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Senate Bill 1022 through 1024 (as introduced 7-23-20)  
Sponsor: Senator Wayne A. Schmidt (S.B. 1022)  
Senator Ken Horn (S.B. 1023)  
Senator Lana Theis (S.B. 1024)  
Committee: Economic and Small Business Development

Date Completed: 9-10-20

### **CONTENT**

**Senate Bill 1022 would create a new act to do the following:**

- Prohibit an employee who tested positive for, or displayed the principal symptoms of, COVID-19 from reporting to work until the employee received a negative COVID-19 test result or a certain amount of time had passed since symptoms appeared or ended.
- Prohibit an employee who had close contact with an individual who tested positive for, or displayed the principal symptoms of, COVID-19 from reporting to work until certain conditions were met.
- Prohibit an employer from taking adverse employment action or otherwise discriminating or retaliating against an employee who either complied with the bill's provisions or opposed a violation of the bill.
- Specify circumstances under which the provision above would not apply.
- Allow an employer to discharge or discipline an employee if he or she were not prohibited from reporting to work, but did not do so.
- Allow an employee aggrieved by a violation of the bill to bring a civil action for appropriate injunctive relief or damages and to award to a plaintiff who prevailed in an action brought under the bill damages of not less than \$5,000.

**Senate Bill 1023 would amend the Michigan Occupational Safety and Health Act to do the following:**

- Specify that an employer would not be liable for damages that resulted from the exposure of an employee to COVID-19 if he or she were exposed to COVID-19 during the COVID-19 emergency and the employer was operating in substantial compliance or reasonably consistent with a Federal or State statute or regulation.
- Specify that immunity from liability would not apply if an employer willfully exposed an employee to COVID-19.
- Specify that the bill's provisions would apply retroactively to an exposure to COVID-19 that occurred after January 1, 2020.

**Senate Bill 1024 would enact the COVID-19 Response and Reopening Liability Assurance Act to do the following:**

- **Prohibit a person from bringing or maintaining a civil action alleging a COVID-19 claim unless the claim alleged harm related to a minimum medical condition as defined in the bill.**
- **Specify that a person would not be liable for a COVID-19 claim that arose from exposure of an individual to COVID-19 on premises owned, leased, managed, or operated by a person, or during an activity managed by a person, unless it was shown by clear and convincing evidence that the injuries were caused by reckless disregard or a deliberate act intended to cause harm.**
- **Specify that a person who operated in substantial compliance with or reasonably consistent with applicable Federal or State statute or regulation or public health guidance would not be liable for a COVID-19 claim or a claim related to conduct intended to reduce transmission of COVID-19.**
- **Specify that a person who designed, manufactured, labeled, sold, delivered, distributed, provided insurance coverage for, or donated a qualified product in response to COVID-19 that was used by an essential business, first responder, government entity, health facility, or health professional would not be liable in a civil action that alleged a product liability claim related to the qualified product.**
- **Specify that the limitations on liability would not apply if there were clear and convincing evidence that a person had actual knowledge that the product was defective and that there was a substantial likelihood that the defect would cause the alleged injury, and the person willfully disregarded that knowledge.**
- **Specify that the bill would apply retroactively to any claim or cause of action that accrued after January 1, 2020.**

The bills are tie-barred.

## **Senate Bill 1022**

### **Definitions**

Under the bill, "adverse employment action" would include any of the following:

- Disciplinary action.
- Termination of employment.
- A demotion or a failure to provide a promotion.
- An involuntary change in a work shift.
- An involuntary reduction of work hours.
- A reduction of employment benefits.
- A reduction in salary or wage.
- Any other changes in the terms or conditions of employment.

"Close contact" would mean being within approximately six feet of an individual for a prolonged period of time.

"Principal symptoms of COVID-19" would mean a fever, atypical cough, or atypical shortness of breath. "COVID-19" would mean the novel coronavirus identified as SARS-CoV-2 or a virus mutating from SARS-CoV-2.

"Damages" would mean actual injury or loss, reasonable attorney fees, or reasonable court costs.

"Employee" would mean an individual employed by an employer and whose primary workplace is not the individual's residence. "Employer" would mean a person or a State or local governmental entity that employs one or more individuals.

"First responder" would mean a law enforcement officer, a firefighter, or a paramedic.

"Health care facility" would mean the following facilities, including those that may operate under shared or joint ownership, and a facility used as surge capacity by any of the following facilities:

- An entity listed in Section 20106(1) of the Public Health Code.
- A State-owned hospital or surgical center.
- A State-operated outpatient facility.
- A State-operated veterans' facility.

(Section 20106(1) of the Public Health Code lists the following entities: an ambulance operation, aircraft transport operation, nontransport prehospital life support operation, medical first response service, a county medical care facility, a freestanding surgical outpatient facility, a health maintenance organization, a home for the aged, a hospital, a nursing home, a hospice, a hospice residence, and certain agencies listed above that are located in a university, college, or other educational institution.)

#### Prohibition Against Reporting to Work

Under the bill, an employee who tested positive for COVID-19 or displayed one or more of the principal symptoms of COVID-19 could not report to work until he or she received a negative COVID-19 test result or until the following conditions were met:

- Three days had passed since the employee's symptoms had ended.
- Seven days had passed since the date the employee's symptoms first appeared or the date the employee received the test that yielded a positive COVID-19 result, whichever was later.

Except as provided below, an employee who had close contact with an individual who tested positive for COVID-19 or with an individual who displayed one or more of the principal symptoms of COVID-19 could not report to work until one of the following conditions was met:

- Fourteen days had passed since the employee last had close contact with the individual.
- The individual with whom the employee had close contact received a negative COVID-19 test result.

The bill specifies that the provision above would not apply to an employee who was any of the following:

- A health care professional.
- A worker at a health care facility.
- A first responder.
- A child protective service employee.
- A worker at a child caring institution, as that term is defined in Section 1 of the child care licensing Act.
- A worker at a correctional facility.

(Section 1 of the child care licensing Act defines "child caring institution" as a child care facility that is organized for the purpose of receiving minor children for care, maintenance, and supervision, usually on a 24-hour basis, in buildings maintained by the child caring institution for that purpose, and operates throughout the year. The Act specifies that a child caring institution includes a maternity home for the care of unmarried mothers who are minors and

an agency group home that is described as a small child caring institution, owned, leased, or rented by a licensed agency providing care for more than four but less than 13 minor children. Child caring institution also includes an institution for developmentally disabled or emotionally disturbed minor children.)

#### Prohibition Against Taking Adverse Employment Action

Under the bill, except as provided below, an employer could not take adverse employment action or otherwise discriminate or retaliate against an employee who either complied with provisions of the bill described above or opposed a violation of the proposed Act. These prohibitions would not apply to either of the following:

- An employee described above who reported to work before the end of the applicable period specified as described above.
- An employee described above who failed to be tested for COVID-19 within three days of displaying one or more of the principal symptoms of COVID-19.

An employer could discharge or discipline an employee if one or more of the following applied:

- The employee consented to the discharge or discipline.
- There was any other lawful basis to discipline or discharge the employee.

In addition, an employer could discharge or discipline an employee if the employee were not prohibited from reporting to work under the bill, but the employee did not report to work. The bill specifies that this provision would not apply if the employee's failure to report to work were otherwise protected by law.

#### Aggrieved Employee

Under the bill, an employee aggrieved by a violation of the bill could bring a civil action for appropriate injunctive relief or damages, or both, in the circuit court for the county where the alleged violation occurred or for the county where the employer against whom the action was filed was located or had its principal place of business.

A court would have to award to a plaintiff who prevailed in an action brought under the bill damages of not less than \$5,000.

#### Scope of Act

The bill specifies that it would apply to public employers and public employees, except to the extent that it was inconsistent with Article XI, Section 5 of the Michigan Constitution (which prescribes the scope of employees considered as part of the classified State civil service.)

If a collective bargaining agreement or other contract that was inconsistent with the bill were in effect for an employee on the effective date of the bill, the bill would apply to that employee beginning on the date the collective bargaining agreement or other contract expired or was amended, extended, or renewed.

The bill also specifies that it would be repealed effective March 31, 2021.

### **Senate Bill 1023**

Generally, the Michigan Occupational Safety and Health Act governs working conditions in the State and prescribes the duties of employers and employees concerning places and conditions of employment.

Under the bill, notwithstanding any other provision of the Act, and except as otherwise provided below, an employer would not be liable for damages that resulted from the exposure of an employee to COVID-19 if the employee were exposed to COVID-19 during the COVID-19 emergency and the employer was operating in substantial compliance or reasonably consistent with a Federal or State statute or regulation, executive order, or public health guidance that was relevant to, and applicable at the time of, the exposure. The bill specifies that if more than one public health guidance applied to the employer at the time of the exposure, the bill's requirements would be satisfied if the employer were operating in substantial compliance or reasonably consistent with any applicable public health guidance.

(The bill would define "COVID-19" as the novel coronavirus identified as SARS-CoV-2 or a virus mutating from SARS-CoV-2, the disease caused by the novel coronavirus SARS-CoV-2, and conditions associated with the disease. "COVID-19 emergency" would mean the state of emergency declared under Public Act 302 of 1945, or the Emergency Management Act, on March 10, 2020, and any subsequent orders or amendments to those orders.

"Public health guidance" would mean written guidance related to COVID-19 issued by the Centers for Disease Control and Prevention (CDC) or the Federal Occupational Safety and Health Administration (OSHA), or by the Department of Health and Human Services (DHHS) or another agency of the State.)

The provisions above would not apply if the employer willfully exposed the employee to COVID-19. (The bill defines "willful" as that term is defined in Section 6 of the Act: for the purpose of criminal prosecution, the term means the intent to do an act knowingly and purposely by an individual who, having a free will and choice, either intentionally disregards a requirement of this act, or a rule or standard promulgated pursuant to this act, or is knowingly and purposely indifferent to a requirement of this act, or a rule or standard promulgated pursuant to this act. The Act also specifies that an omission or failure to act is willful if it is done knowingly and purposely and that willful does not require a showing of moral turpitude, evil purpose, or criminal intent provided the individual is shown to have acted or to have failed to act knowingly and purposely.)

The bill specifies that its provisions would 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, but not limited to, a causation or proximate cause element.
- Amend, repeal, alter, or affect any other immunity or limitation of liability.

The bill also specifies that its provisions would apply retroactively to an exposure to COVID-19 that occurred after January 1, 2020.

### **Senate Bill 1024**

#### **Definitions**

"COVID-19 claim" would mean a claim or cause of action for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to exposure or

potential exposure to COVID-19, or a person's actions, intended to maintain workplace safety. The term also would include a claim made by or on behalf of an individual who has been exposed or potentially exposed to COVID-19, or any representative, spouse, parent, child, member of the same household, or other relative of the individual, 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 individual's exposure or potential exposure to COVID-19. "COVID-19" would mean the novel coronavirus identified as SARS-CoV-2 or a virus mutating from SARS CoV-2, the disease caused by the novel coronavirus SARS CoV-2, and conditions associated with the disease.

"Minimum medical condition" would mean any of the following:

- A positive diagnosis of COVID-19, or symptoms consistent with COVID-19, that required inpatient hospitalization of at least 24 hours.
- A medical illness or physical injury or condition caused by COVID-19 that results in the inability to engage in an individual's usual and customary daily activities for at least 14 days, which does not include any period that the individual is in quarantine to slow the spread of COVID-19.
- Death.

"COVID-19 emergency" would mean the state of emergency declared under Public Act 302 of 1945 or the Emergency Management Act, on March 10, 2020, and any subsequent orders or amendments to those orders.

"Essential business" would mean an individual or employer of an individual who meets the definition of a critical infrastructure worker as defined by Executive Order 2020-70 on May 1, 2020, and any subsequent orders or amendments to those orders.

"First responder" would mean a firefighter, law enforcement officer, member of a rescue squad or ambulance crew, or public safety officer as those terms are defined in Section 2 of the Public Safety Officers Benefit Act, and any other person authorized to provide emergency services during the COVID-19 emergency.

"Gross negligence" would mean conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

"Health facility" would mean a health facility or agency licensed under Article 17 (Facilities and Agencies) of the Public Health Code, a temporary or mobile facility established to provide care during the COVID-19 emergency, and any other person authorized to provide health care in response to the COVID-19 emergency. (Article 17 of the Public Health Code defines a health facility or agency as described above in the summary of Senate Bill 1022.)

"Health professional" would mean an individual licensed, registered, certified, or otherwise authorized to engage in a health profession under Article 15 (Occupations) of the Public Health Code, whether paid or unpaid, including individuals engaged in telemedicine or telehealth, any other individual authorized to provide health care during the COVID-19 emergency, and the employer or agent of a health professional who provides or arranges health care.

"Public health guidance" would mean written guidance related to COVID-19 issued by the CDC or OSHA, or by the DHHS or another agency of the State.

"Qualified product" would mean personal protective equipment (PPE) used to protect the wearer from COVID-19 or the spread of COVID-19; medical devices, equipment, and supplies used to treat COVID-19 including products that are used or modified for an unapproved use

outside of the product's normal use to treat COVID-19 or prevent the spread of COVID-19; medical devices, equipment, or supplies used outside of the product's normal use to treat COVID-19 or to prevent the spread of COVID-19; medications used to treat COVID-19 including medications prescribed or dispensed for off-label use to attempt to combat COVID-19; tests to diagnose or determine immunity to COVID-19; and components or qualified products.

#### COVID-19 Claim

Under the bill, a person could not bring or maintain a civil action alleging a COVID-19 claim unless the claim alleged harm related to a minimum medical condition. The bill specifies that this provision would not apply if the conduct that was the subject of the COVID-19 claim was a deliberate act intended to cause harm.

A person would not be liable for a COVID-19 claim that arose from exposure of an individual to COVID-19 on premises owned, leased, managed, or operated by a person, or during an activity managed by a person, unless it was shown by clear and convincing evidence that the injuries were caused by a reckless disregard of a substantial and unnecessary risk that an individual would be exposed to COVID-19, or the person engaged in a deliberate act intended to cause harm. "Premises" would mean any real property and any appurtenant building or structure, or a vehicle, that serves a commercial, residential, charitable, cultural, educational, governmental, health care, religious, or other purpose.

A person who operated in substantial compliance with or reasonably consistent with a Federal or State statute or regulation, executive order, or public health guidance that was applicable at the time to the conduct or risk that allegedly caused harm would not be liable for a COVID-19 claim or a claim related to conduct intended to reduce transmission of COVID-19. If more than one public health guidance applied to the person or conduct at issue at the time of the alleged harm, this provision would be satisfied by conduct reasonably consistent with any public health guidance. "Conduct intended to reduce transmission of COVID-19" would mean health screening, testing, contact tracing, and other actions intended to reduce transmission of COVID-19 in a workplace or on other premises.

#### COVID-19 Claim for Qualified Products

Under the bill, except as otherwise provided below, a person who designed, manufactured, labeled, sold, delivered, distributed, provided insurance coverage for, or donated a qualified product in response to COVID-19 that was used by an essential business, first responder, government entity, health facility, or health professional would not be liable in a civil action that alleged a product liability claim related to the qualified product. "Product liability claim" would mean an action based on a legal or equitable theory of liability brought for the death of an individual or for injury to an individual or damage to property caused by or resulting from the production of a product.

Except as provided below, a person that designed, manufactured, labeled, sold, delivered, distributed, provided insurance coverage for, or donated disinfecting or cleaning supplies or PPE in response to COVID-19 that did not make such products in the ordinary course of the person's business would not be liable in a civil action that alleged a product liability claim related to the disinfecting or cleaning supplies or PPE. "Disinfecting or cleaning supplies" would include hand sanitizers, disinfectants, sprays, and wipes. "Personal protective equipment" would mean coveralls, face shields, gloves, gowns, masks, respirators, or other equipment used to protect the wearer from infection or illness or the spread of infection or illness.

In addition, except as provided below, a person who selected or dispensed a qualified product in response to the COVID-19 pandemic would not be liable in a civil action for injuries or damages claimed to have arisen from the selection, dispensation, or use of the qualified product.

Under the bill, the limitations on liability provided in bill would not apply if there were clear and convincing evidence that a person had actual knowledge that the product was defective and that there was a substantial likelihood that the defect would cause the injury that was the basis of the action, and the person willfully disregarded that knowledge in the manufacture, distribution, sale, or donation of the product.

#### Liability for a Person's Premises

Under the bill, a person who owned or controlled premises that, voluntarily or at the request of the State or a political subdivision of the State, designated and used the whole or any part of the premises to provide health care services, to provide shelter to patients, first responders, or health professionals, or for quarantine purposes in response to the COVID-19 emergency would not be civilly liable for causing the death of or injury to an individual on or about the premises or for loss of or damage to the property of the individual absent gross negligence that was the proximate cause of the death, injury, or damage.

The bill specifies that the provision above would not affect any obligation of a person who owned or controlled premises to disclose hidden dangers or safety hazards that were known to the owner or occupant of the premises that could possibly result in the death or injury or loss of or damage to property.

#### Scope of Act

The bill specifies that the proposed Act would 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, but not limited to, causation and proximate cause element.
- Affect rights, remedies, or protections under the Worker's Compensation Act, including the exclusive application of that Act.
- Amend, repeal, alter, or affect any other immunity or limitation of liability.

As provided by Section 5 of the Revised Statutes, the bill's provisions would be severable. If any portion of the bill or the application of the bill to any person or circumstance were found to be invalid by a court, the invalidity would not affect, impair, or invalidate the other portions or applications of the bill that could be given effect without the invalid portion or application.

The bill also specifies that it would apply retroactively to any claim or cause of action that accrued after January 1, 2020.

Proposed MCL 408.1085 (S.B. 1023)

Legislative Analyst: Tyler VanHuyse

#### **FISCAL IMPACT**

The bills would have an indeterminate, but likely minimal, fiscal impact on State and local government.

The bills would not directly affect State or local revenue or costs. Instead, the bills would prohibit retaliation by employers against employees who test positive for COVID-19 and would



establish protections against liability when employees contract the disease, excepting those instances of willful or recklessly negligent exposure of employees to COVID-19. These protections could indirectly encourage employers, including the State and local units of government, to continue business operations, provided they substantially complied with Federal or State health safety guidelines.

Fiscal Analyst: Cory Savino  
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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.