

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: HB 7021 PCB HHS 22-01 Covid-19-related Claims Against Health Care Providers

SPONSOR(S): Health & Human Services Committee, Burton and others

TIED BILLS: IDEN./SIM. **BILLS:** SB 610, SB 7014

FINAL HOUSE FLOOR ACTION: 87 Y's 31 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

HB 7021 passed the House on February 10, 2022, as SB 7014.

New mutations of the COVID-19 virus continue to prolong the duration of the current pandemic. Scientific knowledge of COVID-19 continues to grow exponentially due to the novel and ever-evolving nature of the disease. Likewise, guidance to health care providers and long-term care facilities for treatment and infection prevention has rapidly changed as understanding of the disease has evolved. In response, the Legislature passed SB 74 in 2021, which, among other things, created s. 768.381, F.S., establishing certain liability protections for health care providers.

Section 768.381, F.S., provides heightened civil liability protections to health care entities for claims brought by patients and residents related to:

- Diagnosis or treatment of, or failure to diagnose or treat, a person for COVID-19;
- Provision of a novel or experimental COVID-19 treatment;
- Transmission of COVID-19;
- Delay or cancellation of a surgery or medical procedure, test, or appointment in certain situations;
- An act or omission with respect to an emergency medical condition in certain situations; or
- Treatment of a patient with COVID-19 whose injuries were directly related to an exacerbation of preexisting conditions by COVID-19.

Current law requires a plaintiff to prove by the greater weight of the evidence that a defendant was grossly negligent or committed intentional misconduct in order to recover in a COVID-19-related medical claim. The law also enumerates certain affirmative defenses available to defendants against such claims.

These liability protections apply to claims that accrued before the effective date of s. 768.381, F.S., and within 1 year after the effective date. Section 768.381, F.S., became law on March 29, 2021. Thus, these liability protections would not apply to any claim that accrues after March 29, 2022.

HB 7021 extends the heightened civil liability protections for health care entities established in s. 768.381, F.S., to claims that accrue before June 1, 2023.

The bill has no fiscal impact on state or local government.

The bill became law on February 24, 2022, chapter 2022-10, Laws of Florida, and became effective on that date.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Present Situation

New mutations of the COVID-19 virus continue to prolong the duration of the current pandemic. Scientific knowledge of COVID-19 continues to grow exponentially due to the novel and ever-evolving nature of the disease. Likewise, guidance to health care providers and long-term care facilities for treatment and infection prevention has rapidly changed as understanding of the disease has evolved. In response, the Legislature passed SB 74 in 2021, which, among other things, created s. 768.381, F.S., establishing certain liability protections for health care providers.

Section 768.381, F.S., provides heightened civil liability protections to health care providers for civil liability claims based on a breach of duty owed to a patient or resident related to:

- Diagnosis or treatment of, or failure to diagnose or treat, a person for COVID-19;
- Provision of a novel or experimental COVID-19 treatment;
- Transmission of COVID-19;
- Delay or cancellation of a surgery or medical procedure, test, or appointment in certain situations;
- An act or omission with respect to an emergency medical condition, which act or omission was due to a lack of resources directly caused by the COVID-19 pandemic; or
- Treatment of a patient with COVID-19 whose injuries were directly related to an exacerbation of preexisting conditions by COVID-19.

This liability protection is available to certain providers, as follows:

- Any activity, service, agency, or facility regulated by the Agency for Health Care Administration, including hospitals, health care clinics, nursing homes, assisted living facilities, and home health agencies.
- A clinical laboratory providing services in the state or services to health care providers in the state, if the clinical laboratory is certified by the Federal Centers for Medicare and Medicaid Services under the federal Clinical Laboratory Improvement Amendments and the federal rules adopted thereunder.
- Federally qualified health care centers.
- Any site providing health care services which was established for the purpose of responding to the COVID-19 pandemic under any federal or state order, declaration, or waiver.
- Licensed acupuncturists, medical physicians, osteopathic physicians, chiropractors, podiatrists, naturopathic physicians, optometrists, nurses, pharmacists, dentists, dental hygienists, midwives, electrologists, massage therapists, opticians, physical therapists, psychologists, clinical social workers, mental health counselors, marriage and family therapists, speech-language pathologists, nursing home administrators, occupational therapists, respiratory therapists, dietitians, nutritionists, athletic trainers, orthotists, pedorthists, prosthetists, clinical laboratory personnel, medical physicists, radiological personnel, and home health aides;
- Clinical and non-clinical staff of licensed substance abuse and mental health providers.
- Licensed continuing care facilities.
- Pharmacies.

Section 768.381, F.S., requires a plaintiff to plead a COVID-19-related medical claim with particularity; if the plaintiff fails to do so, the court must dismiss the complaint. A plaintiff must prove by the greater weight of the evidence that a defendant was grossly negligent or committed intentional misconduct to recover for a COVID-19-related medical claim. Moreover, if a health care provider proves by the greater weight of the evidence the existence of an affirmative defense applicable to a COVID-19-related

medical claim, the health care provider has no liability for that claim. The affirmative defenses that may apply to a COVID-19-related medical claim include, in addition to other affirmative defenses recognized by law, the health care provider's:

- Substantial compliance with government-issued health standards specifically relating to COVID-19 or other relevant standards.
- Substantial compliance with government-issued health standards relating to infectious diseases in the absence of standards specifically applicable to COVID-19.
- Substantial compliance with any applicable government-issued health standards relating to COVID-19 or other relevant standards if the standards were in conflict.
- Impossibility of substantial compliance with government-issued health standards because of:
 - Widespread shortages of necessary supplies, materials, equipment, or personnel.
 - Insufficient time to implement the standards.

The applicable statute of limitations for a COVID-19-related medical claim:

- Arising out of the transmission, diagnosis, or treatment of COVID-19 to one year after the later of the:
 - Date of death due to COVID-19;
 - Hospitalization related to COVID-19; or
 - First diagnosis of COVID-19 which forms the basis of the action.
- Not arising out of the transmission, diagnosis, or treatment of COVID-19 to one year after the cause of action accrues.

These liability protections apply to claims that accrued before the effective date of s. 768.381, F.S., and within 1 year after the effective date. Section 768.381, F.S., became law on March 29, 2021. Thus, these liability protections would not apply to any claim that accrues after March 29, 2022.

Effect of Proposed Bill

HB 7021 extends the heightened civil liability protections for health care entities established in s. 768.381, F.S., to claims that accrue before June 1, 2023.¹

The bill takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Section 768.381, F.S., requires a trial judge to make an initial determination of whether the plaintiff in a COVID-19 related lawsuit has met certain requirements before sending the case to a jury. As

¹ During the 2021 Special Session B, the Legislature enacted HB 1B which contained several COVID-19 specific provisions. Each of these provisions are set to expire on June 1, 2023.

such, extending the application of s. 768.381, F.S., may reduce the need for jury trials and may have a positive fiscal impact on the state courts system.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Section 768.381, F.S., provides immunities and processes that may reduce the financial risk of health care providers and long-term care facilities for negligence related to the COVID-19 pandemic. Extending its application may increase the likelihood that these providers and facilities will remain solvent through the pendency of the pandemic.

D. FISCAL COMMENTS:

None.