

# CORONAVIRUS INFORMATION & UPDATES

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## COVID-19 Business Liability Considerations in Reopening the Economy

As governors across the country contemplate reopening their state economies, businesses may face potential liability if workers, or if customers and other visitors, contract COVID-19 while on business premises. Concern about a dramatic increase in COVID-19-related claims could inhibit businesses from reopening, stall economic recovery and further injure already weakened organizations. With these concerns in mind, industry groups, state and local leaders, members of Congress, and White House officials have raised the prospect of legislation and executive measures focused on limiting the liability of businesses for COVID-19-related claims.

Businesses face potential COVID-19-related liability exposure on several fronts. With respect to employees, workplace-acquired COVID-19 infections could result in workers' compensation or other liability claims. Actions taken by employers to limit the spread of COVID-19 in the workplace could also trigger claims or regulatory actions based on theories such as discrimination or other unlawful employment practices, invasion of privacy, and failure to comply with workplace safety requirements. Similarly, patrons could pursue a variety of common law tort and statutory claims against businesses should they contract COVID-19 and assert that it was acquired within a specific commercial establishment. The financial harm to businesses could be especially severe because many general liability insurance policies contain exclusions for liabilities related to infectious diseases. Although all successful actions would require some proof that the alleged injury or illness was caused by a violation of a duty of care (or, in the case of a workers' compensation claim, that the injury or illness was work-related), even weak legal claims may have "strike" value, be persuasive to juries, and could be expensive to defend.

This Alert presents several options to address potential COVID-19 liability exposure. The options discussed below include creation of a government COVID-19 claims fund or reinsurance pool, variations on some form of liability immunity for businesses and changes to state workers' compensation, tort, and personal protective equipment ("PPE") laws. These options reflect varied approaches to allocating legal and financial responsibility for potential COVID-19 liabilities among businesses, employees, patrons, insurers, and federal, state, and local governments. Each of these options will require lawmakers to balance the competing interests of reopening the economy as soon and as fully as possible with the resulting potential for a spike in the COVID-19 infection rate.

### Creation of a Claims Fund

One avenue for allocating the financial burden of COVID-19-related claims is to establish a government fund dedicated to covering the cost of these claims or reimbursing businesses for such claims. A public COVID-19 Claims Fund would shift the cost of liability to the government while serving the needs of businesses, employees, and patrons alike. The obvious drawbacks of this approach are the substantial amount of tax dollars that would be required to fund potential COVID-19-related claims against businesses, and the significant administrative burden and cost of operating a fund and adjudicating claims. This approach also would likely be complicated to implement legislatively and therefore difficult to stand up quickly.

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## Creation of a Reinsurance Fund

A similar reallocation of burdens would entail creating a COVID-19 Reinsurance Fund that would provide coverage for aggregate losses associated with COVID-19 claims against a business that (1) meet a specified dollar threshold and (2) are not otherwise covered by the business's insurance policies. This option would require the government to fund substantial losses, but would presumably be far less expensive than a full reimbursement claims fund. This option would leave some economic burden associated with COVID-19 claims to businesses and insurers, while protecting them against outsized, business-ending liabilities. However, a COVID-19 Reinsurance Fund would also present administrative burdens, costs, and legislative complexity similar to the creation of a COVID-19 Claims Fund, as discussed above.

## Business Immunity

To the extent that it is not plausible to impose on government the financial burden of liability from COVID-19 claims, legislatures and governors may consider providing businesses with full immunity for claims—except for ones based on willful misconduct or gross negligence—brought by workers or patrons relating to transmission of COVID-19. Full immunity for employers would instill confidence in the business community that reopening would not further jeopardize business operations due to increased litigation and claims. However, a full immunity solution cuts against the interests of workers and patrons who may be exposed to COVID-19 when working at or frequenting a business and who are harmed by a business's violation of its common law duties, and may create disincentives for businesses to implement rigorously all appropriate safety precautions. Ultimately, many costs of such an alternative may reside with federal, state, and local governments in the form of increased Medicaid expenditures, free care, and other social welfare protections for the victims of COVID-19 that has been acquired in a commercial setting.

To curb concerns that certain businesses may not take proper precautions under a blanket immunity regime, governments may consider providing businesses with conditional immunity. Such an approach would only cover businesses that meet specific operating standards. The standards could be general or industry-specific, and would be tied to proactive steps by businesses to administer “countermeasures” to COVID-19, including compliance with designated standards identified by federal or state authorities (*e.g.*, OSHA, CDC, etc.). The conditional immunity option would therefore provide complete immunity for compliant businesses, but provide a pathway for workers and patrons of businesses to pursue legal remedies for COVID-19 transmission where a business fails to comply with required standards.

Governments could further limit business liability by developing targeted immunity policies, which would provide immunity only to those businesses where employees and patrons necessarily face a heightened risk of contracting COVID-19, namely, health care providers. Several states across the country have already taken such steps, including New York, Massachusetts, Illinois and Arizona. These targeted protections insulate those businesses most likely to face COVID-related claims, but also run the risk of creating disincentives to take the maximum level of precautions. However, to alleviate such concerns, targeted immunity could be conditioned upon a business's adherence to safety and sanitation guidelines, and could carve out willful misconduct or gross negligence.

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## Changes to Workers' Compensation

In addition to directly limiting business liability, governments could expand the scope of state workers' compensation laws to include, explicitly, employee illnesses and injuries stemming from workplace exposure to COVID-19.<sup>1</sup> This approach would potentially benefit both employers and employees, by providing an administrative forum that is less costly and more predictable in outcomes, and that avoids litigation delays. Workers' compensation coverage would also relieve employees of having to prove employer negligence as a condition of obtaining wage replacement payments and medical benefits. The use of the workers' compensation system would benefit employers by removing the risk of excessive jury awards and relieving businesses from the expense and operational demands of litigation. Employers engaging in serious and willful misconduct, however, would be subject to special damages through the workers' compensation system (or to a loss of tort immunity), which would serve as a disincentive to such behavior. However, this option would shift financial responsibility for those claims to insurers, which may then pass on those costs to employers through insurance premium rate increases in the future (while shielding employers from immediate, business-threatening judgments).

## Tort Reform

Another potential solution is to modify existing laws to impose limitations on recovery for COVID-19 claims against businesses. Possible legislative approaches could include monetary caps on compensatory damages, caps on non-economic damages such as pain and suffering, elimination of punitive damages, or shifting of burdens of proof by creating presumptions in favor of a business if the business meets risk mitigation standards. This option could also include limitations on the applicability of certain types of tort claims in the COVID-19 context. This approach would maintain plaintiffs' access to the courts to resolve COVID-19-related claims, but would limit overall recoveries against businesses by capping damages and imposing more demanding liability standards.

## PPE Laws

Finally, the government could identify businesses and/or industries where use of certain types of PPE would be appropriate and mandate use of such PPE for workers and customers (*e.g.*, mandatory facemasks in restaurants, bars, etc.). In addition to—or as an alternative to—penalties for non-compliance, such clear standards around the use of PPE could provide straightforward defenses in a litigation context, or could be a required element of a business's protection against COVID-19-related liability.

## Conclusion

In determining how best to insulate businesses from liability upon reopening the economy, legislatures and governors must wrestle with allocating the legal and financial burden of COVID-19-related claims among businesses, employees, patrons, insurers, and federal, state, and local governments. While striking a balance between these competing interests will certainly be a difficult task, creating and publicizing a business liability plan prior to reopening the economy are imperative to mitigating market uncertainty and starting the long journey towards the country's economic recovery.

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<sup>1</sup> In Massachusetts, infectious disease claims are excluded from coverage under current law unless the nature of the employment is such that an employee's risk of contracting the disease is inherent in the employment. Similar exclusions may apply in many other states.