August 2020

Limit Coronavirus Liability to Promote Jobs and Growth

Stephen Moore
Donald Kochan

Stephen Moore

Stephen Moore is a cofounder of Committee to Unleash Prosperity and a member of President Trump's economic recovery task force.

Donald Kochan

Donald Kochan is a professor of law at the Antonin Scalia Law School at George Mason University.

Executive Summary

With the economy entering the recovery stage from the coronavirus economic lockdowns, a major policy issue is what policymakers in Washington and the states can do to get Americans back on the job. With as many as 20 million still unemployed, a return-to-work policy is imperative. There are many proposals on the table: back to work bonuses paid by the government to workers, a payroll tax cut, health care benefits paid by the government, eliminating the high unemployment benefits under the CARES Act that pay workers more to stay out of work than to return to the job, and other enticements.

One policy that will be critical is providing legal protections for small and medium sized businesses from lawsuits if workers get sick on the job, through no fault of the employer. Employers have told policymakers that fear of lawsuits could inhibit hiring in the months ahead. Our best estimate based on previous similar health-related lawsuits, for example, with tobacco settlements and asbestos is that the average settlement ranged from $2 to $3 million (in 2020 dollars), with some wrongful death awards rising to above $40 million.

Given that the latest estimates are that many millions more American workers will be infected with Coronavirus and that tens of thousands of additional deaths are likely before effective treatments and vaccines take hold, the potential exposure to lawsuits could very easily be in the hundreds of thousands under certain liability standards. Already almost 4,000 lawsuits have been filed. In this study we estimate 100,000 lawsuits at an average cost of $2.5 million (including legal fees). These suits would primarily target employers, but also establishments that have customers or residents, including hospitals, hotels, nursing homes, restaurants, apartment buildings, universities, camps, day care centers, retail stores. The potential cost to the economy could reach to be $250 billion over the next two years. This is a litigation tax on employers, employees, and consumers of the products we all buy.

The economic impact estimates don't even include the potential cost of thousands of nursing homes, hospitals, restaurants, bars, movie theaters going bankrupt as a result of these suits. Assisted care facilities shuttering would force seniors, especially with lower incomes, scrambling in search of housing and health care alternatives – many of which might be inferior and more dangerous.

In this study we propose a temporary liability shield until the coronavirus is defeated, much like Senators Mitch McConnell and John Cornyn have proposed. Employers who are grossly negligent, reckless, or who intentionally cause injury would still be liable for conduct that leads to coronavirus illnesses or deaths. And the shield would limit liability for businesses that adopt safety measures consistent with government recommendations. Thus, safety is incentivized while the shield ensures that courts are unable to accept novel causation theories under loser standards that would impose unreasonable burdens and costs on business, contribute to a sea of uncertainty about duties and liabilities, and consequently create fears that would unnecessarily disincentivize business activity.

The trial bar portrays this idea as a gift to the nation's businesses. This study shows that the cost of these potential lawsuits would not just fall on employers, but workers in the form of lower take-home pay. Businesses will pass some to all of the costs of lawsuit risk on to their employees. We argue that the cost of these coronavirus lawsuits would be the equivalent of a one to two percentage point payroll tax rate increase on employees (the current 15.3% payroll tax raises $1.375 trillion a year). Without liability reform, the U.S. could lose one million jobs next year, or workers could loose 500,000 to 1 million jobs through end of 2021 and wages lose $25 to $50 billion.

Limit Coronavirus Liability to Promote Jobs and Growth

The American legal system is the best in the world. But when it becomes abused by those seeking to use the courts for personal profit, judicial resources are diverted and the creative litigation pursued imposes substantial and unreasonable costs across the population. This includes the substantial liability and litigation costs imposed on the defendants who are sued and their employees and customers who bear the burden of those costs. Consequently, finding ways to keep the court system grounded in its core values—by directing litigation toward valid claims while shielding the system from lawsuits that cause societal harm—is an imperative. Times of crisis, like now with the coronavirus, demand particular vigilance as businesses already face uncertain costs limiting their abilities to reopen or re-employ workers, and yet litigation profiteers still lurk.

The burden on the economy from litigation was already clear before the coronavirus hit. The Institute for Legal Reform of the U.S. Chamber of Commerce reports that the U.S. tort system in 2016 alone cost $3,329 per U.S. household.[1] Yet only 57 cents on the dollar went to compensate the actual victims.[2] The inefficiencies of the tort system were already becoming a major, endemic barrier to economic recovery and sustained growth.

Now, with the coronavirus pandemic upon us, the threat to the economy from novel tort litigation is heightened as it hits an especially sensitive economy already made fragile by the pandemic and its resulting business closures. America is in a near-Depression today, with the unemployment rate officially hitting 13.3% for May 2020, the highest it has been since the Great Depression almost 100 years ago.

The economy was at full employment at the start of 2020, with record levels of jobs, growth, and incomes, with little or no inflation and near zero interest rates. Businesses we are now counting on to reopen the economy, hire all those workers back, and resume record economic growth, are showing reluctance to rehire until they are protected from what Senate Majority Leader Mitch McConnell is calling a potential "trial lawyer bonanza."[3]

Will Americans go to shopping malls, stores, restaurants, movie theaters, and sports stadiums as customers enjoying themselves? Will employees be willing to return to staff these services and to produce goods? Businesses and investors want to bet they will, with the same heart and courage as before. Governors have to pray they will, or see their states go effectively bankrupt, drowning in a sea of paper money, not to mention collapsing tax revenues.

At the same time that employers and workers fear coronavirus infection, they also fear a blizzard of lawsuits. A new storm of lawsuits is already challenging businesses, hospitals, nursing homes, meatpacking plants, and cruise lines, threatening them with liability for any misstep in response to the Coronavirus pandemic. Lawyers stand ready to argue these businesses knew or should have

---

1 Institute for Legal Reform, U.S. Chamber of Commerce, https://www.uschamber.com/institute-legal-reform, May 28, 2020.

2 Id.

3 John Gannon, "It May Not Be a Bonanza, But The Risks For Employers Are Real," BusinessWest.com, May 26, 2020

known about the threats posed by the coronavirus pandemic and to hold them accountable for even attenuated contributions to infection or in situations where causation would be difficult or impossible to establish under traditional rules of tort liability and reasonable expectations of duty and responsibility. These lawyers will argue that the businesses have some special obligation to either remain closed or be held liable for not taking the impossible steps of immunizing their employees and customers from infection from an invisible virus. In other words, groups of attorneys seek to impose upon businesses an obligation to sacrifice their own economic security by entirely remaining closed or suffer a judicially imposed burden to themselves stop the effects of a virus (or compensate infected persons for failing to do so) that has already spread worldwide and that even all the governments and their public health officials worldwide have not been able to stop. In many ways, the call to impose such obligations is asking the business community, as a condition of exercising their rights to engage in business activity, to become the insurer against infection and for the healthcare costs of infection-related illness.

A troubling feature of the threatened coronavirus lawsuits is that they are often not even motivated by a concern for public health. Indeed, in some cases, these potential lawsuits are launched with the financial backing in the billions of dollars from hedge funds that see lawsuits as an investment opportunity, taking a percentage of the winnings in return by contractual agreement. The potential gains make financing litigation—which "produces" nothing but litigation and damage awards, not anything that adds value to the economy—as lucrative for those mega-billion hedge fund investment firms as the alternative investments in productive economic activity.[4]

The impact on the economy of expansive theories of liability is not felt only when judges go along and we see the redistribution of resources from unjustified damages awards. In fact, it is the mere threat of this litigation being successful or the uncertainty of whether it could be that has a chilling impact on productive and efficient business activity, as well as the concomitant hesitation to hire employees or the need to adjust employee wages or the pricing of products in anticipation of potential liabilities.

Law is meant to be reasonable and predictable. The law delivers neither when there is actual judicial or legislative acceptance of novel tort theories or even when those institutions simply tolerate a legal climate where such theories might be acceptable.

The threat of these lawsuits is keeping many businesses closed today, with even insurers frightened out of the market. Any businessperson can tell you that they need the law to provide predictable rules in order to plan effectively. Containing the liability risks to predictable, reasonable, and traditional grounds is necessary for the U.S. economy to grow, especially when it is fighting against so many other uncontrollable uncertainties.

This paper describes a plan for a temporary one- to two-year federal limited liability protection from such threatened lawsuits from employees, customers, and others. After the initial shield period expires, Congress should reexamine the situation and determine whether the protections should be extended. The emergency legislation can be enacted by Congress in its Phase 4 stimulus package. If Congress provides these protections, it will protect workers, consumers, and the public while eliminating the fear, uncertainty, and resulting disincentives businesses feel from the artificial economic barriers posed by the threat of tort liability for infections.

---

4 Institute for Legal Reform, U.S. Chamber of Commerce, https://www.uschamber.com/institute-legal-reform, May, 28, 2020.

The Standard of Liability

Lawyers see a honeypot of recoveries from lawsuits seeking damages for workers and customers who become sick from Coronavirus. This is a troubling and unnecessary roadblock to finding ways to grow the economy while living through the crisis. Investors and businesses are not going to stick their necks out to be subject to a maelstrom of coronavirus-related litigation, especially when they seemingly can take very few measures to protect themselves from liability under the current standards. That inability to meet impossible expectations while opening up is a primary reason those businesses need legislative assurances about their liability risks.

A restaurant, movie theater, sports stadium, office, or manufacturing plant should not be held liable to anyone and everyone who interacts with their space without that business having taken any affirmative acts to increase the risk of exposure. The fact that tracing origins of exposure are so difficult alone counsels in favor of giving businesses confidence that they will not be held responsible unless higher levels of proof of causation are met. The Institute for Legal Reform has described the risk environment as follows:

> *"The brewing litigation storm is a recipe for economic havoc. Businesses that performed the civic duty of remaining open over the past several weeks to provide their customers essential services (e.g., food, medicine) may face a tidal wave of lawsuits. Other businesses— particularly smaller ones— will be forced to choose between: (1) rolling the dice on being hit with potential exposure litigation; or (2) keeping their operations shut down (and eventually facing bankruptcy), regardless of what governmental guidance they are receiving about reopening."*[5]

As noted, even businesses that follow best practices and adopt government-recommended measures to improve levels of safety during the pandemic cannot be confident they will not be sued and have great uncertainty about whether those lawsuits will be successful.

That is because they are up against a cottage industry of well organized and sophisticated tort litigators. Lawyers will bring on expert witnesses who make careers of creatively testifying about what business owners knew or should have known about even remote or uncontrollable risks. And, these same hired experts are innovative at proposing a dizzying array of alternative practices they claim a business could have adopted, often ignoring actual or opportunity costs associated with these proposed risk-reduction practices. Worse yet, while we should hope that courts would be effective gatekeepers against letting in such testimony, as the Institute for Law Reform advises, exclusion of such expert opinion from the trial record remains the exception, not the norm.[6] These experts become the tour guides for the courts to expand, or find hidden paths around, even traditional proof-of-causation limits in tort law.

These private experts similarly see meeting government-recommended public-expert standards as insufficient. On that point, the Institute for Legal Reform observes that, "Although one might think that compliance with government or industry standards precludes claims for negligence as a matter of

---

5 "Covid-19: Federal Liability Problems and Solutions," Institute for Legal Reform, U.S. Chamber of Commerce (2020), p. 3.

6 Id., p. 4

law, the laws of many states provide otherwise."[7] The lack of such a common law or state law shield for compliance is particularly unsettling at a time when businesses are trying to do the right thing by following public health standards surrounding containment of the coronavirus, yet are being advised by their lawyers that even that compliance—coupled with otherwise not affirmatively doing harm—may not be enough to protect them from lawsuits. That conundrum is why temporary limited liability is needed to protect reopening businesses.

The liability protections proposed in this paper and in similar legislative proposals seek to expressly define threshold causation requirements for tort liability from coronavirus exposure and infection. These threshold requirements will be set at levels that will ensure businesses behave responsibly while giving them confidence that they will not face uncertain and unjustified liabilities or litigation costs for agreeing to participate in the economy while the virus is active in the environment.

To understand the need to set the liability floor at these levels during the Coronavirus with the benefit of encouraging business activity, it will be useful to provide a brief summary of the traditional legal standards and their susceptibility to manipulation by tort lawyers and courts sympathetic to their theories of expansive liability.

Tort law is designed to identify duties of care we all must take to avoid causing injury. If someone is owed a duty and harmed by someone else who has violated their duty to that person, then the injured party is entitled to recovery from the tortfeasor who caused the harm. Failure to take proper care can make someone negligent. Thus, where we set the duty of care defines what is negligent. The next and separate question, of course, must be whether that negligence was the cause of the harm to the injured person. If it was, the negligent party is liable. If it was not, then no liability attaches.

Thus, normally, even the lowest standard of tort liability for "negligence" requires proof of negligent action or inaction that also can be traced to the defendant's action and identified as the actual or proximate cause of the plaintiff's injury before holding a defendant liable. In other words, the defendant must directly inflict the injury or the defendants' negligent action or inaction must be a proximate (primary or closely linked and not attenuated) cause of the harm. Most states adopt proximate causation rules that demand plaintiffs prove that "but for" the defendant's action or inaction the plaintiff would not have suffered the injury or at least that the defendant's actions were a substantial factor contributing in a non-attenuated manner to the harm. Remote, imagined, or speculative contributions to the chain leading to the injury are not supposed to be enough to generate liability.

The risk from keeping the liability standard open to development in the courts while the Coronavirus remains a threat is multi-faceted. We will focus on two problems here. First, there is a risk that plaintiffs' attorneys will ask the courts to fiddle with the concept of "duty of care" and accept claims that push it beyond reasonable limits. Remember, the mere risk of this is something that creates the kind of uncertainty that chills productive economic behavior or re-entry into the market by those who closed earlier due to the Coronavirus threat. Here, we return to our previous comments about adherence to government-recommended or -required safety standards. Because meeting that threshold of good practices does not end the matter under the status quo, express safe harbor protections that thereby define the scope of the mandatory duty of care are necessary.

---

7 Id.

That kind of safe harbor protection would give businesses the requisite level of certainty regarding their expected duties. In other words, it would insulate the concept of "duty" from creative expansion in the courts and at the urging of the plaintiffs' bar beyond those levels deemed sufficient by standards developed by knowledgeable and neutral government experts. If legislation guaranteed that adherence to government-recommended safety protocols limited liability from employees or customers for exposure or infections—absent any grossly negligent, reckless, or intentional behavior creating additional risk—much of the disincentive to reopen would be eliminated and a corresponding incentive to take protective measures (to get the safe harbor protection) would likewise emerge in business practices.

The second major risk of keeping the status quo tort regime during the coronavirus comes from the call by plaintiffs' attorneys and their allies for accepting novel theories of causation as sufficient to link a business's behavior with the alleged injury. Coronavirus is all around us. Tracing the actual or even proximate cause is extraordinarily difficult. It is not reasonable to expect that all businesses shoulder the burden of liability for infections that could be picked up from myriad sources, absent some contributing overt act by the business that creates a heightened risk of exposure (which would be captured by the gross negligence and higher standards that would remain in effect under this proposal and most similar legislation).

If we could trust the courts and litigants before them to be good guardians of actual and proximate cause requirements, then the fact that traceability will be difficult to prove should already be a barrier to recovery for negligence claims from coronavirus infection against most businesses. In a perfect world with fidelity to original understandings of the proper scope of tort liability, that would be enough. But, what if courts start to accept the idea that simply opening up was negligent and a sufficient contributor to causation so as to meet that court's definition of "proximate"? It is not an irrational worry, and it is one that is already making businesses cautious about re-engaging in the economy. Setting the standard at gross negligence and higher—as this paper and some recent bills propose—would require that plaintiffs prove a specific action or inaction by a business actually increased the risk level (making it harder to inject theories accepting attenuated causal links as sufficient to create liability). Coupled with a safe harbor clearly identifying the minimum duties against which gross negligence will be judged—which themselves will lead to adoption by businesses of safety protocols beneficial to public health—this liability threshold will encourage responsible business engagement in the economy. Allowing anything more severe to linger in our liability climate will slow or even snuff out recovery altogether.

In addition to the threshold-setting benefits described above, another consequence of this paper's proposal, and others like, is that strict liability claims by customers or employees during the coronavirus for infection-related claims would be made unavailable. Strict liability is a subset of tort liability for certain wrongs and is one of the tort forms that is designed precisely to make recovery for plaintiffs substantially easier when certain conditions obtain. Strict liability is meant to be rare, and, when it applies, the plaintiff need not meet the same traditional burdens of proving causation that are necessary in most other tort claims.

A full summary of strict liability and its various applications is beyond the scope of this paper. Instead, we will highlight just a few key points. Many states attach strict liability when especially risky or ultra- or inherently hazardous conditions are known to exist, and often because the conditions are seen as unavoidable. Consequently, strict liability is meant to incentivize those conducting inherently hazardous operations to take the highest level of care possible precisely because they will be strictly liable for any injuries no matter how many precautionary measures they adopt. As the novel litigation

theories begin to surface for litigating against businesses in an era of the coronavirus, it is not hard to see how claims of strict liability might emerge.

Plaintiffs will undoubtedly also ask for even looser applications of strict liability than have been accepted in the past. They may claim that, regardless of whether the harm can be traced to specific action of a business, these entities should be liable for all of it. If applied, strict liability does not make room for many defenses. It could be presumed that worker sickness occurred from an infection in the workplace, and customers can be presumed to have contracted it from whoever sold them goods or provided them services. No actual or proximate causation is required under strict liability. When it applies, the defendant just needs to be in a position to have caused the infection. You only need to prove that you were an employee or customer of someone who can be held liable.

Because the pandemic arguably makes the whole world an inherently hazardous place, individual plaintiffs may begin to claim that operating a business in such a hazardous environment is just like operating under the conditions that give rise to strict liability (like an inherently hazardous chemical or nuclear power plant, places where strict liability has been applied, except now the whole world is a hazardous place!). Such an argument may seem absurd because it would essentially make everyone strictly liable for everything, because the virus is potentially anywhere and everywhere. Yet absurdity has never been an assurance against advancement as an argument in modern tort litigation or even against adoption by some courts.

It is appropriate in these perilous economic and scientifically uncertain times to change the way we judge business behavior. To raise the bar for plaintiffs before making a coronavirus-related tort claim—requiring proof of causation and demanding plaintiffs show a higher breach of duty under gross negligence or more—is an appropriate adjustment to the times. Conversely, it does not make sense to impose unreasonable obligations on businesses to operate as the insurers against risk of infections from the coronavirus pandemic, a virus not of their making and for which there are many unknown risks beyond businesses' control.

An additional liability threat comes from courts potentially entertaining lawsuits claiming businesses create a "public nuisance" by opening up, as some have already begun to do. A public nuisance is traditionally defined as an unreasonable interference with a right common to the general public. The Institute for Legal Reform provides some interesting historical context that underscores the realistic nature of this line of reasoning reaching the courts:

> *"During the Spanish Flu epidemic, various local government entities declared public gatherings and other mass events to be public nuisances. In addition, the United States has previously sought—and obtained—injunctive relief based on the theory that a defendant's unsanitary and unhygienic conditions constituted a public nuisance."*[8]

Under a public nuisance claim, plaintiffs would contend that the meatpacking plant, or church service, or the baseball or football or basketball game, or pleasure cruise was so infectious that the whole endeavor could be held a public nuisance. The Institute adds further:

> *"Plaintiffs may try to exploit these precedents and commence public nuisance lawsuits related to the COVID-19 pandemic. For example, plaintiffs might allege that an individual or company*

8 "Covid-19: Federal Liability Problems and Solutions," Institute for Legal Reform, U.S. Chamber of Commerce (2020), p. 4.

created a situation in which the public was at an increased risk of exposure to COVID-19, such as a large public gathering. Although certain courts have previously cautioned against using public nuisance as a basis for vindicating mass tort actions (e.g., the New Jersey Supreme Court during the sprawling lead paint litigation), other courts have held differently (e.g., courts overseeing cases related to the opioid crisis). And those that have endorsed the use of public nuisance in such circumstances have employed watered-down causation standards.[9]

This kind of regulation-by-litigation is not a road to investment, booming economic growth, and restoration of work, employment, growing wages, saving, business creation, job creation, business expansion, and world-leading prosperity.

Separate consideration should be given in legislation to expressly preempt this line of state court "public nuisance" litigation or to find other ways to shield businesses from having to defend against it. Whether to create a market environment that includes opening businesses is a decision for the legislature and perhaps administrative agencies. We should not allow those kinds of public policy decisions to be hijacked by private or municipal plaintiffs.

This paper's proposal and similar legislation moves our focus back to the concepts of duty, responsibility, and proof of causation at the core of the fairness standards underlying our traditional tort system. Wrongdoers should be liable only when they have done something wrong, the wrong reasonably could have been avoided by adopting prudent measures, and when the wrong can be traced to specific and unique actions or inactions of the defendants without which the injury could have been prevented. The proposed temporary reforms keep all of that intact. Far from gutting the tort system as some opponents contend, the reforms maintain accountability for wrongs. The reforms provide context-specific protections against abuse of the tort system in these unique and unprecedented circumstances. They only eliminate some of the avenues for tort opportunism that could impede our ability to achieve other ends while living through an infectious environment.

Businesses are not going to recover and rehire workers from the current recession if they have to bear the costs of unpredictable and unavoidable illnesses under the legal standard of tort liability. To employers, expanded standards of liability, or even just the unpredictable risks of their imposition, will seem like an extra payroll tax on labor and employment, to finance all coronavirus costs. Fewer workers will get their jobs back and the economic recovery will be hindered.[10]

---

9 Id., pp. 4-5.

10 Incidentally, these kinds of additional costs of doing businesses, no matter how much they are controlled by other legislative efforts, will linger and are a reason why payroll tax relief would be an ideal response to spur quicker recovery. That relief would directly cover some added expenses employers are likely to face from reopening that could be overlooked at first. See Implementing A National Return to Work Plan, U.S. Chamber of Commerce, April 13, 2020

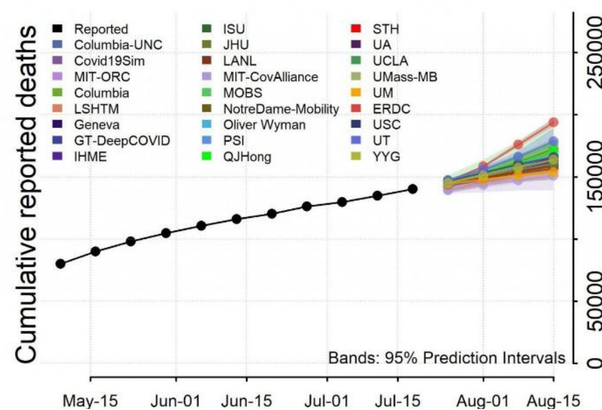
Economic Costs of Coronavirus Lawsuits

Predicting the cost is difficult and our estimates are necessarily imprecise given the challenge of weighing the total economic impact of the coronavirus. We have not had any recent experience with a pandemic like coronavirus, so predicting the potential cost to businesses and especially employers from a lawsuit brigade would be in the tens of billions of dollars. We know from asbestos and cigarette lawsuits that the judgments reached in settlement or court reached about $2 to $2.5 million on average (in today's dollars). We also know from the most recent estimates that we can expect millions more to be infected before the end of the year.

Obviously, treatments and vaccines would dramatically lower these cost estimates and the number of suits. The liability costs in the U.S. can be as much as $1.5 million per infected person, plus another million in additional legal fees and costs for each claim.[11] Under strict liability, the direct recovery costs alone can be for pain and suffering (which can include fear), punitive damages, lost wages (for the rest of their expected lives for those that died), and medical costs for treatment and care. In many of the asbestos and tobacco cases that went to trial, plaintiffs won awards of more than $40 million.

Latest estimates by the CDC is that as many as 20 million Americans have already been infected with coronavirus, though most of them are asymptomatic and only a small percentage will get sick. Death rates will be even lower, though latest models are suggesting that total deaths could hit 200,000.

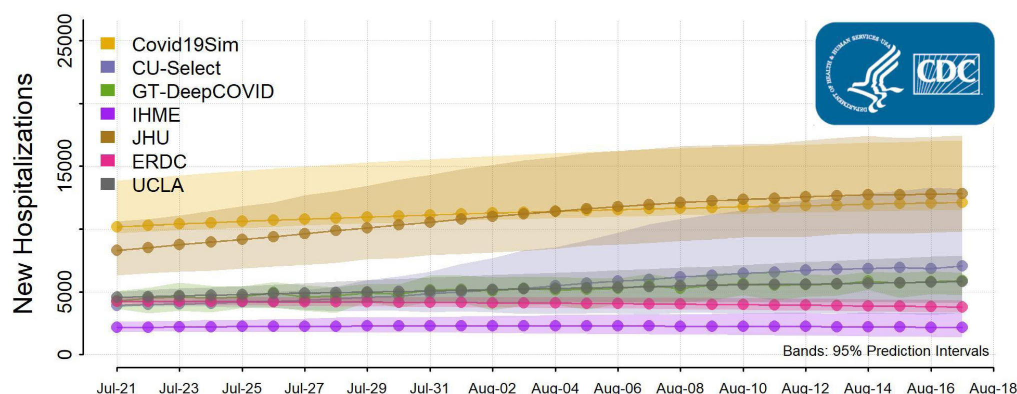
National Forecast



We also show below the latest forecast on hospitalizations. Five national forecasts suggest an increase in the number of new hospitalizations per day in the coming weeks and months, while two other forecasts predict stable numbers or slight declines. The range is between 2,000 to 13,000 new COVID-19 hospitalizations per day, as seen in the chart below.

11 The Institute for Legal Reform estimates that only 57% of litigation costs go back to compensate victims for their original damages. "Covid 19: Federal Problems and Solutions," Institute for Legal Reform, U.S. Chamber of Commerce, May, 2020. This inefficiency of our legal system in addressing harms and recoveries effectively doubles the costs of addressing the problems with lawsuits. And worse because not all lawsuits are valid. Even when the Defendant wins and is held not liable, the business still must pay the legal fees and litigation costs (the transcripts for depositions, the costs of a court reporter taking down the transcripts, not to mention the transcripts of oral arguments in court). So even legal victory in a non-valid suit only eliminates half the costs of the suit.

National Forecast



Law firms are already out with advertising campaigns to attract plaintiffs. We conservatively estimate 100,000 lawsuits over the next two years. With 100,000 lawsuits at $2.5 million on average cost, we estimate total litigation costs of $250 billion.[12] About 60 percent would go to the workers or injured customers and the rest would go to trial lawyers. The deadweight loss to the economy is expected to be more than $100 billion.

Cost of Coronavirus Lawsuits

Lost jobs	500,000 to 1 million
Lost wages	$25 to $50 billion
Lost output	$250 billion
Deadweight loss to economy	$100 billion

It is useful to characterize this litigation-induced extra cost-of-hiring as effectively a new kind of informal payroll tax on employers who hire back workers. Under the current total payroll tax rate of 15.3% split between employer and employee, total present payroll tax revenues add up to $1.375 trillion this year.[13] An effective payroll tax increase of $250 billion would be the equivalent of adding another 1 to 2% to the payroll tax rate, or raising the total effective payroll tax rate from 15.3% to about 16.8%. A payroll tax increase of that magnitude would be economically harmful, especially with unemployment already in double digits. This could cost the economy up to 500,000 to 1,000,000 jobs, depending on how much of the burden falls on employers, consumers (in higher prices), or workers.

12 Id.

13 The 2020 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, April 22, 2020, Table VI.G8, p. 228.

Limited Liability

Limited liability does not mean blanket liability protection from any responsibility whatsoever. If courts—on their own or as a result of legislation—constrained lawsuits for coronavirus infections to appropriate standards of liability specifically tailored to these peculiar times, the litigation climate would have the kind of certainty required for businesses to open up with a predictable and manageable risk calculus. Businesses, however, need to be confident that unreasonable liability standards will not be applied to their openings, and they need to be able to predict when and how liability will attach., While the scope of liability itself is a problem, uncertainty is in some ways an even greater problem for businesses. They know how to manage risks they can predict. But when liability standards are flexible enough to make predictions unavailable or unreliable, the fear of liability alone is enough to stifle economic activity. That said, if a business actually causes coronavirus harm to workers or customers, through gross negligence, recklessness, or outright refusal to bear the costs of prevention, the business should pay for it. They can take actions to control those risks and they can get insurance to cover limited liability like that. It is much harder to plan for liability contingencies in the current environment with no legislative protection.

Congress should include limited liability protection and a safe harbor from liability for businesses that adhere to generally accepted and government-recommended safety standards. Such federal legislation will recognize the need to incentivize businesses to be partners in controlling the spread of coronavirus while promoting a booming recovery through the restoration of jobs and economic growth. The protections should apply to all businesses reopening now, and those that continued to function through the pandemic. This federal law, preempting state tort law, would apply to all lawsuits relating to the coronavirus. To enhance public safety, liability-limiting legislation could make the limited liability contingent on complying with general or coronavirus-specific worker protections under state laws in existence now or in the future.

Under these more certain and predictable standards, businesses will be incentivized to both open up and promote public safety. Knowing that they are still liable if they do not follow safety practices or are otherwise grossly negligent, reckless, or intentionally cause harm, businesses will take steps to help stop the spread. Furthermore, businesses will be separately incentivized by their desire to attract the best workers who themselves will demand safe working environments. Employers will know that to attract workers back, the workers must feel safe. That means employers know they must provide workers personal protective equipment (PPE) as well. Safety becomes a cost of doing business and a condition of receiving liability protection.

Importantly, even after liability protection passes Congress, the law can also outright require certain safety measures like providing all workers PPE. This will set the duty of care against which gross negligence or intentional acts would be judged.

Of course, as Congress evaluates different legislative proposals addressing varying aspects of the crisis, it will be important to see how each component interacts with others. There will undoubtedly be practical coordination problems. For example, if all employers are required to provide PPE like masks, gloves, and even respirators for their workers, as well as training on how to use them, thought should be given to how supply shortages would affect that duty. The legislators and regulators should plan for numerous contingencies. What if there is not enough PPE produced in the economy for employers to provide it to all workers who policymakers think should have it? And, if a shortage arises, how do

the legislature or government agencies respond if the demand bids up prices and costs for employers, discouraging them from hiring back workers? In light of some of these concerns, the federal limited liability law should include a defense for shortages of PPE, with good faith efforts to acquire it. That good faith defense should apply to OSHA requirements for PPE as well.[14] The Chamber of Commerce has explained:

> *"Generally, when maintaining a safe workplace requires the use of personal protective equipment (PPE) such as masks, respirators, and physical barriers, OSHA requires employers to be responsible for ensuring the availability of such equipment and training employees in the use of the equipment. This is simply not possible if PPE becomes recommended for all workplaces."*[15]

These are the kinds of circumstances where the law needs to anticipate flexible standards adaptable to on-the-ground conditions. Legislation should address the likelihood that there will not always be enough PPE for all workers of all employers across the whole country. There should be a good faith defense to accommodate such inevitable shortages. This can work as a defense that the employer would have the burden of proving.

This is why the Chamber added that "the federal government should make clear that PPE recommended specifically to combat the spread of COVID-19 is not subject to the normal OSHA requirements around workplace PPE." But even apart from OSHA requirements, there needs to be an employer defense for when the employer tries to get all the PPE in good faith but still can't. Maybe then in those cases, when the employer tries but still can't get it, the worker could be given the choice of getting paid to work without the mask or getting furloughed without pay until the mask or other PPE or training can be acquired.

Further on the issue of PPE and the need to attack the problem of liability and other aspects of the crisis holistically, consider that more than 23 million Americans work as independent contractors.[16] Businesses will want to provide those independent contractors with PPE without those independent contractors losing their independent contractor status under the law—in other words, where they would be instead treated like employees—a shift in obligation that dramatically changes the nature of the business relationship for both parties. National limited liability legislation should think through issues like this and, in this instance, independent contractors should receive legislative assurances that they would retain their independent contractor status despite these virus-prevention changes in how they relate with certain businesses.

Like the independent motivation to attract employees by offering them assurances of a safe working environment, even absent legislation, so too will businesses want to attract customers and respond to competitive pressures to provide safe ways for those customers to interact with them. Businesses won't expect customers to come flocking in their doors if the customers are scared for their personal safety. Thus, businesses already have natural incentives to address safety concerns.

Businesses are natural innovators and market forces (including those generated for attracting customers and attracting the best employees in a competitive environment), coupled with reasonable liability for direct harms, are innovation-inducing. Acting under such incentives, businesses would

14 Implementing A National Return to Work Plan, U.S. Chamber of Commerce, April 13, 2020, p. 4.

15 Implementing A National Return to Work Plan, U.S. Chamber of Commerce, April 13, 2020, p. 4.

16 Implementing A National Return to Work Plan, U.S. Chamber of Commerce, April 13, 2020, p. 4.

naturally incorporate social distancing for their customers. They would readily spray their facilities with disinfectant before the start of every day. They would be expected to provide their employees and customers with masks, gloves, even respirators when prudent, and to construct plexiglass barriers between customers, or between customers and employees serving them.

They could adopt temperature taking practices for customers and employees and install safe ultraviolet lighting in their stores or factories or offices or restaurants to kill viruses. They could ultimately make customers and employees feel going to their store or restaurant or movie theater or gym or office would actually be good for their health. All of these market forces are yet another reason that we should not fear that limited liability will somehow lead to a race to the bottom.

Liability protections need not operate only through federal law. State law can also require customer or employee protections, and federal law can make limited liability contingent as well on businesses following state laws providing for these protections. State law protections for customers and workers would be a safe harbor on both accounts. Businesses would be protected from liability when they follow such state law.

The Special Case of Nursing Homes

Medical malpractice claims are another area of liability, of special concern relating to nursing homes and assisted living facilities. The CARES Act provided some protection for volunteers providing health care for COVID-19 patients. Those CARES Act protections should be expanded to include all health care providers and facilities, which are going to provide essential health care for victims of the Coronavirus. The CARES Act is an example of national legislation providing for some limited liability for businesses, reopening or which remained open throughout the pandemic as essential businesses.

This presents a special problem for nursing home and assisted living centers. The lawsuits have already begun, as evidenced by this New York Post headline: “Deadly NYC nursing homes hit with lawsuits from grieving families,” written by Melissa Klein and published on July 18, 2020.

The problem for the nursing homes is that because they are ground zero of COVID, with about half of all COVID deaths nationally among their residents, they are suffering an acute staffing shortage. The risk of lawsuits on an unreasonable standard, potentially impossible liability on facilities and staff that acted in good faith and following appropriate precautions, will substantially increase the costs of operating by steeply raising insurance costs and will deter badly needed new staff from taking positions in these facilities. Therefore failure to act will likely worsen the quality of care and the risk of contagion in these facilities.

One potential adverse outcome of a broad liability shield, however, is that it could create a perverse incentive for facilities to accept contagious patients they are not able to isolate from staff and other vulnerable residents. This may have been a factor in the nursing home meltdown in Connecticut, which lost approximately 12.8 percent of its long-term care population despite not having a Cuomo-style order requiring readmission and designating four COVID-only facilities for post-acute care. Those facilities went mostly unused while infectious residents were readmitted to their facilities of residence and the disease circulated broadly.

The liability duties preserved in this paper's proposal and similar bills would provide prudent and appropriate protections for nursing homes. The gross negligence, reckless, or intentional action or inaction standards – coupled with proper and traditional causation requirements—forces courts to ask whether the nursing home did something overt to cause or enable Coronavirus infection. Furthermore, nursing homes should be entitled to safe harbor protections. Nursing homes are already heavily regulated under federal and state law, or subject to orders from state or local officials relating to public health.

Public health orders to take in or retain patients already infected have been especially problematic for nursing homes. Those patients risk rapidly spreading the virus to others in the nursing home.[17] Under the limited liability protections coupled with safe harbors for compliance with governmental orders, nursing homes would not be held liable for taking in such sick patients. Furthermore, adherence to tighter causation standards would deem the government order or regulation the cause of infection and resultant spread rather than any independent choice by the nursing home itself.

Evaluating Pre-Existing Liability Limitations

While tort liability standards have traditionally been a domain of state law, today we have a national economic crisis caused by the coronavirus pandemic. America now needs a national economic recovery plan based on national economic policies to survive and return to prosperity. Central to that national economic recovery plan is limited liability for reopening businesses, and for businesses remaining open through the pandemic that never closed.

National limited liability can have a time limit. Sunsetting provisions will allow this national liability standard as an initial experiment from which we can learn and adapt future legislation.

Tort liability is not presently without exceptions, especially in the area of employee claims. There are some defenses already in current law.[18] Lawsuits against employers can be covered by workers compensation statutes, which would often preclude liability or cash payouts by employers. If the allegation is covered as a workplace hazard, further liability is often barred by workers' compensation statutes, which vary by state.[19]

The existence of workers' compensation, however, does not deter trial attorneys from trying to push for additional tort liability for claimed injuries. Workers' compensation funds, already financed by employer taxes, and workers' compensation insurance arrangements sometimes make payouts and even pay the legal defense and legal fees. But lawyers are often not interested in these payouts, because recoveries and legal fees can be limited, by both law and contract.

---

17 Phil Kerpen, Committee to Unleash Prosperity, Covid 19: The Nursing Home Disease, Testimony to the House Select Committee on Coronavirus, June 11, 2020

18 Employer Liability and Defenses from Suit for COVID-19-Related Exposures in the Workplace, Gibson, Dunn and Crutcher, May 4, 2020; Amanda Bronstad, Lawyers Predict a 'Huge Explosion' in Worker Class Actions Over COVID-19, Law.com (Apr. 16, 2020), https://www.law.com/2020/04/16/lawyers-predict-a-huge-explosion-in-worker-class-actions-over-covid-19/

19 Employer Liability and Defenses from Suit for COVID-19-Related Exposures in the Workplace, Gibson, Dunn and Crutcher, May 4, 2020

Another recognized defense to tort suits is claiming release from liability due to an "Act of God," or what is commonly characterized in legal terms more broadly as *force majeure*.[20] This is available when everyone is affected by natural developments in nature beyond their control, like a pandemic, a hurricane, a flood, and the like. Contracts often include clauses releasing the parties from liabilities for injuries and other legal obligations (such as when one cannot perform on a contract) due to *force majeure*. Whether and the extent to which this is recognized in Coronavirus cases will be developed by judicial precedent over time. But businesses can't assume they will be protected by this defense, which is still being tested in the courts in the context of the pandemic.

Additional Related Concerns to Make Liability Protections Work and Fit with Other Aspects of the Response

Childcare is provided for many working parents through school, even pre-school. For even younger children, providers will bear higher costs if they have to accommodate social distancing, such as through lower care provider/child ratios. Child care providers will likely need some temporary financial assistance to cover these costs for parents to return to work.[21]

If employers are required to provide coronavirus testing for workers, most employers would need third-party providers to carry out the tests, as most employers would not have healthcare credentials to do the testing directly. This would be a new business opportunity for the third parties. But provision needs to be made as to who will pay the costs for such services.[22]

Federal and some state laws maximize health privacy of individual workers. This can conflict with requirements for employers to identify a worker's COVID-19 status, protect other workers from those identified as positive for the virus, pursue contact tracing for those workers, and protect sick workers with underlying vulnerabilities due to comorbidities. Employers will need a safe harbor to carry out these health care requirements for their workers without liability.[23]

Employers would also face liability under discrimination law relating to age and underlying health conditions, such as the Age Discrimination and Employment Act, and the Americans with Disabilities Act. Employers can face liabilities for employees who feel they were delayed in returning to work, or for others claiming they were rushed back to work too soon. Guidelines are needed to cover such issues, providing a safe harbor for employers who take actions consistent with such guidelines.[24]

The Public Readiness and Emergency Preparedness Act (PREP Act) provides some liability protection for product liability for manufacturers of some PPE, when their products are challenged as defective in a way that led to some employees or customers of some businesses getting sick because the product is alleged to be defective in some way. The PREP Act can be more effective in limiting liability for businesses if it is expanded to cover hand sanitizers, soaps and other cleaning supplies, and to businesses

---

20 "Lawsuits Against Business Over Coronavirus Have Begun. More to Come?" Insurance Journal, Bloomberg News, March 4, 2020.

21 Implementing A National Return to Work Plan, U.S. Chamber of Commerce, April 13, 2020, p. 3.

22 Implementing A National Return to Work Plan, U.S. Chamber of Commerce, April 13, 2020, p. 2.

23 Implementing A National Return to Work Plan, U.S. Chamber of Commerce, April 13, 2020, p. 3.

24 Implementing A National Return to Work Plan, U.S. Chamber of Commerce, April 13, 2020, p. 3.

outside of healthcare fields. It should also be extended in any national limited liability legislation to cover products approved by FDA or the EPA. And to cover corporate "Good Samaritans" who are manufacturing not for sale, but for emergency public stockpiles of PPE.

Securities litigation has been filed against some businesses, such as cruise lines and pharmaceutical manufacturers, for failure to warn about sharp declines in stock prices. Legislation limiting liability should include an automatic stay of all such securities litigation until the ultimate consequences of the pandemic can be better ascertained. Stock prices can recover lost ground, especially due to new treatments and vaccines. In addition, all these securities cases can be consolidated into one or a few district courts which will develop expertise in this area of law, with well suited rules on discovery and appeals, and timing to measure damages.

Approval of a pending petition at the FCC can exempt customer communications from needless lawsuits over telephone and text messages under the Telephone Consumer Protection Act during the pandemic. Similarly, the Federal False Claims Act can impose significant liabilities on businesses receiving federal funding from the paycheck protection loan program under the CARES Act. "Hold harmless" language for financial service companies protecting those paychecks working people are counting on under the Act can ensure promised public assistance is not entangled in weeds of lawyers. Federal legislation should also enact cautionary language in the Federal WARN Act requiring notice regarding unforeseeable plant and business closings that developed suddenly in response to the pandemic.

Finally, national limited liability legislation should ban punitive damages for coronavirus-related litigation. Employers hiring and rehiring workers, providing essential income to pay rent, mortgage payments, and to feed their families, should not be subject to punitive damages of any sort. This is especially true for businesses providing goods and services customers want, from groceries to restaurant meals, to equipment for home and autos, to entertainment, essential for the national life Americans enjoy.

Conclusion

Normally, liability issues are dealt with at the state level, as well they should be. But these times are extreme circumstances that require extraordinary actions to get the hobbled economy back up and running at full force as expeditiously as possible. A temporary federal limited liability shield for businesses covering coronavirus-related illnesses is necessary for the U.S. economy to recover from this economic trauma of the last six months. Without this shield, we believe that as many as one million jobs could be lost over the next year. The McConnell Bill has many important protections for businesses, though we are not sure that a four-year shield is necessary. A temporary federal shield should give states enough time to adapt their own legal system to the new health and economic threats we face.

We believe something like the McConnell liability shield can keep nursing homes both safe and solvent by limiting claims to gross negligence and willful misconduct. Facilities and staff that make reasonable efforts to follow applicable public-health guidelines would not be liable.

Given the now broad availability of testing and PPE, and the understanding of best practices to cohort Coronavirus patients and protect staff and residents, we are confident that under the McConnell standard lawsuits would be available as an appropriate recourse against bad actors and facilities within the purview of the shield would be incentivized only to accept patients they can accept within public health guidelines, which should prevent the mass outbreaks we saw in the northeast.

Appendix

Summary of McConnell-Cornyn Liability Relief Bill

Safe To Work Act

Safeguarding America's Frontline Employees To Offer Work Opportunities Required to Kickstart the economy

- Protections for Schools, Colleges, Charities, and Businesses
- Provides temporary protection from the trial bar for schools, colleges, charities, and businesses that follow public-health guidelines, and for frontline medical workers
    - Creates an exclusive federal cause of action for personal injuries arising from coronavirus exposure allegedly caused at a school, college, charity, church, association, government agency, or business.
    - Defendants are liable only if they failed to make reasonable efforts to follow applicable public-health guidelines and committed an act of gross negligence or intentional misconduct.
    - Imposes procedural rules, including concurrent federal jurisdiction, over all claims covered by the statute, heightened pleading standards, a clear-and-convincing-evidence burden of proof, class action disclosures and damages caps.
    - Cause of action and procedural rules sunset the later of the end of the COVID-19 PREP Act Declaration or October 1, 2024.
- Provides temporary protections from the trial bar for frontline healthcare workers
    - Creates an exclusive federal cause of action for medical liability claims arising out of the provision of care for coronavirus, or services provided as a result of coronavirus, by licensed healthcare facilities and healthcare workers, including doctors, nurses, and volunteers.
    - Limits liability only to gross negligence and willful misconduct.
    - Imposes procedural rules, including concurrent federal jurisdiction, over all claims covered by the statute, heightened pleading standards, a clear-and-convincing-evidence burden of proof, and damages caps.
    - Cause of action and procedural rules sunset the later of the end of the COVID-19 PREP Act Declaration or October 1, 2024.
- Provides protection from federal labor and employment laws for employers who follow public health guidelines
    - Protects employers from liability and from agency investigation under federal labor and employment laws for actions taken to comply with stay-at-home orders and other public-health guidance.

- Protects employers from liability for injuries arising from workplace coronavirus testing.
- Provides that a business who provides training, PPE, or other assistance to an independent contractor or to a franchisees employee does not convert the independent contractor or franchisees employee into the employee of the person providing the training, PPE, or other assistance.
- Amends the WARN Act of 1988 to provide employers flexibility in light of the sudden economic dislocation caused by the coronavirus.

- Updates to the PREP Act
    - Limits liability for new products, such as types of PPE, if they meet certain FDA requirements.
    - Clarifies liability protections based on methods of distribution of covered countermeasures.

COMMITTEE
TO UNLEASH PROSPERITY