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WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 277

BY SENATORS BLAIR (MR. PRESIDENT) AND BALDWIN

(BY REQUEST OF THE EXECUTIVE)

[Passed March 11, 2021; in effect from passage]

AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §55-19-1, §55-19-2, §55-19-3, §55-19-4, §55-19-5, §55-19-6, §55-19-7, §55-19-8, and §55-19-9, all relating generally to creating the COVID-19 Jobs Protection Act; designating a short title; making legislative findings; setting forth legislative purposes; defining terms; prohibiting certain claims against persons or entities arising from COVID-19, COVID-19 care, or impacted care; extinguishing liability for death or personal injury related to the design, manufacture, or labeling of supplies or personal protective equipment either sold or donated; creating an exception to the extinguishment of claims for persons having actual knowledge of a product defect acting with conscious, reckless, and outrageous indifference to a substantial and unnecessary risk or with actual malice; providing that, when a claim for workers' compensation benefits is awarded to an employee pursuant to §23-1-1 et seq. of this code for a work-related injury, disease, or death caused by or arising from COVID-19 in the course of and resulting from covered employment, such claim for workers' compensation benefits shall be the sole and exclusive remedy for such injury, disease, or death; providing that, except for §55-19-5 and §55-19-6 of this code, limitations on liability shall not apply to any person, employee, or agent who engaged in intentional conduct with actual malice; providing for severability of provisions; adding retro-activity of act to January 1, 2020; clarifying that no new cause of action is created nor defense limited by the act; and clarifying that the article does not affect duties or rights arising from contract.

Be it enacted by the Legislature of West Virginia:

ARTICLE 19. COVID-19 JOBS PROTECTION ACT.

§55-19-1. Short title.

This article shall be known and may be cited as the COVID-19 Jobs Protection Act.

§55-19-2. Findings and purpose.

(a) The West Virginia Legislature finds that:

(1) The novel coronavirus, also known as COVID-19, has been deemed a pandemic and the President of the United States has declared a national emergency.

(2) The Governor issued a State of Preparedness on March 4, 2020, to allow agencies to coordinate and create necessary measures to prepare for COVID-19.

(3) The Governor proclaimed a State of Emergency on March 16, 2020, finding that the COVID-19 pandemic constitutes a disaster under §15-5-2 of this code.

(4) To protect public health, safety, and welfare, all nonessential businesses were directed to cease all activities except for minimum basic operations in the state.

(5) To protect public health, safety, and welfare, and to ensure the health care system is capable of serving all citizens in need, especially those at high risk and vulnerable to COVID-19, all West Virginia residents were directed to stay at home unless performing an essential activity.

(6) Health care providers have operated with shortages of medical personnel, equipment, and supplies while responding to COVID-19 and were prohibited by Executive Order No. 16-20 from engaging in elective medical procedures.

(7) There is a critical need for personal protective equipment, such as masks, respirators, ventilators, and other medical equipment and products designed to guard against or treat COVID-19.

(8) Manufacturers have substantially increased production of essential products and have made products outside their ordinary course of business to aid in response to COVID-19.

(9) West Virginia is reopening its businesses, including restaurants, retail stores, office buildings, fitness centers, hotels, hair and nail salons, and barber shops, as well as religious institutions.

(10) Lawsuits are being filed across the country against health care providers and health care facilities associated with care provided during the COVID-19 pandemic and illness of health care workers due to exposure to COVID-19 while providing essential medical care, and against businesses seeking damages associated with a person's exposure to COVID-19.

(11) The threat of liability poses an obstacle to efforts to reopen and rebuild the West Virginia economy and to continue to provide medical care to impacted West Virginians.

(12) The diagnosis and treatment of COVID-19 has rapidly evolved from largely unchartered, experimental, and anecdotal observations and interventions, without the opportunity for the medical community to develop definitive evidence-based medical guidelines, making it difficult, if not impossible, to identify and establish applicable standards of care by which the acts or omissions of health care providers can fairly and objectively be measured.

(b) It is the purpose of this article to:

(1) Eliminate the liability of the citizens of West Virginia and all persons including individuals, health care providers, health care facilities, institutions of higher education, businesses, manufacturers, and all persons whomsoever, and to preclude all suits and claims against any persons for loss, damages, personal injuries, or death arising from COVID-19.

(2) Provide assurances to businesses that reopening will not expose them to liability for a person's exposure to COVID-19.

§55-19-3. Definitions.

For the purposes of this article:

(1) "Arising from COVID-19" means any act from which loss, damage, physical injury, or death is caused by a natural, direct, and uninterrupted consequence of the actual, alleged, or possible exposure to, or contraction of, COVID-19, including services, treatment, or other actions in response to COVID-19, and without which such loss, damage, physical injury, or death would not have occurred, including, but not limited to:

(A) Implementing policies and procedures designed to prevent or minimize the spread of COVID-19;

(B) Testing;

(C) Monitoring, collecting, reporting, tracking, tracing, disclosing, or investigating COVID-19 exposure or other COVID-19-related information;

(D) Using, designing, manufacturing, providing, donating, or servicing precautionary, diagnostic, collection, or other health equipment or supplies, such as personal protective equipment;

(E) Closing or partially closing to prevent or minimize the spread of COVID-19;

(F) Delaying or modifying the schedule or performance of any medical procedure;

(G) Providing services or products in response to government appeal or repurposing operations to address an urgent need for personal protective equipment, sanitation products, or other products necessary to protect the public;

(H) Providing services or products as an essential business, health care facility, health care provider, first responder, or institution of higher education; or

(I) Actions taken in response to federal, state, or local orders, recommendations, or guidelines lawfully set forth in response to COVID-19.

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

(3) “COVID-19 Care” means services provided by a health care facility or health care provider, regardless of location and whether or not those services were provided in-person or through telehealth or telemedicine, that relate to the testing for, diagnosis, prevention, or treatment of COVID-19, or the assessment, treatment, or care of an individual with a confirmed or suspected case of COVID-19.

(4) “COVID-19 emergency” means the State of Emergency declared by the Governor of the State of West Virginia by proclamation on March 16, 2020, and any subsequent orders or amendments thereto.

(5) “Essential business” means a person or entity that is:

(A) An essential business or operation as specified by Executive Order No. 9-20 on March 23, 2020, and any subsequent orders or amendments thereto; or

(B) Within an essential critical infrastructure sector as defined by the United States Department of Homeland Security.

(6) “First responder” means a person who performs one or more “emergency services” as that term is defined in §15-5-2 of this code. “First responder” also includes any other person authorized by executive order who will be deployed in response to the COVID-19 pandemic.

(7) “Health care” means any act, service, or treatment as defined by §55-7B-2 of this code.

(8) “Health care facility” means a facility as defined by §55-7B-2 of this code and any other facility authorized to provide health care or vaccinations in response to the COVID-19 emergency, including, but not limited to, a personal attendant agency.

(9) “Health care provider” means a person, partnership, corporation, professional limited liability company, health care facility, entity, or institution as defined by §55-7B-2 of this code, whether paid or unpaid, including persons engaged in telemedicine or telehealth; and any person authorized to provide health care in response to the COVID-19 emergency, including, but not limited to personal attendants and the employer, employees or agents of a health care provider who provide, arrange for, and assist with the delivery of health care, including those whose licensing requirements were modified through executive order.

(10) “Impacted care” means care offered, delayed, postponed, or otherwise adversely affected at a health care facility or from a health care provider that impacted the health care facility or health care provider’s response to, or as a result of, COVID-19 or the COVID-19 emergency: Provided, That this provision does not prohibit claims that may otherwise be brought pursuant to §55-7B-1 et seq. of this code so long as such claims for loss, damage, physical injury, or death are unrelated to COVID-19 or the COVID-19 emergency and the care provided. If the issue of impacted care is raised by a defendant under §55-19-4 of this code, the circuit court shall, upon motion by the defendant, stay the proceedings, including any discovery proceedings, and, as soon as practicable, hold a hearing to determine whether the care offered, delayed, postponed, or otherwise adversely affected at a health care facility or from a health care provider was related to COVID-19 or the COVID-19 emergency. If the circuit court determines that the care offered, delayed, postponed, or otherwise adversely affected at a health care facility or from a health care provider was related to COVID-19 or the COVID-19 emergency and the care provided, then the cause of action shall be dismissed under §55-19-4 of this code.

(11) “Person” means an individual, partnership, corporation, association, state, county, or local governmental entity, or other entity, including, but not limited to, a school, a college or university, an institution of higher education, religious organization, or nonprofit charitable organization. “Person” includes an employee, agent, or independent contractor of the person, regardless of whether the individual is a paid or an unpaid volunteer.

(12) “Personal protective equipment” means coveralls, face shields, gloves, gowns, masks, respirators, or other equipment designed to protect the wearer or other persons from the spread of infection or illness.

(13) “Physical injury” means actual bodily harm, sickness, or disease.

(14) “Public health guidance” means written guidance related to COVID-19 issued by the Centers for Disease Control and Prevention, Occupational Safety & Health Administration of the United States Department of Labor, Office of the Governor, West Virginia Department of Health and Human Resources, or any other state, federal, county, or local government agency.

(15) “Qualified product” means personal protective equipment used to protect the wearer from COVID-19 or prevent 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 to treat COVID-19 or prevent the spread of COVID-19; medical devices, equipment, or supplies utilized 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 of qualified products.

(16) “Volunteer” means any person or entity that makes a facility, product, or service available to support a state, county, or local response to COVID-19.

§55-19-4. Claims arising from the COVID-19 pandemic.

Notwithstanding any law to the contrary, except as provided by this article, there is no claim against any person, essential business, business, entity, health care facility, health care provider, first responder, or volunteer for loss, damage, physical injury, or death arising from COVID-19, from COVID-19 care, or from impacted care.

§55-19-5. Products made, sold, and donated in response to COVID-19.

(a) Any person that designs, manufactures, labels, sells, distributes, or donates a qualified product in response to COVID-19 that is utilized by any person, essential business, government entity, business entity, health care facility, health care provider, first responder, or

volunteer shall not be liable in a civil action alleging personal injury, death, or property damage caused by or resulting from the product's manufacturing or design, or a failure to provide proper instructions or sufficient warnings.

(b) Any person that designs, manufactures, labels, sells, distributes, or donates household disinfecting or cleaning supplies or personal protective equipment in response to COVID-19 that does not make such products in the ordinary course of the person's business shall not be liable in a civil action alleging personal injury, death, or property damage caused by or resulting from the product's manufacturing or design, or a failure to provide proper instructions or sufficient warnings.

(c) The limitations on liability provided in this section shall not apply to any person, or any employee or agent thereof, that:

(1) Had actual knowledge of a defect in the product when put to the use for which the product was manufactured, sold, distributed, or donated; and acted with conscious, reckless, and outrageous indifference to a substantial and unnecessary risk that the product would cause serious injury to others; or

(2) Acted with actual malice.

(d) Any action under subsection (c) of this section must be brought not later than one year after the date of personal injury, death, or property damage.

§55-19-6. Workers' compensation.

Notwithstanding the provisions of this article and the further provisions of §23-4-2 of this code which permits the filing of a civil cause of action against an employer for damages in excess of benefits received or receivable in a workers' compensation claim, if it is determined that the employer acted with deliberate intention, when a claim for workers' compensation benefits is awarded to an employee pursuant to §23-1-1 et seq. of this code for a work-related injury, disease, or death caused by or arising from COVID-19 in the course of and resulting from covered employment, such claim for workers' compensation benefits shall be the sole and exclusive remedy for such injury, disease, or death and the immunity from suit provided under §23-2-6 and §23-2-6a of this code shall be and remain in full force and effect.

§55-19-7. Exception.

Excluding the provisions of §55-19-5 and §55-19-6 of this code, the limitations on liability provided in this article shall not apply to any person, or employee or agent thereof, who engaged in intentional conduct with actual malice.

§55-19-8. Severability.

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act, and to this end the provisions of this act are declared to be severable.

§55-19-9. Application.

(a) This article shall be effective retroactively from January 1, 2020, and applies to any cause of action accruing on or after that date.

(b) Nothing in this article shall be construed to create a new cause of action or expand any liability otherwise imposed, limit any defense, or affect the applicability of any law that affords greater protections to defendants that are provided in this article.

(c) Nothing in this article shall be construed to affect any duties, rights, benefits, or any other term or condition arising from a contractual relationship.

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