



June 22, 2020

## Arkansas Governor Issues Executive Orders for Business Liability, Medical Immunity, and Workers' Compensation

On Monday, June 15, Arkansas Governor Asa Hutchinson issued three executive orders protecting businesses and healthcare providers from civil liability for claims related to COVID-19 and clarifying Workers' Compensation claims connected to the virus.

**Business Liability.** Executive Order 20-33 affords businesses and their employees, officers, and agents immunity from civil liability for any injury related to exposure to COVID-19 on the premises. However, the immunity does not cover willful, reckless, or intentional misconduct. Business owners whose actions substantially comply with or attempt to comply in good faith with official health and safety directives from the Governor or the Department of Health are presumed not to be acting willfully or recklessly. Immunity from COVID-19-related lawsuits does not exempt businesses from providing appropriate workers' compensation benefits, discussed further below.<sup>1</sup> Executive Order 20-33 only applies to claims or actions filed after June 15, 2020 and will expire when the emergency is terminated.<sup>2</sup>

**Medical Immunity.** Executive Order 20-34 authorizes healthcare providers<sup>3</sup> to use any drug, device or product approved or cleared under the Federal Food, Drug and Cosmetic Act ("FD&C Act"); licensed under the Public Health Service Act; or authorized for emergency use under an Investigational Device Exemption or Investigational Drug Application of the FD&C Act to diagnose, treat, mitigate, or cure COVID-19 (or any complication therefrom). Moreover, Executive Order 20-34 declares all healthcare providers providing healthcare services<sup>4</sup> during the declared emergency to be emergency responders under Ark. Code Ann. § 12-75-103. By designating such Healthcare Providers as Emergency Responders, Executive Order 20-34 extends the immunity provided under Ark. Code Ann. § 12-75-128. Specifically, Executive Order 20-34 provides immunity from liability for any death, injury or property damage alleged to have been sustained as a result of acts or omission by healthcare providers in the course of providing COVID-19-related emergency management functions<sup>5</sup> during the public health emergency if the act or omission occurs as a result of a good faith effort on

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<sup>1</sup> Exec. Order 20-33 (June 15, 2020).

<sup>2</sup> "Governor Hutchinson Issues Executive Orders on Medical Immunity, Business Liability, and Workers Compensation Coverage," GOVERNOR.ARKANSAS.GOV (June 15, 2020), <https://governor.arkansas.gov/news-media/press-releases/governor-hutchinson-issues-executive-orders-on-medical-immunity-business>.

<sup>3</sup> "Healthcare Providers" include all healthcare providers who are licensed, certified, or otherwise authorized by law to administer health care in Arkansas, and any partnership, association, corporation or other facility or institution that employs or contracts with such healthcare providers to provide healthcare services in their normal course of business or operation.

<sup>4</sup> "Healthcare Services" include acts or treatment performed or furnished by a Healthcare Provider to a patient during the patient's medical care, treatment, or hospitalization that are directed at the treatment, mitigation, or symptoms of COVID-19.

<sup>5</sup> "Emergency Management Functions" include (a) triage, diagnostic testing, and/or treatment to individuals with known or suspected COVID-19; (b) cancelling, postponing, or denying elective procedures for an illness or condition that does not fall within the scope of the COVID-19 public health emergency pursuant to an order, directive, or recommendation from the Governor, the Arkansas Department of Health, the Arkansas Department of Human Services, or other State

the part of the healthcare provider and was the direct result of a healthcare provider's providing a healthcare service to a patient for the treatment and mitigation of COVID-19 or the symptoms of COVID-19 during the COVID-19 public health emergency. This immunity extends to the use of prescription drugs or devices in the treatment of COVID-19 so long as (i) prescription of the drug or device is within the scope of the healthcare provider's license; (ii) the healthcare provider prescribes the drug or device in accordance with the most current written recommendations of a U.S. Government agency; and (iii) the healthcare provider informs the patient of known positive and negative outcomes of the drug or device and documents the patient's informed consent. Again, this immunity does not cover acts or omissions that are willful, reckless, or intentional.<sup>6</sup>

**Workers' Compensation.** Finally, Executive Order 20-35 clarifies Arkansas' Workers' Compensation Law in light of employees potentially contracting COVID-19 on the job. Specifically, Executive Order 20-35 clarifies that requiring an employee to perform work when the employer has knowledge that, within the normal course and scope of the employee's job performance, the employee may be exposed to COVID-19 is *not* intentional conduct that would remove the employer from the protections of the Workers' Compensation Law, Ark. Code Ann. § 11-9-101, et seq. Additionally, COVID-19 is now considered an "occupational disease," meaning the employee is entitled to workers' compensation benefits if COVID-19 is contracted during the scope of employment. The virus is an exception to the prohibition on compensation for "ordinary disease of life" to which any member of the general public is exposed. The Executive Order does not change any other requirements to claim workers' compensation benefits. For example, an employee must still follow proper claim procedures and ultimately establish a causal connection between his or her employment and the disease.<sup>7</sup> Executive Order 20-35 applies to all claims filed after June 15, 2020 and automatically expires when the emergency is terminated.

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agency with the authority to order or recommend cessation of healthcare services; (c) redeploying or cross training staff not typically assigned to such duties, to the extent necessary to respond to the COVID-19 public health emergency; (d) planning or enacting crisis standards of care measures, such as modifying numbers of beds, preserving personal protective equipment, and triaging access to services or equipment; and (e) reducing recordkeeping requirements to the extent necessary for Healthcare Providers to perform tasks as may be necessary to respond to the COVID-19 public health emergency.

<sup>6</sup> Exec. Order 20-34 (June 15, 2020).

<sup>7</sup> Exec. Order 20-35 (June 15, 2020).