LIABILITY SAFE HARBORS - MYTHS AND FACTS

Myth **Businesses are asking for "blanket immunity" or "broad immunity" from liability.**

Facts

- We are asking Congress and the states to enact time-limited safe harbors for businesses and other entities that are trying to operate safely during this unprecedented pandemic.
- The problem is that guidance for how to do so often does not exist, constantly evolves, may be unclear or not feasible for a specific place, and is sometimes contradictory. Without any clear, objective standards, subjecting businesses and other entities to traditional negligence claims would create highly speculative and variable litigation results.
- We are not asking to protect bad actors. Businesses that act with reckless disregard of applicable federal or state safety regulations, thereby creating an obvious risk of harm, are exempted from this legislation.
- This bill establishes a fair middle ground: no "blanket immunity" and no speculative litigation.

Myth **Without the threat of tort lawsuits, employers will lose the incentive to take the precautions reasonably necessary to protect workers from exposure to the coronavirus.**

Facts

- This draft legislation creates the right incentives. The bad actor exemption ensures there is no incentive for a company to disregard the measures it should take to mitigate the spread of COVID-19. Instead, the bill incentivizes companies to look for, and implement, available and feasible guidance.
- As employers resume or continue operations to support the nation's economic recovery, they have every incentive to keep their workforce safe, healthy and productive. Employers cannot operate without their employees. This is a highly communicable disease, and employers want to keep it out of their workspaces. If employees do not feel comfortable that their employers are taking adequate measures to protect them, they will not come to work.
- Federal law already requires employers to provide places of employment which are free from hazards to employees. This was true before the current pandemic and will remain true afterwards.

Myth **The fear of litigation is a useful backstop to prevent states from opening too soon or to fill the gap before there are federal regulations on point.**

Facts

- Businesses, non-profit organizations, municipal entities and others do not deserve to be caught in the middle of a political battle over when to re-open. When allowed to

reopen, they must take the pandemic seriously, figure out how to operate, keep workers employed, and provide their goods and services.

- Judges are generally not well-equipped to make scientific decisions that impact major public health programs or requirements, and court decisions generally affect only the parties to the case. Relying on the judicial system, rather than public health authorities, will create a chaotic patchwork of rules that businesses, non-profits, and governmental entities will find difficult to understand and follow.
- In the same vein, imposing liability after-the-fact is not a stand-in for the lack of proactive guidance from America's disease experts. The fact that there are no objective standards is why they need protections from speculative, subjective lawsuits.

Myth **Liability protections for employers would weaken the ability of states to protect their citizens.**

Facts

- The exact opposite is true. If a state enacts regulations applicable to a business or other facility to prevent the spread of COVID-19, this legislation reinforces the need to follow those regulations. Under the bad actor exemption, recklessly disregarding any such regulation would continue to trigger liability.
- This bill merely prevents plaintiffs' lawyers from filing highly speculative lawsuits over the spread of a communicable disease. Community-wide diseases like COVID-19 are different from hazardous workplace conditions, such as asbestos exposure. Because the disease may spread among asymptomatic individuals, businesses cannot fully control the spread of COVID-19 or guarantee employees or customers that they will not get COVID-19. What they can do is try to implement measures that can reduce the likelihood that the virus will spread, and states are free to issue regulations that entities must follow for doing so.
- State governments continue to possess the authority to make and enforce laws aimed at public health, safety and general welfare. This includes the power to regulate business activity, declare states of emergency, enforce curfews and issue stay-at-home orders. Nothing in this draft legislation would impede these powers or a state's right to affirmatively protect their citizens.

Myth **Congress has never passed a federal law protecting businesses or individuals from state lawsuits and should not do so as a matter of state rights.**

Facts

- Congress has passed many federal laws that limit or bar state lawsuits against individuals or businesses in certain circumstances. Indeed, Congress just recently expanded the scope of the PREP Act, which provides robust liability protections to manufacturers of certain covered medical countermeasures used to combat large-scale health risks like COVID-19. Other examples of these laws include:

- Bill Emerson Good Samaritan Food Donation Act: Passed in 1996, it protects individuals, corporations, or organizations that donate food or grocery products to the needy from being sued if those products are spoiled or otherwise unfit.
- Volunteer Protection Act of 1997: It protects nonprofit organizations or governmental entities that conduct volunteer work from being sued if, while performing that volunteer work, someone gets hurt.
- Year 2000 Readiness and Responsibility Act: It provided a 90-day notice period before a Y2K ("millennium bug") action could be brought, limited the ability to bring class actions, and restricted punitive damages.
- 9/11 Act: It created a federal program to compensate victims of the September 11, 2001 terrorist attacks. By opting into that program, victims gave up the right to file tort lawsuits against the airlines or others.
- SAFETY Act (the Support Anti-terrorism by Fostering Effective Technologies Act of 2002): It eliminates state law claims against sellers of anti-terrorism technologies following an act of terrorism and provides for more limited liability including the prohibition of punitive damages.

- Here, Congress has a clear interest in providing basic liability protections to support national economic activity. In the past few months, Congress has legislated extensively to support businesses and workers through loans and grants. The federal government now must make sure this investment in our economy is used productively, not needlessly diverted to plaintiffs' lawyers and speculative lawsuits.

Myth **This legislation is unnecessary because if a business complies with federal regulations related to COVID-19, they are fully protected from lawsuits based on COVID-19 claims.**

Facts

- This is not true. Businesses are routinely sued despite full compliance with federal (and state) health and safety regulations. In many states, failing to comply with regulations can lead to a presumption of liability, but the opposite is not true. States generally do not provide protection from liability simply for complying with federal regulations. In fact, only some states have a regulatory compliance defense for punitive damages, let alone for general negligence claims.
- Instead, many states view federal regulation as minimum standards that companies must meet, and that additional protections may be required based on the facts and circumstances. Juries may consider a defendant's compliance with applicable regulations as a factor when assessing liability during a trial, but compliance does not prevent a baseless accusation from moving forward in the first place or a jury from finding for liability for a sympathetic plaintiff.
- The reason companies need the protections in the bill is because federal guidance on how to slow the spread of COVID-19 is constantly evolving, highly variable, and not always feasible to implement. As the CDC explained in a recent guidance document, there is no one-size-fits-all solution: "establishments may choose those [measures]

that make sense for them in the context of their operations and local community, as well as State and local regulations and directives."

Myth **This legislation is not needed because cases based on the spread of the coronavirus will be too difficult to prove at trial, so plaintiffs' attorney will not bring these cases.**

Facts

- America's litigiousness is already on display, as law firms are already touting their "Coronavirus Litigation Task Forces." They are not even waiting for people to actually get Covid-19, as they are suing because workers and customers fear catching it. Even businesses deemed "essential" by the government have been labeled "public nuisances" in lawsuits asking courts to order specific safety measures when federal infectious disease experts haven't issued such guidance.
- Also, some have suggested that liability protections are not needed because causation cannot be proved. In tort law, the legal standard for causation is not scientific certainty—only that it is more likely than not the person contracted COVID-19 at the facility. Plaintiffs' lawyers will have no problem finding friendly experts to say such a probability exists, particularly if there were several cases at a facility or contact tracing pointed to that location.
- Finally, without this legislation, plaintiffs do not need to prove any claim, or even make credible allegations, to file lawsuits. Plaintiffs' attorneys are known to bring such speculative claims to elicit settlements based on the costly nature of discovery and mounting a legal defense, in addition to a defendant's desire to avoid protracted litigation. Given how precarious the economy is right now, businesses need to use their federal assistance to maintain or hire back workers and provide customer services--not waste this money on speculative lawsuits.