

# TORT IMMUNITY IN THE PANDEMIC

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## INTRODUCTION

The Covid-19 pandemic set off a public health emergency that quickly brought doctors and other health care providers to the front line, while shuttering businesses throughout the United States. In response to the emergency, the federal and state governments rapidly created broad protections from tort liability for health care providers. To encourage businesses to reopen, some states have also provided liability protection for businesses from personal injury suits brought by patrons and employees. Congress is considering similar protections for businesses as it contemplates further aid packages. Some industries, like nursing homes and universities, are lobbying for specific immunity. This Essay overviews some of these liability shields, examines their relative necessity and value, and anticipates some of the issues that will inevitably arise as the provisions are implemented.

Part I briefly explains that, even without liability shields, potential plaintiffs face high hurdles under traditional common law principles to successfully bring personal injury lawsuits for Covid-19 related injuries. Proof of the elements of negligence and overcoming traditional defenses will be difficult, whether suit is brought against businesses, health care workers, or employers. These common law obstacles call into question the need for further liability protections.

That said, the strongest case for liability shields is for health care workers—those who are on the frontlines of the battle against the pandemic. Part II reviews the shields that have been promulgated for these workers both at the state and federal levels. While Part II concludes that these shields serve health care policy, it questions whether similar protections should extend to treatment of non-Covid-19 patients, as is being advocated by the American Medical Association.

Parts III and IV consider whether the need for immunity for businesses is comparable to health care workers. These Parts conclude that providing immunity to businesses is counterproductive and detracts from important values served by tort liability: Part III from the perspective of suits against employers and Part IV from the point of view of patron suits against businesses open to the public. Preliminarily, it is debatable whether immunity shields are even necessary. Lawmakers assume these shields are critical to encouraging businesses to resume normal business activities, an assumption that is not supported by the data.<sup>1</sup> It is likely that other challenges facing businesses in the pandemic, such as reduced business operations

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<sup>1</sup> *Small Business Coronavirus Impact Poll*, U.S. CHAMBER OF COM. (June 3, 2020, 8:00 AM), <https://www.uschamber.com/report/small-business-coronavirus-impact-poll-june> [<https://perma.cc/3JFK-LKR5>] (finding that seventy-nine percent of small businesses were either fully or partially open by the end of May 2020).

to allow for social distancing or lower patronage due to public fear of exposure, may be inhibiting resumption of full business activities far more than the potential for liability. Significantly, very few personal injury lawsuits have been filed against businesses since the pandemic began in the United States.<sup>2</sup>

At the same time, providing immunity shields to businesses comes at a high cost. Although immunity allows defendants to escape lawsuits at or near the pleading stage, this type of “bail-out” removes fundamental incentives for businesses to operate safely. Even though our country is currently fraught with inconsistent messaging regarding safety and businesses, we need to encourage businesses to make reasonable efforts to keep up to date on the information regarding the virus, take reasonable precautions, and provide reasonable notice of risks to those potentially exposed. Immunity from civil liability lowers the incentive to take these precautions and to create a safe workplace or business. In the absence of, or in addition to, “government-provided” immunity, some businesses have created their own private liability shields through liability waivers, as discussed in Part IV. Whether these shields are enforceable is questionable, but in any event, they should be discouraged in the Covid-19 context. A business that meets the appropriate standard of care to provide a safe environment would not need waivers; reliance on waivers may disincentivize businesses from taking needed safety steps during the pandemic.

Liability shields shift loss away from accountable parties, and thus deprive deserving victims of the ability to receive compensation for preventable injuries. Some industries, like nursing homes, already were experiencing considerable problems due to faulty practices even before the pandemic, and liability shields may overprotect those industries. Part V concludes that the benefits from the tort system outweigh the questionable need to provide liability shields for businesses.<sup>3</sup> Finally, other systems, such as insurance and government compensation funds, can be used to encourage businesses to reopen and stay open.

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<sup>2</sup> See *Covid-19 Case Tracking Research*, PERKINS COIE LLP (July 2020), <https://www.perkinscoie.com/images/content/2/3/v8/234690/Perkins-Coie-Client-Advantage-COVID-Case-Tracking-Research-Exter.pdf> [<https://perma.cc/79BD-VPYX>]. The largest number of suits filed this far have been against insurance companies for disputes over business interruption coverage. *Id.*; see also *COVID-19 Complaint Tracker*, HUNTON ANDREWS KURTH, <https://www.huntonak.com/en/covid-19-tracker.html> [<https://perma.cc/3REQ-A8SZ>] (reporting very few tort claims).

<sup>3</sup> Some have argued that these liability shields are really just a decoy to enact tort reform at a federal level. See Michael L. Rustad, *Your Right to Sue, Goodnight!*, NULR OF NOTE (June 15, 2020), <https://blog.northwesternlaw.review/?p=1487> [<https://perma.cc/8JGR-CSZS>].

## I. HURDLES TO PERSONAL INJURY LAWSUITS

In a tort suit, the plaintiff must prove several elements.<sup>4</sup> The plaintiff must first demonstrate the duty of care the actor owes to the injured party and that the defendant failed to exercise that level of care.<sup>5</sup> The duty generally requires the actor to exercise reasonable care.<sup>6</sup>

Defining reasonable care is usually a comparative view as to how other reasonable actors would act under the circumstances.<sup>7</sup> In the healthcare context, the medical malpractice standard of care refers to best practices of the reasonable practitioner in the field facing similar circumstances. For healthcare professionals treating patients with Covid-19, that duty would take into account conditions such as treating a novel illness without established treatment plans, shortages of beds, staff and personal protective equipment (PPE), and sparse testing. Given these extraordinary circumstances, with so much unknown about the virus, the standard of care would not be on par with treating known diseases, and plaintiffs likely will have difficulty proving that the provider failed to exercise the appropriate level of care.

Defining the duty of care that businesses owe to their employees and patrons in the context of Covid-19 is equally, if not more, challenging. Employers owe a duty to provide a safe environment; exercising that duty takes into account the use of known, cost-effective precautions (like use of gloves, masks, temperature checks, and social distancing), complying with relevant governmental regulations and guidelines, following the standards and customs of safe practices for that type of business, as well as exercising common sense. It would also take into account the high level of risk involved and the state of knowledge on the spread and prevention of Covid-19. Our knowledge of how the virus spreads keeps shifting, along with the appropriate measures to prevent the spread. These factors will complicate plaintiffs' ability to prove that business owners failed in their duty of safety to their customers and employees. For employers, the availability of workers' compensation may provide an additional liability shield, while other strong defenses, like compliance with regulation, comparative fault, and assumption of risk, may come into play.

Plaintiffs also must prove the element of causation, demonstrating that defendant's failure to provide reasonable care caused the plaintiff's injury.<sup>8</sup> For example, a plaintiff would bear the burden of proving that the exposure to the virus occurred in the workplace or business setting. Given the highly contagious nature of the disease, this may prove an insurmountable hurdle. Determining causation from Covid-19 exposure is complicated by the lack of evidence, due to sometimes sparse testing, asymptomatic vectors, undetectable periods, the number of potential exposures and different types of airborne transmissions. With the enormous difficulty of proving causation in this context, it may prove fatal to a plaintiff's

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<sup>4</sup> DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *HORNBOOK ON TORTS* § 9.5 (2d. ed. 2016).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at § 9.1.

<sup>7</sup> *Id.* at § 10.5.

<sup>8</sup> *Id.* at § 9.5.

lawsuit. Proving causation may be less difficult in settings that are more contained, like cruise ships, nursing homes, prisons, and dormitories. Contact tracing may offer some evidence that an individual contracted the virus in a business setting. Our understanding of the ways of virus transmission continues to develop, which also affects causal proof. Generally, however, proving causation in a business setting may be a plaintiff's highest hurdle to a successful suit.

Notwithstanding these high hurdles to bringing a successful tort suit for personal injury, state and federal governments have created shields for healthcare providers and businesses from tort liability. These immunity provisions are discussed below.

## II. LIABILITY PROTECTION FOR HEALTH CARE PROVIDERS

After the Covid-19 outbreak, the state and federal governments quickly created a number of strong protections from civil liability for healthcare workers. These liability shields generally address negligence-based behavior and not willful misconduct. Two main federal laws, the Public Readiness and Emergency Preparedness (PREP) Act and the Coronavirus, Aid, Relief, and Economic Security (CARES) Act, address liability protections. The federal government enacted the PREP Act in 2005 to provide liability protections during public health emergencies.<sup>9</sup> With its extension to Covid-19, it covers health professionals who administer or use countermeasures to treat, cure, prevent, or mitigate Covid-19.<sup>10</sup> Similarly, the federal government enacted the CARES Act to protect volunteer health care professionals during the Covid-19 emergency.<sup>11</sup>

The Department of Health and Human Services (HHS) urged the state governors to provide immunity for healthcare professionals from liability for medical malpractice.<sup>12</sup> As described below, some states already had immunity shields in place and others responded to the call by passing legislation or creating executive orders.

### *A. Public Readiness and Emergency Preparedness (PREP) Act*

The PREP Act has a broad reach. It authorizes the Secretary of HHS to issue a Declaration providing immunity from liability in response to a public health emergency.<sup>13</sup> The Declaration may provide immunity to covered persons for federal and state claims relating to the administration or use of certain countermeasures. On

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<sup>9</sup> See *infra* note 13.

<sup>10</sup> See *infra* note 14.

<sup>11</sup> See *infra* note 20.

<sup>12</sup> Letter from Alex M. Azar II, Secretary of Health and Human Services to Governors (Mar. 24, 2020), [https://www.ncsbn.org/HHS\\_Secretary\\_Letter\\_to\\_States\\_Licensing\\_Waivers.pdf](https://www.ncsbn.org/HHS_Secretary_Letter_to_States_Licensing_Waivers.pdf) [<https://perma.cc/W8V5-G69S>].

<sup>13</sup> 42 U.S.C. § 247d–6d.

March 10, 2020, Secretary Alex Azar issued a Declaration<sup>14</sup> that defined “countermeasures” to include antivirals, drugs, biologics, diagnostics, devices, or vaccines used to combat Covid-19.<sup>15</sup> “Qualified pandemic products” are also countermeasures.<sup>16</sup> Under the Declaration, covered persons include manufacturers, distributors, or program planners of a countermeasure as well as those who prescribe, administer, or dispense a countermeasure. To receive immunity, a covered person must have a contract with the federal government or act according to an authority having jurisdiction, which can include local agencies with a legal responsibility to respond to the pandemic.<sup>17</sup>

Immunity applies to claims for personal injury or damage to property.<sup>18</sup> The Act does not protect against willful misconduct or actions brought by the United States government. However, an individual or entity who is not covered but who complies with the PREP Act requirements and conditions of the Declaration may receive immunity if the individual or entity could have reasonably believed the activity was covered.<sup>19</sup>

#### *B. Coronavirus, Aid, Relief, and Economic Security (CARES) Act*

The CARES Act provides immunity from liability under federal and state law for volunteer healthcare professionals.<sup>20</sup> To receive protection, volunteers must: act within the scope of their state license, registration, or certification, not exceed the scope of license, registration, or certification of a substantially similar health professional in the state where the act or omission occurs, and not act in bad faith or

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<sup>14</sup> Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198 (Mar. 17, 2020).

<sup>15</sup> *Id.* at 15,202.

<sup>16</sup> *Id.* Qualified pandemic products must be cleared by the FDA, authorized under an Emergency Use Authorization, described in the CDC’s Emergency Use Instructions, or used under either an Investigational New Drug Application or an Investigational Device Exemption. Robert P. Charrow, Advisory Opinion on the Public Readiness and Emergency Preparedness Act and the March 10, 2020 Declaration Under the Act April 17, 2020, as Modified on May 19, 2020, HHS (May 19, 2020), <https://www.hhs.gov/sites/default/files/prep-act-advisory-opinion-hhs-ogc.pdf> [<https://perma.cc/F28S-6VKF>].

<sup>17</sup> *See supra* note 14.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Coronavirus, Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, § 3215, 134 Stat. 281, 374–75 (2020).

engage in willful misconduct.<sup>21</sup> The CARES Act also amends the PREP Act to include certain respirators as “covered countermeasures.”<sup>22</sup>

### C. State Protections

State laws also provide immunity from liability for healthcare workers and facilities. Before the Covid-19 outbreak, several states had statutes limiting liability for healthcare providers during public health emergencies.<sup>23</sup> These statutes generally eliminate liability for acts or omissions causing injury, death, or property damage unless the healthcare worker’s conduct constitutes gross negligence or willful misconduct. After the outbreak, other states passed similar legislation protecting healthcare workers during the pandemic.<sup>24</sup> Similarly, many governors have responded to the outbreak by issuing executive orders shielding healthcare workers from liability.<sup>25</sup> The protections generally do not protect against gross negligence or willful misconduct.<sup>26</sup>

### D. Coverage Issues that May Arise

As mentioned, even without these protections, the standard of care for hospitals and healthcare providers would automatically take into account the extraordinary conditions of the pandemic and minimize the risk of health worker liability. But with the added shield provided by the state and federal measures, these workers are ensured even broader protection from suit. Most people would probably agree that added protection against healthcare worker liability is warranted, even if only for symbolic purposes, given that these people are on the frontline of the pandemic and face a heightened risk of contracting the virus. Beyond symbolism, liability shields

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<sup>21</sup> *Id.*

<sup>22</sup> Coronavirus, Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, § 3103, 134 Stat. 281, 361 (2020).

<sup>23</sup> See DEL. CODE ANN. tit 20, § 3129 (West 2007); IOWA CODE ANN. § 135.147 (West 2007); LA. STAT. ANN. § 29:771(B)(2)(c) (2003); VA. CODE ANN. §§ 801–225.01–.02 (West 2014).

<sup>24</sup> See S.B. 150, 2020 Leg., Reg. Sess. (Ky. 2020); S.B. 2640, 191st Gen. Court, Reg. Sess. (Mass. 2020); S.B. 300, 2020 Leg., Reg. Sess. (Okla. 2020).

<sup>25</sup> See Ariz. Exec. Order No. 2020–27 (Apr. 9, 2020), <https://azgovernor.gov/executive-orders> [<https://perma.cc/R2R9-AY6Y>]; Conn. Exec. Order No. 7V (Apr. 7, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7V.pdf?la=en> [<https://perma.cc/D75W-CETW>]; Ga. Exec. Order No. 04.14.20.01 (Apr. 14, 2020), <https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders> [<https://perma.cc/VPM3-USJL>]; Ill. Exec. Order No. 2020–19 (Apr. 1, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-19.aspx> [<https://perma.cc/7F8W-4KHD>].

<sup>26</sup> See *supra* note 25.

may encourage healthcare workers to step forward to deal with the surge of cases in the face of limited equipment.

Even if the shields are an important immediate step, how long should these liability protections last? Experts have warned that the pandemic may continue for eighteen to twenty-four months,<sup>27</sup> but it could be even longer—if ever—before there are no active cases. Many states have provided immunity for the duration of the public health emergency, so governors and legislatures will decide when to remove the protections.<sup>28</sup> For those liability protections that are not specifically tied to the duration of the public health emergency, should the protections continue until there are no active cases? If Covid-19 infection rates eventually decrease to levels similar to the seasonal flu, the broad liability protections for healthcare workers may no longer be necessary.

The ever-changing state of knowledge on the virus presents challenges. It is critical to ensure that healthcare workers stay abreast of developments that will help them fight the virus. But while we can count on the professionalism of the vast majority of these workers to keep up with advances in treatment, liability shields may create something of a disincentive for others to do so. Without the accountability that the tort system brings, some workers and facilities may become less safe and fall below the evolving standard of care. So as strong as the case may be for liability shields now—especially as we are encouraging health care workers to risk their own lives to meet the crisis—the benefits of these shields may diminish over time as the health crisis eases and risks to the health care workers are better managed.

Aside from duration and sliding scale questions, we also face difficult questions over the type and extent of liability protections in different contexts. These questions are at the forefront of issues surrounding shields for nursing home providers, the medical provider's decision to postpone elective surgery for patients, and licensure relaxation.

Take immunity protections for nursing homes. Nursing homes have seen notoriously high rates of Covid-19.<sup>29</sup> Although nursing homes have pushed for immunity from Covid-19 related lawsuits, federal legislation shielding hospitals and healthcare workers has not covered nursing homes. Many states have explicitly

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<sup>27</sup> See, e.g., Kristine A. Moore, Marc Lipsitch, John M. Barry, & Michael T. Osterholm, *COVID-19: The CIDRAP Viewpoint*, CIDRAP, (Apr. 30, 2020), [https://www.cidrap.umn.edu/sites/default/files/public/downloads/cidrap-covid19-viewpoint-part1\\_0.pdf](https://www.cidrap.umn.edu/sites/default/files/public/downloads/cidrap-covid19-viewpoint-part1_0.pdf) [<https://perma.cc/9952-F96X>].

<sup>28</sup> See Conn Exec. Order No. 7V (Apr. 7, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7V.pdf?la=en> [<https://perma.cc/8CTT-5EDM>]; Ga. Exec. Order No. 04.14.20.01 (Apr. 14, 2020); S.B. 2640, 191st Gen. Court, Reg. Sess. (Mass. 2020).

<sup>29</sup> One estimate (as of June 28, 2020) placed the number of nursing homes deaths due to Covid-19 at over 35,000. *COVID-19 Nursing Home Data*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://data.cms.gov/stories/s/COVID-19-Nursing-Home-Data/bkwz-xpvg> [<https://perma.cc/L9YQ-2D5L>].

provided immunity for nursing homes,<sup>30</sup> but in other states, the question whether nursing homes are protected has not yet been tested.

Nursing homes demonstrate the conflicts and costs involved in providing immunity shields. Even with the uncertainty surrounding the virus, the dangers of the virus to older individuals and high risk of transmission in contained spaces were quickly discovered.<sup>31</sup> In response, federal officials have curtailed routine inspections since March and nursing homes have restricted outside visitors.<sup>32</sup>

Under tort law, nursing homes would be responsible for a high standard of care, given the heightened vulnerability of their residents. Certainly, nursing homes face huge challenges: they may function with extremely limited budgets, be unable to maintain social distancing when caring for patients with severe pre-existing conditions, and face PPE shortages and high risks to their own workers. Although these factors may be considered when determining the duty of care, they would not excuse the lack of due care.

Critics argue that providing immunity for nursing homes will mask long-term problems with the industry and make accountability much more difficult.<sup>33</sup> Regulation has not been effective in recent years and precautions taken in light of the pandemic, like restricting visitors and decreasing inspections, have made monitoring

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<sup>30</sup> See N.Y. PUB. HEALTH LAW § 3082 (Consol. 2020); S.B. 704, 2020 Leg., 2019–2020 Sess. (N.C. 2020). According to a Washington Post article, about twenty states have provided some form of liability immunity to nursing homes. Debbie Cenziper, Peter Whoriskey, Shawn Mulcahy, & Joel Jacobs, *As Nursing Home Residents Died, New Covid-19 Protections Shielded Companies from Lawsuits. Families Say That Hides the Truth*, WASH. POST (June 8, 2020, 5:13 PM), <https://www.washingtonpost.com/business/2020/06/08/nursing-home-immunity-laws/> [<https://perma.cc/7KAE-JQ42>].

<sup>31</sup> See, e.g., Jonel Aleccia, *Coronavirus Cluster Near Seattle Highlights Vulnerability of Nursing Homes*, NPR (Mar. 2, 2020, 4:57 PM), <https://www.npr.org/sections/health-shots/2020/03/02/811276257/coronavirus-cluster-near-seattle-highlights-vulnerability-of-nursing-homes> [<https://perma.cc/V4NQ-YKRL>].

<sup>32</sup> See Press Release, CTRS. FOR MEDICARE & MEDICAID SERVS., *CMS Announces New Measures to Protect Nursing Home Residents from COVID-19*, (Mar. 13, 2020), <https://www.cms.gov/newsroom/press-releases/cms-announces-new-measures-protect-nursing-home-residents-covid-19> [<https://perma.cc/H84X-69FF>].

<sup>33</sup> Abigail Abrams, *'A License for Neglect.' Nursing Homes Are Seeking — and Winning — Immunity Amid the Coronavirus Pandemic*, TIME (May 14, 2020, 2:40 PM), <https://time.com/5835228/nursing-homes-legal-immunity-coronavirus/> [<https://perma.cc/LN77-HT43>] (“[T]he pandemic has exposed longstanding problems in the industry, such as staffing shortages and infection control violations, and that taking away its legal liability will make it harder to hold facilities to account now and in the future.”).



much more difficult.<sup>34</sup> Providing liability shields reduces the incentives to address problems like infection control and may even create a race to the bottom for the standard of care. If nursing homes cannot implement sufficient safety measures for their residents in the pandemic context, liability shields may not be the best approach to dealing with the problem; increased regulation and monitoring, along with tort liability, may be a better way to help correct it.

Other satellite litigation from liability shields will arise in the healthcare context with regard to treatment of non-Covid-19 patients. Many state executive orders expanded the use of telemedicine and lessened or eliminated restrictions on out-of-state healthcare workers providing care.<sup>35</sup> These expansions alter the care that patients receive, but whether this will lead to liability or be shielded by immunity is unknown. Similarly, many executive orders postponed nonessential surgeries and procedures.<sup>36</sup> These orders raise the question of whether immunity meant to protect healthcare professionals caring for Covid-19 patients applies to decisions made about other patients. The American Medical Association is advocating to extend immunity protections from harm due to surgeries and procedures that were postponed or foregone during the pandemic.<sup>37</sup> Critics question whether such broad immunity, which would include claims made by non-Covid-19 patients, is necessary because

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<sup>34</sup> These problems are exacerbated by the lack of transparency to virus information in nursing homes. For example, in Arizona, the public health authority have refused to respond to public records requests for information on Covid-19 infections and mortality rates in nursing homes. *See* Craig Harris, *Judge Rules Ducey Administration Does Not Have to Release COVID-19 Nursing Home Records*, AZCENTRAL (May 29, 2020, 8:44 PM), <https://www.azcentral.com/story/news/local/arizona-health/2020/05/29/judge-rules-arizona-nursing-home-covid-19-records-private/5283835002/> [<https://perma.cc/VN6T-EM3H>].

<sup>35</sup> *See* Ariz. Exec. Order No. 2020-15 (Mar. 25, 2020), [https://azgovernor.gov/sites/default/files/eo\\_2020-15\\_expansion\\_of\\_telemedicine\\_0.pdf](https://azgovernor.gov/sites/default/files/eo_2020-15_expansion_of_telemedicine_0.pdf) [<https://perma.cc/9KGN-VARZ>]; Kan. Exec. Order No. 20-08 (Mar. 20, 2020), <https://governor.kansas.gov/executive-order-no-20-08/> [<https://perma.cc/W98U-RFUK>].

<sup>36</sup> *See* Mich. Exec. Order No. 2020-17 (Mar. 20, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-522451--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522451--,00.html) [<https://perma.cc/4JUK-FWCH>]; Minn. Exec. Order No. 20-09 (Mar. 19, 2020), [https://secureservercdn.net/198.71.233.204/182.80d.myftpupload.com/wp-content/uploads/2020/03/Emergency-Executive-Order-20-09\\_FINAL\\_As\\_Filed.pdf](https://secureservercdn.net/198.71.233.204/182.80d.myftpupload.com/wp-content/uploads/2020/03/Emergency-Executive-Order-20-09_FINAL_As_Filed.pdf) [<https://perma.cc/9M24-FGHU>].

<sup>37</sup> Tony Pugh & Lydia Wheeler, *Push to Expand Doctors' Legal Immunity for Virus Draws Ire*, BLOOMBERG LAW (June 25, 2020, 5:14 AM), <https://news.bloomberglaw.com/health-law-and-business/push-to-expand-doctors-legal-immunity-during-crisis-draws-ire> [<https://perma.cc/JEB7-2AMZ>].

the standard of care would encompass these mandatory changes.<sup>38</sup> As hospitals restart elective surgeries, another question remains: Would they receive tort immunity from claims from patients and workers who become infected by the virus during visits to the hospitals? Moreover, many remedies, such as hydroxychloroquine, have been touted by various individuals and entities but lack proven benefits and may even harm patients. Would PREP protect the negligently prescribed “off label” remedies and other therapies as a countermeasure under the Act? These types of challenges are inevitable and will likely lead to litigation.

### III. LIABILITY PROTECTION FOR EMPLOYERS

Legislation and directives related to the pandemic created two categories of employers: those of essential and nonessential businesses. Essential businesses, like grocery stores, have remained open throughout the pandemic, while nonessential businesses are gradually re-opening throughout the country. President Trump used his powers under the Defense Production Act to require certain businesses he deemed essential, like meatpacking plants, to remain open.<sup>39</sup> Several states, like New York and New Jersey, have addressed safe working conditions by, for example, making mask usage mandatory for employees of essential businesses, but many states have not.<sup>40</sup> As nonessential businesses have reopened, some have allowed employees to continue working remotely as Google and Twitter have done.<sup>41</sup> For businesses unable to function remotely, employers face the challenge of deciding how to keep

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<sup>38</sup> *Id.* (quoting Professor Hodge stating that “the common law ‘standard of care’ changed in March when most elective procedures and surgeries were suspended in order to curb Covid-19 infections and preserve hospital capacity.”).

<sup>39</sup> Exec. Order No. 13917, 85 Fed. Reg. 26,313 (Apr. 28, 2020). The Defense Production Act provides immunity to businesses required to act; however, whether this includes tort claims is unresolved.

<sup>40</sup> N.J. Exec. Order No. 122 (Apr. 8, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-122.pdf> [<https://perma.cc/2K45-2GUN>]; N.Y. Exec. Order No. 202–17 (Apr. 15, 2020), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.17.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.17.pdf) [<https://perma.cc/4UN6-GCVC>]. Arizona’s governor is allowing local governments and mayors to decide face mask requirements. *See* Jeremy Duda, *Ducey Won’t Mandate Masks, But Gives Eager Mayors Ability to Do So*, AZMIRROR (June 18, 2020, 9:08 AM), <https://www.azmirror.com/2020/06/17/ducey-wont-mandate-masks-but-gives-eager-mayors-ability-to-do-so/>.

<sup>41</sup> Dana Brownlee, *Twitter, Square Announce Work From Home Forever Option: What Are The Risks?*, FORBES (May 18, 2020, 8:08 PM), <https://www.forbes.com/sites/danabrownlee/2020/05/18/twitter-square-announce-work-from-home-forever-optionwhat-are-the-risks/#32f93b812565> [<https://perma.cc/UJF8-G3LH>].

employees safe and healthy at work. Most states have not addressed working conditions; OSHA has given some non-mandatory guidance.<sup>42</sup> Businesses look to other businesses for guidance on how to reopen safely.<sup>43</sup>

To support the liability shields, some commentators and politicians have predicted that employers will face an “avalanche” of personal injury tort suits related to the pandemic from their employees.<sup>44</sup> Thus far, the explosion of tort suits has not yet materialized, and only a few personal injury lawsuits have been filed.<sup>45</sup> The basic claim for these suits is that unsafe workplaces caused employees to contract Covid-19.

One such lawsuit, a wrongful death claim, was filed against WalMart after an employee died from Covid-19.<sup>46</sup> The suit claims that Wal-Mart ignored the employee’s concerns about experiencing symptoms, failed to properly sanitize the store, and failed to provide sufficient PPE for employees.<sup>47</sup> A similar wrongful death lawsuit was brought against Safeway on behalf of an employee who died of Covid-19.<sup>48</sup> The employee worked at a distribution center where fifty-one employees tested positive for the virus.<sup>49</sup> Among other claims, the suit alleges that the defendants acted negligently by failing to comply with Occupational Health and Safety Administration (OHSA) guidelines and misleading employees by posting a sign stating that PPE was not helpful in preventing transmission.<sup>50</sup> In a third suit, already dismissed, employees in a meat processing plant alleged that their employer failed to provide adequate protections, even when nearby plants had been forced to close after virus outbreaks.<sup>51</sup> In addition to wrongful death claims, several employees and their family members

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<sup>42</sup> See *infra* note 71 and accompanying text.

<sup>43</sup> See, e.g., Ryan Randazzo, *With No Specific Guidance for Some Businesses, Reopening for Customers Means Creating Their Own Rules*, AZCENTRAL (June 13, 2020),

<https://www.azcentral.com/search/?q=With+No+Specific+Guidance+for+Some+Businesses%2C+Reopening+for+Customers+Means+Creating+Their+Own+Rules%2C+> [https://perma.cc/VVP3-Q538].

<sup>44</sup> Jim Tankersley & Charlie Savage, *Businesses Seek Sweeping Shield from Pandemic Liability Before They Reopen*, N.Y. TIMES (Apr. 28, 2020),

<https://www.nytimes.com/2020/04/28/business/businesses-coronavirus-liability.html> [https://perma.cc/H7QU-9EZ3] (quoting Senator Mitch McConnell warning of an “avalanche of lawsuits” if Congress doesn’t act).

<sup>45</sup> See *supra* note 2.

<sup>46</sup> Complaint at 2–3, *Evans v. Walmart Inc.*, No. 2020-L-003938 (Ill. Cir. Ct. Apr. 6, 2020).

<sup>47</sup> *Id.* at 3–4.

<sup>48</sup> Complaint at 1, *Zuniga v. Safeway Inc.*, No. HG20062742 (Sup. Ct. for Cal. May 13, 2020).

<sup>49</sup> *Id.* at 7–8.

<sup>50</sup> *Id.* at 8–10.

<sup>51</sup> *Rural Cmty Workers All. v. Smithfield Foods, Inc.*, No. 5:20-CV-06063-DGK, 2020 WL 2145350 (W.D. Mo. May 5, 2020).

have filed a public nuisance suit against McDonald's.<sup>52</sup> Under this novel theory, plaintiffs seek a court order requiring McDonald's to take further steps to protect their employees, such as providing adequate PPE.<sup>53</sup>

Anticipating more lawsuits, some states have already created liability shields to protect employers from personal injury claims.<sup>54</sup> For example, North Carolina gave healthcare providers and other essential businesses liability immunity, except in cases of "gross negligence, reckless misconduct, or intentional infliction of harm."<sup>55</sup> The immunity applies to customers' or employees' claims of injury or death related to Covid-19. Similarly, although the Bill's sponsor did not know of "any Covid-19-related claims in Utah,"<sup>56</sup> Utah's liability immunity protects someone from suits resulting from exposure to Covid-19 on "premises owned or operated by the person, or during an activity managed by the person."<sup>57</sup> Notably, Utah's liability shield is not limited to essential businesses. Although more states are considering similar protections,<sup>58</sup> businesses have started to reopen even without them.

Even without special liability shields, several strong defenses are already available to both essential and non-essential business employers that would preclude most suits and discourage attorneys from bringing them.

#### A. Workers' Compensation

State workers' compensation schemes are considered the exclusive remedy for workplace injuries. These administrative schemes eliminate the need for employees to prove employer negligence, but they remove the right to bring a civil action in court. Assuming that Covid-19 is an occupational disease or injury covered by

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<sup>52</sup> Complaint at 1–3, *Massey v. McDonald's Corp.*, No. 2020-CH-04247 (Ill. Cir. Ct. May 19, 2020).

<sup>53</sup> *Id.* at 3, 17.

<sup>54</sup> See Ala. Proclamation—Eighth Supp. State of Emergency (May 8, 2020), <https://governor.alabama.gov/assets/2020/05/2020-05-08-8th-Supplemental-SOE-COVID-19.pdf> [<https://perma.cc/ETT5-6N3V>]; Ark. Exec. Order No 20–33 (June 15, 2020), [https://governor.arkansas.gov/images/uploads/executiveOrders/EO\\_20-33.pdf](https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-33.pdf) [<https://perma.cc/7RTT-7JFH>]; S.B. 1946, 57th Leg., 2d Reg. Sess. (Okla. 2020); S.F. 1002, 65th Leg., Spec. Sess. (Wyo. 2020).

<sup>55</sup> S.B. 704, 2020 Leg., 2019–2020 Sess. (N.C. 2020).

<sup>56</sup> Taylor Stevens, *Utah Governor Signs Bill Shielding Businesses, Property-Owners from Coronavirus-Related Suits*, SALT LAKE TRIB. (May 5, 2020), <https://www.sltrib.com/news/politics/2020/05/04/utah-governor-signs-bill/> [<https://perma.cc/UW4T-QNXS>].

<sup>57</sup> S.B. 3007, 2020 Leg., 3d Spec. Sess. (Utah 2020).

<sup>58</sup> E.g., Bob Christie & Jonathan J. Cooper, *Arizona House Oks Coronavirus Liability Shield for Businesses*, FOX NEWS (May 22, 2020), <https://www.fox10phoenix.com/news/arizona-house-oks-coronavirus-liability-shield-for-businesses> [<https://perma.cc/4L2H-25JA>].

workers' compensation statutes, most tort claims for monetary damages by employees will be barred by those statutes.

Although workers' compensation schemes strongly protect employers from tort suits, there is uncertainty surrounding whether workers' compensation will cover employees who contract Covid-19 on the job. While workers' compensation can cover "occupational diseases," it generally does not cover "ordinary diseases of life."<sup>59</sup> In some states, workers' compensation excludes infections if the general public is also exposed.<sup>60</sup> This would likely exclude a disease as widespread as Covid-19, even if certain workers, such as those in meat packing plants, are more likely to contract it. Most people who get Covid-19 recover within a few weeks, and workers' compensation is not usually designed to provide benefits for short-term illnesses.

Even assuming workers' compensation extends coverage to claims for Covid-19, employees may still struggle to bring successful claims. Generally, the schemes require a worker to show that a disease or injury resulted from an activity within the course or scope of employment.<sup>61</sup> The employee's ability to prove that exposure occurred in the workplace could be quite difficult since there are likely many alternative sources of exposure. In recognition of that challenge, some states, such as Alaska, Minnesota and Wisconsin, have enacted legislation creating a presumption of causation that first responders contracted Covid-19<sup>62</sup> or respiratory diseases<sup>63</sup> in the course of their employment. In California, even non-essential workers receive a presumption.<sup>64</sup>

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<sup>59</sup> *Survey of State Workers Compensation Compensability Statutes*, NAT'L COUNCIL ON COMP. INS., INC. (May 2020), <https://www.ncci.com/Articles/Pages/Insights-Compensability-Statutory-Survey-May-2020.pdf> [<https://perma.cc/J25T-QYZX>].

<sup>60</sup> See ARK. CODE ANN. § 11-9-601(e)(3) (1987); GA. CODE ANN. § 34-9-281 (2004); S.C. CODE ANN. § 42-11-10(B). Notably, South Carolina excludes diseases that the general public would be "equally exposed" to, which raises questions about employees in professions who are more likely to be exposed (such as healthcare workers).

<sup>61</sup> Jim Pocius, *Workers Compensation and Course of Employment*, INT'L RISK MGMT INST., INC. (Feb. 2001), <https://www.irmi.com/articles/expert-commentary/workers-compensation-and-course-of-employment> [<https://perma.cc/GM4L-VUKF>].

<sup>62</sup> See S.B. 241, 31st Leg., Reg. Sess. (Alaska 2020), HF 4537, 91st Leg., Reg. Sess. (Minn. 2020); WIS. STAT. § 102.03(6) (2020).

<sup>63</sup> See D.C. CODE § 5-652 (2019); VA. CODE ANN. § 65.2-402 (2020).

<sup>64</sup> Cal. Exec. Order N-62-20 (May 6, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf> [<https://perma.cc/U2X9-QUYT>]. Governor Newsom's executive order created a rebuttable presumption that an employee who tests positive for Covid-19 within fourteen days of working at the employee's place of employment caught the disease in the course of employment. This presumption is "disputable" and does not apply if the employee's place of employment is his own residence. *Id.*

Workers' compensation schemes do not cover all potential tort claims, and employees may need to seek recourse in civil courts. Claims for severe emotional distress may not be recoverable. For example, when hospitals closed to visitors, healthcare workers became the only ones able to comfort dying patients while also facing PPE and supply shortages. Additionally, some healthcare workers decided to live away from their families for fear of infecting them.<sup>65</sup> These extraordinary circumstances likely have taken an emotional toll, but states vary on whether psychic trauma such as PTSD stemming from exposure to the virus would be considered an occupational disease and thus a compensable workers' compensation claim. In California, for instance, diagnosed psychiatric injuries are compensable even in the absence of a physical injury;<sup>66</sup> whereas, in Montana, "stress claim[s]" are not compensable even if they accompany a physical injury.<sup>67</sup> If not covered, workers' compensation would not bar the claim and the worker could pursue the claim in civil court. Furthermore, workers' compensation schemes typically do not cover an employer's intentional misconduct toward employees, so workers could bring those claims in court.<sup>68</sup> Third party vendors and independent contractors such as a cleaning crew also may not be covered by workers' compensation schemes and thus would be eligible to sue employers directly for unsafe conditions.

Other questions remain with regard to workers' compensation coverage. Understandably, very little is known about the long-term impact Covid-19 will have on the body, but some scientists are warning that the disease may cause lasting damage.<sup>69</sup> This raises important questions about the impact on workers' compensation, especially for states creating presumptions that a worker who contracts Covid-19 did so at work. If the employee later develops a disease linked to surviving Covid-19, will workers' compensation cover the claim?<sup>70</sup>

Apart from employer defenses to workers' compensation coverage, employers also have strong defenses to suits brought outside that administrative scheme. The theories of tort liability against employers will be based on a failure to take proper precautions. Possible theories include: 1) failure to properly screen employees; 2) failure to protect employees from other persons, both symptomatic and

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<sup>65</sup> Emma Grey Ellis, *How Health Care Workers Avoid Brining Covid-19 Home*, WIRED (Apr. 4, 2020, 8:00 AM), <https://www.wired.com/story/coronavirus-covid-19-health-care-workers-families/> [<https://perma.cc/HYL4-YLGK>] (describing how some healthcare workers "have moved into hotel rooms or sleep in their cars").

<sup>66</sup> CAL. LAB. CODE § 3208.3 (Deering 2019).

<sup>67</sup> MONT. CODE ANN. § 39-71-105 (2019).

<sup>68</sup> See LA. REV. STAT. ANN. § 23:1032 (2018); OR. REV. STAT. § 656.156(2) (2018).

<sup>69</sup> George Citroner, *What We Know About the Long-Term Effects of COVID-19*, HEALTHLINE (Apr. 21, 2020), <https://www.healthline.com/health-news/what-we-know-about-the-long-term-effects-of-covid-19> [<https://perma.cc/9PZ8-L5M8>].

<sup>70</sup> The same question arises with regard to coverage of long-term effects for liability shields for businesses.

asymptomatic; 3) failure to disclose to the workforce that an individual worker contracted the virus; 4) failure to sufficiently clean and sanitize the workplace; 5) failure to provide sufficient PPE; 6) failure to maintain a social distancing policy; 7) failure to allow telecommuting, for those workplaces that can accommodate it; and 8) failure to comply with government guidelines, both state and federal. These types of claims can be met by numerous defenses.

### *B. Compliance and Other Defenses*

A strong defense for employers will be compliance with governmental workplace regulations and recommendations. Several federal agencies have provided guidance to businesses in the pandemic. OSHA has posted recommendations for Covid-19 on its website and identified relevant pre-existing standards and regulations, including OSHA's PPE standards.<sup>71</sup> The CDC has also posted guidance on measures for employers to take in the workplace.<sup>72</sup> Although the guidelines allow businesses to show compliance, a stronger defense for businesses would come from following regulations, statutes, or standards.<sup>73</sup> But so far, these regulations or statutes have not been forthcoming.<sup>74</sup>

Other strong defenses to these claims include assumption of risk, comparative fault, and co-worker negligence. For example, businesses could argue under a comparative fault scheme damages should be reduced because of negligent behavior by the injured actor. In other words, it may argue that employees enhanced the risks of contracting the disease due to their own carelessness and failure to take personal responsibility for exposure. This duty of self-care arguably increases if an employee is in a high-risk category.

Calling the employee's behavior into question raises a host of other issues—in particular the knowing and voluntary assumption of the risk of exposure. This defense could be either for implied or express assumption of risk in the form of a liability waiver. As discussed in Part IV below, some employers and businesses are requiring their employees and patrons to sign these waivers, although the validity of the waiver will depend on several factors.<sup>75</sup> Implied assumption of risk poses another

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<sup>71</sup> *Guidance on Preparing Workplaces for COVID-19*, OSHA, <https://www.osha.gov/Publications/OSHA3990.pdf> [<https://perma.cc/GJ5D-45KZ>].

<sup>72</sup> *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, CTRS. FOR DISEASE CONTROL AND PREVENTION (May 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> [<https://perma.cc/YJ2J-WFEY>].

<sup>73</sup> If a defendant complied with a federal regulation, statute, or standard, the defendant could raise a preemption defense that could preclude a tort claim. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

<sup>74</sup> *See Examining Liability During the COVID-19 Pandemic*, S. Judiciary Comm., 116<sup>th</sup> Cong. 7–8 (2020) (statement of David C. Vladeck, Professor, Georgetown University Law Center) (urging the federal government and agencies to provide guidance to businesses).

<sup>75</sup> *See infra* notes 96–100 and accompanying text.

set of problems. On the one hand, employees could be charged with knowingly and voluntarily exposing themselves to other sources of the virus. On the other hand, it is arguable that employees do not voluntarily assume the risk in returning to a workplace that they consider unsafe with the threat of losing unemployment benefits if they fail to return to work.

### C. Open Questions

Demonstrating that an employee contracted Covid-19 at work may not fully resolve who is liable. If the employer is a building tenant, the employee may be able to seek compensation from the building owner by filing a premises liability claim. For example, the building owner would likely be responsible for the elevator and common areas, whereas the business tenant would be responsible for operations within the business. This may raise very specific questions of causation regarding where the employee contracted the virus.

Individual industries, such as the previously mentioned nursing home industry, have been lobbying for immunity protections. Another group pushing for immunity is universities. Universities present a unique set of circumstances. On the one hand, they are critical to educating healthcare and other workers and funding researchers. They offer an important, some would say critical, public good.<sup>76</sup> On the other hand, they do not provide life-saving services like health care providers or everyday necessities like grocery stores. They have alternative methods to deliver some of their services; they can offer the option of classes online so that students do not need to risk exposure. Universities have responded to the pandemic in different ways. Some have decided to use remote learning for all classes,<sup>77</sup> while others plan to reopen in the fall.<sup>78</sup> Still others are taking a hybrid approach.

Although not a traditional business, universities face the same potential lawsuits as other employers, as well as suits from their “patrons,” the students. Many universities are already facing lawsuits from students for tuition and fee reimbursements stemming from the move to remote learning in March;<sup>79</sup> however,

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<sup>76</sup> Some states have deemed universities an essential business for Covid-19 purposes. *E.g.*, Ariz. Exec. Order No. 2020-12 (Mar. 23, 2020), <https://azgovernor.gov/executive-orders>.

<sup>77</sup> *E.g.*, Daniel Uria, *Cal State Schools to Keep Campuses Closed for Fall Semester*, UPI (May 12, 2020), [https://www.upi.com/Top\\_News/US/2020/05/12/Cal-State-schools-to-keep-campuses-closed-for-fall-semester/7361589325441/](https://www.upi.com/Top_News/US/2020/05/12/Cal-State-schools-to-keep-campuses-closed-for-fall-semester/7361589325441/) [<https://perma.cc/3YPE-JNEL>].

<sup>78</sup> *E.g.*, Anemona Hartocollis & Dan Levin, *Notre Dame Plans to Reopen Its Campus in the Fall*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/notre-dame-reopening-coronavirus.html> [<https://perma.cc/E5S8-8HCE>].

<sup>79</sup> *E.g.*, Andrew Keshner, *At Least 100 Lawsuits Have Been Filed by Students Seeking College Refunds — And They Open Some Thorny Questions*, MARKETWATCH (May 22, 2020, 8:23 AM), <https://www.marketwatch.com/story/unprecedented-lawsuits-from-students-suing->



like other businesses, there does not appear to be an explosion of personal injury suits against universities. Lobbying groups for higher education have begun pushing Congress to grant liability immunity if campuses are open in the fall.<sup>80</sup> Some states, like North Carolina, have already granted immunity to certain businesses and educational facilities.<sup>81</sup>

Because of the highly infectious nature of Covid-19, consideration of the environment within university buildings may become crucial. As a hybrid between administering both open public and contained spaces, university buildings present significant redesign challenges to both classroom settings and student housing. Measures to promote social distancing, such as reducing class sizes and dormitory occupancy, as well as Plexiglas barriers and HVAC conditions may be important tools to combat the spread. The extent to which universities and other businesses that invite the public need to re-design buildings in order to meet the standard of care is an open question.<sup>82</sup> Nonetheless, universities recognize that they can only mitigate risks and that they may become a virus hotspot, given the 24/7 nature of their environment. As a contained environment, it may be inevitable that some students will contract the virus.<sup>83</sup>

The CDC has not set specific standards for reopening universities, although it has offered some guidelines on such areas as residence halls, class size, and testing availability. Tort law traditionally fills in the gap left by the lack of standards in an

colleges-amid-the-coronavirus-outbreak-raise-3-thorny-questions-for-higher-education-2020-05-21 [https://perma.cc/B52C-C4ZG].

<sup>80</sup> Danielle McLean, *Higher-Ed Lobbying Group, Eyeing an In-Person Fall, Asks Congress for Liability Shields*, CHRON. OF HIGHER EDUC. (May 28, 2020), <https://www.chronicle.com/article/Higher-Ed-Lobbying-Group/248878> [https://perma.cc/UM3M-AS89].

<sup>81</sup> S.B. 704, 2020 Leg., 2019–2020 Sess. (N.C. 2020).

<sup>82</sup> Eric K. Clemons, *COVID-19 on Campus: How Should Schools Be Redesigned?*, KNOWLEDGE@WHARTON (June 22, 2020), [https://knowledge.wharton.upenn.edu/article/how-should-universities-be-redesigned-in-the-wake-of-covid-19/?utm\\_source=The+Abstract&utm\\_campaign=d0ac61bc42-EMAIL\\_CAMPAIGN\\_LR\\_Abstract\\_June20&utm\\_medium=email&utm\\_term=0\\_9e1c242ede-d0ac61bc42-338850365](https://knowledge.wharton.upenn.edu/article/how-should-universities-be-redesigned-in-the-wake-of-covid-19/?utm_source=The+Abstract&utm_campaign=d0ac61bc42-EMAIL_CAMPAIGN_LR_Abstract_June20&utm_medium=email&utm_term=0_9e1c242ede-d0ac61bc42-338850365) [https://perma.cc/799D-BDEC] (“Redesigning elite academic institutions provides a concrete example of the most difficult design problem.”).

<sup>83</sup> One school, Middlebury College, has taken robust steps to minimize the spread among students. See Laurie L. Patton, *Initial Decisions about the Fall Semester*, MIDDLEBURY (June 22, 2020), <https://www.middlebury.edu/office/announcements/previous-announcements/initial-decisions-about-fall-semester> [https://perma.cc/8ZY7-UMEY] (requiring fourteen-day quarantine at home before returning to school; seven day on-campus quarantine; and after a negative Covid-19 test, remaining on the closed campus for the semester).

industry. Without tort law protections, irresponsible or hard-pressed colleges could ignore the broad guidelines and create a race to the bottom, given the financial pressures they face right now. And while the pandemic may have exposed higher education to a financial crisis, that problem will not be solved with tort immunity.

#### *D. Other Compensation Options*

Governments can protect employers from civil lawsuits in other ways, without enacting shield immunities. One way is to create a victim's compensation fund for essential workers. After the 9/11 terrorist attacks, Congress created the September 11<sup>th</sup> Victim Compensation Fund for individuals who developed an illness, were injured, or were killed as a result of the attacks or cleanup efforts.<sup>84</sup> Congress also created a compensation fund for individuals who suffer injury from childhood vaccinations.<sup>85</sup> Congress could create a similar Covid-19 claims fund, either federally funded or funded through a tax scheme. Currently, the proposed Pandemic Heroes Compensation Act would create a compensation fund for essential workers who fall sick or die from Covid-19.<sup>86</sup>

Another approach is to create a reinsurance pool, which has been used to protect certain high-risk industries. When nuclear power was developed, insurers were faced with potentially having to insure a disastrous accident leading to widespread contamination. In order to encourage development of the industry, market-wide insurance pools were created.<sup>87</sup> Like nuclear power, Covid-19 has the potential to create such substantial liability and cause insurance companies to exclude coverage for Covid-19 related claims. A reinsurance pool could help ensure that insurance would be extended to those claims.<sup>88</sup>

#### IV. LAWSUITS BY BUSINESS PATRONS

Businesses owe a duty to take reasonable measures to provide a safe environment for customers. This would generally require a business owner to evaluate whether a dangerous condition exists, take steps to reduce the danger, and warn of the danger.

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<sup>84</sup> Air Transportation Safety and System Stabilization Act, Publ. L. No. 107-42, § 403, 115 Stat. 230, 237 (2001).

<sup>85</sup> Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-1 to -34 (2006).

<sup>86</sup> Press Release, Reps. Maloney, Nadler, King and Sen. Duckworth Unveil Legislation to Create Compensation Fund for Essential Workers (May 14, 2020), <https://maloney.house.gov/media-center/press-releases/reps-maloney-nadler-king-and-sen-duckworth-unveil-legislation-to-create> [<https://perma.cc/MN2G-6QVU>].

<sup>87</sup> *The Insurance of Nuclear Pools and Associate Risks*, NUCLEAR RISK INSURERS LTD., <https://www.nuclearpools.com/about-us> [<https://perma.cc/63PH-686G>].

<sup>88</sup> See Timothy D. Lytton, Opinion, *Businesses That Reopen Unsafely Should be Subject to Liability*, REG. REV. (May 4, 2020), <https://www.thereview.org/2020/05/04/lytton-businesses-reopening-tort-liability/> [<https://perma.cc/S29Q-DU6S>] (explaining that liability insurers are able to leverage their power to encourage businesses to meet certain standards).

This may include requiring face coverings, conducting temperature checks, and providing sufficient ventilation. It may also include redesigning spaces open to the public, as mentioned above.<sup>89</sup>

Grocery stores and other essential businesses have already implemented many precautions to maintain reasonably safe premises for their patrons. Many require social distancing and post signs requiring customers to wear a mask. Some businesses clean shopping carts and have installed Plexiglas at checkout counters. Others have converted to curbside pick-up only. As non-essential businesses have reopened, they have implemented similar precautions.

Personal injury lawsuits by patrons have not yet materialized.<sup>90</sup> Because of the strong defenses available to business owners facing liability lawsuits, plaintiff lawyers do not have strong incentives to bring these cases. Business owners acting with reasonable care should not need the shields. Aside from being unnecessary, liability shields may have unintended consequences. They can protect the businesses that practice lower safety standards and give them a competitive edge over businesses that maintain a higher standard. In his testimony before Congress, Professor David C. Vladeck argued that immunity to help states re-open would be “counterproductive.”<sup>91</sup> Vladeck emphasized that liability protections only protect the “non-compliant” and warned that removing liability would leave consumers and employees feeling unsafe.<sup>92</sup>

Perhaps the strongest defense available to business owners from suits by patrons may be assumption of risk, either express or implied. This may bar, or at least reduce, recovery for business patrons who understand the dangers of contracting the virus and yet voluntarily accept them when they frequent the business.<sup>93</sup> Many businesses, such as gyms, require their patrons to sign an express waiver form acknowledging the risks and willingly undertaking them.<sup>94</sup> Even law students may be asked to waive

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<sup>89</sup> These changes can also be driven by the liability insurance industry because insurers can “sell[] insurance only to those businesses that implement appropriate risk-reduction measures, provid[e] premium discounts to businesses that take extra precautions, or exclude[e] coverage for high-risk activities such as crowded gatherings.” *Id.* The insurance market can help minimize the financial risks to businesses by incentivizing these kinds of changes. *Id.*

<sup>90</sup> *See supra* note 2.

<sup>91</sup> *Examining Liability During the COVID-19 Pandemic*, S. Judiciary Comm., 116th Cong. 1–3 (2020) (statement of David C. Vladeck, Professor, Georgetown University Law Center). Professor Vladeck also questions the constitutionality of Congress creating such widespread immunity. *Id.* at 14–20.

<sup>92</sup> *Id.* at 1, 5–6.

<sup>93</sup> S.B. 359, 2020 Leg., Reg. Sess. (Ga. 2020) (to be codified as O.C.G.A. § 51-16-3) (creating an assumption of risk presumption if a business places a written warning on a receipt or proof of purchase for entry or on a sign at a point of entry).

<sup>94</sup> *See, e.g.*, Kate Gibson, *COVID-19 Liability Waivers Now Part of Going to Hair Salons, Gyms, Theme Parks and More*, CBS NEWS (June 12, 2020, 9:10 AM),

their rights before taking the bar exam.<sup>95</sup> Whether these agreements are enforceable is uncertain and state-driven.

Waivers, which lie at the intersection of tort and contract law, ask the signee to assume the risk of engaging in the relevant activity. Courts generally uphold them for waiving negligence but not for claims of gross negligence, recklessness, or intentional torts.<sup>96</sup> Some states will not enforce waivers in the case of personal injury claims,<sup>97</sup> while others may emphasize freedom of contract principles and be more likely to enforce waivers.<sup>98</sup>

Even in states allowing personal injury waivers, several restrictions exist. The waiver usually must be clear and unambiguous,<sup>99</sup> and the signee needs to be able to understand what was agreed to. Significantly, courts do not enforce waivers if doing so would go against public policy.<sup>100</sup> This public policy exception will be important

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<https://www.cbsnews.com/news/covid-19-liability-waivers-now-part-of-going-to-hair-salons-gyms/> [<https://perma.cc/Q4VE-2K3B>].

<sup>95</sup> See Stephanie Francis Ward, *Two States Introduce COVID-19 Waivers for July Bar Exams*, ABA J. (June 2, 2020, 3:42 PM),

<https://www.abajournal.com/web/article/liability-waivers-may-not-mean-much-but-two-states-include-them-for-july-in-person-bar-exam> [<https://perma.cc/55HQ-BBJ3>].

<sup>96</sup> See, e.g., 15 CORBIN ON CONTRACTS §85.18 (2019) (“The general rule of exculpatory agreements is that a party may agree to exempt another party from tort liability if that tort liability results from ordinary negligence. Courts do not enforce [exculpatory] agreements . . . if the liability results from that party’s own gross negligence, recklessness, or intentional conduct.”).

<sup>97</sup> See LA. CIV. CODE ANN. art. 2004 (2018); *Hielt v. Lake Barcroft Cmty Ass’n*, 418 S.E.2d 894, 896 (Va. 1992) (“[P]rovisions for release from liability for personal injury which may be caused by future acts of negligence are prohibited ‘universally.’”).

<sup>98</sup> See, e.g., *Neighborhood Assistance Corp. of Am. v. Dixon*, 593 S.E.2d 717, 718 (Ga. Ct. App. 2004) (“It is the paramount public policy of this state that courts will not lightly interfere with the freedom of parties to contract. . . . Exculpatory clauses in Georgia are valid and binding. . . .”) (quoting *My Fair Lady v. Harris*, 364 S.E.2d 580, 581 (Ga. Ct. App. 1987)); *Sharon v. Newton*, 769 N.E.2d 738, 744 (Mass. 2002) (“Massachusetts law favors the enforcement of releases.”) (citing *Lee v. Allied Sports Assocs., Inc.* 208 N.E.2d 329, 332 (Mass. 1965)).

<sup>99</sup> See, e.g., *Potter v. National Handicapped Sports*, 849 F. Supp. 1407, 1409 (D. Colo. 1994) (examining “whether the intention of the parties is expressed in clear and unambiguous language” to determine the validity of an exculpatory contract) (citing *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981)).

<sup>100</sup> See, e.g., *Topp Copy Prods. v. Singletary*, 626 A.2d 98, 99 (Pa. 1993) (“[T]he [exculpatory] clause must not contravene public policy.”). Six factors are often considered when determining whether the public interest was adversely affected by a waiver: 1) the involved business is “generally thought suitable for public

in the context of Covid-19 waivers. It may argue in favor of distinguishing between waivers for essential and non-essential services. Thus, waivers for using grocery stores may be unenforceable while waivers for using gyms may be upheld. Even if the original waiver were upheld, if the signee infects a spouse or other third party, the waiver would not likely be enforceable against the non-signer. In that case, the third party would still be able to sue the negligent business.

Waivers in the employment context raise other validity questions. It may go against public policy for employers to ask employees to sign waivers if they feel they may lose their jobs if they refuse. At least two universities have asked student athletes (a quasi-employment context) to sign waivers in order to participate in workouts.<sup>101</sup> Although those schools indicated that failure to sign would not affect scholarships, other schools may not make that explicit. That may render the waiver unenforceable on public policy grounds.

Many of the arguments against granting liability immunity also apply to enforcing liability waivers. Proponents of waivers may point to freedom of contract (and a bargained for reduction in price for services or goods) and argue that waivers allow businesses to reopen without the threat of litigation looming over them. However, liability waivers may create disincentives to maintain a non-negligent standard of care. If waivers shield businesses from liability, businesses may decide to cut corners and risk the safety of consumers and employees. Furthermore, if businesses are meeting the standard of care, they will not be found to be negligent and should not need protection from waivers in the first place.

To combat these unintended consequences from public and private shields, one option would be to strengthen one of the most important defenses available to business, the compliance defense. States could make the defense absolute. This

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regulation,” 2) the party is “engaged in performing a service of great importance to the public” or of practical necessity for some 3) the “party holds himself out as willing to perform this service for any member of the public who seeks it,” 4) the “party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services,” 5) the party “makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence,” and 6) the “person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.” *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441, 445–46 (Cal. 1963).

<sup>101</sup> Tommy Beer, *University Requiring All Student-Athletes to Sign Coronavirus Liability Waiver Before Return to Campus*, FORBES (June 15, 2020, 4:34 PM), <https://www.forbes.com/sites/tommybeer/2020/06/15/university-requiring-all-student-athletes-to-sign-coronavirus-liability-waiver-before-return-to-campus/#2ae0c51b99ff> [<https://perma.cc/5XG3-K9RL>]; Heather Dinich, *Ohio State Football Players, Parents Asked to Sign Coronavirus Risk Waiver*, ESPN (June 14, 2020), [https://www.espn.com/college-football/story/\\_/id/29311945/ohio-state-football-players-parents-asked-sign-covid-19-risk-waiver](https://www.espn.com/college-football/story/_/id/29311945/ohio-state-football-players-parents-asked-sign-covid-19-risk-waiver) [<https://perma.cc/6PKK-ZXSH>].

assumes, however, that the standards—by OSHA and the CDC—are comprehensive and up-to-date. As Professor Vladeck argued, until consumers and employees feel protected, the economy will falter.<sup>102</sup> Instead, he argued that regulatory compliance would help businesses defend against tort suits without allowing bad actors to avoid liability.<sup>103</sup> Professor Vladeck encouraged federal agencies who “have left the playing field” to provide detailed guidance.<sup>104</sup> In order for businesses to rely on a strong compliance defense, the government must provide clear guidelines so that businesses wishing to take advantage of the defense are able to.

#### CONCLUSION

Tort liability is an important instrument to regulating health and safety. Accordingly, we need to examine closely the motivation to eliminate that benefit during the pandemic by offering businesses immunity from personal injury lawsuits. Tort liability poses little threat to businesses that act reasonably. Although they would surely prefer to be rid of lawsuits at the pleading stage, they have an excellent chance of successfully defeating personal injury claims in the Covid-19 context and so are not easy prey for plaintiff lawyers. To be found negligent, the business would have to be operating without such precautions as social distancing, gloves, masks and disinfecting measures, which is unlikely. Even if this were the case, causation would be very challenging for the plaintiff to prove. Employers have the added protection of workers’ compensation and strong defenses like regulatory compliance. Balanced against all of those existing liability protections in the law, immunity shields may not only be unnecessary, but they may be counterproductive. They signal to workers and patrons that they return to work or patronize the business at their own peril. Creating this anxiety is the opposite of the trust we want to instill to encourage the restart of our economy. We certainly do not want to encourage businesses to cut corners with impunity during the pandemic.

Shield proponents caution that, as businesses reopen—which is a social good—it is inevitable that they will see higher rates of infection among employees and patrons regardless of the precautions they take. But eliminating the risk of tort liability may make those health risks even greater by reducing incentives to meet safety standards and lowering accountability. Tort law offers a more nuanced approach by encouraging employers to act safely while minimizing their liability exposure if they do.<sup>105</sup>

Alternative measures should be considered as well. Strengthening the compliance defense through comprehensive regulation would add more certainty to businesses,

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<sup>102</sup> *Examining Liability During the COVID-19 Pandemic*, S. Judiciary Comm., 116th Cong. 1 (2020) (statement of David C. Vladeck, Professor, Georgetown University Law Center).

<sup>103</sup> *Id.* at 1–5.

<sup>104</sup> *Id.* at 7–8.

<sup>105</sup> Others have raised the potential question about the constitutionality of federal liability shields, given that tort law historically is in the state purview. *Id.* at 2, 14–20.

employees, and the public. Legislative solutions along the lines of the 9/11 Victim's Compensation Fund are another approach. Creating a government fund for essential workers harmed by the virus may be more efficient and ultimately more equitable, given the likelihood that inconsistent verdicts will occur across the various state jurisdictions. To avoid inconsistencies, we could consolidate all the Covid-19 personal injury litigation in one designated court, at least on the federal level. Finally, Congress could create a federally backed secondary insurance fund, such as created to protect the nuclear energy industry, to encourage primary insurance to cover Covid-19 personal injury claims.

The balance between economic and health concerns is critical in this context. Tort law can help optimize the right amount of safety to address both concerns.