

Virus Suit Immunity Would Likely Not Totally Shield Cos.

By **Lisa Himes and Eleanor Ross**

As states across the U.S. continue to open up for business, liability risks are among the key issues confronting small and large businesses. Companies face current and potential litigation by employees and customers for alleged failure to properly protect against the virus or negligently promote its transmission.

This article discusses the current COVID-19 liability landscape, including the debate over federal legislation, and provides recommendations for companies as they handle evolving liability issues in the COVID-19 environment.

Current COVID-19 Liability Landscape

As of June 30, 3,144 COVID-19-related legal complaints had been filed, the majority of which were insurance claims, prisoner release efforts and civil rights related complaints.[1] Approximately 130 cases were liability claims, mainly directed at the healthcare and cruise line industries.

However, these cases may be the tip of the iceberg — and as more businesses begin to reopen, the number of lawsuits could dramatically increase. Many have weighed in on the debate over whether the liability of businesses should be limited, with some emphasizing the economic costs of failing to limit legal liability, and others emphasizing the deterrent effect of the threat of a lawsuit or the need for accountability.

The National Association of Manufacturers believes complaints will balloon as the workforce returns and businesses reopen. They have expressed concern that "outdated liability rules" will expose manufacturers to litigation risk.[2]

This view is shared by many other representatives of industry, including the U.S. Chamber of Commerce, which has been one of the strongest proponents of limiting businesses' liability for COVID-19 claims.[3] It is pushing for retroactive protections that would protect businesses from lawsuits brought any time after the start of the outbreak.

Proponents of liability limitations argue that the uncertainty facing businesses, particularly small businesses, may discourage them from reopening, even as the economy requires a boost in commerce. These groups argue that without liability protections, economic recovery will be hindered, and the door will be opened for plaintiffs attorneys to focus on clusters of cases and tracing to file lawsuits against such businesses.

They contend that liability protection for businesses that are following public health guidelines will help reinvigorate the economy safely and sustainably. Conversely, they



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assert that without such protections in place, businesses will face the daunting choice of staying closed and laying off workers, or risking reopening and facing an expensive and damaging lawsuit. Either option could bankrupt thousands of businesses.

Meanwhile, consumer advocacy groups, such as the American Association for Justice, have opposed any business immunity against COVID-19 claims. Noting that only a small number of the COVID-19-related complaints have involved allegations of exposure or potential exposure, the group has expressed concern that liability shields are not only unnecessary, but are unlikely to contribute to safety or economic recovery.

Those opposed to liability limitations are concerned that liability limitations will undermine businesses' commitment to precautions, and may place employees and consumers at risk.[4] These groups contend that such limitations are unnecessary, because there are already legal protections against frivolous lawsuits.

They argue that it is hard to prove causation — i.e., to relate a COVID-19 exposure back to a particular event or business — given the long incubation period and the difficulty of accounting for all movements over that period. And they assert that businesses which comply with federal, state and local guidelines should have no need for liability protections, as such compliance is a defense against lawsuits. They further contend that protections will lead to lax implementation of best practices and policies, and that consumers will be left unprotected from negligent businesses.

While the federal government continues to debate liability provisions, states have taken action to limit corporate liability for certain COVID-19 claims.[5] At least 20 states have passed laws granting immunity from COVID-19-related liability for health care workers and facilities, including nursing homes.

Other states have moved to cover a broader range of businesses.[6] Alternatively, a number of states have no form of liability limitation or very narrow liability limitations. In the face of this patchwork of state laws, proponents of liability limitations have turned their advocacy toward Congress to effect standardized liability protection.

Debate Over Federal Legislation

As interest groups turn their focus to Capitol Hill, there likely will be federal legislation addressing the concerns of businesses and consumers. Senate Majority Leader Mitch McConnell, R-Ky., has emphasized that a civil liability shield is a priority, and that he will not consider additional relief packages unless they include protections for businesses.

There is general support for some business protections. The degree of protection, however, has proven a contentious issue in a polarized Congress.[7] McConnell has proposed blanket immunity for all business for all COVID-19-related claims. This sweeping immunity proposal has not found substantial support.

Sen. John Cornyn, R-Texas, has taken the lead for the Senate majority in drafting immunity legislation. His approach has been to emphasize that businesses making a good-faith effort to comply with applicable regulations should be protected by a safe harbor provision.

Notably, Cornyn's proposal would allow businesses to choose which set of guidelines to implement — federal, state or local — and require compliance with their chosen set. Other Republican senators have similarly emphasized that businesses following applicable guidance should be protected. It is expected that the Republican proposal will be released this month.[8]

In May, the House of Representatives passed the Health and Economic Recovery Omnibus Emergency Solutions Act, which does not include immunity provisions. Rather, the act focuses on establishing mandatory protocols for workplace safety. However, a number of congressional Democrats have expressed support for some liability protections for businesses that have adopted national safety guidelines.

Several Democratic senators, such as Christopher Coons of Delaware and Doug Jones of Alabama, have indicated they support liability protections for businesses, provided the protections are balanced with accountability. Speaker of the House Nancy Pelosi also has indicated her support for liability protections for businesses that follow guidelines, but has opposed blanket immunity, as have most Democrats.

Given the general agreement that some liability protection is appropriate, it is likely that provisions will be included in the next round of COVID-19 spending. In addition to addressing immunity, the legislation could consider other legal protections.

For example, rather than following the traditional civil standard of "preponderance of the evidence," it is possible that plaintiffs may have to prove COVID-19 claims to a higher standard of proof: "clear and convincing evidence." The legislation also could include limitations on damages by excluding certain types of damages — i.e., punitive damages — or capping damages. And it may allow cases to be removed to federal court to protect businesses from state biases.

While none of these proposals would immunize businesses from liability, these or similar provisions could help protect businesses from frivolous or unsubstantiated claims and limit the amount of damages for which a business may be responsible.

Recommendations for Handling Liability Issues

While it seems likely that Congress will pass, and the president will sign, some type of business liability legislation for claims related to COVID-19 claims, companies should not assume that they will be granted blanket immunity, or that such immunity will apply retroactively — i.e., will protect them against actions which occurred prior to the passage of the legislation. The following are several recommendations to help companies limit their liability as they look to reopen in the coming weeks and months:

Liability Waivers

Companies should consider implementing liability waivers, which indicate that the signer assumes the specific risks associated with COVID-19. The waiver also may include a waiver of liability for ordinary business negligence or an indemnification provision. Such waivers can help limit the liability risks for business owners.

It is important to note, however, that many states have limitations on the enforceability of liability waivers. Virginia, for example, does not allow for liability waivers. Other states are hesitant to enforce liability waivers as between a business and an individual — especially indemnification provisions.

As such, while liability waivers can be an important tool for limiting business exposure to lawsuits relating to COVID-19, companies should be aware of the restrictions imposed by state law. Despite these legal limitations, businesses from The Walt Disney Co. to local hair salons are all using waivers to clarify the risks of COVID-19, and make clear that customers are assuming those risks.

Public Policy

It is essential that companies monitor federal, state and local guidelines, which are changing on a regular basis. Regardless of whether limitations on liability are put in place, it will be important for businesses to comply with all applicable laws and health regulations.

If there is no limitation on liability, businesses may be able to defend against negligence claims by demonstrating that they were in compliance with the applicable health and safety regulations. And if a limitation on liability does exist, its application may be contingent on compliance with health and safety regulations.

Industry Standards

Companies should watch industry announcements to ensure that they are meeting all applicable industry standards.

Reviewing guidance from industry associations, chambers of commerce, and state and federal health departments will help ensure that companies have stronger defenses to allegations related to COVID-19 exposure. The U.S. Occupational Safety and Health Administration and the Centers for Disease Control and Prevention provide a specific standard of care for businesses to follow.

Basic Legal Defenses

Other basic legal defenses apply to allegations related to COVID-19. For instance, all states have some form of comparative or contributory negligence, which can either eliminate or reduce damages based on a plaintiff's negligence.

Under comparative negligence systems, a plaintiff can only recover the damages for which he or she is not responsible. In modified comparative negligence states, a plaintiff can recover the damages for which he or she is not responsible, provided the plaintiff is responsible for half or less than half of the damages.

In contributory negligence states, such as Virginia or Alabama, the fact that the plaintiff was at all negligent completely bars the plaintiff's recovery. This may be relevant if an individual failed to wear a mask or follow six-feet-apart markings, or disobeyed any other regulations.

Businesses also can point to superseding or intervening causes, such as a plaintiff visiting another store, which could have caused the plaintiff's injuries. These and other defenses may be essential to limiting or eliminating companies' liability for COVID-19-related claims.

Insurance Review

Companies should review their insurance policies to determine whether they contain provisions protecting against COVID-19-related lawsuits. Policies that contain exclusions for bacteria and fungus may not exclude virus-related events, such as COVID-19.

Supply Chain Contracts

Companies should try to ensure that any contracts with suppliers and others in the supply chain include indemnity provisions that prevent liability in the event of a COVID-19 lawsuit.

Compliance Responsibility

Companies should employ internal experts or consultants to establish processes and procedures for preventing the spread of COVID-19. Businesses could assign responsibility for ensuring compliance with applicable regulations to an individual or office, to confirm the company is complying with the most recent requirements.

This would demonstrate a commitment to compliance, and also allow companies to consolidate responsibility and resources in one place, rather take a piecemeal approach to monitoring changes. Additionally, an internal expert or consultant could help identify risk areas and establish best practices for mitigation, based on risks and practices specific to the company's industry.

In sum, businesses should prepare for a variety of potential liability impacts when reopening. It is important for businesses to remain aware of their legal and regulatory obligations at the national, state and local levels. By keeping these recommendations in mind, businesses can help mitigate any potential liability associated with COVID-19.

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[1] A daily tracker for COVID-19 complaints can be found here: <https://www.huntonak.com/en/covid-19-tracker.html>.

[2] <https://www.nam.org/manufacturers-fight-covid-19-but-face-legal-obstacles-8088/?stream=policy-legal>.

[3] <https://www.uschamber.com/press-release/us-chamber-calls-liability-protection-businesses-fear-of-lawsuits-continue-grow>.

[4] <https://www.justice.org/news/new-national-poll-reveals-broad-bipartisan-opposition-corporate-liability-immunity-related>.

[5] Existing federal legislation in the form of the Public Readiness and Emergency Preparedness Act provides certain immunity for businesses and individuals that develop, test, manufacture, distribute, administer, prescribe or use "covered countermeasures" in combating a public health emergency. 42 U.S.C. § 247d-6d.

[6] See, e.g., <https://www.crowedunlevy.com/news/bill-establishing-covid-19-liability-immunity-signed-by-oklahoma-governor-stitt/>.

[7] <https://www.jdsupra.com/legalnews/congress-weighs-federal-liability-38092/>.

[8] <https://www.claimsjournal.com/news/national/2020/06/11/297584.htm>.