OPPONENT TESTIMONY TO SB 308
BY THE OHIO EMPLOYMENT LAWYERS ASSOCIATION AND
PROTECTING OHIO EMPLOYEES
MAY 27, 2020

Chairman Eklund, Vice Chair Manning, Ranking Member Thomas, and members of the Judiciary Committee,

I previously submitted written testimony jointly with representatives of 8 other organizations concerning the earlier version of this bill. I submit this testimony about the latest version of Senate Bill 308 to make it clear that many, if not most, of the problems with the previous versions have not been corrected, and other provisions have been amended in ways that increase their discriminatory impact on employees, low income communities, senior citizens, and people of color.

The changes in the newest version assure that even irresponsible or reckless employers and medical providers cannot be held accountable for dangerous or illegal conduct that sickens, kills, or injures Ohioans. The purpose of my testimony is to highlight the provisions in the pending bill that will cause those who need protection to be abandoned and left without any meaningful protection.

INCOMPETENT, IRRESPONSIBLE AND RECKLESS MEDICAL PROVIDERS CANNOT BE HELD ACCOUNTABLE

The bill protects all medical providers (a term defined so broadly that, besides doctors and nurses, it includes personal trainers and masseuses) from being held accountable in any way for irresponsible, negligent, and reckless treatment during a disaster or emergency that causes injury, illness or death. The bill will ban any lawsuit against providers (and any institution at which a provider works, whether or not it is really a medical facility). Even more disturbing, the bill will prohibit the Ohio Medical Board, Board of Nursing, and other boards that license providers from investigating or disciplining them for incompetent, irresponsible, negligent, or reckless conduct. The bill gives providers, during any declared disaster or emergency, nothing less than a license to be irresponsible, negligent, and reckless.

Under the bill, an incompetent doctor, nurse, or other provider can proceed without any concern about consequences. A heavy drinking physician need not hesitate to have a few stiff ones before surgery, as long as there is a declared disaster or emergency in place. All that is required is that the condition being treated is related to the event or disease that caused the emergency. This would include catastrophic weather, fires, major industrial accidents or explosions, large scale drinking water contamination, or new contagious diseases. Obviously, the range of injuries or illnesses related to such catastrophes could include broken bones, heart damage, neurological impairments, kidney damage, fever, sepsis from open wounds, loss of lung capacity – and the list goes on and on.

THE IMMUNITIES CREATED BY THE BILL ARE VIRTUALLY PERMANENT

Making matters worse, the bill's new immunities will stay in effect permanently. It has no sunset provision or time limit. Disaster and emergency declarations typically have no specified end date. And, as is apparent from the above examples, sadly, disasters and emergencies happen all too often. In addition, the bill includes disaster and emergency declarations by state officials as well as the federal government. In effect, the legislators who vote for the bill, as presently written, are likely banning any medical board enforcement actions and lawsuits by injured patients or the families of deceased patients

for negligent, irresponsible, and even reckless treatment and diagnoses permanently, or for a period of time that is not even knowable.

BUSINESS AND CORPORATE MISCONDUCT WILL BE IMMUNIZED EVEN IF NOT DIRECTLY RELATED TO AN EMERGENCY

The bill does not limit its extreme protections to medical providers. The legislation also shelters "service providers"—essentially all businesses, enterprises, churches, and other organizations who can claim they are assisting people to recover from or survive an emergency or disaster. The law states that service providers cannot be sued for any harm or illness they cause related to the services they provide during an emergency or disaster. This will be true even if the harm or illness resulted from irresponsible or negligent behavior.

Car dealers and garages that do expensive but faulty repairs, requiring owners to have the repairs redone, can't be sued. The car owner, who may have barely been able to pay for the necessary repairs to begin with, is left without recompense and without an operable car during urgent times. Grocery or convenience stores that carelessly sicken customers by selling recalled or tainted products during disasters or emergencies cannot be required to pay for the medical bills and suffering caused their customers.

This will be true even though the services involved have no direct relationship to the disease, fire, explosion, weather conditions, or other reason for the emergency declaration. And, once again, keep in mind that there is no end date to such declarations under the legislation. While the bill refers to the immunities ending 180 days after the end of the disaster or emergency, it does not require such declarations to include an end date and does not provide any method to calculate an end date for open-ended disaster declarations.

THE BILL BANS THE EVIDENCE NECESSARY TO PROVE RECKLESSNESS

The bill also engages in a kind of sleight of hand as to the recklessness exception for service provider immunity. Under the bill, if a service provider's reckless conduct causes injury, illness, or death, the individual who suffered (and in death cases, their family) can sue. But the bill takes away the evidence that the individual would need to prove recklessness, especially in cases involving pandemic illnesses like Covid-19's. Under the bill, government orders, such as those issued by the Ohio Department of Health during the current emergency, do not create any duty or obligations on a business or other service provider. Nor can such orders or standards be used as evidence in court, as they are presumed to be inadmissible. As a result, businesses are licensed to recklessly thumb their noses at directives and guidelines specifically designed to help prevent the illness, injury, or death involved without concern about being held accountable.

SB 308 BANS CLASS ACTIONS, PROTECTING THE WORST OF THE WORST

Amazingly, even those individuals and unscrupulous businesses who intentionally and maliciously harm Ohioans during emergencies are protected under the bill. The bill shields such willful bad actors from any possibility of a class action by their employees or customers. So a business that defrauds Ohioans (and risks their lives) by selling a knowingly fake snake oil cure for COVID-19 can be sued by only one customer at a time (sometimes for only a few dollars at a time), even if it has ripped off thousands of Ohioans for millions of dollars. Because of the other provisions in the bill, this ban on class actions is

only offered to the worst of the worst, whose actions are too extreme or intentional to be protected from lawsuits even under this bill.

THE KEY VICTIMS OF THE BILL BESIDES THE POOR, SENIORS, DISABLED, AND MINORITIES ARE WORKERS

Collectively, the immunities put working Ohioans in grave danger, with no way to protect themselves and their families. Employees who work for companies that ignore the disaster and emergency directives of the state and refuse to take common sense steps to make sure their workers are protected from exposure (in the case of contagious diseases, for example) are barred from suing their employers. Even if they go to a lawyer, their counsel will have to warn them that the Ohio Senate has determined they cannot use evidence that their employer ignored Health Department directives and guidelines.

Consider hygienists fired for objecting to performing aerosol-creating procedures without appropriate masks, or the maintenance worker fired for refusing to enter the apartment of an infected tenant. Under the right COVID conditions, discrimination and retaliation claims may be barred. Many employees will be afraid to protest a lack of appropriate protective equipment, spacing, air circulation, testing or barriers required by state emergency pandemic directives.

Yet, employees of grocery stores, restaurants, bars, coffee shops, salons, exercise facilities, and almost all other businesses are exposed every day to dozens or hundreds of customers. Unlike customers who can decide not to frequent establishments that refuse to implement precautions (sometimes applicable to other customers), the employees' only choice other is to quit or risk exposure.

Unfortunately, if they do quit, they likely will not be eligible for unemployment benefits. If they go to work and become ill, they will not be able to get workers' compensation, because it will be impossible to prove, especially in the case of a viral disease like COVID-19, how they became infected. Nor will they be able to sue their employer under the bill for negligence or recklessness, and, even if they do, the ban on key evidence will likely result in its dismissal. If they go to a medical provider, they may lack insurance or have large co-pays. And if they go to an irresponsible, incompetent, or negligent physician, neither the medical board or the courts can help them.

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