

SESSION OF 2021

**SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2126**

As Amended by House Committee on Judiciary

**Brief\***

HB 2126 would amend the COVID-19 Response and Reopening for Business Liability Protection Act by replacing the definition of “adult care facility” with the following definition of “covered facility”:

- An adult care home, as defined elsewhere in statute, except that covered facility would include a center approved by the Centers for Medicare and Medicaid Services as a program for all-inclusive care for the elderly (PACE) that provides services only to PACE participants;
- A community mental health center and a crisis intervention center, as defined elsewhere in statute; and
- A community service provider, a community developmental disability organization, and an institution, as defined in the Developmental Disabilities Reform Act.

The bill would replace an affirmative defense available in certain circumstances for an adult care facility in a civil action for damages, administrative fines, or penalties for a COVID-19 claim with immunity from liability for a covered facility in a civil action for damages for a COVID-19 claim if such facility was in substantial compliance with public health directives applicable to the activity giving rise to the cause of action when the cause of action accrued.

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\*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

For purposes of this immunity provision, “public health directives” would mean any of the following required by law to be followed related to COVID-19:

- State statutes or rules and regulations; or
- Federal statutes or regulations from federal agencies, including the U.S. Centers for Disease Control and Prevention and the Occupational Safety and Health Administration of the U.S. Department of Labor.

The bill would state this immunity provision would not apply to civil liability when it is established that the act, omission, or decision giving rise to the cause of action constituted gross negligence or willful, wanton, or reckless conduct.

The bill would state the amendments replacing the affirmative defense with an immunity provision would apply retroactively to any cause of action accruing on or after March 12, 2020, and prior to termination of the state of disaster emergency related to the COVID-19 public health emergency.

The bill would be in effect upon publication in the *Kansas Register*.

## **Background**

The bill was introduced by the House Committee on Judiciary at the request of LeadingAge Kansas and Kansas Health Care Association (KHCA). As introduced, the bill would have provided immunity for an adult care facility in a civil action for damages, administrative fines, or penalties for any claim for damages or liability arising out of or relating to acts, omissions, or decisions related to the COVID-19 public health emergency.

### ***House Committee on Judiciary***

In the House Committee hearing on February 3, 2021, representatives of the Association of Community Mental Health Centers of Kansas, Inc., Axiom Healthcare Service, Bluestem Communities, Kansas Adult Care Executives, Kansas Hospital Association, KHCA and Kansas Center for Assisted Living, LeadingAge Kansas, Locust Grove Village, Progressive Healthcare Alliance, and Starkey, Inc., testified as **proponents** of the bill. Representatives of Bethany Village and InterHab provided written-only proponent testimony.

Representative Coleman, the State Long-Term Care Ombudsman, and representatives of AARP Kansas, Disability Rights Center of Kansas, Kansas Advocates for Better Care, Kansas Bar Association, and Kansas Trial Lawyers Association testified as **opponents** of the bill.

On February 24, the House Committee amended the bill to:

- Include community mental health centers and crisis intervention centers in a definition of “covered facility” and apply the immunity to covered facilities (at the request of the Association of Community Mental Health Centers of Kansas) ;
- Include community service providers, community developmental disability organizations, and institutions, as defined in the Developmental Disabilities Reform Act, in the definition of “covered facility” (at the request of InterHab);
- Remove a provision applying the immunity to administrative fines or penalties; and
- Replace language providing broader immunity with a requirement that a facility must have been in substantial compliance with public health directives

to qualify for immunity and define “public health directives” for this specific purpose.

### **Fiscal Information**

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the Department for Aging and Disability Services (KDADS) and the Office of Judicial Administration indicate enactment of the bill would not have a fiscal effect. KDADS indicates the immunity provided by the bill could create savings in litigation costs for adult care facilities related to COVID-19 claims.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2022 Governor’s Budget Report*.

COVID-19; civil liability; immunity; adult care; covered facilities