SQUIRE PATTON BOGGS

H.B. 606 Retroactively Shields School Districts From Liability for Students' and Visitors' Exposure to COVID-19

September 30, 2020

Governor Mike DeWine signed House Bill 606 (H.B. 606) into law on September 14, 2020. The new law, titled "Grant immunity to essential workers who transmit COVID-19," expanded and clarified school districts' immunity as they prepare to reopen – or perhaps recently reopened – their school buildings for in-person instruction. This alert (1) provides an overview of H.B. 606 as enacted; (2) discusses how it expands school districts' pre-existing statutory immunity in the event that students or visitors are exposed to COVID-19 on school grounds; (3) explains why the new law does not affect school districts' liability for their employees' exposure to COVID-19; and (4) assesses the practical considerations and key takeaways for school districts.

I. Overview of H.B. 606

H.B. 606 expands the immunity afforded to governmental entities and establishes COVID-19-related immunity for private entities. The new law applies retroactively to March 9, 2020 (the date of Governor DeWine's Executive Order declaring a state of emergency due to COVID-19), and expires after September 30, 2021.

A. Expanded Immunity

H.B. 606 grants immunity from civil damages "caused by the exposure to, or the transmission or contraction of, MERS-CoV, SARS-CoV, or SARS-CoV-2, or any mutation thereof." This immunity yields, however, if the exposure to COVID-19 resulted from "reckless conduct," "intentional misconduct," or "willful or wanton misconduct." Someone engages in "reckless conduct" if they "disregard[] a substantial and unjustifiable risk that [their] conduct is likely" to either (1) expose someone to COVID-19, or (2) "be of a nature that results in" such exposure. Therefore, H.B. 606 sets a high bar to pierce this expanded immunity.

B. No Liability for Failure to Follow Governmental Orders, Recommendations, or Guidelines

Further, H.B. 606 clarifies that "[a] government order, recommendation, or guideline" does not create an enforceable "duty of care" or a "new cause of action or substantive legal right," and "any such government order, recommendation, or guideline" is presumptively inadmissible as evidence of any such duty of care, cause of action, or substantive right. Similarly, no legal duties are created by "orders and recommendations from the Executive Branch, from counties and local municipalities, from boards of health and other agencies, and from any federal government agency," and such orders and recommendations are presumptively inadmissible to establish a duty or a breach of a duty. In other words, there is no liability simply for failing to abide by governmental orders, recommendations, or guidelines.

II. H.B. 606 Fills the Immunity Gaps Left by R.C. Chapter 2744

Under R.C. Chapter 2744, public school districts already enjoyed substantial immunity from civil liability arising from students' or visitors' exposure to COVID-19 while at their schools. That said, school districts risked forfeiting their pre-existing statutory immunity if either of the following caused a student or visitor to contract COVID-19: (1) an employee's negligence and a physical defect on district property, such as a failure to properly maintain engineering controls or to ensure adequacy and proper use of face coverings or personal protective gear; or (2) an employee's negligent performance of a proprietary function, such as (possibly) serving school lunches.

H.B. 606 has filled those immunity gaps. Now, an employee's mere negligence is insufficient to pierce a district's immunity from liability for a student's or visitor's exposure to COVID-19. Instead, to expose a school district to liability, an employee would have to engage in much more egregious misconduct – i.e., "reckless conduct," "intentional misconduct," or "willful or wanton misconduct" – and it does not matter whether the employee was engaged in a governmental function or a proprietary one.

III. H.B. 606 Does Not Affect School Districts' Liability for Employee Exposure to COVID-19

Under the state Workers' Compensation Act (WCA), employers such as school districts have broad immunity from liability arising from "any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition." This immunity does not apply, however, to situations where an employee seeks damages for injury that their employer intentionally caused. So the WCA would not shield a school district from liability for intentionally exposing an employee to COVID-19, or otherwise intentionally injuring the employee. Because the standard for piercing this immunity was already higher than that under H.B. 606 – i.e., not even "reckless" or "wanton" conduct would be sufficient under the WCA – H.B. 606 does not expand school districts' liability arising from employee exposure to COVID-19.

IV. Practical Considerations and Key Takeaways

Although H.B. 606 provides vast immunity to school districts arising from students' or visitors' exposure to COVID-19 on their premises, this immunity still has its limits. To avoid claims of "reckless conduct," "intentional misconduct," or "willful or wanton misconduct," school districts should continue to take all feasible steps to ensure the safety of their students, employees, and visitors. And while districts do not face liability simply for failing to follow governmental orders, recommendations, and guidelines, such guidance is still a vital tool for ensuring as healthful an environment as possible based on current knowledge regarding COVID-19. Therefore, we recommend that each district (1) ensure that its safety protocols and procedures are reasonable (i.e., consistent with state and federal guidelines); (2) develop a training program to properly train its employees on implementing and enforcing those protocols and procedures; and (3) ensure appropriate oversight over employees' implementation and enforcement of the same.

V. Conclusion

Our lawyers are available to discuss any questions you may have.

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