



# STATE OF MISSISSIPPI GENERAL LIABILITY COVID-19 QUICK GUIDE

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1. Statute of Limitations: The Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act (“Act”) (discussed in immunity section below) requires that a person bring suit for any alleged injury arising from COVID-19 not later than two (2) years after the day the cause of action accrues. Because the Act is relatively new and untested, it is possible, but probably unlikely, that other limitation periods may be applicable. For example, general negligence claims arising out of COVID-19 may be subject to the general three-year statute of limitations. §15-1-49, Miss. Code. However, if the claim arises out of medical negligence, the medical malpractice statute of limitations of two years could be applicable. § 15-1-36, Miss. Code. If the claim is made against the State of Mississippi, its political subdivisions, and/or state and political subdivision employees, there is a one-year statute of limitation with a 90-day notice of claim to the chief executive officer of the governmental entity requirement before suit may be filed which will toll the statute of limitations for an additional 95 days from the date the chief executive officer of the governmental entity receives the notice of claim. Recently, the Mississippi Supreme Court has been issuing rulings to clarify issues related to adequate notice and the tolling provision.

2. Negligence: There are no court decisions concerning negligence as relates to the transmission of COVID-19 in the liability context, therefore negligence claims arising out of COVID-19 are likely to be evaluated and handled pursuant to general negligence tort law (but see the Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act, discussed in the immunity section below). In Mississippi, negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like or similar circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like or similar circumstances, or in failing to do something that a reasonably careful person would do under like or similar circumstances. Mississippi Model Jury Instructions; 15.1; *Smith v. City of West Point*, 475 So. 2d 816 (Miss. 1985). In Mississippi, like other states, the necessary elements of a successful negligence claim are: (1) duty; (2) breach of duty; (3) proximate cause; and (4) damage. If there is an absence of any one of these elements, the negligence claim fails.

3. Standard of Care: See Number 2 hereinabove. There currently are no Mississippi statutes or interpretative case law concerning COVID-19 general liability and the applicable standard of care; therefore, general negligence principles are applicable. It is believed that expert witness testimony along with the guidance issued by the CDC, OSHA, EEOC, Mississippi State Department of Health, Mississippi Office of the Governor, Executive Orders, and other state and federal agencies will likely be used as evidence for the standard of care of individuals and businesses in Mississippi.

4. Causation: As stated hereinabove, proximate cause is a necessary element for a successful negligence claim for the transmission of COVID-19. Due to the nature of the infectious disease, it is believed it will be difficult for a claimant to meet this burden which includes proof of when and where they were exposed. This will vary greatly from case to case and is very fact specific. In addition to factual testimony and evidence, it will be necessary to have expert witness testimony on these issues.

5. Premises Liability: Mississippi follows the common law rule that analyzes premises liability according to the relationship between the premises owner, operator, and/or person in control and the person who comes onto the property. The duty owed by the premises owner/occupier to one who comes onto the property varies depending upon the status of the person as a trespasser, licensee, or invitee. Mississippi applies a three-part process in determining premises liability: (1) the injured party must first be classified as an invitee, licensee, or trespasser; (2) once the injured party's status is identified, the duty the premises owner/occupier owes the injured party is determined; (3) the last step is to determine whether the premises owner/occupier breached this duty. *Thomas v. Columbia Group, LLC*, 969 So. 2d 849 (Miss. 2007); *Leffler v. Sharp*, 891 So. 2d 152 (Miss. 2004).

A trespasser is one who enters onto another's property without the owner's or occupier's knowledge, permission, license, invitation, or any other right to enter. *Thomas v. Columbia Group, LLC*, 969 So. 2d 849 (Miss. 2007). If the premises owner/occupier becomes aware of the trespasser's presence and takes no action to prevent the trespasser from coming onto the property, the trespasser's status can change to that of a licensee. *Archie v. Illinois Cent. Gulf R. Co.*, 709 F.2d 287 (5th Cir. 1983). The only duty a premises owner/occupier owes to the trespasser is to avoid "willfully and wantonly" injuring the trespasser. *Massey v. Tingle*, 867 So. 2d 235 (Miss. 2004). Willful and wanton conduct is more than mere negligence. *Leffler v. Sharp*, 891 So. 2d 152 (Miss. 2004).

A licensee is one who comes onto another's premises for his own convenience, pleasure, or benefit pursuant to the express or implied permission of the premises owner/occupier. *Thomas v. Columbia Group, LLC*, 969 So. 2d 849 (Miss. 2007). This category includes invited guests where the "invitee" criteria do not apply. *Lucas v. Buddy Jones Ford Lincoln Mercury, Inc.*, 518 So. 2d 646 (Miss. 1988). The premises owner/occupier owes the duty not to "willfully and wantonly" injure the licensee. However, the Mississippi Supreme Court has made a distinction in limited circumstances to the duty owed to a licensee where there is "active negligence" in the business operations on the premises. *Hoffman v. Planter's Gin Company, Inc.*, 358 So. 2d 1008 (Miss. 1978). In *Hoffman*, the court imposed a duty to use ordinary care instead of the typical willful and wanton standard holding that "active negligence" which subjects a licensee to unusual danger or increases the hazard to the licensee, when their presence is known, subjects the premises owner/occupier to liability. This is a narrow holding that applies only to cases involving injury resulting from "active conduct." Moreover, based on existing case law, it applies only to the operation and control of a business. *Little v. Bell*, 719 So. 2d 757 (Miss. 1998).

When the premises owner/occupier expressly or impliedly invites the claimant onto the property or into the business for his own benefit and for his and the claimant's mutual benefit, the claimant is an invitee. This situation usually arises when the claimant enters property open to the general public such as a business. *Massey v. Tingle*, 867 So. 2d 235 (Miss. 2004). The premises owner/occupier owes a duty to make the premises reasonably safe for invitees and when not reasonably safe, the premises owner/occupier has a duty to warn only where there is a hidden danger or peril that is not in plain or open view. *Leffler v. Sharp*, 891 So. 2d 157 (Miss. 2004). It is believed that premises owners/occupiers should follow or exceed industry, CDC, OSHA and

other federal and state standards, guidelines, and recommendations pertaining to hygiene, sanitation, and workplace safety.

6. **Violation of Statute/Executive Orders as Evidence of Negligence:** Other than the Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act, there are no Mississippi statutes that currently pertain to COVID-19 general liability. If negligence per se is found to be applicable regarding the Act, there is a two-step process that the factfinder must go through to determine liability. First, the factfinder must determine if the defendant violated the statute which resulted in an injury of the type that the statute was intended to prevent and that the injured was in the category of persons that the statute is designed to protect. If so, then negligence is established. Secondly, the factfinder must determine if the negligence was the sole or contributing proximate cause of the injury. Negligence alone does not establish liability.

However, pursuant to statute, § 33-15-11, Miss. Code, the Governor may issue emergency executive orders dealing with health care and other emergencies to protect the citizens of Mississippi during the state of an emergency and, in fact, the Governor of Mississippi has issued multiple executive orders pertaining to the COVID-19 crisis in Mississippi. It is unclear whether Mississippi courts will apply those orders like statutes. It is believed that more likely than not, the negligence per se two-step process will be followed to determine liability. If not, the executive orders of the Governor and the executive orders of county and city officials at a minimum will be used as evidence of negligence if not negligence per se.

7. **Contributory Negligence:** Mississippi is a pure comparative negligence state. § 11-7-15, Miss. Code; *Bradford v. Barnett*, 615 So. 2d 582 (Miss. 1993). Under the relevant statute, “damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.” Also, the Mississippi legislature expanded the doctrine to one of pure comparative fault, thus requiring an appropriate percent allocation for each party alleged to be responsible, both with respect to the plaintiff’s damages and to contribution among joint tortfeasors, in a wide range of actions, including negligence, personal injury, or death, and strict liability. § 85-5-7, Miss. Code. Therefore, a plaintiff who may be negligent for violating CDC guidelines and other applicable federal, state, and municipal guidelines pertaining to COVID-19 may face an affirmative defense to any COVID-19 claims based on comparative negligence.

8. **Assumption of the Risk:** Assumption of risk is no longer a viable defense and complete bar to recovery in Mississippi by a plaintiff. Comparative negligence principles apply.

9. **Statutory Cap on Non-Economic Damages:** The statutory cap on non-economic damages in Mississippi is \$1,000,000.00. § 11-1-60, Miss. Code.

10. **Death Cases:** The wrongful death statute in Mississippi, being § 11-7-13, Miss. Code, applies whenever the death of any person is caused by: (1) any real, wrongful or negligent act or omission; (2) such unsafe machinery, way or appliance; (3) breach of any warranty (express or implied) of the purity or fitness of any foods, drugs, medicines, beverages, tobacco, or any and all other articles or commodities intended for human consumption. A wrongful death action may

be brought by: (1) a personal representative of the deceased person for the benefit of all persons entitled under the law to recover; (2) the spouse for the death of a spouse; (3) the parent for the death of a child; (4) a child for the death of a parent; (5) a sibling for the death of another sibling; (6) interested parties who may all join in the suit.

Generally, the hierarchy of recovery under the wrongful death statute is as follows: (a) surviving spouse and children; (b) surviving spouse, no children; (c) children, no surviving spouse; (d) surviving parents and siblings; (e) legal representative of decedent on behalf of all persons entitled under the law to recover.

The party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all of the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit. This includes the present net cash value of the life expectancy of the deceased, the loss of companionship, the conscious pain and suffering of the decedent between the time of injury and death, and punitive damages, if warranted. Non-economic damages are subject to the statutory cap.

11. **Punitive Damages:** Punitive damages are allowed in limited circumstances pursuant to § 11-1-65, Miss. Code. Under Mississippi law, punitive damages may be awarded when the plaintiff proves, by clear and convincing evidence, that the defendant acted with actual malice or gross negligence, evidencing a willful, wanton, or reckless disregard for the safety of others, and the plaintiff is intentionally or maliciously injured.

In all cases involving the award of punitive damages, the factfinder shall consider the following: (1) the defendant's financial condition and net worth; (b) the nature and reprehensibility of the defendant's wrongdoing; (c) the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; (d) the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and (e) any other circumstances shown by the evidence to bear on determining a proper amount of punitive damages. There are statutory caps on punitive damages which are tied to the defendant's net worth. The cap is lowered as the net worth diminishes. The highest cap is \$20,000,000 which can be awarded against the defendant with a net worth in excess of \$1,000,000,000. The lowest cap is 2% of the defendant's net worth for a defendant with a net worth of \$50,000,000.00 or less. Punitive damages are frequently alleged in negligent action complaints, although they are difficult to obtain and rarely awarded only in the exceptional case.

## **FAQs**

(1) Can a plaintiff recover for fear of exposure to COVID-19?

Unlikely. To date the Mississippi Supreme Court has not recognized a cause of action for fear of contracting a disease in the future. In a dioxin exposure case, the Mississippi Supreme Court held that there is no cause of action recognized in Mississippi for fear of contracting a disease in the future. *Leaf River Forest Products, Inc. v. Ferguson*, 662 So. 2d 648 (Miss. 1995).

(2) Will Commercial General Liability Insurance apply to COVID-19 claims?

Possibly but doubtful. Insurance coverage issues are resolved by the courts based upon contract and statutory interpretation law. Therefore, the insurance policy terms and language including exclusions are usually determinative. Since the early part of March 2020, many businesses across the country were forced to close their doors, at least temporarily, as a result of COVID-19. The loss of income during that period of time damaged many, particularly restaurants and small businesses. Numerous businesses have turned to their insurance company seeking coverage for losses under business interruption policies. Generally, businesses are claiming that the government-mandated closure should be covered either because policies lacked a specific virus or pandemic exclusion or that coverage is required pursuant to a policy's civil authority coverage provision. Upon receiving denials from their insurers in response to claims, numerous businesses have turned to the state and federal courts to force insurance companies to pay under the policy. Most standard business policies provide coverage only for losses caused by direct physical damage. Insurers argue that COVID-19 has not caused a direct physical loss as required by the policies and accordingly they assert that business interruption claims do not fall within a covered loss under the policies it issued. Whether a direct physical loss has been suffered by an insured will likely be a key issue in all COVID-19 business interruption cases. Also, most commercial policies include a specific exclusion for "loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease." The insurance companies assert that this policy language clearly applies to COVID-19 and supports the denial of business interruption claims. Therefore, even if a business suffered a direct physical loss or damage, claims for COVID-19 would still be excluded from coverage. To date there are no reported cases in Mississippi on this coverage issue.

(3) Is there immunity from COVID-19 claims?

Yes. Senate Bill No. 3049, the "Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act," was recently passed to provide protections from civil lawsuits for COVID-19 – related activities.

First, this Act provides immunity for any "person" (defined to include individuals, the state, associations, educational entities, for-profit or nonprofit entities, religious, and charitable organizations) or an owner/lessee/occupant of a premises from civil damages for injuries or death resulting from or related to actual, alleged, or potential exposure to COVID-19. To qualify for immunity, the person/entity must be able to show that he attempted "in good faith to follow applicable public health guidance...." The Act also extends immunity from suit to health care professionals/facilities for "acts or omissions while providing health care services related to a COVID-19 state of emergency." Lastly, the Act provides immunity for any person who "designs, manufactures, labels, sells, distributes, or donates" a broad range of "qualified product[s]" in response to the emergency.

The Act is retroactively effective to March 14, 2020, and extends until one (1) year after the end of the emergency. Protections extend in perpetuity for acts, omissions, or injuries that occur while the Act is in effect. All lawsuits for alleged COVID-19 – related injuries must be brought no later than two (2) years after the cause of action accrues.

A copy of the bill can be found through this link:

<http://billstatus.ls.state.ms.us/documents/2020/pdf/SB/3000-3099/SB3049SG.pdf>

#### **BEST PRACTICES FOR AVOIDING/REDUCING FURTHER LIABILITY FOR COVID-19 CLAIMS:**

- Monitor and follow all local, state, and federal guidelines and standards pertaining to COVID-19;
- Develop and follow policies and practices that monitor employee health, require good hygiene practices, ensure physical distancing;
- Implement environmental controls for hygiene, sanitation, and safety.

#### **HELPFUL LINKS**

- [CDC Workplace Guidance](#)
- [Centers for Disease Control and Prevention – COVID-19](#)
- [EEOC's COVID-19 Page](#)
- [OSHA's COVID-19 Page](#)
- [OSHA's Guidance on Preparing Workplaces for COVID-19](#)
- [World Health Organization COVID-19 Updates](#)

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