

Liability Shield Will Not Lead to a Safer Reopening

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Despite arguments to the contrary, most recently from former NYC mayor and former Democratic presidential aspirant Michael Bloomberg,¹ a liability shield for companies who follow federal administrative guidance in reopening their workplaces will not lead to significantly less litigation and nor will it, in the former mayor's words, "help ensure workplaces are safe."

Mr. Bloomberg is not the only one pushing for liability shields. Recently, a model state bill has been circulated by the American Legislative Exchange Council, or ALEC, a non-profit that drafts conservative model legislation.² Jonathon Williams, chief economist for ALEC, claims that liability shields would provide "business owners [with] confidence that trial lawyers will not be able to feast on them for real or perceived harm."³ Oklahoma and North Carolina have both passed such legislation already, and Kansas appears poised to as well. Even in a solidly blue state like New York, Governor Cuomo inserted language into the state budget passed back in March which shields nursing homes from liability for COVID-19 outbreaks.⁴ At the federal level, president Trump has expressed support for liability shields generally, while also suggesting that the use of the Defense Production Act to keep meatpacking plants open would address "liability problems" that the companies face.⁵ And Senate majority leader Mitch McConnell has suggested that any new stimulus bill must address the "epidemic of lawsuits" which he claims will "impact our ability to get back to work."

Of course, at some point the economy must reopen and federal and state guidelines on best practices based on current scientific evidence are essential to reopening as safely as possible. But each workplace is unique, and the legal duty to provide a safe workplace requires each employer look closely at the circumstances of their specific workplace to determine what additional steps, if any, must be taken. For some workplaces simply conforming to the administrative guidance may be enough, for others additional safeguards may be necessary, and for still others it may not be possible to reopen without risking the safety of employees, customers, or the community as a whole. Companies should feel "confident opening their doors," to quote the former mayor again, if they have carefully assessed these risks and acted reasonably given the circumstances.

¹ <https://www.bloomberg.com/opinion/articles/2020-05-11/companies-need-safety-from-lawsuits-if-they-protect-workers>

² <https://news.bloomberglaw.com/daily-labor-report/red-states-to-get-blueprint-on-limiting-business-virus-liability>

³ <https://www.governing.com/next/As-Economy-Reopens-a-Push-to-Rethink-Regulations.html>

⁴ <https://www.nytimes.com/2020/05/13/nyregion/nursing-homes-coronavirus-new-york.html>

⁵ <https://thecounter.org/trump-meatpackers-liability-protection-tort-reform-tyson-covid-19/>

For all practical purposes, employers are protected against unreasonable risk of liability under existing law. California and other states have indicated that their worker's compensation laws cover injuries from contracting the virus at work. Where states take this position (and their courts agree), workers will not be able to resort to the tort system but will be relegated to a no-fault, non-jury administrative system. Coverage of COVID-19 injuries by workers' compensation may be contested by some labor groups, but many employees will prefer the relative certainty of workers' compensation to protracted litigation over coverage issues. Furthermore, if a customer or employee not covered by workers' compensation wants to bring an action against a company for negligence, a company's compliance with federal and state administrative guidance will still deter litigation, because juries will be able to consider such compliance in determining whether the company acted reasonably. Even without any "liability shield," the plaintiff would need to prove that the company did not take "reasonable care" to protect her from harm, that the lack of reasonable care was the "cause in fact" of her harm, and that that she experienced actual damages. Given limited testing and tracing protocols, the element of causation may be particularly challenging.⁶ And where a company can show that it took reasonable care under the circumstances, it will not be held liable.

One of the most important goals of personal injury law developed by state courts over many decades, if not centuries, is to encourage everyone – individuals and corporations alike – to take reasonable care to protect each other from harm. Limiting this standard by allowing companies to avoid a claim of negligence altogether simply because they have complied with administrative guidance, which can change and is not even binding on the agency, will not make customers or employees safer. Companies may be too quick to require employees to return to work even where work from home is feasible, and they may not consider additional safety protocols such as staggering customers throughout a store or improving ventilation in a given workplace where it is reasonable to do so.

In any case, the liability shields being proposed would not preclude protracted litigation. An employee or customer could still bring an action, but instead of the typical claim for negligence they would instead argue that the company did not, in fact, meet the guidelines provided by the government. Even the AELC's model legislation would permit a lawsuit to proceed where the plaintiff complains the company exhibited "gross negligence,"⁷ a higher standard but one that would nonetheless often require findings of fact past the motion to dismiss stage.

⁶ https://www.law360.com/employment/articles/1272303/sens-say-safety-regs-must-precede-covid-19-biz-immunity?nl_pk=ece9ed9f-6821-481b-92aa-aa1236182d72&utm_source=newsletter&utm_medium=email&utm_campaign=employment

⁷ <https://www.governing.com/next/As-Economy-Reopens-a-Push-to-Rethink-Regulations.html>

Under a traditional negligence standard, a company that complied with federal guidelines would still be able to argue that those protocols constitute the appropriate standard of care for their workplace. Where a jury agrees, the company would not be liable. But for certain workplaces where those standards were obviously not sufficient, companies should not be able to simply say “we did as we were told” in order to avoid compensating those who were unnecessarily harmed.