

## 1 SENATE BILL NO. 65

2 INTRODUCED BY S. FITZPATRICK, M. NOLAND

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 4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING CIVIL LIABILITY LAWS; SETTING CONDITIONS ON  
 5 CIVIL ACTIONS FOR EXPOSURE TO COVID-19; LIMITING LIABILITY OF PREMISES OWNERS;  
 6 PROVIDING ~~SAFE HARBOR~~ AFFIRMATIVE DEFENSE FOR THOSE WHO COMPLY WITH CERTAIN TYPES  
 7 OF REGULATIONS; LIMITING LIABILITY OF HEALTH CARE PROVIDERS; LIMITING PRODUCTS LIABILITY  
 8 CLAIMS IN RESPONSE TO COVID-19; PROVIDING DEFINITIONS; ~~AND~~ AMENDING SECTION 27-1-719,  
 9 MCA; AND PROVIDING AN EFFECTIVE DATE, AN APPLICABILITY DATE, AND A TERMINATION DATE."  
 10

11 WHEREAS, the COVID-19 pandemic has caused significant disruption to Montana's people,  
 12 businesses, places of worship, property owners, and nonprofit organizations and has adversely affected  
 13 Montana's economy and the rights of Montana's citizens; and

14 WHEREAS, in order to improve Montana's economy and to encourage people to engage in private  
 15 sector activities, the Legislature believes it is necessary to enact this legislation to establish standards for  
 16 imposing liability and to provide defenses for claims relating to COVID-19.

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 18 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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 20 NEW SECTION. Section 1. Definitions. As used in [sections 1 through ~~6~~8], unless the context  
 21 clearly indicates otherwise, the following definitions apply:

22 (1) "Covid-19" means the novel coronavirus identified as SARS-CoV-2, the disease caused by the  
 23 novel coronavirus SARS-CoV-2 or a virus mutating from it, and conditions associated with the disease caused  
 24 by the novel coronavirus SARS-CoV-2 or a virus mutating from it.

25 (2) "Health care professional" means, FOR THE PURPOSES OF [SECTIONS 1 THROUGH 8], physicians,  
 26 PHYSICIAN ASSISTANTS, NURSE PRACTITIONERS, NURSES, NURSING ASSISTANTS, CHIROPRACTORS, PHARMACISTS,  
 27 PHARMACY TECHNICIANS, DENTISTS, DENTAL HYGIENISTS, MEDICATION AIDES, RESPIRATORY THERAPIST  
 28 PRACTITIONERS, PROFESSIONAL COUNSELORS, OCCUPATIONAL THERAPISTS, MIDWIFES, PSYCHOLOGISTS, and other

1 health care practitioners who are licensed, certified, or otherwise authorized or permitted by the laws of this  
 2 state to administer health care services in the ordinary course of business or in the practice of a profession,  
 3 whether paid or unpaid. This term includes persons engaged in telemedicine as defined in 33-22-138, and a  
 4 similar professional's employer or agent who provides or arranges health care.

5 ~~(3) "Minimum medical condition" means an inpatient hospitalization or death where the primary cause~~  
 6 ~~of the inpatient hospitalization or death is covid-19.~~

7 (3) "HEALTH CARE PROVIDER" MEANS AND INCLUDES, FOR THE PURPOSES OF [SECTIONS 1 THROUGH 8], A  
 8 HEALTH CARE PROFESSIONAL, HEALTH CARE FACILITY, HOME HEALTH CARE FACILITY, AND ANY OTHER PERSON OR  
 9 FACILITY OTHERWISE AUTHORIZED OR PERMITTED BY ANY FEDERAL OR STATE STATUTE, REGULATION, ORDER, OR PUBLIC  
 10 HEALTH GUIDANCE TO ADMINISTER HEALTH CARE SERVICES OR TREATMENT. IT DOES NOT INCLUDE A GOVERNMENT  
 11 ENTITY OR A HEALTH CARE PROFESSIONAL THAT IS EMPLOYED BY A GOVERNMENT ENTITY.

12 (4) "PERSON" MEANS AN INDIVIDUAL, CORPORATION, NONPROFIT CORPORATION, ESTATE, TRUST,  
 13 PARTNERSHIP, LIMITED LIABILITY COMPANY, BUSINESS OR SIMILAR TRUST, ASSOCIATION, JOINT VENTURE, PLACE OF  
 14 WORSHIP, PERSONAL REPRESENTATIVE, TRUSTEE, OR ANY OTHER LEGAL OR COMMERCIAL ENTITY. IT DOES NOT INCLUDE  
 15 A GOVERNMENT ENTITY.

16 (4) (5) "Personal protective equipment" includes protective clothing, gloves, face shields, goggles,  
 17 face masks, respirators, gowns, aprons, coveralls, and other equipment designed to protect the wearer from  
 18 injury or spread of infection or illness.

19 (5) (6) "Premises" includes any real property and any appurtenant building or structure, as well as any  
 20 other location, vehicle, or place, serving a commercial, residential, educational, religious, governmental,  
 21 cultural, charitable, or health care purpose.

22 (6) (7) "Public health guidance" includes guidance related to covid-19 issued by the following:

23 (a) the centers for disease control and prevention of the U.S. department of health and human  
 24 services;

25 (b) the centers for medicare and medicaid services of the U.S. department of health and human  
 26 services;

27 (c) the federal occupational safety and health administration;

28 (d) the office of the governor;

- 1 (e) a state agency, including the department of public health and human services; or  
 2 (f) a local government including a local government health department or local government board of  
 3 health.

4 ~~(7)~~ (8) "Qualified product" means and includes:

- 5 (a) personal protective equipment and supplies used to treat covid-19 or to prevent the spread of  
 6 covid-19;  
 7 (b) medical devices, equipment, and supplies used to treat covid-19, including medical devices,  
 8 equipment, and supplies that are used or modified for an unapproved use to treat covid-19 or to prevent the  
 9 spread of covid-19;  
 10 (c) medical devices, equipment, and supplies used outside of their normal use to treat covid-19 or to  
 11 prevent the spread of covid-19;  
 12 (d) medications used to treat covid-19, including medications prescribed or dispensed for off-label use  
 13 to attempt to treat covid-19;  
 14 (e) tests to diagnose or determine immunity to covid-19; and  
 15 (f) a component of an item described in subsections ~~(7)(a) through (7)(e)~~ (8)(A) THROUGH (8)(E).

16  
 17 NEW SECTION. Section 2. Actual injury LIABILITY. A-EXCEPT AS PROVIDED IN [SECTIONS 3 THROUGH  
 18 8]. A person may not bring or maintain a civil action alleging exposure or potential exposure to covid-19 unless:

- 19 ~~(1) the civil action relates to a minimum medical condition;~~  
 20 ~~(2) the civil action involves an act that was intended to cause harm; or~~  
 21 ~~(3) the civil action involves an act OR OMISSION that constitutes gross negligence, ~~or~~ willful and wanton~~  
 22 ~~misconduct, OR INTENTIONAL TORT.~~

23  
 24 NEW SECTION. Section 3. Premises owner's duty of care -- limited liability. (1) A person who  
 25 possesses or is in control of a premises, including a tenant, lessee, or occupant of a premises, who directly or  
 26 indirectly invites or permits an individual onto a premises, ~~shall not be~~ IS NOT liable for civil damages for injuries  
 27 sustained from the individual's exposure to covid-19, whether the exposure occurs on the premises or during an  
 28 activity managed by the person who possesses or is in control of a premises, unless ~~one or both of the following~~

1 apply to the person who possesses or is in control of the premises:

2 (1) ~~the person who possesses or is in control of the premises exposes the individual to covid-19~~  
 3 ~~through an act of gross negligence or willful and wanton misconduct; or~~

4 (2) ~~the person who possesses or is in control of the premises intentionally exposes the individual to~~  
 5 ~~covid-19~~ THE CIVIL ACTION INVOLVES AN ACT OR OMISSION THAT CONSTITUTES GROSS NEGLIGENCE, WILLFUL AND  
 6 WANTON MISCONDUCT, OR INTENTIONAL TORT.

7 (2) THE STANDARD ESTABLISHED IN SUBSECTION (1) APPLIES IN LANDLORD-TENANT CLAIMS MADE UNDER 70-  
 8 24-303(1)(B) THROUGH (1)(E) FOR INJURIES SUSTAINED FROM AN INDIVIDUAL'S EXPOSURE TO COVID-19.

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 10 NEW SECTION. Section 4. Safe harbor for compliance with regulations, executive orders, or  
 11 public health guidance. ~~A person shall not be held liable for civil damages for injuries sustained from an~~  
 12 ~~alleged exposure or potential exposure to covid-19 if the act or omission alleged to violate a duty of care was in~~  
 13 ~~substantial compliance or was consistent with a federal or state statute, regulation, order, or public health~~  
 14 ~~guidance related to covid-19 that was applicable to the person or activity at issue at the time of the alleged~~  
 15 ~~exposure or potential exposure.~~

16  
 17 NEW SECTION. Section 5 4. Liability of health care providers. A health care provider ~~shall not be~~  
 18 IS NOT liable for civil damages for causing or contributing, directly or indirectly, to the death or injury of an  
 19 individual as a result of the health care provider's acts or omissions while providing or arranging health care in  
 20 support of the ~~state's~~ response to covid-19 unless the health care provider caused the death or injury of an  
 21 individual through an act ~~of~~ OR OMISSION THAT CONSTITUTES gross negligence, willful and wanton misconduct, or  
 22 an intentional tort. This ~~subsection~~ SECTION applies to:

23 (1) injury or death resulting from screening, assessing, diagnosing, caring for, or treating individuals  
 24 with a suspected or confirmed case of covid-19;

25 (2) prescribing, administering, or dispensing a pharmaceutical for off-label use to treat a patient with a  
 26 suspected or confirmed case of covid-19;

27 (3) acts or omissions while providing health care to individuals with a condition unrelated to covid-19  
 28 when those acts or omissions support the ~~state's~~ response to covid-19, including the following:

1 (a) delaying or canceling nonurgent or elective dental, medical, or surgical procedures, or altering the  
 2 diagnosis or treatment of an individual in response to a federal or state statute, regulation, order, or public  
 3 health guidance;

4 (b) diagnosing or treating patients outside the normal scope of the health care provider's license or  
 5 practice;

6 (c) using medical devices, equipment, or supplies outside of their normal use for the provision of  
 7 health care, including using or modifying medical devices, equipment, or supplies for an unapproved use;

8 (d) conducting tests or providing treatment to an individual outside the premises of a health care  
 9 facility;

10 (e) acts or omissions undertaken by a health care provider because of a lack of staffing, facilities,  
 11 medical devices, equipment, supplies, or other resources attributable to covid-19 that renders the health care  
 12 provider unable to provide the level or manner of care to a person that otherwise would have been required in  
 13 the absence of covid-19; or

14 (f) acts or omissions undertaken by a health care provider relating to the use or nonuse of personal  
 15 protective equipment.

16

17 **NEW SECTION. Section 6 5. Supplies, equipment, and products designed, manufactured,**  
 18 **labeled, sold, distributed, and donated in response to covid-19.** (1) A person who designs, manufactures,  
 19 labels, sells, distributes, or donates household disinfecting or cleaning supplies, personal protective equipment,  
 20 or a qualified product in response to covid-19 ~~shall not be~~ IS NOT liable in a civil action alleging personal injury,  
 21 death, or property damage caused by or resulting from the design, manufacturing, labeling, selling, distributing,  
 22 or donating of the household disinfecting or cleaning supplies, personal protective equipment, or a qualified  
 23 product unless the person caused the personal injury, death, or property damage through ~~an act of~~ AN ACT OR  
 24 OMISSION THAT CONSTITUTES gross negligence, willful and wanton misconduct, or an intentional tort.

25 (2) A person who designs, manufactures, labels, sells, distributes, or donates household disinfecting  
 26 or cleaning supplies, personal protective equipment, or a qualified product in response to covid-19 ~~shall not be~~  
 27 IS NOT liable in a civil action alleging personal injury, death, or property damage caused by or resulting from a  
 28 failure to provide proper instructions or sufficient warnings unless the person caused the personal injury, death,

1 or property damage through an act of ~~or~~ OR OMISSION THAT CONSTITUTES gross negligence, willful and wanton  
2 misconduct, or an intentional tort.

3 (3) This section supersedes 27-1-719 for product liability claims brought for damages caused in part  
4 by covid-19 as defined in [section 1].

5  
6 **NEW SECTION. Section 6. Affirmative defense -- reasonable measures consistent with**  
7 **regulations, orders, and guidance.** (1) In addition to all other defenses, a person may assert as an affirmative  
8 defense that the person took reasonable measures consistent with a federal or state statute, regulation, order,  
9 or public health guidance related to covid-19 that was applicable to the person or activity at issue at the time of  
10 the alleged injury.

11 (2) If two or more sources of public health guidance are applicable, a person does not breach a duty  
12 of care if the person took reasonable measures consistent with one applicable set of guidance.

13 (3) If a person proves the affirmative defense contained in this section, the affirmative defense is a  
14 complete bar to any action relating to covid-19.

15 (4) This section may not be construed to impose liability on a person for failing to comply with a  
16 federal or state statute, regulation, order, or public health guidance related to covid-19.

17  
18 **NEW SECTION. Section 7. Limitation on action.** A government order, regulation, or guidance  
19 related to covid-19 may not create and may not be construed to create a new cause of action against any  
20 person with respect to the matters contained in the government order, regulation, or guidance.

21  
22 **NEW SECTION. Section 8. Limitation on requirements.** (1) If a federal or state statute, regulation,  
23 order, or public health guidance related to covid-19 recommends or requires the use of a face mask, a person  
24 is not required to ensure face masks are being used or a face mask is sufficient to stop the spread of covid-19  
25 to meet the standard of care.

26 (2) If a federal or state statute, regulation, order, or public health guidance related to covid-19  
27 recommends or requires temperature checks, a person is not required to conduct temperature checks before  
28 allowing a person to enter a premises if an individual entering the premises refuses to allow a temperature

1 check.

2 (3) If a federal or state statute, regulation, order, or public health guidance related to covid-19  
3 recommends or requires a vaccine, an individual is not required to receive a vaccine and a person is not  
4 required to ensure employees or agents are vaccinated to meet the standard of care.

5

6 **Section 40 9.** Section 27-1-719, MCA, is amended to read:

7 **"27-1-719. (Temporary) Liability of seller of product for physical harm to user or consumer. (1)**

8 As used in this section, "seller" means a manufacturer, wholesaler, or retailer.

9 (2) A person who sells a product in a defective condition that is unreasonably dangerous to a user or  
10 consumer or to the property of a user or consumer is liable for physical harm caused by the product to the  
11 ultimate user or consumer or to the user's or consumer's property if:

12 (a) the seller is engaged in the business of selling the product; and

13 (b) the product is expected to and does reach the user or consumer without substantial change in the  
14 condition in which it is sold.

15 (3) The provisions of subsection (2) apply even if:

16 (a) the seller exercised all possible care in the preparation and sale of the product; and

17 (b) the user or consumer did not buy the product from or enter into any contractual relation with the  
18 seller.

19 (4) (a) Subsection (2) does not apply to product liability claims brought for damages caused in part by  
20 covid-19 as defined in [section 1], which are governed by [section 3 2].

21 (b) Subsection (2)(b) does not apply to a claim for relief based upon improper product design.

22 (5) Except as provided in this subsection, contributory negligence is not a defense to the liability of a  
23 seller, based on strict liability in tort, for personal injury or property damage caused by a defectively  
24 manufactured or defectively designed product. A seller named as a defendant in an action based on strict  
25 liability in tort for damages to person or property caused by a defectively designed or defectively manufactured  
26 product may assert the following affirmative defenses against the user or consumer, the legal representative of  
27 the user or consumer, or any person claiming damages by reason of injury to the user or consumer:

28 (a) The user or consumer of the product discovered the defect or the defect was open and obvious

1 and the user or consumer unreasonably made use of the product and was injured by it.

2 (b) The product was unreasonably misused by the user or consumer and the misuse caused or  
3 contributed to the injury.

4 (6) The affirmative defenses referred to in subsection (5) mitigate or bar recovery and must be applied  
5 in accordance with the principles of comparative negligence set forth in 27-1-702. (Terminates on occurrence of  
6 contingency--sec. 11(2), Ch. 429, L. 1997.)

7 **27-1-719. (Effective on occurrence of contingency) Liability of seller of product for physical**  
8 **harm to user or consumer.** (1) As used in this section, "seller" means a manufacturer, wholesaler, or retailer.

9 (2) A person who sells a product in a defective condition that is unreasonably dangerous to a user or  
10 consumer or to the property of a user or consumer is liable for physical harm caused by the product to the  
11 ultimate user or consumer or to the user's or consumer's property if:

12 (a) the seller is engaged in the business of selling the product; and

13 (b) the product is expected to and does reach the user or consumer without substantial change in the  
14 condition in which it is sold.

15 (3) The provisions of subsection (2) apply even if:

16 (a) the seller exercised all possible care in the preparation and sale of the product; and

17 (b) the user or consumer did not buy the product from or enter into any contractual relation with the  
18 seller.

19 (4) (a) Subsection (2) does not apply to product liability claims brought for damages caused in part by  
20 covid-19 as defined in [section 1], which are governed by [section 3 2].

21 (b) Subsection (2)(b) does not apply to a claim for relief based upon improper product design.

22 (5) Contributory fault is a defense to the liability of a seller, based on strict liability in tort, for personal  
23 injury or property damage caused by a defectively manufactured or defectively designed product. A seller  
24 named as a defendant in an action based on strict liability in tort for damages to a person or property caused by  
25 a defectively designed or defectively manufactured product may assert the following affirmative defenses  
26 against the user or consumer, the legal representative of the user or consumer, or any person claiming  
27 damages by reason of injury to the user or consumer:

28 (a) The user or consumer of the product discovered the defect or the defect was open and obvious



1 and the user or consumer unreasonably made use of the product and was injured by it.

2 (b) The product was unreasonably misused by the user or consumer and the misuse caused or  
3 contributed to the injury.

4 (6) The affirmative defenses referred to in subsection (5) mitigate or bar recovery and must be applied  
5 in accordance with the principles of comparative fault set forth in 27-1-702 and 27-1-705."

6

7 **SECTION 14 10.** Section 70-24-303, MCA, is amended to read:

8 **"70-24-303. Landlord to maintain premises -- agreement that tenant perform duties -- limitation**  
9 **of landlord's liability for failure of smoke detector or carbon monoxide detector.** (1) A-Subject to [section  
10 3], a landlord:

11 (a) shall comply with the requirements of applicable building and housing codes materially affecting  
12 health and safety in effect at the time of original construction in all dwelling units where construction is  
13 completed after July 1, 1977;

14 (b) may not knowingly allow any tenant or other person to engage in any activity on the premises that  
15 creates a reasonable potential that the premises may be damaged or destroyed or that neighboring tenants  
16 may be injured;

17 (c) shall make repairs and do whatever is necessary to put and keep the premises in a fit and  
18 habitable condition;

19 (d) shall keep all common areas of the premises in a clean and safe condition;

20 (e) shall maintain in good and safe working order and condition all electrical, plumbing, sanitary,  
21 heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or  
22 required to be supplied by the landlord;

23 (f) shall, unless otherwise provided in a rental agreement, provide and maintain appropriate  
24 receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the  
25 occupancy of the dwelling unit and arrange for their removal;

26 (g) shall supply running water and reasonable amounts of hot water at all times and reasonable heat  
27 between October 1 and May 1, except if the building that includes the dwelling unit is not required by law to be  
28 equipped for that purpose or the dwelling unit is so constructed that heat or hot water is generated by an

1 installation within the exclusive control of the tenant; and

2 (h) shall install in each dwelling unit under the landlord's control an approved carbon monoxide  
 3 detector, in accordance with rules adopted by the department of labor and industry, and an approved smoke  
 4 detector, in accordance with rules adopted by the department of justice. Upon commencement of a rental  
 5 agreement, the landlord shall verify that the carbon monoxide detector and the smoke detector in the dwelling  
 6 unit are in good working order. The tenant shall maintain the carbon monoxide detector and the smoke detector  
 7 in good working order during the tenant's rental period. For the purposes of this subsection (1)(h), an approved  
 8 carbon monoxide detector, as defined in 70-20-113, and an approved smoke detector, as defined in 70-20-113,  
 9 bear a label or other identification issued by an approved testing agency having a service for inspection of  
 10 materials and workmanship at the factory during fabrication and assembly.

11 (2) If the duty imposed by subsection (1)(a) is greater than a duty imposed by subsections (1)(b)  
 12 through (1)(h), a landlord's duty must be determined by reference to subsection (1)(a).

13 (3) A landlord and tenant of a one-, two-, or three-family residence may agree in writing that the  
 14 tenant perform the landlord's duties specified in subsections (1)(f) and (1)(g) and specified repairs, maintenance  
 15 tasks, alteration, and remodeling but only if the transaction is entered into in good faith and not for the purpose  
 16 of evading the obligations of the landlord.

17 (4) A landlord and tenant of a one-, two-, or three-family residence may agree that the tenant is to  
 18 perform specified repairs, maintenance tasks, alterations, or remodeling only if:

19 (a) the agreement of the parties is entered into in good faith and not for the purpose of evading the  
 20 obligations of the landlord and is set forth in a separate writing signed by the parties and supported by  
 21 adequate consideration;

22 (b) the work is not necessary to cure noncompliance with subsection (1)(a); and

23 (c) the agreement does not diminish the obligation of the landlord to other tenants in the premises.

24 (5) The landlord is not liable for damages caused as a result of the failure of the carbon monoxide  
 25 detector or the smoke detector required under subsection (1)(h)."  
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27 **NEW SECTION. Section 42 11. Codification instruction.** [Sections 1 through 6 8] are intended to  
 28 be codified as an integral part of Title 27, and the provisions of Title 27 apply to [sections 1 through 6 8].

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**NEW SECTION. Section 13 12. Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

**NEW SECTION. Section 13. {standard} Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

**NEW SECTION. Section 14. {standard} Effective date.** [This act] is effective on passage and approval.

**NEW SECTION. Section 15. Retroactive applicability.** [This act] applies retroactively, within the meaning of 1-2-109, to claims made on or after January 1, 2021.

**NEW SECTION. Section 16. Termination.** [This act] terminates January 1, 2031.

- END -