

March 12, 2021

Wisconsin Adopts Broad COVID-19 Civil Liability Immunity

Joining a growing number of states, on February 25, 2021, Wisconsin enacted its own COVID-19 civil liability shield law, one of the broadest in the country, 2021 Wisconsin Act 4 (the “Act”).

What is the scope of the immunity?

Act 4’s immunity from Civil Liability is broad. Act 4 creates Wis. Stat. § 895.476. Subsection (2) of that new statute provides:

Beginning March 1, 2020, an entity is immune from civil liability for the death of or injury to any individual or damages caused by an act or omission resulting in or relating to exposure, directly or indirectly, to the novel coronavirus identified as SARS-CoV-2 or COVID-19 in the course of or through the performance or provision of the entity’s functions or services.

The immunity covers both the death or injury that may have been sustained due to COVID-19 exposure and the monetary damages that might have resulted from that exposure. The statute covers both acts and omissions and applies regardless of whether those acts or omission cause a direct or an indirect exposure.

There is an internal limitation to this broad immunity. The immunity only applies when the entity is performing or providing the “entity’s functions or services.” This leaves open the question of whether a company holiday party *qua* super spreader event is within the scope of the immunity.

Subsection (3) also makes clear that the immunity does not apply if the act or omission “involves reckless or wanton conduct or intentional misconduct.” Reckless, wanton and intentional conduct are standard tort concepts and are used limitations in numerous immunity statutes.

The Legislature made an unfortunate drafting choice by introducing the limitations of Subsection (3) with the qualifier

Related Practices

COVID-19 Resource Center
Labor & Employment Relations
Litigation
Return to Work Strategy
Workplace Safety & Health

“involves...”. Precisely what it means for an act or an omission to “involve” reckless, wanton or intentional conduct seems broader than an act or omission, which *is* reckless, wanton or intentional. This will likely have to be sorted out through litigation.

Subsection (3)’s potentially broader language provides an incentive for entities to follow applicable public health (e.g. CDC, state and local equivalents) and other agency (e.g. OSHA) guidance to be best positioned to take advantage of this protection[1].

What “entities” are entitled to immunity?

“Entity” is broadly defined by the Act. Partnerships, corporations, associations, governmental entities, tribal government, tribal entities, school, institutions of higher education, and nonprofit organizations, as well as other legal entities are all covered. Additionally, “entity” includes an employer or business owner, employee, agent, or independent contractor of the entity, regardless of whether paid or an unpaid volunteer.

Is the immunity retroactive?

The immunity provided by Act 4 is retroactive to any acts or omissions that may form the basis of a claim; however, the immunity does not apply to any actions that were already filed before the effective date of the Act – February 27, 2021.

How does the immunity interact with other laws, including Worker’s Compensation?

The Act explicitly states that the immunity from “civil liability” under Act 4 is in addition to, and not in lieu of, other immunity granted by law. Therefore, Act 4 will not impact other immunity arguments entities may raise.

Act 4 does not reference Wisconsin’s worker’s compensation statute. The question that may be asked is whether or not Act 4 impacts available benefits under the worker’s compensation statutes. Worker’s Compensation is its own statutory system that involves a tradeoff for giving up civil claims (by employees) in exchange for certain limited and insured benefits and waiver of defenses by employers that would otherwise be available under the tort system. Benefits provided under the worker’s compensation system are not the same as “civil liability” (although no definition of civil liability is provided under Wisconsin Statutes Chapter 895 governing claims for Damages and Liability in Courts). It is unclear whether the legislature intended to alter the Worker’s Compensation Act coverage for work related COVID-19 claims of covered employees when it enacted Act 4.

However, for independent contractors that are not covered by Workers Compensation, Act 4 would bar claims arising from their work. But, the Wisconsin Workers Compensation Act should be consulted as to the definition of an independent contractor for this purpose. See Wis. Stat. 102.07(8).

Will Wisconsin “entities” be able to use this protection if sued in another state?

Notably, Act 4 does not expressly limit the scope of the immunity to acts or omissions that were committed in Wisconsin. Thus, the applicability of this statute to a lawsuit filed in another state will most likely be determined by the standard choice of law analysis used in tort law. Even if Wisconsin law is not applicable, at this point, many other states have adopted some sort of liability shield, and legislation is currently pending in others. Washington D.C., Hawaii, Illinois, Maryland, Massachusetts, New Jersey,

New Mexico, New York, Pennsylvania, Rhode Island, Vermont, and Virginia have passed civil immunity liability laws for healthcare and/or first responder related entities. Oregon has enacted immunity for schools. Alabama, Arkansas, Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nevada, North Carolina, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming have all enacted some level of non-healthcare civil immunity.

Michael Best's interactive map setting forth summaries of these state civil liability immunity provisions can be found [here](#).

[1] A new OSHA Emergency Temporary Standard is expected to issue by March 15, 2021. Watch for an MBF alert on this shortly.

Related People

Joseph Olson

Partner

jolson@michaelbest.com

T 414.277.3465

Charles Palmer

Partner

cbpalmer@michaelbest.com

T 262.956.6518

Farrah Rifelj

Partner

fnwrefelj@michaelbest.com

T 608.283.0110