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INSIGHT: Business Immunity Will Prevent Covid-19 Litigation Crisis



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Already reeling from the human toll and economic devastation wrought by the Covid-19 pandemic, American businesses could soon face a devastating aftershock: a wave of coronavirus litigation which will threaten to take down many businesses that managed to survive the first waves of the pandemic. This is a preventable situation that Congress must address now.

Americans and American businesses have demonstrated that they want to get back to work carefully and in accordance with best practices. Unfortunately, business owners are facing this challenge in an environment of extreme uncertainty and with few legal protections.

The recent release of federal guidelines for how businesses and employers should govern themselves at various stages of the crisis was an important first step. Nevertheless, American businesses will likely reopen with no identified vaccine and a well-funded plaintiffs' bar that will be seeking out claimants for all nature of lawsuits.

A Great Risk for Small, Large Businesses Alike To examine the impact of such litigation, consider the owner of a small suburban restaurant. After scraping by with takeout and delivery sales for months, she opens her dining room (three weeks after the governor allows it, just to be sure). She has carefully disinfected the counters, provided masks and gloves to staff, sacrificed valuable tables to expanded spacing, and abandoned cash transactions—all without raising prices in hopes of encouraging her customers to return. But one customer gets the virus and files suit, forcing her to defend her decision to reopen.

The legal fees for this uninsurable risk may well crush her already-suffering small business. And since

the customer does not really know where he got the disease, his lawyer will sue several businesses, multiplying the economic disruption throughout the community.

While this concern is put in sharp focus with the example of this single small business owner, these concerns apply similarly to larger businesses, which will have bigger targets on them. The only people who will truly benefit from this litigation pandemic are the lawyers: plaintiffs' attorneys who will be able to extract settlements and potentially collect judgments, and the army of defense attorneys who will be retained to defend the onslaught of cases.

Absent immediate action, the potential cost to the economy, and to the livelihoods of millions of Americans, will be enormous and long-lasting, and will prolong and exacerbate what already is sure to be a challenging recovery.

Implement Broad Safe Harbors Now As businesses prepare to reopen, the federal government should implement broad safe harbor protections now. Under such rules, companies that rely on and follow applicable government standards and guidance related to coronavirus exposure would be granted immunity from future claims for allegedly causing someone to contract Covid-19.

As the government learns more about the disease and how to best combat it, the rules would change, as well, and businesses would be expected to adjust accordingly. A business choosing to comply with these rules could publicly demonstrate its commitment to best-practice protections, enhancing its customers' confidence that they are in a safe place and giving those businesses a competitive advantage over the less diligent. And that's what we want—an approach that allows our economy to thrive while we discover and implement ever-better ways to keep us safe and defeat this disease.

This approach is far from revolutionary—it is already being used in this crisis, albeit to a far more limited extent. The 2005 Public Readiness and Emergency Preparedness Act (PREP Act) provides companies with immunity from liability for certain wrongful death and product liability claims related to countermeasures to Covid-19, but not for all claims.

Claims resulting from the use of respirators, for example, are covered by the Act, while those related to the use of recommended cleaning products, like hand sanitizers and soaps, are not. The recently passed CARES Act only extends liability protection to volunteer health-care providers—not to health-care providers and facilities generally.

Some states like New York have taken steps to limit this liability during the pandemic, so that health-care professionals will not have to face substantial litigation threats for their efforts to save lives during the pandemic, particularly where shortages in medical supplies result from a lack of government foresight.

Similar Measures in the Past The federal government has taken similar measures to protect businesses from widespread litigation following large-scale disasters in the past, including the Y2K Act, the 9/11 Victim Compensation Fund, and the SAFETY Act.

In each of these cases, legislatures have realized that rational businesses need protection to provide necessary services amid a crisis, particularly one where speed is important and knowledge is limited. That is precisely the situation facing the broader American

economy, and exactly why a wider application of safe harbor protection is needed now.

Of course, none of this can work without government leadership to define how we can return to work and school safely. Implementing safe harbor legislation in response to the current pandemic will require a joint effort and consistent approach at the federal and state levels. The FDA, CDC, OSHA, and state or local health departments all have a role to play to ensure that clear, medically sound guidelines are in place for businesses to follow as they prepare to reopen.

The government has the opportunity now to avoid the oncoming Covid-19 litigation crisis and the entirely preventable impact it will have on American society as we try to emerge from our homes and back into the public square. It should act immediately to do so.

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