

COVID-19 ALERT: Congress Prepares for America's Reopening

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As states move toward reopening businesses, the battle in Washington over whether to shield businesses from civil lawsuits brought by workers and customers in connection with COVID-19 has begun. On May 12, the U.S. House of Representatives released a draft of the next COVID-19 relief bill (referred to as "The Heroes Act"). The current Heroes Act draft does not include any liability protections for employers or businesses, despite repeated calls for such protections from various members of the U.S. Senate and businesses across the country. The House will convene on Friday, May 15, to vote on the proposed package, and while it is likely the bill will pass the House, the Senate is unlikely to pass any bill that does not contain liability protections.

While the House and Senate move on a collision course toward addressing this issue, businesses have begun to voice their support for a bill that would create some kind of shield against lawsuits related to COVID-19. The current legal landscape leaves businesses in a difficult position. Workers' compensation laws generally provide an exclusive remedy for employees who are injured on the job and immunize employers from tort suits related to those injuries, but the COVID-19 pandemic presents an unprecedented set of issues related to customer exposure and exposure risks faced by workers' immediate family members. Furthermore, general questions about employer liability for employee exposure remain, given the uniqueness of the COVID-19 crisis.

The lack of consistent, enforceable federal guidance on how "reasonable" businesses should behave in relation to COVID-19 creates many questions about how businesses that attempt to continue operations will fare if they face scrutiny under existing tort

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law and employee-safety statutes, such as the Occupational Safety and Health Act. In the absence of clear, enforceable guidance, employers cannot be certain what measures they must take in order to limit or avoid liability for the spread of COVID-19 in the workplace. Employers who follow recommendations from the Centers for Disease Control and Prevention (CDC) concerning cleaning, social distancing, and employee isolation are certainly wise to do so, but the CDC's recommendations are not binding on employers, and they do not carry the legal weight afforded legislative rules issued by federal agencies. Furthermore, the reality is that those recommendations cannot completely prevent exposure to COVID-19 and employers have no way of understanding their potential liability under such circumstances. Adding to the confusion are the myriad of state and local guidelines, which often conflict with each other or with federal agency guidelines.

This lack of legal clarity exacerbates an already difficult situation. Businesses need to reopen to remain viable but without some certainty, reopening may open them to legal liabilities they cannot afford, even if they are acting with the best intentions. The risk of litigation is real, though the extent to which employers are or could be facing frivolous lawsuits related to COVID-19 remains to be seen.

Against this backdrop, politicians and industry advocates have begun to push for legislation that would provide some kind of liability shield or federal liability standard for businesses that are reopening. Senate Majority Leader Mitch McConnell has stated that the next COVID-19 relief bill must contain a broad liability shield that would protect companies against lawsuits from employees and customers. The Senate Judiciary Committee held a hearing on the issue on May 12, during which a diverse group of industry leaders voiced their desire for the creation of enforceable federal guidance from the CDC and the Occupational Health and Safety Administration (OSHA) as a means of setting a standard of care. The hearing evidenced bipartisan support for a standard that employers and businesses can turn to, before the creation of a legislative shield on liability.

Yet, despite the need for such a standard and widespread support, the creation of a single set of enforceable standards that would be broadly applicable to every business or workplace is probably not realistic. One reason for the lack of enforceable guidelines is that it is hard to define requirements that can be broadly applied to all workplaces. For example, both OSHA and the CDC suggest considering daily health checks, but health checks may not be possible for every business, and health checks themselves can take a variety of forms. Temperature checks, for one, may be feasible for some businesses, but unaffordable or practically not feasible for others. The latest CDC reopening guidelines seem to recognize this; initially the White House had concerns that the guidance was too prescriptive and pulled the publication, it appears that concern was addressed, leaving employers with more general guidance and decision trees to guide, rather than dictate, the decisions that will need to be made over the coming months.

There has not been a firm proposal to address the concerns of businesses on a federal level, and it is unlikely that the federal government will pass legislation that completely rewrites tort law or provides for blanket protection from liability. That said, this is an issue that will impact U.S. businesses as they continue to operate or move to reopen. Even if federal or state governments pass immunity legislation, those putative laws will not shield employers from liability for gross negligence or intentional conduct, so taking and documenting all reasonable measures to protect the workforce will always be the best defense to potential liability.

Employers are in a special position to be at the forefront of these issues, especially as they begin to bring employees back into the workplace. While there are many unknowns, employers are advised to review their existing legal obligations and existing guidance from state and federal agencies and government, evaluate how those obligations and recommendations interact with COVID-19 issues specific to their workplace, and consult with counsel at every step of the process. Wiley has created Reopening Guidance for Employers and a detailed list of COVID-19 Frequently Asked Questions to assist with this process.

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