Pandemic Liability Protection Act: Is SB 6 Working?

by George Christian | Mar 28, 2022

Nearly a year has passed since the Legislature enacted SB 6, which extends liability protections to health care providers and businesses from lawsuits related to COVID-19. Has the bill been successful in its policy objective to prevent a wave of litigation in Texas courts, primarily health care liability, premises liability, and employer-employee claims?

The answer is almost certainly yes. While it is always difficult to assess how many lawsuits might have been filed if the Legislature had not intervened, we feel confident that we would be seeing far more malpractice claims against health care providers, particularly hospitals and nursing homes, and essential businesses that had to keep operating during the height of the pandemic in the face of ever-changing health and safety guidelines. We should also note that since the bill passed, Texas, like the rest of the nation, has experienced two additional surges in infections, hospitalizations, and fatalities associated with the Delta and Omicron variants. Some states enacted liability protections with sunset provisions on the assumption that the pandemic would "end" on a date certain. Wisely, as it turns out, SB 6's applicability is tied to the date of the Governor's termination of the state of emergency, not an arbitrary one. Moreover, again unlike the protections in many states, SB 6 applies to future pandemics, not just this one.

Still, plaintiffs have filed and continue to file some COVID-related lawsuits in Texas courts. It appears that the lion's share of these are employee claims against employers. According to Fisher Phillips, a national firm that provides employers with a wide variety of compliance services, there are currently 222 such claims filed in Texas as of February 28, the third highest number in the nation behind California and New York. See https://www.fisherphillips.com/innovations-center/covid-19-employment-litigation-tracker-and-insights.html (accessed March 24, 2022). The Hunton Andrews Kurth COVID Claims Tracker reports 901 claims in Texas, including 54 health care cases, 108 insurance cases, 165 employment cases (and another 122 civil rights cases), 42 consumer claims, 109 contract cases, and 32 general tort cases, four of which

involve wrongful death. We are aware of at least three wrongful death claims against essential businesses, including federal lawsuits against Pilgrim's Pride processing plants in Mt. Pleasant and Lufkin. More recently, wrongful death claims have been filed against nursing homes in Austin and Houston. Fortunately, these claims remain relatively few, and we are thus unaware of any that have progressed very far.

To date, however, most claims have been routed through the Texas workers' compensation system. According to the most recent data compiled by the Workers' Compensation Division of the Texas Department of Insurance, more than 61,000 COVID-19 claims, including 371 involving fatalities, have been filed with workers' compensation insurers, half of which involve correctional officers and first responders. https://www.tdi.texas.gov/wc/information/documents/covid19txwc1221.pdf (accessed March 24, 2022). Up to November 7 of last year, insurers have accepted about half the claims and paid about $48 million in indemnity benefits, $25.4 million in salary continuation, $20.6 million in income benefits, $1.6 million in death benefits, and more than $200,000 in burial benefits. With respect to medical costs, insurers paid $28.1 million, $22.1 million in hospital or facility charges, $5.5 million for professional services, and $443,914 for pharmacy services. The average cost of a COVID-related medical claim for six months came to $4,122, but that figure rises to an average of $12,297 for claims including hospitalization, most of which covered inpatient care. Obviously, when these numbers are updated, they will be considerably higher.

The claims data shows the impact of COVID-19 on essential workers. Almost two-thirds of claims come from three occupation groups: first responders, health and social assistance workers, and correctional officers and prison workers. Private sector essential businesses, however, also witnessed a significant number of claims, led by waste management (8%), manufacturing (5%), retail trade (4%), and transportation and warehousing (2%). Construction, oil and gas extraction, utilities, real estate, wholesale trade, and other business sectors account for 7% of claims. More than half of claims have been made on the public sector workers' compensation funds for political subdivisions (40%) and the state (12%). Commercial carriers account for the remaining 48%. With respect to death claims, half involved first responders and correctional officers, 55% of which were processed by the state and local governments. Employees of 50 years of age or more make up more than two-thirds of of the death claims, 78% of which were males.

Not all of these claims were paid. About 60% of the total number of COVID-19 related claims came from employees who either tested positive or were diagnosed. Private and public carriers accepted about half of these. Commercial carriers have processed more than 13,000 of these claims and rejected 71% of them. Despite the large number of rejections, only 134 claims disputes have been filed with the Division of Workers' Compensation. Political subdivisions, by contract, have accepted 83% of claims involving a positive test or diagnosis. SB 22, which created a presumption in favor of first responders, correctional officers, and detention officers, had up to November 7 resulted in nearly 100 claims, 72 of which were accepted. It should be noted that claims based on reactions to COVID vaccines peaked at 221 in January 2021, when the vaccines were available primarily to health care workers and first responders, and have steadily fallen even as the percentage of vaccinated workers greatly expanded throughout the rest of the year. In the last month for which data is available (October 2021), only 11 such claims were processed.

Of the 600 or so total claims based on vaccine reaction, 85% had no indemnity or medical benefits paid and the remaining 15% cost less than $100,000. No death cases involving vaccine reactions are reported in the data thus far.

This is exactly how SB 6 was designed to work, though the burden on the workers' compensation system—especially public sector funds—is significant. But if SB 6 had not been enacted, many of these claims, particularly those involving fatalities, would undoubtedly have ended up in the courts. To illustrate the point, to date the State of California has not enacted any COVID-19 liability protections, though legislation was introduced early last year. Late last year a California state court of appeals affirmed a trial court order denying a candy-manufacturer employer's motion to dismiss an employee's wrongful death lawsuit based on the workers' compensation exclusive remedy. The employee alleged that she contracted COVID-19 at work and spread it to her husband, who subsequently died. The court held that the exclusive remedy only applied to the employee, not to non-employees who may have injured by coming into contact with her. The employer argued that the case should be dismissed under derivative injury doctrine, which holds non-employee injuries are covered by the exclusive remedy if they would not have occurred absent the employee's work-related injuries. The court of appeals rejected this argument, holding that that because COVID-19 biologically caused the non-employee's injury, it was not "derivative" of the employee's injury. Instead, the employee merely asserted her husband's tort claim, not a claim based on her own injury. The opinion analyzes a considerable body of California workers' compensation law in reaching this decision, so the decision's potential for spreading to other jurisdictions is uncertain.

With SB 6 in place, however, there is very little chance that a case like this could succeed in Texas. The statute applies the same high liability threshold and evidentiary requirements to any lawsuit against an employer, whether by employees or non-employees. The California decision raises the possibility that one could theoretically construct an almost infinite chain of causation between an employee's infection and the outside world. Even if these types of exposure claims could not ultimately be proved up, they would still generate a potentially huge number of lawsuits against employers. SB 6 shuts down this possibility in Texas. SB 6 also affects constitutional exception to the exclusive remedy for death claims alleging the employer's gross negligence. Again, because the bill ties the cause of action to the employer's good faith effort to comply with any government-promulgated health and safety standards effective on the date of the alleged exposure, most of those claims will be dismissed. Moreover, the evidentiary requirements, including serving an expert report to maintain suit, make such cases expensive to prosecute and extremely uncertain of result.