

# The Pros and Cons of Federal COVID-19 Liability Protections

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Congress is currently battling over another coronavirus relief package and one of the main areas of contention is COVID-19 liability protections for businesses. The current CARES ACT offers some liability protection to manufacturers of PPE and to volunteer health care providers crossing state lines. But in this next package, Republican Senate Majority Leader, Mitch McConnell, wants sweeping legal protections for all businesses, including health care providers and hospitals. Lobbyists for providers point out that provider budgets have already been hit by increased PPE costs, increased telehealth billing with lower reimbursement rates and increased staffing costs trying to stay ahead of CMS and payor policy changes. Health care providers want to be protected from exposure to costly lawsuits that stem from treating a virus that has so many unknown physical effects. Democrats contend that patient's rights will suffer and many providers, namely nursing homes who are the target of most current lawsuits, will lose incentive to provide the best possible care. Further, they believe providers are already protected under common law without statutory intervention.

Liability protections for health care providers are usually handled at the state level. At least nine states have passed some sort of business coronavirus immunity protection and a significant number of states have legislation pending. The health care lobbyists hope that the federal legislation does not preempt state statutes, but rather still allows states to impose stricter standards. Passage of a federal coronavirus immunity law will clearly help providers in states with no immunity protections and will help strengthen providers' legal defenses in states with protections already in place. The proposed legislation carves out an exception to immunity in cases of gross negligence.

Most state statutes limit the immunity protections to the duration of the public emergency. The proposed federal legislation could span for up to five years, starting December 2019. Proponents argue that this is necessary because the long-term effects of the virus, especially potential kidney and lung damage, could emerge well after the pandemic has ended. They also argue that a uniform federal standard will offer protections to providers and businesses who practiced and conducted business across state lines

during the public health emergency. Further, proponents of the legislation want the scope of protection to cover everyone: hospitals, medical entities, individual providers, businesses and schools.

The Democratic Speaker of the House, Nancy Pelosi, is opposed to these liability protections, and wants to see a trend in the opposite direction with more regulations put in place by OSHA for businesses and health care providers. They want more infection control requirements in place that will require increased vigilance on the part of health care professionals. Naysayers worry that the immunity provisions will be construed too broadly and individuals with legitimate negligence and malpractice claims will be barred from bringing suit.

Both sides to this debate make solid points and will need to make concessions. The only sure thing is that it will be interesting to follow. **Pro-COVID Liability Protection** **Anti-COVID Liability Protection** **\*\*Uniformity across states** **\*\*No incentive to provide care/safety** **\*\*Businesses and health care providers need financial breaks** **\*\*Valid lawsuits will be thwarted**