

Legislative Analysis



IMMUNITY FROM COVID-19 LIABILITY

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House Bill 6030 as enacted
Public Act 236 of 2020
Sponsor: Rep. Thomas A. Albert

Analysis available at
<http://www.legislature.mi.gov>

House Bill 6031 as enacted
Public Act 237 of 2020
Sponsor: Rep. Tommy Brann

House Bill 6032 as enacted
Public Act 238 of 2020
Sponsor: Rep. Graham Filler

House Bill 6101 as enacted
Public Act 239 of 2020
Sponsor: Rep. Wendell L. Byrd

House Committee: Judiciary
Senate Committee: Economic and Small Business Development [Discharged]
Complete to 10-27-20

SUMMARY:

House Bill 6030 creates a new act to establish standards for immunity from liability for certain tort claims alleging COVID-19 exposure.

House Bills 6031 and 6101 together amend the Michigan Occupational Safety and Health Act to establish conditions for immunity from civil liability for an employer whose employee is exposed to COVID-19.

House Bill 6032 creates a new act to prohibit an employee from reporting to work under certain circumstances related to COVID-19, to prohibit certain employer actions against certain employees, and to provide remedies.

The bills took effect October 22, 2020. As described below, HB 6032 is effective retroactive to March 1, 2020, and the other bills apply retroactively to specified occurrences after that date.

House Bill 6030 creates a new act, the COVID-19 Response and Reopening Liability Assurance Act, to establish standards for immunity from liability for certain tort claims alleging **COVID-19** exposure.

COVID-19 means the novel coronavirus identified as SARS-CoV-2 or a virus mutating from SARS-CoV-2, the disease caused by SARS-CoV-2, and conditions associated with the disease.

Under the act, a **person** is immune from liability for a **COVID-19 claim** if the person operates in compliance with all federal, state, and local statutes, rules, regulations, executive orders, and agency orders related to COVID-19 that had not been denied legal effect at the time of the conduct or risk that allegedly caused harm. An isolated, de minimis deviation from strict compliance with those statutes, rules, regulations, executive orders, and agency orders

unrelated to the plaintiff's injuries does not deny a person this immunity. ("De minimis" means so minor or trivial as to be not worth considering.)

Person means an individual, partnership, corporation, association, governmental entity, or other legal entity. The term includes schools, colleges or universities, institutions of higher education, and nonprofit charitable organizations. The term also includes an employee, agent, or independent contractor of a person, regardless of whether he or she is paid or is an unpaid volunteer.

COVID-19 claim means a tort claim or tort cause of action for damages, losses, indemnification, contribution, or other relief arising from, based on, or in any way related to exposure or potential exposure to COVID-19 or to **conduct intended to reduce transmission of COVID-19**. The term also includes a tort claim made by or on behalf of an individual exposed or potentially exposed to COVID-19 (or that individual's representative or relative or a member of his or her household) for injury (including mental or emotional injury, death, or loss to person), risk of disease or other injury, costs of medical monitoring or surveillance, or other losses allegedly caused by the exposure or potential exposure to COVID-19. The term does not include an administrative proceeding or civil action brought by a state or local government prosecutor or agency to enforce state statutes and regulations, executive orders, or state agency orders applicable to COVID-19.

Conduct intended to reduce transmission of COVID-19 means health screening, testing, contact tracing, and other actions intended to reduce transmission of COVID-19 in a workplace or on other premises.

Limitations

The act states that it does not do any of the following:

- Create, recognize, or ratify a claim or cause of action of any kind.
- Eliminate a required element of any claim, including causation and proximate cause elements.
- Affect rights, remedies, or protections under the Worker's Disability Compensation Act, including the exclusive application of that act.
- Amend, repeal, alter, or affect any other immunity or limitation of liability.

Severability

The act declares itself to be severable. (All Michigan laws are severable under MCL 8.5.) Severability means that if a court finds any part of a law or its application to be invalid, that finding does not affect the validity of the rest of the law.

Retroactivity

The act applies retroactively to a claim or cause of action that accrues after March 1, 2020.

MCL 691.1451 to 691.1460

House Bills 6031 and 6101 together add two new sections to the Michigan Occupational Safety and Health Act (MIOSHA) to establish conditions for immunity from civil liability for an employer whose employee is exposed to COVID-19. HB 6031 adds substantive provisions, and HB 6101 defines ***COVID-19*** for purposes of those provisions.

COVID-19 means the novel coronavirus identified as SARS-CoV-2 or a virus mutating from SARS-CoV-2, the disease caused by SARS-CoV-2, and conditions associated with the disease.

Under the bills, notwithstanding any other provision of MIOSHA, an employer is not liable for damages under the act for an employee's exposure to COVID-19 if the employer was operating in compliance with all federal, state, and local statutes, rules, and regulations, executive orders, and agency orders related to COVID-19 that had not been denied legal effect at the time of the exposure. An isolated, de minimis deviation from strict compliance with those statutes, rules, regulations, executive orders, and agency orders unrelated to the employee's exposure to COVID-19 does not deny an employer this immunity.

Limitations

House Bill 6031 states that it does not do any of the following:

- Create, recognize, or ratify a claim or cause of action of any kind.
- Eliminate a required element of a claim of any kind, including a causation or proximate cause element.
- Amend, repeal, alter, or affect any other immunity or limitation of liability.
- Affect a right, remedy, or protection under the Worker's Disability Compensation Act, including the exclusive application of "this act."¹

Retroactivity

House Bill 6031 applies retroactively to an exposure to COVID-19 that occurs after March 1, 2020.

MCL 408.1085 (HB 6031) and MCL 408.1085a (HB 6101)

House Bill 6032 creates a new act to prohibit an employee from reporting to work under certain circumstances related to ***COVID-19***, to prohibit certain employer actions against certain employees, and to provide remedies.

COVID-19 means the novel coronavirus identified as SARS-CoV-2 or a virus mutating from SARS-CoV-2.

Employees with symptoms or positive test

The act prohibits an ***employee*** who tests positive for COVID-19 or who displays the ***principal symptoms of COVID-19*** from reporting to work until all of the following conditions are met:

- If the employee has a fever, 24 hours have passed since the fever has stopped without the use of fever-reducing medications.

¹ **Note:** While similar provisions in House Bills 6030 and 6032 refer to "the exclusive application of that act," meaning the Worker's Disability Compensation Act, House Bill 6031 refers to "the exclusive application of this act," which would appear to mean MIOSHA.

- Ten days have passed since the later of the following:
 - The date the employee’s symptoms first appeared.
 - The date the employee received the test that yielded a positive result for COVID-19.
- The employee’s principal symptoms of COVID-19 have improved.

Employee means an individual employed by an **employer** and whose primary workplace is not his or her home.

Employer means an individual, partnership, corporation, association, or other legal entity, including a state or local governmental entity, that employs one or more individuals. The act specifies that it applies to public employers and public employees to the extent consistent with section 5 of Article XI of the state constitution. That section establishes a framework for the classified state civil service and the Civil Service Commission.

Principal symptoms of COVID-19 has the definition provided by order of the director or chief medical executive of the Michigan Department of Health and Human Services. If the term is not defined by either official at the time of an action described above or under “Employees with close contact” below, it means either or both of the following:

- One or more of the following not explained by a known medical or physical condition:
 - Fever.
 - Shortness of breath.
 - Uncontrolled cough.
- Two or more of the following not explained by a known medical or physical condition:
 - Abdominal pain.
 - Diarrhea.
 - Loss of taste or smell.
 - Muscle aches.
 - Severe headache.
 - Sore throat.
 - Vomiting.

Employees with close contact

The act also prohibits an employee who has **close contact** with an individual who tests positive for COVID-19 or displays the principal symptoms of COVID-19 from reporting to work until one of the following conditions is met:

- Fourteen days have passed since the employee last had close contact with the individual.
- The individual the employee had close contact with receives a medical determination that he or she did not have COVID-19 at the time of that contact.

Close contact means being within about six feet of an individual for 15 minutes or longer.

However, this prohibition does not apply to the following employees:

- A health care professional. (The term is not defined in the act. Under the Public Health Code, a health care profession is an occupation or employment performed by an individual licensed or registered under Article 15 of that code.)
- A worker at a health care facility, as that term is defined in the act.
- A first responder (a law enforcement officer, firefighter, or paramedic).
- A child protective service employee.
- A worker at a child caring institution, as defined in section 1 of 1973 PA 116.
- A worker at an adult foster care facility, as defined in section 3 of the Adult Foster Care Facility Licensing Act.
- A worker at a correctional facility.

Adverse employment actions

The act prohibits an employer from discharging, disciplining, or otherwise retaliating against an employee who does any of the following:

- Complies with the prohibitions described above, including when an employee who displays the principal symptoms of COVID-19 does not report to work and later tests negative for the disease.
- Opposes a violation of the act.
- Reports health violations related to COVID-19.

However, this provision does not apply to an employee who, after displaying the principal symptoms of COVID-19, fails to make reasonable efforts to schedule a COVID-19 test within three days after receiving a request from his or her employer to get tested for COVID-19.

Remedy for an aggrieved employee

An employee aggrieved by a violation of the act can bring a civil action for appropriate injunctive relief or damages, or both. The lawsuit can be filed in the circuit court for the county where the alleged violation occurred or where the employer is located or has its principal place of business. If the employee prevails in the action, the court must award him or her damages of at least \$5,000.

Limitation

The act states that it does not affect rights, remedies, or protections under the Worker's Disability Compensation Act, including the exclusive application of that act.

Retroactivity

The act is effective retroactive to March 1, 2020.

MCL 419.401 to 419.412

FISCAL IMPACT:

House Bill 6030 would have an indeterminate fiscal impact on local court funding units. Provisions of the bill are aimed at limiting the number of lawsuits likely to be filed. Any fiscal impact would be directly related to how provisions of the bill affect court caseloads, the complexity of lawsuits, and related administrative costs.

House Bills 6031 and 6101 would have an indeterminate fiscal impact on state and local government. The bills would potentially reduce liability for damages for governmental employers, though the magnitude of the potential reduction is unknown.

The bills would also have an indeterminate fiscal impact on local court funding units. Provisions of the bills are aimed at limiting the number of lawsuits likely to be filed. Any fiscal impact would be directly related to how provisions of the bills affect court caseloads, the complexity of lawsuits, and related administrative costs.

House Bill 6032 would have an indeterminate fiscal impact on local court funding units. Costs could be incurred depending on how the bill affects court caseloads, the complexity of lawsuits brought under the bill, and related administrative costs.

The bill would also create potential fiscal liabilities for state and local governments by providing a legal basis from which employees may bring a civil action against employers under circumstances related to COVID-19. However, it is not clear how the bill's clarification of employee and employer rights with regard to working during the pandemic would affect lawsuits against the state or what the extent of potential fiscal liabilities could be. According to one COVID-19 employment litigation tracker,² as of August 10, 2020, there have been 15 COVID-19-related employment lawsuits in Michigan since the start of the pandemic, seven of which were classified as employment discrimination.

If a court rules that a state employer violated the bill and a lawsuit settlement is owed, proceeds for the settlement would have to be taken from the department's existing appropriated state GF/GP or restricted revenue or the legislature would have to appropriate additional funds to support the ruling.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

² <https://www.fisherphillips.com/covid-19-litigation>