



2021 HB 1175

Senate Industry, Business and Labor Committee

Senator Jerry Klein, Chairman

March 10, 2021

Chairman Klein and members of the Senate Industry, Business and Labor Committee, I am Melissa Hauer, General Counsel of the North Dakota Hospital Association (NDHA). NDHA is a voluntary, not-for-profit organization comprised of hospitals and health systems, related organizations, and other members with a common interest in promoting the health of the people of North Dakota. NDHA supports Engrossed House Bill no. 1175, and we ask that you give it a **Do Pass** recommendation.

The bill provides important protections for businesses and, specifically, health care as we work through all the uncertainty and difficulty of the COVID-19 pandemic. The bill provides temporary immunity from civil lawsuits for businesses and specifically for health care providers who responded to the COVID-19 outbreak in the middle of great uncertainty about how best to treat a novel disease. Immunity applies so long as the health care provider acted reasonably based upon the knowledge of the circumstances at that time as it relates to COVID-19. However, this immunity does not apply to willful and wanton misconduct or reckless or intentional infliction of harm.

The pandemic has created an unprecedented landscape for potential medical malpractice liability, given the lack of any uniformly recognized protocol for treating the disease and the absence of a prevailing standard of care against which a practitioner's actions can be fairly and reliably measured. As hospitals care for COVID patients, we have learned how to better deal with the virus through trial and error. We continue to adjust our approach as we learn more and treatments for the disease continue to be discovered. With increasing knowledge, treatment standards will continue to evolve. While some believe that patient or employee claims against a

health care provider for origination of a COVID-19 illness would be difficult to prove and thus less likely to be brought, the economic burden to a provider of having to defend or settle such claims could be catastrophic. With that in mind, we want to make sure providers are given some measure of protection from liability if they used the best guidance they had available at the time the care was provided.

It is important to note that this bill does not provide unlimited protection; rather it provides temporary protection necessary for providers who stepped up quickly to care for patients amid the many uncertainties with COVID-19, putting themselves at risk while facing constraints on resources such as scarce personal protective equipment (PPE), ICU beds, ventilator availability, as well as strained staffing resources. Immunity applies to situations not only when a provider acted, but also when a provider did not, or could not, act. It is important that health care providers are protected from lawsuits not only for the provision of care but also for the times when they had to make the decision that a certain treatment or level of care was either not necessary or not available.

The challenge of an unknown virus necessitated novel approaches to care for patients. Providers were forced to plan for scenarios that at one time may have been unthinkable, whether we would have enough beds, staff, PPE, ventilators, etc. Providers had to think about what they might do if scarce resources had to be allocated among patients. We still operate with unknowns as new strains are discovered and we still do not know if we will experience additional surges, or if our hospitals will become overwhelmed. This bill provides protections for that incredible effort in the midst of such uncertainty, so long as the health care provider was trying to do the right thing based on information known at the time.

Businesses and health care providers need to be protected from what many fear will be a deluge of frivolous lawsuits that, while perhaps ultimately unsuccessful, would be prohibitively costly to defend. This feared flood of lawsuits could amount to a second pandemic. The immunity provided in the bill is necessary to reassure tireless and selfless health care providers that their efforts to care for patients amid such uncertainty will not be threatened by the specter of protracted coronavirus-related litigation. Some argue against such protections, stating that liability would be particularly difficult to establish, given both the relatively long incubation period of the virus and the resultant difficulty of proving that any particular place was the source of infection. But these lawsuits may come months or even years after the current ordeal ends,

when the public memory of the great uncertainty surrounding how best to treat those infected with the virus or the sacrifices of health care providers may be forgotten.

The bill strikes a balance between patients and providers. It does not alter the standard of care owed to patients by health care providers. Rather it heightens the degree of negligence required to prove liability relative to that standard. As a result, patients will continue to be assured of the best possible care in light of what was known at the time, while healthcare professionals will be assured that their amazing efforts to provide care in these trying times will be recognized through common sense liability protections. Again, as long as the provider was acting on the best available information and not recklessly or intentionally trying to cause harm, there would be protection. This legislation strikes an appropriate balance between supporting health care providers and protecting patients.

In summary, the provision of health care due to COVID-19 has rapidly changed based on what we have learned along the way as well as guidance and recommendations from regulatory agencies such as the CDC and public health directives. Hospitals continue to provide high quality patient care, while adhering to these recommendations and directives. At times, care may have to be provided without the appropriate or optimal equipment, supplies, or health care staff. We feel it is important to protect the providers who are on the front lines providing care to COVID-19 patients during this challenging time. It supports the work providers are doing and protects them from liability when they are doing the right thing.

NDHA is supportive of this bill and we ask that you give it a Do Pass recommendation. Thank you.

Respectfully Submitted,

Melissa Hauer, General Counsel
North Dakota Hospital Association