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HB 112: Extension of the Pandemic Business Safety Act

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TORTS

COVID-19 Pandemic Business Safety Act: Amend an Act Relating to Torts to Provide Certain Immunities from Liability Claims Regarding COVID-19, so as to Extend Applicability for One Year

CODE SECTIONS:	O.C.G.A. §§ 51-16-1, -2, -3, -4, -5 (amended)
BILL NUMBER:	HB 112
ACT NUMBER:	175
GEORGIA LAWS:	2021 Ga. Laws 341
SUMMARY:	This Act amends the Pandemic Business Safety Act to extend its applicability for an additional year, expiring on July 14, 2022. The Pandemic Business Safety Act provides liability protection limitation to business against tort claims arising from the COVID-19 pandemic.
EFFECTIVE DATE:	July 1, 2021

History

Outbreak of the COVID-19 Pandemic in Georgia

On January 21, 2020, the United States Centers for Disease Control and Prevention (CDC) confirmed the first travel-related case of the novel SARS-CoV-2 (COVID-19) within the United States.¹ COVID-19 is “an infectious disease . . . [that causes] mild to moderate respiratory illness” in most people.² This highly contagious disease can cause fever, shortness of breath, cough, muscle or body aches, sore throat, loss of taste or smell, diarrhea, and headache.³ For some people,

1. Press Release, U.S Ctrs. for Disease Control & Prevention, First Travel-Related Case of 2019 Novel Coronavirus Detected in United States (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> [<https://perma.cc/UHG7-X79D>].

2. *Coronavirus Disease (COVID-19)*, WORLD HEALTH ORG., https://www.who.int/health-topics/coronavirus#tab=tab_1 [<https://perma.cc/78RJ-WLX7>].

3. *What Is Coronavirus?*, JOHNS HOPKINS MED.,

“COVID-19 can even lead to respiratory failure, lasting lung and heart muscle damage, nervous system problems, kidney failure, or death.”⁴

The State of Georgia confirmed its first COVID-19 case on March 2, 2020, followed by the state’s first death on March 12, 2020.⁵ Six months after the first COVID-19 death in Georgia, the state reported more than 1,110,000 cases, 74,000 hospitalizations, and 20,000 deaths.⁶ In December 2020, Georgia received its first doses of the COVID-19 vaccine.⁷ By early September 2021, the State had administered more than 9,700,000 doses of the various vaccines available.⁸

After nearly a year of business closures, the CDC announced in May 2021 that fully vaccinated individuals could safely travel and “resume activities without wearing masks or physically distancing.”⁹ Additionally, Governor Brian Kemp (R) announced in April 2021 that “Georgia is open for business” and issued an order to roll back COVID-19 restrictions.¹⁰ That statewide executive order “end[ed] a ban on large gatherings, eliminat[ed] shelter-in-place requirements,

<https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus> [https://perma.cc/F9HU-CKWS] (May 19, 2021).

4. *Id.*

5. *TIMELINE: Today Marks 1 Year Since Georgia’s First COVID-19 Cases Were Confirmed*, WSB-TV (Mar. 2, 2021, 12:09 PM), <https://www.wsbtv.com/news/local/timeline-today-marks-1-year-since-georgias-first-covid-19-cases-were-confirmed/O4OCZTPX3RHSJPSTMKDWA7BMEM/> [https://perma.cc/J2XR-5EDF].

6. *COVID-19 Daily Status Report*, GA. DEP’T OF PUB. HEALTH, <https://dph.georgia.gov/covid-19-daily-status-report> [https://perma.cc/6FHB-HYS4].

7. Press Release, Ga. Dep’t of Pub. Health, *First Doses of COVID Vaccine Arrive in Georgia* (Dec. 14, 2020), <https://dph.georgia.gov/press-releases/2020-12-14/first-doses-covid-vaccine-arrive-georgia> [https://perma.cc/4YWP-6VMW].

8. *GA DPH Vaccine Distribution Dashboard*, GA. DEP’T OF PUB. HEALTH, <https://experience.arcgis.com/experience/3d8eea39f5c1443db1743a4cb8948a9c> [https://perma.cc/WF5R-6CFR] (Numbers and data sets reported on the website on September 3, 2021). Georgia has administered the Pfizer, Moderna, and Johnson & Johnson vaccines. *See Different COVID-19 Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html?s_cid=11304:types%20of%20covid%20vaccines:sem.ga:p:RG:GM:gen:PTN:FY21 [https://perma.cc/KE8U-K9C6] (Oct. 20, 2021).

9. *Interim Public Health Recommendations for Fully Vaccinated People*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html> [https://perma.cc/28M6-M7KW] (Oct. 15, 2021).

10. *Kemp: “Georgia is Open for Business” with Order Rolling Back COVID Restrictions*, NEWS CHANNEL 9 (Apr. 7, 2021), <https://newschannel9.com/news/coronavirus/kemp-georgia-is-open-for-business-with-order-rolling-back-covid-restrictions> [https://perma.cc/T6GF-335F].

and reduc[ed] any remaining distance requirements at restaurants, bars,” and other businesses.¹¹ Moreover, the order eliminated law enforcement’s ability to close businesses for noncompliance with COVID-19 restrictions.¹²

Throughout the pandemic, business owners have expressed concerns about potential liability from their patrons contracting COVID-19, which are similar to the concerns that medical facilities have when treating patients infected with the virus.¹³ Lawmakers temporarily assuaged these concerns in 2020 by establishing liability protections with the passage of Senate Bill (SB) 359.¹⁴ Yet, even as restrictions began to ease across the state in 2021, continued concerns over liability for COVID-19 exposure in businesses and hospitals remained.¹⁵ In response, lawmakers extended SB 359’s liability protections for an additional year with the passage of House Bill (HB) 112.¹⁶

Georgia Legislature Passes SB 359: The Georgia COVID-19 Pandemic Business Safety Act

On August 5, 2020, Governor Kemp signed SB 359 into law as the Georgia COVID-19 Pandemic Business Safety Act (PBSA or the Act).¹⁷ The first version of the PBSA protected certain businesses and entities from liability for COVID-19 related injuries or deaths through July 14, 2021.¹⁸ The Act, which has been extended for an additional

11. *Id.*

12. *Id.*

13. Beau Evans, *COVID-19 Liability Protections in Georgia Set for One-Year Extension*, AUGUSTA CHRON., <https://www.augustachronicle.com/story/news/2021/03/17/covid-19-liability-protections-georgia-set-one-year-extension-general-assembly/4738077001/> [<https://perma.cc/46T6-BG75>] (Mar. 17, 2021, 3:22 PM).

14. State of Georgia Final Composite Status Sheet, SB 359, Aug. 13, 2020.

15. *Id.*; Todd Van Dyke & Raymond Perez, II, *Georgia Passes Bill to Extend COVID-19 Legal Immunity Protection a Year; Governor Considering*, JACKSONLEWIS (Apr. 8, 2021), <https://www.jacksonlewis.com/publication/georgia-passes-bill-extend-covid-19-legal-immunity-protection-year-governor-considering> [<https://perma.cc/E4TB-BXCX>] (“Despite declining hospitalization rates and the roll out of highly effective vaccines, concerns linger about the possible course of the pandemic in 2021. Proliferation of COVID-19 variants, reopening of many businesses and schools, and loosening of restrictions in some states may be contributing to increased infection rates.”).

16. *See* Evans, *supra* note 13.

17. State of Georgia Final Composite Status Sheet, SB 359, Aug. 13, 2020.

18. 2020 Ga. Laws 798, § 4, at 802.

year, generally provides blanket immunity from liability for negligence claims, but plaintiffs may still recover damages upon a showing of “gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm.”¹⁹

Section 1 of the PBSA defines a “COVID-19 liability claim” as a cause of action for the “[t]ransmission, infection, exposure, or potential exposure of COVID-19 to a claimant . . . [a]t any healthcare facility or on the premises of any entity, individual, or healthcare provider, resulting in injury to or death of a claimant”²⁰ Further, the Act’s provisions also extend to “[m]anufacturing, labeling, donating, or distributing personal protective equipment [PPE] or sanitizer . . . which departs from the normal manufacturing . . . that proximately results in injury to or death of a claimant.”²¹ Given the scale of the COVID-19 pandemic, the Georgia legislature drafted this section broadly to cover virtually every entity with which COVID-19 liability could arise.²² Although the language of Section 1 primarily focuses on entities, it does expressly provide the same immunities for individual healthcare providers and any persons with “legal responsibility for the acts or omissions of such healthcare facilit[ies] or healthcare provider[s].”²³

One unique aspect of the PBSA is the fixed expiration date of its immunities.²⁴ Although some states take a fixed-date approach like Georgia, other states have opted to end their COVID-19 provisions upon the expiration of a declared state of emergency.²⁵ Still, other states take the broadest approach and provide no expiration date for their COVID-19 immunity provisions.²⁶

19. O.C.G.A. § 51-16-3(a) (Supp. 2020).

20. O.C.G.A. § 51-16-1(3)(A)(i) (Supp. 2020).

21. *Id.* § 51-16-1(3)(C).

22. Press Release, Ga. State Senate, Senate Rsch. Off., Revisiting the Georgia COVID-19 Pandemic Business Safety Act, https://cviog.uga.edu/_resources/documents/training-and-education/biennial-presentations/2020/sro-covid-19-pandemic-business-safety-act.pdf [<https://perma.cc/EEJ2-T7LH>].

23. § 51-16-1(6), (11).

24. See 2020 Ga. Laws 798, § 4, at 802.

25. See KAN. STAT. ANN. § 60-5503(b) (West, Westlaw through 2021 Reg. Sess.); N.C. GEN. STAT. ANN. § 99E-72 (West, Westlaw through S.L. 2021-60 of the 2021 Reg. Sess. of the Gen. Assemb.).

26. See OKLA. STAT. ANN. tit. 76 § 111(C) (West, Westlaw current with legislation of First Reg. Sess. of the 58th Leg. 2021).

Georgia Tort Litigation Following the Adoption of the PBSA

One of Georgia's earliest COVID-19 related civil cases was *Hendrix v. Arbor Terrance at Cascade, LLC*, which involved a wrongful death claim that resulted from the spread of COVID-19 in a senior assisted living facility.²⁷ The plaintiffs filed a complaint in the State Court of Fulton County, alleging that, despite restrictions imposed by the facility, the defendants continued to work even after COVID-19 exposure and failed to wear PPE and to restrict outside visitation.²⁸ The plaintiffs also alleged negligence and gross negligence.²⁹ The defendants moved for judgment on the pleadings, contending that the PBSA exempted the facility from liability.³⁰

In an order entered on April 6, 2021, the judge evaluated the defendants' immunity under the PBSA and found that, although the Act "provides broad immunity as to COVID-19 related causes of action the Act still allows a claim to proceed when the otherwise covered defendant showed "gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm."³¹ Pertaining to the state law claims, the judge denied the motion for judgment on the pleadings because, if proven, the plaintiff's claims would defeat immunity under the Act."³²

*Bill Tracking of HB 112**Consideration and Passage by the House*

Representative Trey Kelley (R-16th) sponsored HB 112 in the House with Representative Sharon Cooper (R-43rd), Representative Kasey Carpenter (R-4th), Representative Mark Newton (R-123rd), Representative Lee Hawkins (R-27th), and Representative John

27. See generally Complaint, *Hendrix v. Arbor Terrance at Cascade, LLC*, No. 20EV002365 (Ga. State Ct. Fulton Cnty. Apr. 23, 2020).

28. *Id.* at 5.

29. *Id.* at 6–7.

30. Order at 3, *Hendrix v. Arbor Mgmt. Servs., LLC*, No. 20EV002365 (Ga. State Ct. Fulton Cnty. Apr. 6, 2021).

31. *Id.* at 2–3.

32. *Id.* at 3.

LaHood (R-175th) cosponsoring.³³ The bill was prefiled on January 26, 2021, and the House read it for the first time on January 27, 2021.³⁴ Following a second reading in the House on January 28, 2021, the House then referred the bill to the House Special Committee on Access to the Civil Justice System.³⁵

The Committee favorably reported the bill on February 4, 2021.³⁶ On February 9, the House read the bill for a third time.³⁷ That same day, the House adopted the bill by a vote of 99 to 68.³⁸

Consideration and Passage by the Senate

Senator Brian Strickland (R-17th) sponsored the bill in the Senate, and the Senate read it for the first time on February 10, 2021.³⁹ The Senate referred the bill to the Senate Judiciary Committee that same day.⁴⁰

The Committee favorably reported the bill on March 11, 2021.⁴¹ The Senate read the bill for a second time on March 15, 2021.⁴² On March 17, 2021, the Senate read the bill for a third time.⁴³ Senator Bill Cowsert (R-46th) accompanied by Senators Greg Dolezal (R-27th), Steve Gooch (R-51st) and John Kennedy (R-18th), introduced a floor amendment to the bill.⁴⁴ Additionally, Senator Jennifer Jordan (D-6th), along with Senators Gloria Butler (D-55th), Nikki Merritt (D-9th), and Michelle Au (D-48th), introduced an amendment to the bill, which

33. Georgia General Assembly, HB 112, Bill Tracking [hereinafter HB 112, Bill Tracking], <https://www.legis.ga.gov/legislation/58959>.

34. State of Georgia Final Composite Status Sheet, HB 112, May 13, 2021.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. HB 112, Bill Tracking, *supra* note 33.

40. State of Georgia Final Composite Status Sheet, HB 112, May 13, 2021.

41. *Id.*

42. *Id.*

43. *Id.*

44. Failed Senate Floor Amendment to HB 112, introduced by Sen. Bill Cowsert (R-46th), Sen. Greg Dolezal (R-27th), Sen. Steve Gooch (R-51st), and Sen. John Kennedy (R-18th), Mar. 17, 2021. “Sen. Bill Cowsert, R-Athens, also tried but failed to bring an amendment that would have blocked sickened Georgians from suing hospitals and businesses that put up certain warning signs, even if those entities acted recklessly or with gross negligence to provide safety measures.” *See* Evans, *supra* note 13.

would have updated definitions pertaining to COVID-19 found in Code section 34-9-280.⁴⁵ Neither proposed amendment passed.⁴⁶

On March 17, 2021, the Senate adopted the bill without any amendments by a vote of 36 to 17.⁴⁷

On April 5, 2021, the House sent the bill to Governor Brian Kemp (R) to be signed.⁴⁸ The Governor signed the bill on May 4, 2021, with an effective date of July 1, 2021.⁴⁹

The Act

The Act amends the following portions of the Official Code of Georgia Annotated: Chapter 16 of Title 51, relating to COVID-19 claims.⁵⁰ The Act's overall purpose is to extend the sunset provision of SB 359, granting COVID-19 transmission liability protections for businesses and medical providers until July 14, 2022.⁵¹

Analysis

The PBSA and its subsequent extension are a bipartisan effort aimed at keeping Georgia businesses and medical facilities afloat during the COVID-19 pandemic.⁵² Although the Act garnered the support of both plaintiff and defense attorneys, it is far from a perfect solution.⁵³

45. Failed Senate Floor Amendment to HB 112, introduced by Sen. Jennifer Jordan (D-6th), Sen. Gloria Butler (D-55th), Sen. Nikki Merritt (D-9th), and Sen. Michelle Au (D-48th), Mar. 17, 2021. "Sen. Jen Jordan, D-Atlanta, brought a failed amendment that would have allowed workers who cannot do their jobs from home to bring workers' compensation claims if they contract COVID-19 on the job, which Jordan says they currently cannot do under state law." Evans, *supra* note 13.

46. State of Georgia Final Composite Status Sheet, HB 112, May 13, 2021; HB 112, Bill Tracking, *supra* note 33.

47. State of Georgia Final Composite Status Sheet, HB 112, May 13, 2021.

48. *Id.*

49. *Id.*

50. *See generally* 2021 Ga. Laws 341.

51. *Id.*

52. *See* O.C.G.A. §§ 51-16-1, -2, -3, -4, -5 (Supp. 2020).

53. *See, e.g.,* Greg Land, *With Legislative Session over, Georgia Legal Community Ponders Bills Passed and Defeated*, DAILY REP. (Apr. 1, 2021, 6:05 PM), <https://www.law.com/dailyreportonline/2021/04/01/with-legislative-session-over-georgia-legal-community-ponders-bills-passed-and-defeated/> [https://perma.cc/C8SB-CMPS]. Both the Georgia Trial Lawyers Association and the Georgia Defense Lawyers Association supported the passing of HB 112 and participated in its creation. *Id.*

Business and Economic Policy Considerations

The PBSA was promulgated to protect businesses, medical providers, and PPE manufacturers from liability stemming from the transmission of COVID-19. Representative Trey Kelley (R-16th), one of HB 112's sponsors, asserted that in a time when businesses struggle to stay open and medical providers struggle to provide care to the community, those entities do not need to be "attacked by frivolous lawsuits."⁵⁴ Accordingly, the PBSA "allow[s] businesses to stay open so that employees have an opportunity to go to work."⁵⁵ Amy Jensen, a labor and employment attorney at Ogletree Deakins, echoed the same sentiment, stating that the PBSA's extension "should make it easier for employers to reopen more facilities in the coming months."⁵⁶

The Georgia Trial Lawyers Association (GTLA) also rallied behind the PBSA and used the new legislation to advocate for the return of collegiate and high school athletic programs.⁵⁷ The GTLA released an open letter assuring Georgia schools that their athletic programs were immune from liability for COVID-19 transmission claims.⁵⁸ The GTLA explained that so long as an entity "provided some level of protection related to transmission, even careless protection," then it would not be held liable because "gross negligence under Georgia law and Senate Bill 359 is the *complete* want of care, meaning failure to take any steps to prevent transmission."⁵⁹

54. Nyamekye Daniel, *House Approves Extending COVID-19 Lawsuit Protection for Georgia Businesses by a Year*, CTR. SQUARE (Feb. 9, 2021), https://www.thecentersquare.com/georgia/house-approves-extending-covid-19-lawsuit-protection-for-georgia-businesses-by-a-year/article_9fcc8824-6b16-11eb-adc7-ffc4c94f8c5d.html [https://perma.cc/J3YN-FRZN].

55. *Id.*

56. Brett Barrouquere, *Biggest Georgia Litigation of 2021: Midyear Report*, LAW360.COM (July 8, 2021, 4:37 PM), <https://www.law360.com/articles/1399538/biggest-georgia-legislation-of-2021-midyear-report> [https://perma.cc/9ZYG-9C9X].

57. Greg Land, *Ga. Trial Lawyers Assure Colleges That Sports Programs Protected from CV-19 Lawsuits*, LAW.COM: DAILY REP. (Aug. 14, 2020, 6:15 PM), <https://www.law.com/dailyreportonline/2020/08/14/ga-trial-lawyers-assure-colleges-that-sports-programs-protected-from-cv-19-lawsuits/> [https://perma.cc/8K9W-ZFC4].

58. *Id.*

59. Open Letter from Lyle Warshauer & Daniel Snipes, Ga. Trial Lawyers Ass'n, <https://images.law.com/contrib/content/uploads/documents/404/50968/GTLA-Open-Letter-re.-CV-19.pdf> [https://perma.cc/SSX9-8PCA]; Order, *supra* note 30, at 2–3.

Some of Georgia's major income drivers partly explain the pro-economy ideology that led to the extension of the PBSA's sunset provision. For example, Georgia was among the first states to "reopen [the] economy," and thus, it had a "blockbuster year" in the film and television industry, commanding more than \$4 billion from in-state spending on productions for fiscal year 2021.⁶⁰ Additionally, in June 2020, production companies committed to hiring an estimated 40,000 workers to staff ongoing productions in the state.⁶¹ And, as of July 2021, more than fifty productions were filming in Georgia.⁶²

Despite compelling pro-business policies, not everyone is convinced that the PBSA is a fix-all solution. Many opponents of the PBSA argue that the Act offers too many protections for businesses at the expense of workers and consumers.⁶³ One central issue surrounding the PBSA is whether the Georgia legislature went too far by providing near-blanket immunity to businesses in the state.⁶⁴ Given the broad nature of the PBSA's liability shield, businesses that act without gross negligence under Code section 51-1-4 are, in effect, now permitted to use COVID-19 as a defense to an otherwise legitimate COVID-19 related claim.⁶⁵ Aside from cases of gross negligence, Georgia businesses now have even less incentive to go beyond the bare minimum to protect consumers or employees from contracting the COVID-19 virus.

Employee Protection Policy Considerations

The PBSA does not offer much for business employees. Georgia law provides that employees usually cannot bring claims stemming

60. *Georgia's Film Industry Breaks State Production Records*, VALDOSTA TODAY (July 22, 2021), <https://valdostatoday.com/business-2/2021/07/georgias-film-industry-breaks-state-production-records/> [<https://perma.cc/K9AE-D2VT>]. For the fiscal year 2020, productions filmed in Georgia only brought in \$2.2 billion. *Id.*

61. *Id.*

62. *Id.*

63. See Evans, *supra* note 13.

64. See Robin Frazer Clark, *Covid-19 Liability Concerns Lead to Short-Term Tort Reform in Georgia*, ATLANTA INJ. LAW. BLOG (July 22, 2020), <https://www.atlantainjurylawyerblog.com/covid-19-liability-concerns-lead-to-short-term-tort-reform-in-georgia/> [<https://perma.cc/665U-URGQ>].

65. *Id.*

from workplace injuries.⁶⁶ Instead, employees file suits through the Georgia State Board of Workers' Compensation (SBWC), and those claims are either settled or adjudicated via an administrative law judge.⁶⁷ Because Code section 51-16-5 plainly states that the Act does not amend or supersede any of the state workers' compensation statutes, it is "unlikely to significantly alter the nature of COVID-19 claims brought by employees against their employers."⁶⁸ Representative Matthew Wilson (D-80th) echoed these concerns, stating that the statute is "too broad" and "places shareholders and CEOs over Georgians."⁶⁹ To rebut the pro-employer critique of the PBSA, Representative Kelley argued that there is "nothing, not a single right, that will be taken away from a single employee in our state."⁷⁰

In addition to remedies available to employees via the SBWC, the Federal Occupational Safety and Health Administration (OSHA) retains jurisdiction over workplaces in Georgia, which means that the "employers could still be cited under OSHA's general duty clause if they fail to follow federal guidance from OSHA and the CDC."⁷¹

66. *Can You Sue Your Employer for a Workplace Injury in Georgia?*, S. BURKE L., <https://www.sburkelaw.com/faqs/can-you-sue-your-employer-for-a-workplace-injury-in-georgia.cfm> [https://perma.cc/FW64-3ZVP]; *Am I Allowed to Sue After a Workplace Accident?*, GARY MARTIN HAYS & ASSOCS., P.C., <https://www.garymartinhays.com/workers-compensation/can-i-sue-my-employer/> [https://perma.cc/W4K2-844N].

67. *See generally State Board of Workers' Compensation*, STATE BD. OF WORKERS' COMP., <https://sbwc.georgia.gov/> [https://perma.cc/PUD7-RTSR]. The workers' compensation laws are codified in Georgia Code 34-9. *Statutes and Rules*, STATE BD. OF WORKERS' COMP., <https://sbwc.georgia.gov/statutes-and-rules> [https://perma.cc/QD2H-UJJP].

68. Jackson Dial, *How Much Liability Protection Does Georgia's COVID-19 Law Provide Hospitality Business Owners?*, LAW.COM: DAILY REP. (Oct. 12, 2020, 1:13 PM), <https://www.law.com/dailyreportonline/2020/10/12/how-much-liability-protection-does-georgias-covid-19-law-provide-hospitality-business-owners/> [https://perma.cc/C2AT-7ZB5].

69. *See* Daniel, *supra* note 54.

70. *Id.*

71. J. Micah Dickie, Fisher Phillips, *Georgia Extends Limited COVID-19 Liability Protections*, JD SUPRA (May 18, 2021), <https://www.jdsupra.com/legalnews/georgia-extends-limited-covid-19-3713249/> [https://perma.cc/56ZR-CWZR]. Although further discussion is outside of the purview of this Article, OSHA guidance on COVID-19 is available on the OSHA website. *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, U.S. DEP'T OF LAB.: OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/coronavirus/safework> [https://perma.cc/6MGD-T9B8] (June 10, 2021).

Moreover, the Act fails to consider another worker group— independent contractors.⁷² Many times, independent contractors are unable to file for relief under Georgia’s workers’ compensation statutes, so they alternatively file under Georgia’s occupational accident laws.⁷³ Due to the absence of any pending or current COVID-19 claims against businesses and the silence in the Georgia Code, it is unclear how the courts will handle such claims brought by independent contractors.

Georgia Case Law Provides Little Framework for COVID-19 Liability Claims Against Businesses

It is often impossible to determine the exact moment an individual contracted an infectious disease, and COVID-19 is no different in this regard. Accordingly, the current scarcity of Georgia case law concerning COVID-19 related claims can at least be partly attributed to the difficulty of initially showing (1) that an individual was infected at a specific business and (2) that the individual’s injuries were indeed caused by the infection.⁷⁴ Given the low number of COVID-19 liability cases that have arisen in 2020, it is unclear whether more cases would increase if the Georgia legislature let the PBSA expire on July 14, 2021, which was the original expiration date.⁷⁵

Should plaintiffs prove that they contracted COVID-19 at a specific business and that their injuries were caused by that contraction, they must next make a showing of “gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm.”⁷⁶ Code section 51-1-4 defines gross negligence as the absence

72. Julie Poirier, *Georgia Workers’ Compensation Law and the Independent Contractor*, POIRIER L. (Mar. 16, 2018, 4:57 PM), <https://www.poirierlawfirm.com/2018/03/16/georgia-workers-compensation-law-independent-contractor/> [https://perma.cc/AX5D-AWY2].

73. David Hart, *What Are Your Rights to Compensation as an Independent Contractor When You’re Injured on the Job?*, HART L. FIRM, PLLC, <https://www.thehartlawfirm.com/library/independent-contractors-rights-after-a-workplace-accident.cfm> [https://perma.cc/JSD5-JSZZ].

74. See Dial, *supra* note 68.

75. Raychel Lean, *Southeast Takeaways: Traversing the ‘Wild West’ of COVID-19 Liability Shields*, LAW.COM: DAILY BUS. REV. (Mar. 30, 2021, 10:30 AM), <https://www.law.com/dailybusinessreview/2021/03/30/southeast-takeaways-traversing-the-wild-west-of-covid-19-liability-shields/> [https://perma.cc/4X2J-5YHN] (“COVID-19 liability suits aren’t that common. About 50 have been filed in the state so far.”).

76. O.C.G.A. § 51-16-3(a) (Supp. 2020)

of such care “which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances.”⁷⁷ Although courts have discretion to interpret the confines of this reasonableness standard, the absence of Georgia case law regarding COVID-19 related claims makes it unclear as to what conduct constitutes gross negligence regarding COVID-19 protocols. *Hendrix* does provide some guidance: a finding of gross negligence is reasonable when a defendant “fail[s] to exercise even slight diligence in enforcing visitation restrictions, imposing workplace PPE requirements, and mandating social distancing between residents and staff.”⁷⁸

The Future of PBSA’s Immunity with the COVID-19 Delta Variant

In March 2021, the highly contagious Delta variant of COVID-19 reached the United States.⁷⁹ By the end of July 2021, the Delta variant made up over 80% of new United States COVID-19 cases.⁸⁰ Georgia saw a higher rate of new COVID-19 cases and hospitalizations in July 2021 than it did in the previous month, largely due to the Delta variant.⁸¹ Along with the Delta variant, the new Delta Plus and Lambda variants pose increasing threats to the United States.⁸²

Although the Delta variant may provide increased public health concerns, particularly for unvaccinated individuals, it does not appear to limit protections under the PBSA.⁸³ The definition of COVID-19

77. O.C.G.A. § 51-1-4 (Supp. 2020) (“[S]light diligence is that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances [T]he absence of such care is termed gross negligence.”).

78. Order, *supra* note 30, at 2–3.

79. Kathy Katella, *5 Things to Know About the Delta Variant*, YALE MED., <https://www.yalemedicine.org/news/5-things-to-know-delta-variant-covid> [https://perma.cc/A6MC-JM6M] (Oct. 22, 2021).

80. *Id.*

81. *Id.*

82. Alex Meier, *Lambda and Delta Plus: What to Know About Other COVID Variants Detected in US*, ABC 7 CHI. (Aug. 7, 2021), <https://abc7chicago.com/lambda-variant-delta-plus-covid-variants-vaccine/10937097/> [https://perma.cc/WXW6-HC9U].

83. See generally O.C.G.A. § 51-16-1 (Supp. 2020); Brittany Kleinpeter & Donesha Aldridge, ‘We’ve Seen This Movie Before’ Atlanta Doctor Concerned as COVID Cases Rise in Georgia, 11 ALIVE, <https://www.11alive.com/article/news/health/coronavirus/atlanta-covid-doctor-concerns-delta-variant-cases-rise-georgia/85-6ead6751-3c4c-46b2-82f0-7cb30a0e11e1> [https://perma.cc/C7JJ-75HS] (July 21, 2021 6:47 PM); *Georgia Sees Rise in COVID-19 Cases, Hospitalizations as Delta Variant Spreads*, FOX

found in Code section 51-16-1(2) includes “any mutation or viral fragments” of COVID-19, which includes the new Delta variant spreading throughout the state.⁸⁴

Ultimately, the PBSA is a compromise between two countervailing interests: (1) reopening Georgia’s economy by encouraging small businesses to continue operations without the threat of COVID-19 liability claims, and (2) providing recourse for individuals who contract COVID-19 from the gross negligence of a business or healthcare provider.⁸⁵ The PBSA does weigh heavily in favor of Georgia’s economic interests at the expense of protecting individuals, but at the very least, it paves a way for small businesses to reopen and support the economy without the threat of unnecessary litigation.

Conclusion

A little over a year after Georgia confirmed the state’s first COVID-19 case, businesses began reopening and recovering from the pandemic.⁸⁶ Despite the threats posed by COVID-19 variants, more consumers continue to enter the public space.⁸⁷ In light of the situation, the PBSA provides businesses with near-blanket immunity from liability for COVID-19-related injury or death.⁸⁸

Though the PBSA attempts to weigh the countervailing interests of boosting the economy and curbing COVID-19 numbers, the high burdens that plaintiffs must meet to prevail in personal injury cases involving COVID-19 mean that citizens are ultimately left with little recourse should they contract the virus at a particular business.⁸⁹ And without the threat of COVID-19 litigation, businesses have less reason to not open their doors after a year of shutdown.

Reid Hansen & Britt Spurka

5 ATLANTA (July 20, 2021), <https://www.fox5atlanta.com/news/georgia-sees-rise-in-covid-19-cases-hospitalizations-as-delta-variant-spreads> [<https://perma.cc/RT6Z-QM3N>].

84. *Id.*

85. *See* Lean, *supra* note 75.

86. *COVID-19 Daily Status Report*, *supra* note 6.

87. *See, e.g.*, Meier, *supra* note 82; Kleinpeter & Aldridge, *supra* note 83.

88. *See generally* O.C.G.A. § 51-16-3 (Supp. 2020).

89. *See* Lean, *supra* note 75.