

Legislative Analysis



PANDEMIC RESPONSE HEALTH CARE IMMUNITY ACT

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Senate Bill 1185 as enrolled

Sponsor: Sen. Curtis S. VanderWall

House Committee: Judiciary

Senate Committee: Health Policy and Human Services [Discharged]

Complete to 2-1-21

Analysis available at
<http://www.legislature.mi.gov>

(Vetoed by the Governor 12-30-20)

SUMMARY:

Senate Bill 1185 would repeal 2020 PA 240, the Pandemic Health Care Immunity Act, and create a similar new act called the Pandemic Response Health Care Immunity Act. Like 2020 PA 240, the new act would provide protection from liability, with some exceptions, to a health care provider or health care facility that provided health care services under specific circumstances related to the COVID-19 pandemic. Senate Bill 1185 differs from 2020 PA 240 in that it would apply to an additional period of time¹ and it would additionally apply to psychiatric hospitals, psychiatric units, and nursing home care and recovery centers (see **Background**, below).

Under the bill, a *health care provider* or *health care facility* that provided *health care services* in support of the state's response to the COVID-19 pandemic during the following times would not be liable for an injury (including death) sustained by an individual because of those services:

- From March 29 through July 13, 2020.
- From October 30, 2020, through February 13, 2021.

This protection from liability would apply regardless of how, under what circumstances, or by what cause the injuries were sustained. However, it would not apply if it were established that the provision of the services constituted *willful misconduct*, *gross negligence*, intentional and willful criminal misconduct, or intentional infliction of harm by the health care provider or health care facility. The act also would not apply to claims covered by the Worker's Disability Compensation Act.

Health care services would mean services provided to an individual by a health care facility or health care provider regardless of where the services were provided, including services provided through telehealth or another remote method.

Health care provider would mean an individual who is one or more of the following:

- An individual licensed under Article 15 of the Public Health Code. (This includes, among others, physicians, nurses, dentists, mental health professionals, acupuncturists, physical therapists, occupational therapists, and respiratory therapists.)

¹ 2020 PA 240 applies only to services provided from March 29 through July 13, 2020.

- An individual who by education, training, or experience substantially meets requirements for licensure under Article 15 and is allowed under the code to render medical care without a license in a time of disaster or at the scene of an emergency.
- A medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, or emergency medical services instructor-coordinator.
- A student, a volunteer, or any other licensed health professional at a health care facility.

Health care facility would mean an entity that is one or more of the following:

- A hospital.
- A health maintenance organization.
- A freestanding surgical outpatient facility.
- A nursing home.
- A county medical care facility.
- A home for the aged.
- An ambulance operation, aircraft transport operation, nontransport prehospital life support operation, or medical first response service.
- A facility or agency described above located in a university, college, or other educational institution.
- A hospice or hospice residence.
- A psychiatric hospital or psychiatric unit, as those terms are defined in the Mental Health Code.
- A state-owned surgical center.
- A state-operated outpatient facility or veterans' facility.
- A facility operating as a ***care and recovery center***.
- A facility used as surge capacity for any of the health care facilities described above.

Care and recovery center would mean a nursing home that is designated by the Department of Health and Human Services (DHHS) as a dedicated facility to temporarily and exclusively care for and isolate residents affected by COVID-19.

Willful misconduct would mean conduct or a failure to act that was intended to cause harm.

Gross negligence would mean conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

BACKGROUND:

The bill is similar to House Bill 6159, which was enacted into law as 2020 PA 240 and took effect October 22, 2020. That act, called the Pandemic Health Care Immunity Act, differs from SB 1185 in the following ways:

- It applies only to services provided from March 29 through July 13, 2020 (and not from October 30, 2020, through February 13, 2021).
- For purposes of its provisions, the term “health care facility” does not specifically include a psychiatric hospital, a psychiatric unit, or a facility operating as a care and recovery center.

Senate Bill 1185 would repeal and replace 2020 PA 240.

BRIEF DISCUSSION:

Senate Bill 1185 would extend COVID-19 liability protections recently enacted for most health care facilities to psychiatric hospitals, psychiatric units, and nursing home care and recovery centers as their patients, like those in other institutional settings, have close contact with staff and other residents. The bill would also extend the dates for which the immunity would apply to cover services provided during the surge in positive cases that began in fall through the holiday season. However, the bill would not protect health care facilities or providers forever, as there would be a cut-off point. Further, the immunity would not cover conduct that constituted gross negligence or willful acts. An injured worker could also pursue redress under the Worker’s Disability Act.

Opponents of extending the immunity from liability for health care facilities and providers said that, although such immunity made some sense in the early days of the pandemic, when little was known about the route of transmission or how to effectively treat the disease, there is now understanding of the role of personal protection equipment for workers and appropriate staffing levels, and best practices for treatment of infections. In short, there now is a standard of care. Gross negligence, and the other exceptions from liability immunity, present a very high bar to overcome, and therefore would unfairly limit the ability of an injured party to seek recourse in the courts if a health care facility or provider failed to follow standards of care.

FISCAL IMPACT:

Senate Bill 1185 would have an indeterminate fiscal impact on local court funding units. The bill would potentially reduce liability for injury, including death, for health care providers and health care facilities that provide COVID-19 health care services, unless it was established that the services provided constituted willful misconduct, gross negligence, intentional and willful criminal misconduct, or intentional infliction of harm by the health care provider or health care facility. Provisions of the bill are aimed at limiting the number of medical malpractice lawsuits likely to be filed. Any fiscal impact would be directly related to how provisions of the bill affect court caseloads, the complexity of lawsuits, and related administrative costs.

Vetoed 12-30-20:

In her veto message,² Governor Whitmer echoed the sentiments of opponents of the bill (described above) by stating that lessons had been learned from the surge of cases in the spring of 2020; that there is now “a roadmap for treating this disease;” and that “[w]hen a COVID-19 patient receives substandard care, they should not be deprived of their day in court.” She also wrote that although she believes that frontline health care professionals deserve full support, and that this is why she “fought hard for hazard pay, to maintain a health supply of PPE, and for robust workplace protections,” she also believes that “[i]mmunity from liability, however, is no longer appropriate under the circumstances.”

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

² https://content.govdelivery.com/attachments/MIEOG/2020/12/30/file_attachments/1636357/SB%201185%20Veto%20Letter.pdf.