

**DRAFT ONLY
NOT APPROVED FOR
INTRODUCTION**

SENATE FILE NO.

Public health emergencies-immunity amendments 3.

Sponsored by: Senator(s) Driskill

A BILL

for

1 AN ACT relating to public health and safety; providing
2 legislative findings; amending provisions related to
3 immunity from civil liability for actions and omissions
4 during public health emergencies; specifying applicability;
5 making immunity provisions retroactive as specified; and
6 providing for an effective date.

7

8 *Be It Enacted by the Legislature of the State of Wyoming:*

9

10 **Section 1.**

11

12 (a) The legislature finds that:

13

1 (i) The conditions and circumstances recognized
2 in the legislative findings in 2020 Wyoming Special Session
3 Laws, Chapter 1, Section 1 continue to exist and continue
4 to impose extraordinary financial pressure on Wyoming
5 residents, families, homeowners, hospitals, healthcare
6 facilities, businesses, educational providers, state
7 agencies and local governments;

8
9 (ii) Most persons who contract novel coronavirus
10 disease 2019 (COVID-19) do not become seriously ill, and
11 people who have COVID-19 who are asymptomatic or who have
12 mild symptoms may place other vulnerable members of the
13 public at significant risk;

14
15 (iii) The state of Wyoming currently does not
16 have the testing capacity to ensure that all residents are
17 tested for COVID-19;

18
19 (iv) The people of Wyoming need to return to
20 work and other essential activities for the good of their
21 families, communities and the state;

22

1 (v) Wyoming businesses, nonprofit entities,
2 hospitals, healthcare facilities and governmental entities
3 face a growing concern regarding litigation arising from
4 allegations of exposure to COVID-19 and the costs
5 associated with defending those lawsuits and paying any
6 resulting settlement costs or liability;

7

8 (vi) These costs and the threat of potential
9 liability will only worsen the economic devastation of
10 Wyoming residents and businesses already caused by the
11 COVID-19 public health emergency;

12

13 (vii) Wyoming citizens who have been exposed to
14 or contracted COVID-19 as a result of the gross negligence
15 or willful and wanton misconduct of another should have
16 access to the courts to pursue a remedy for any resulting
17 damage;

18

19 (viii) Claims alleging COVID-19 exposure or
20 infection that do not sufficiently allege facts supporting
21 the liability of a defendant should be dismissed at the
22 earliest possible time, sparing Wyoming entities the cost

1 and disruption of defending claims based on conjecture or
2 bare allegations.

3

4 *****
5 **STAFF COMMENT**

6
7 **Generally, findings are not included in bills. The sponsor**
8 **may wish to consider whether the findings are necessary to**
9 **include in this bill draft.**

10
11
12

13 **Section 2.** W.S. 35-4-114(a) and by creating a new
14 subsection (d) is amended to read:

15

16 **35-4-114. Immunity from liability.**

17

18 (a) During a public health emergency as defined by
19 W.S. 35-4-115(a)(i), any ~~health care provider or other~~
20 ~~person, including a business or~~ entity, ~~who in good faith~~
21 ~~follows the instructions of a state, city, town or~~
22 ~~county health officer or who acts in good faith in~~
23 ~~responding to the public health emergency is~~ shall be
24 immune from any liability arising from complying with those
25 instructions or acting in good faith civil liability for
26 any acts or omissions of the person or entity that caused
27 another to be exposed to or to contract the disease, agent

1 or toxin for which the public health emergency is declared.
2 ~~This immunity shall apply to health care providers who are~~
3 ~~retired, who have an inactive license or who are licensed~~
4 ~~in another state without a valid Wyoming license and while~~
5 ~~performing as a volunteer during a declared public health~~
6 ~~emergency as defined by W.S. 35-4-115(a)(i).~~ This immunity
7 shall not apply to acts or omissions constituting gross
8 negligence or willful or wanton misconduct. Any complaint
9 alleging that acts or omissions of a person or entity
10 caused another to be exposed to or to contract the disease,
11 agent or toxin for which a public health emergency is
12 declared shall state with particularity the acts or
13 omissions constituting the basis of the civil action, which
14 shall be proven by clear and convincing evidence. As used
15 in this subsection, "any person or entity" includes any
16 individual person, business entity, sole proprietorship,
17 nonprofit entity, charitable entity, faith-based entity,
18 church, associations and service clubs, healthcare
19 providers, hospitals, clinics, long-term care facilities,
20 county and municipal political subdivisions, special
21 districts and healthcare providers who are retired, who
22 have an inactive license or who are licensed in another
23 state without a valid Wyoming license and while performing

1 as a volunteer during a declared public health emergency as
2 defined by W.S. 35-4-115(a)(i).

3 *****

4
5 STAFF COMMENT

6
7 Rule 8 of the Wyoming Rules of Civil Procedure provides the
8 general rules of pleading and requires that a pleading
9 contain "(1) a short and plain statement of the grounds
10 for the court's jurisdiction, unless the court already has
11 jurisdiction and the claim needs no new jurisdictional
12 support; (2) a short and plain statement of the claim
13 showing that the pleader is entitled to relief; and (3) a
14 demand for the relief sought, which may include relief in
15 the alternative or different types of relief." The
16 heightened pleading standard in subsection (a) above is
17 modeled after Rule 9 of the Wyoming Rules of Civil
18 Procedure, which in circumstances of alleged fraud or
19 mistake, requires that a party "state with particularity
20 the circumstances constituting fraud or mistake."
21

22 Regarding the defined burden of proof, clear and convincing
23 evidence is the "kind of proof which would persuade a trier
24 of fact that the truth of the contention is highly
25 probable."
26

27 Alexander v. Meduna, 2002 WY 83, ¶ 29, 47 P.3d 206, 216
28 (Wyo. 2002).
29

30 *****

31
32
33 *****
34 STAFF COMMENT

35
36 The sponsor may wish to consider whether the new
37 sentence/definition at the end of subsection (a) is
38 necessary given the broad reference to "any person or
39 entity" as amended in this subsection, and whether the
40 definition would impact other uses of "person" or "entity"
41 in Wyoming statutes. Of note, the term "person" is defined
42 in Title 8 of Wyoming statute:
43

1 **8-1-102. Definitions.**

2

3 (a) As used in the statutes unless the legislature
4 clearly specifies a different meaning or
5 interpretation or the context clearly requires a
6 different meaning:

7

8 * * *

9

10 (vi) "Person" includes an individual,
11 partnership, corporation, joint stock company or any
12 other association or entity, public or private;

13

14 The Wyoming Supreme Court has stated that, where "a statute
15 enumerates the subjects or things on which it is to
16 operate, or the persons affected, or forbids certain
17 things, it is to be construed as excluding from its effect
18 all those not expressly mentioned under the rule of
19 expressio unius est exclusion alterius." Cheyenne v. Huit,
20 844 P.2d 1102, 1104 (Wyo. 1993). By trying to list every
21 type of entity or organization that should be granted
22 immunity under this statute, the statute may inadvertently
23 exclude an entity that the legislature intended to cover.

24

25 The sponsor may also wish to consider the specific
26 inclusion of "county and municipal political subdivisions"
27 and "special districts" in light of the Wyoming
28 Governmental Claims Act. Relevant provisions of that Act
29 are included here:

30

31 **1-39-103. Definitions.**

32

33 (a) As used in this act:

34

35 (i) "Governmental entity" means the state,
36 University of Wyoming or any local government;

37

38 (ii) "Local government" means cities and towns,
39 counties, school districts, joint powers boards, airport
40 boards, public corporations, community college districts,
41 special districts and their governing bodies, all political
42 subdivisions of the state, and their agencies,
43 instrumentalities and institutions, and governmental
44 entities of another state but only while physically present

1 in the state of Wyoming and while in the course of
2 operating a cooperative public transportation program as
3 defined by W.S. 16-1-104(f);
4

5 **1-39-104. Granting immunity from tort liability;**
6 **liability on contracts; exceptions.**
7

8 (a) A governmental entity and its public employees
9 while acting within the scope of duties are granted
10 immunity from liability for any tort except as provided by
11 W.S. 1-39-105 through 1-39-112. Any immunity in actions
12 based on a contract entered into by a governmental entity
13 is waived except to the extent provided by the contract if
14 the contract was within the powers granted to the entity
15 and was properly executed and except as provided in W.S. 1-
16 39-120(b). The claims procedures of W.S. 1-39-113 apply to
17 contractual claims against governmental entities.
18

19 **1-39-109. Liability; medical facilities.**
20

21 (a) Except as provided in subsection (b) of this
22 section, a governmental entity is liable for damages
23 resulting from bodily injury, wrongful death or property
24 damage caused by the negligence of public employees while
25 acting within the scope of their duties in the operation of
26 any public hospital or in providing public outpatient
27 health care.
28

29 (b) The state of Wyoming is solely liable for damages
30 resulting from, and the sole responsible party for, bodily
31 injury or wrongful death to a patient treated under the
32 provisions of W.S. 35-31-101 through 35-31-103 caused by
33 the negligence of a health care provider or a medical
34 facility while performing health care services pursuant to
35 a contract to deliver volunteer health services under W.S.
36 35-31-101 through 35-31-103.
37

38 **1-39-110. Liability; health care providers.**
39

40 (a) A governmental entity is liable for damages
41 resulting from bodily injury, wrongful death or property
42 damage caused by the negligence of health care providers
43 who are employees of the governmental entity, including
44 contract physicians, physician assistants, nurses,
45 optometrists and dentists who are providing a service for

1 state institutions or county jails, while acting within the
2 scope of their duties.

3
4 (b) Notwithstanding W.S. 1-39-118(a), for claims
5 under this section against a physician, physician
6 assistant, nurse, optometrist or dentist who is employed by
7 a governmental entity or who is deemed to be a public
8 employee of the state by virtue of a contract pursuant to
9 W.S. 35-31-101 through 35-31-103, based upon an act, error
10 or omission occurring on or after May 1, 1988, the
11 liability of a governmental entity shall not exceed the sum
12 of one million dollars (\$1,000,000.00) to any claimant for
13 any number of claims arising out of a single transaction or
14 occurrence nor exceed the sum of one million dollars
15 (\$1,000,000.00) for all claims of all claimants arising out
16 of a single transaction or occurrence.

17
18 *****
19

20 (d) The immunity provided in subsection (a) of this
21 section shall only apply to claims alleging that actions or
22 omissions caused exposure to or the contraction of a
23 disease, agent or toxin for which a public health emergency
24 was declared under W.S. 35-4-115(a)(i) and arising from
25 actions or omissions occurring during the declared public
26 health emergency;

27
28 (e) The immunity provided in subsection (a) of this
29 section shall apply to any person or entity whose alleged
30 act or omission was in substantial compliance or was
31 consistent with any federal, state, county or municipal
32 statute, regulation, order, ordinance or public health

1 guidance related to the disease, agent or toxin for which a
2 public health emergency is declared under W.S. 35-4-
3 115(a)(i).
4

5 **Section 3.** This act shall apply to all civil actions
6 occurring on and after March 13, 2020 alleging that actions
7 or omissions caused exposure to or the contraction of a
8 disease, agent or toxin for which a public health emergency
9 was declared under W.S. 35-4-115(a)(i) and arising from
10 actions or omissions occurring during the declared public
11 health emergency.
12

13 *****
14 STAFF COMMENT

15
16 The retroactive application of this bill draft raises
17 certain constitutional concerns. "[R]etroactivity is not
18 favored in the law [and] congressional enactments and
19 administrative rules will not be construed to
20 have retroactive effect unless their language requires this
21 result." Landgraf v. Usi Film Prods., 511 U.S. 244, 264
22 (1994). This "antiretroactivity principle finds expression
23 in several provisions of [the] Constitution." Id. at 266.
24 Notably, "[t]he Due Process Clause ... protects the

1 interests in fair notice and repose that may be compromised
 2 by retroactive legislation; a justification sufficient to
 3 validate a statute's prospective application under the
 4 Clause "may not suffice" to warrant its retroactive
 5 application." Landgraf, 511 U.S. at 264 (internal citations
 6 and quotation marks omitted). If enacted into law, this
 7 bill would affect already filed civil actions, for example,
 8 by making previously filed pleadings subject to challenge
 9 for lack of particularity. In addition, a legal calculus is
 10 conducted on whether a plaintiff believes they can satisfy
 11 a particular evidentiary burden. Increasing this burden
 12 after a civil action has been filed could be problematic.

13
 14 *****
 15

16 **Section 4.** This act is effective immediately upon
 17 completion of all acts necessary for a bill to become law
 18 as provided by Article 4, Section 8 of the Wyoming
 19 Constitution.

20

21

(END)