



## OREGON LIABILITY REFORM COALITION

Chair Power and Members of the House Committee on Judiciary Subcommittee on Civil Law:

COVID-19 has impacted our state like nothing we have experienced. The very real health impacts on Oregon, the impact on our kids as their schools and activities shut down and the economic impacts on workers and businesses were easy to recognize and try to fix from the beginning. The impact of potential lawsuits against businesses, non-profits and other entities, however, will be an issue that potentially plays out far beyond when the COVID emergency situation finally ends.

We started hearing from our partners and members in the medical community almost immediately as the Executive Orders required them to halt virtually all but urgent and emergency procedures and as other states recognized and adopted emergency orders or legislation to provide COVID related immunity protections. We heard from essential businesses who remained open who also began to question the liability risk they were taking on. And when the state began considering reopening, the outpouring of concerns from business trying to decide if they should risk potential liability to open their business was overwhelming.

Because of this, we approached the legislature asking for limited liability protection for entities acting under orders issued by the Governor or guidance issued for COVID-19. The resulting workgroup met throughout the summer trying to identify a solution to this problem. Our colleagues in the medical community had been working with Senator Prozanski in a separate work group to find an approach that he shared with our workgroup. While we did not reach agreement, HB 2638 is the result of those discussions.

The goal of HB 2638 is simple – if you are a business owner trying to operate in good faith, in reasonable compliance with government guidelines, you should have some protection against a lawsuit if COVID-19 exposure is somehow tied to your place of business.

Unlike the legislation passed in December to provide liability protection to schools, this legislation does not include absolute immunity. It focuses on obligations to pay damages, not on immunity from a suit. It provides protection for “reasonable compliance” but does not apply to situations where gross negligence, reckless, wanton or intentional misconduct has occurred. It also does not apply to claims subject to ORS chapter 656 which includes workers comp, labor, employment and unlawful discrimination, meaning claims brought by employees. This was done based on the direction of Chair Power during the workgroup process.

Determining whether the liability protection will be applicable is addressed in HB 2638 with an “off-ramp” aligned with existing statutory provisions for Anti-SLAPP (Strategic Lawsuit Against Public Participation) suits. The off-ramp in HB 2638 would operate as follows:

- A person files a civil suit for COVID-19 related damages
- The entity being sued makes a motion to strike the claim based on the protections in this bill

- The court will determine if the entity has demonstrated “reasonable compliance” with applicable government guidelines for their sector
- If the entity has demonstrated “reasonable compliance,” the burden shifts to the plaintiff to make an initial showing that the defendant wasn’t in “reasonable compliance” with government guidelines for COVID-19 affecting their sector’s activities
- If the plaintiff can’t make an initial showing, the court will dismiss their claim without prejudice, meaning the plaintiff can bring the claim back in the future
- If the defendant can’t show “reasonable compliance” or the plaintiff can demonstrate the defendant wasn’t in “reasonable compliance,” the suit moves forward through the process as in any other case

HB 2638 has the same off-ramp provisions as both the school liability legislation already passed by the legislature and as SB 780 for medical liability introduced in the Senate including the same motion to strike, the same burden-shifting structure, the same dismissal without prejudice and the same level of evidence including pleadings and affidavits without full discovery.

We will need to draft an amendment to HB 2638 to include public entities who were unintentionally excluded in drafting and to potentially address other definition issues, as well as an emergency clause or clarification the bill applies to the entirety of this COVID state of emergency.

We have heard from proponents and legislators who are uncertain this liability protection is necessary. There have been questions about whether the causal relationship between exposure and the entity will be provable. We have also heard that these types of suits aren’t being filed at the rate many thought they would be. A site that is tracking COVID-related lawsuit shows that more than 8,600 COVID related lawsuits have been filed across the country including 74 in Oregon. While not all of HB 2638 would not be applicable to all the lawsuits filed, this shows there is already a problem and we are concerned that problem will only grow.

One indicator that lawsuits are likely to emerge around an issue is trial lawyer advertising. Since March of 2020, lawyers, law firms and other legal services advertisers have aired over 176,000 TV ads referencing the virus at an estimated cost of \$34 million. When compared to ads soliciting medical device claims, three times as many COVID-19 legal services ads aired. The wave of COVID litigation is coming, and HB 2638 provides limited liability protection to try to avoid Oregon being the state where these types of cases are tested.

Businesses and other entities that have been open during this time have done a lot of work and invested a lot of time and money to comply with COVID-19 guidelines. HB 2638 provides limited liability protection they need right now as we try to recover from this situation. Please support HB 2638.

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