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GOP's Coronavirus Biz Liability Shield Plan Raises Eyebrows

By **Y. Peter Kang**

Law360 (July 31, 2020, 9:55 PM EDT) -- Republicans' recently floated bill in the Senate to shield businesses and health care providers from coronavirus-related injury suits has raised the eyebrows of both plaintiffs and defense attorneys, with some saying it was the most sweeping and expansive attempt at tort reform they'd ever seen.

The Safe to Work Act would impose significant hurdles for workers, customers and patients who want to sue businesses and health care providers over coronavirus-related injuries, which the bill's sponsor, Sen. John Cornyn, R-Texas, said were necessary to prevent the latter "from being sued into oblivion." Senate Majority Leader Mitch McConnell, R-Ky., had called the liability shield a top Republican priority and a "red line" issue for their next relief package proposal, which Senate GOP members unveiled last Monday.

The bill would enact a five-year period of limited immunity for certain defendants in coronavirus-related personal injury and medical malpractice suits, and such cases would fall under the jurisdiction of federal courts. The bill also contains a two-pronged requirement that plaintiffs must establish that a business was grossly negligent or engaged in willful misconduct and that it failed to make "reasonable efforts" to comply with applicable public health guidelines.

In addition, all such cases would be subject to a "clear-and-convincing" evidentiary standard and limitations on noneconomic damages such as pain and suffering.

Attorneys for both the plaintiffs and defense bars expressed concerns that the proposal is overly broad, saying certain provisions are problematic and either unfair or impractical.

Nina Kohn, a professor at the Syracuse University College of Law and an advocate for nursing home patients' rights, said the only good thing about the bill is its title.

"It is the kitchen sink of tort reforms. It's possibly the kitchen bathtub, though, because there are things in here that are unscrupulous and extraordinary," Kohn said. "Not only is this an incredible amalgamation of every tort reform wish list, there are things in here that, to the best of my knowledge, are unprecedented."

Kohn noted that the bill defines gross negligence as reckless disregard of both legal duty and applicable government standards and guidance.

"The 'and' does incredible mischief here," she said. "Things that we would consider gross negligence [under common law] would not be considered gross negligence here."

The proposal also contains a number of procedural requirements such as a one-year statute of limitations, the filing of an affidavit of merit from a medical expert who did not treat an injured plaintiff, contact-tracing details and a statement of facts "giving rise to a strong inference that the defendant acted with the required state of mind."

Kohn said the bill completely excludes claims stemming from health care providers' resource or staffing shortages but doesn't distinguish self-created shortages, such as when a "bad actor" nursing home company deliberately understaffs its facilities to cut costs and boost profits.

"If you have chronically understaffed your facility and that's why people are dying, by [the bill's] definition that is not gross negligence," she said. "If you are siphoning profits for your corporate owner, and have a resource shortage, that is not willful misconduct" under the bill.

Janie Schulman, a Morrison & Foerster LLP employment and labor partner, said it was the first time she's seen a statutory provision, in the employment context, requiring a plaintiff to submit a medical expert's affidavit of merit essentially vouching for an injured plaintiff's tort claim.

"The bill is designed to make it practically impossible for an employee to bring a successful claim for damages for a coronavirus-related injury," she said. "I've never seen a statute drafted this stringently when it comes to employees."

Schulman said she expects lawmakers in the Democratic-led House of Representatives to insist that some of the provisions be scaled back substantially. Indeed, House Speaker Nancy Pelosi, D-Calif., said Wednesday that the bill is "McConnell liability on steroids" and that the Senate leader "has taken it to a whole other place."

The requirements for a statement regarding a defendant's "state of mind" and the clear-and-convincing evidentiary standard are the most likely to be excised from the final version of the bill, Schulman said. Conversely, she said the health guidelines compliance requirement is likely to withstand negotiations in Congress.

"I think that it'll be easier to push back against some of those requirements than to argue that employers should be held liable in tort when they are doing their best in a crazy time," Schulman said.

Guy Gruppie, co-chair of the emerging risks practice group at Murchison & Cumming LLP in Los Angeles, applauded the bill's goal but expressed some skepticism that certain provisions would make it into the final version, calling the "state of mind" requirement a "nebulous concept."

Gruppie also said the plaintiffs bar will likely take issue with the medical certification requirement, which in California only applies to medical malpractice cases.

"I would think there's quite a number of issues that the trial lawyers are going to be uncomfortable with, and there needs to be negotiations to get the foundational parameters that are commonsense," he said.

However, Gruppie said businesses and health care providers should be allowed to mount an affirmative

defense if they can establish compliance with the applicable safety standards.

"If we are really committed as a nation to move forward through this crisis together, businesses that comply with public health guidelines would seem to logically deserve protections from coronavirus-related lawsuits, with the duration and breadth subject to reasonable debate and discussion," he said.

--Editing by Breda Lund.