services, and

355 WHEREAS, health care providers, including hospitals,
356 doctors, nurses, and other health care facilities and workers,
357 have struggled to acquire personal protective equipment and
358 other supplies to protect against the risk of COVID-19
359 transmission and medications used in the treatment of the



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360 disease, and

361 WHEREAS, the circumstances of the COVID-19 pandemic have
362 made it difficult or impossible for health care providers to
363 maintain ideal levels of staffing, and

364 WHEREAS, health care providers are essential to the
365 residents of this state's survival of the pandemic, and health
366 care providers have continued to treat patients despite the
367 potential, and still not fully known, risks of exposure to
368 COVID-19, and

369 WHEREAS, while many actions may seem reasonable during the
370 pandemic, some may attempt to construe these actions differently
371 in hindsight when calm is restored, and

372 WHEREAS, as the pandemic continues and recovery begins,
373 health care providers must be able to remain focused on serving
374 the health care needs of their respective communities and not on
375 the potential for unfounded lawsuits, and

376 WHEREAS, the Legislature finds that it is an overpowering
377 public necessity to enact legislation that will deter unfounded
378 lawsuits against individuals, businesses, health care providers,
379 and other entities based on COVID-19-related claims, while
380 allowing meritorious claims to proceed, and

381 WHEREAS, the Legislature finds that the unprecedented
382 and rare nature of the COVID-19 pandemic, together
383 with the indefinite legal environment that has
384 followed, requires the Legislature to act swiftly and
385 decisively, NOW, THEREFORE,

386