

## **Talking Points: Retroactivity / Consistent Application Provisions: TN Safe Harbor and Recovery ACT**

- The proposed legislation can have and should have retroactive effect because the retroactive effect would serve the public interest. The first case of COVID-19 was identified in Tennessee on March 5. The Governor's first proclamation didn't come until March 12. The Act can't get through the legislative process until the middle of June at the earliest.
- First: During this period, the schools, day care centers, non-profit service providers and businesses that operated using the best guidance from public health authorities available at the time educated our future, took care of our workers' children, provided services to the most vulnerable among us, and fed and clothed our citizens despite uncertainty and fear. These critical institutions served our State with care and honor knowing there were risks and they took all reasonable steps under available guidance to protect our children, our citizens, our workers and the public. They deserve legal protections if they acted honorably and responsibly.
- Second: This law could not have been passed earlier because the General Assembly was not in session because the General Assembly suspended its work on March 19, 2020 because of public health guidance. This is crucial – the General Assembly could not have passed this law any sooner because of the pandemic.
- Third: The law has been carefully drafted to address procedure, not substantive rights. The law supplements the Rules of Civil Procedure by addressing what a plaintiff must allege and prove, it does not create any kind of blanket immunity for bad actors who did not act honorably and responsibly. People who were injured by gross negligence or willful misconduct can still bring a legal claim and can still obtain all the remedies they could get if this law did not exist. There are no new immunities created by this law. Chief Justice William Koch specifically said, in the authoritative case on retroactivity, that the legislature can give laws retroactive effect if the laws advance the public interest, are procedural, and do not impair vested rights. This law does exactly that.

- Fourth: The Supreme Court has handed down any number of decisions that change the law and directly affect vested rights. Those decisions have retroactive effect. In a case called *Clanton v. Cain-Sloan* the Court created a new legal claim for wrongful discharge that had never before existed. That had retroactive effect. In a case called *Trau-Med* the Supreme Court created a new legal claim for interference with business relations where there was no contract. That decision had retroactive effect. That decision directly and immediately affected the legal rights of parties who had actually won their case because the legal claim did not exist, and some of those parties wound up paying a lot of money in damages because of conduct that had already been determined by the Court of Appeals to be legal at the time of the conduct. There are numerous other examples. There is no fairness or equity where the Supreme Court can change the law with retroactive effect and the legislature cannot. That is just not right.

These are four compelling reasons for the Tennessee Recovery and Safe Harbor Act to have retroactive effect.