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Pandemic Liability Shield the Epicenter of Congressional Relief Negotiation

Amid stalling talks between Congressional leaders over the content of new Coronavirus relief and economic stimulus legislation, the issue of providing for temporary restrictions on pandemic related lawsuits has emerged as an intractable dispute separating Democrats, Republicans, and key constituencies in their respective coalitions.

The Safe to Work Act (S. 4317), introduced last week by Senator John Cornyn (R-TX) has opened a seemingly unbridgeable divide between Senate Republicans, who are insisting that liability relief be included in any comprehensive COVID-19 legislation, and House and Senate Democratic leaders who have offered blanket opposition to the measure.

The dispute pits large coalitions within the business community (including the US Chamber of Commerce), education, and health systems against politically powerful labor unions and the trial bar. The White House disclosed last week that it wouldn't insist on the inclusion of the legislation.

"The fight over the temporary liability shield may be the single largest barrier to a resolution of what most consider must-pass legislation," according to former Rep. Philip S. English of Arent Fox. "The intent of this change is to speed reopening of the American economy and vital institutions by providing relief for those who comply with public health guidelines. But the differences in the need and method of a liability safe harbor may be impossible to resolve as part of a process requiring significant consensus."

Mr. English predicted that the liability proposal "is probably impossible to pass as proposed, but also difficult to reshape to find common ground. The congressional consensus that prevailed early in the pandemic has dissipated, and negotiators face an impasse unless both sides dial back their demands and settle for more targeted assistance. Sweeping civil justice reform, even on a temporary basis under crisis conditions, is running into fierce ideological headwinds on the lip of a polarized election."

Last week, Senate Republicans introduced a bill, dubbed the "Safeguarding America's Frontline Employees to Offer Work Opportunities Required to Kickstart the Economy Act", or "Safe to Work Act". It contains temporary, but far-reaching, liability protection against claims based on alleged

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coronavirus exposure that are sure to encounter resistance from the Democrats.

Liability Limitations for Individuals and Entities Engaged in Businesses, Services, Activities, or Accommodations

Under the bill, individuals and entities engaged in businesses, services, or accommodations enjoy broad protections against liability for "coronavirus exposure action". That is, a civil action:

- brought by, or on behalf of, a person injured or at risk of being injured;
- against an individual or entity engaged in business, services, activities, or accommodations; and
- alleging that an actual, alleged, feared, or potential exposure to coronavirus caused the plaintiff's injury or risk.

The contested exposure must have occurred on or after December 19, 2019 and before October 1, 2024, or the date on which the HHS Secretary declares that the COVID-19 pandemic has ended, whichever is later.

The bill creates an exclusive federal remedy for those actions and it sets a high burden of proof for plaintiffs.

To prevail, they must demonstrate, by clear and convincing evidence, that:

- the defendant was not making reasonable efforts, considering all the circumstances, to comply with the applicable government standards and guidance in effect when the contested exposure occurred;
- the defendant engaged in gross negligence or willful misconduct that caused an actual exposure to coronavirus; and
- that exposure injured the plaintiff.

If the defendant was subject to conflicting government standards and guidance when the contested exposure occurred, the plaintiff must prove, by clear and convincing evidence, that the defendant did not make a reasonable effort, considering all the circumstances, to comply with any of them.

If, when the contested exposure occurred, the defendant maintained a written or published policy to mitigate coronavirus transmission that complied with the government standards and guidance to which the defendant was subject, the defendant is presumed to have made reasonable efforts under the circumstances to comply with the standards and guidance. Plaintiffs, though, may rebut the presumption by establishing that the defendant was not complying with its policy with the contested exposure occurred.

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A defendant without a written or published policy is not presumed to have failed to make reasonable efforts considering all the circumstances to comply with the applicable government standards and guidance.

A defendant may not be held liable in a coronavirus exposure action due to a third party's alleged misconduct unless (1) the defendant had a common law obligation to control the third party's conduct; or (2) the third party was the defendant's agent.

The bill's federal remedy generally preempts all other law related to recovery for personal injury due to actual, alleged, feared, or potential for exposure to coronavirus. That preemption, however, is inapposite to any law that affords greater protection to defendants in a coronavirus exposure action. Neither does the preemption apply to any workers' compensation scheme or program. Likewise, it does not affect the applicability of any law that creates a cause of action for intentional discrimination based on race, color, national origin, religion, sex (including pregnancy), disability, genetic information, or age.

A coronavirus exposure action must be commenced no later than one year after the actual, alleged, feared, or potential for exposure to coronavirus.

Liability Limitations for Health Care Providers

The bill creates an exclusive federal remedy for "coronavirus-related medical liability actions", defined as a civil action:

- brought by, or on behalf of, a person who suffered a personal injury;
- brought against a health care provider; and
- alleging any harm, damage, breach, or tort resulting in the personal injury alleged to have been caused by or related to a health care provider's act or omission when arranging for or providing coronavirus-related health care services.

The alleged misconduct must have occurred on or after December 19, 2019 and before October 1, 2024, or the date on which the HHS Secretary declares that the COVID-19 pandemic has ended, whichever is later.

The bill creates an exclusive federal remedy for those actions and sets a high burden of proof for plaintiffs.

To prevail, the plaintiff must demonstrate, by clear and convincing evidence:

- gross negligence by the health care provider; and
- that the alleged harm, damage, breach, or tort resulting in the plaintiff's personal injury was directly caused by the provider's alleged gross negligence or willful misconduct.

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A health care provider's acts, omissions, and decisions resulting from a resource or staff shortage are not considered willful misconduct or gross negligence.

The bill embraces a wide array of potential defendants; health care professionals, institutions, facilities, administrators, board members, and volunteers providing coronavirus-related health care services.

The bill's federal remedy generally preempts all other law related to recovery for personal injury due or related to a health care provider's act or omission when arranging for or providing coronavirus-related health care services. That preemption, however, does not apply to any law that affords greater protection to health care providers in those circumstances or otherwise affords greater protection to defendants in a coronavirus-related medical liability action than the bill provides.

Neither does the preemption affect the applicability of any law that creates a cause of action for intentional discrimination based on race, color, national origin, religion, sex (including pregnancy), disability, genetic information, or age.

A coronavirus-related medical liability action must be commenced no later than one year after the action accrued, unless the limitations period is tolled due to fraud, intentional concealment, or the presence of a foreign body, which has no therapeutic or diagnostic effect, in the person of the injured person.

Procedural Requirements

The complaint in any coronavirus-exposure action or coronavirus-related medical liability action (collectively, "coronavirus action") must plead with particularity each element of the plaintiff's claim.

Also, in a coronavirus exposure action, the complaint must identify all people who and places that the plaintiff visited and everyone who visited the plaintiff's residence within the 14-day period before the onset of the first symptoms that the coronavirus allegedly caused. The complaint also must plead with particularity each alleged act or omission that constitutes the defendant's gross negligence or willful misconduct.

A complaint seeking damages must specify the nature and amount of each element of damages and the factual basis for the damages calculation.

And, in claims in which the plaintiff may prevail only if the defendant acted with a particular state of mind, the complaint must identify facts that give rise to a strong inference that the defendant acted with the required state of mind.

Additionally, the plaintiff must file with the complaint:

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- an affidavit from physician or other qualified medical expert who did not treat the plaintiff, that explains the basis for the individual's belief that the plaintiff suffered the personal injury, harm, damage, breach, or tort that the complaint alleges; and
- certified medical records documenting the alleged personal injury, harm, damage, breach, or tort.

Limitations on Suits

Apportioning Liability

A defendant found liable in a coronavirus actions is only responsible for the portion of the judgment that corresponds with the defendant's proportionate responsibility, determined as a percentage of the total fault of all individuals and entities, including the plaintiff, who caused or contributed to the plaintiff's total loss.

A defendant's liability is joint and several, however, if the defendant intended to injure the plaintiff or committed fraud.

Damages

In any coronavirus action, compensatory damages generally are limited to the plaintiff's economic loss. The court, however, may award damages for noneconomic losses if the defendant's willful conduct caused the plaintiff's personal injury, harm, damage, breach, or tort.

Punitive damages also are available if the defendant's willful misconduct caused the plaintiff's injury. Punitive damages, however, may not exceed the plaintiff's compensatory damages award.

The plaintiff's monetary damages award must be reduced by the amount of compensation that the plaintiff received from other sources, such as insurance companies or government payments, for the alleged harm.

Demand Letters

Anyone who transmits or causes another to transmit a demand letter in exchange for settling, releasing, waiving, or otherwise not pursuing a claim that is, or could be, brought as part of a coronavirus action is subject to liability, if the underlying claim is meritless. Plaintiffs may recover compensatory damages. Also, they may recover punitive damages, if the defendant knew that the alleged claim was meritless or was reckless regarding its merits. A prevailing plaintiff also may recover reasonable attorneys' fees.

When the US Attorney General has reasonable cause to believe that a person or group is engaged in a pattern or practice of running afoul the

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demand letter provision, the Attorney General may assess a civil penalty, of up to $50,000 per transmitted demand, against the respondent. Those penalties must be equitably distributed against the people aggrieved by the contested pattern or practice.

Labor and Employment Law Implications

In any action, proceeding, or investigation resulting from or related to an actual, alleged, feared, or potential for exposure to coronavirus, or a change in working conditions resulting from a law, rule, declaration, or order related to coronavirus, an employer may not be liable under OSHA, the FLSA, the ADEA, WARN, Title VII, Title II of GINA, or Title I of the ADA, if the employer:

- acted in reliance on, and was generally following, applicable government standards and guidance;
- knew of its obligations under the relevant provision; and
- attempted to satisfy those obligations by:
  - exploring options to comply with those obligations and applicable government standards and guidance (such as through the use of virtual training or remote communications strategies);
  - implementing interim alternative protections and procedures; or
  - following guidance issued by the relevant agency with jurisdiction regarding any exemptions from such obligations.

Place of Public Accommodation Law Implications

Under the bill, during any public health emergency, no person who owns, leases (or leases to), or operates a place of public accommodation shall be liable under the ADA or the Civil Rights Act of 1964 for any action or measure taken regarding coronavirus and that place of public accommodation, if the person:

- has determined that the significant risk of substantial harm to public health or health of employees cannot be reduced or eliminated by reasonably modifying policies, practices, or procedures, or the provision of an auxiliary aid or service; or
- has offered such a reasonable modification or auxiliary aid or service but such offer has been rejected by the individual protected by covered law.

Likewise, no person who owns, leases (or leases to), or operates a place of public accommodation shall be required to waive any measure, requirement, or recommendation that has been adopted in accordance with an applicable governmental requirement or recommendation regarding coronavirus, in order to offer such a reasonable modification or auxiliary aids and services.

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Liability for Conducting Workplace Testing

Employers, and others who hire, or contract with other individuals to provide service, that test for coronavirus at the workplace may be not held liable for any action or personal injury directly resulting from the testing, except for personal injuries resulting from gross negligence or intentional misconduct.

Joint Employment and Independent Contracting

The bill states that it shall not constitute evidence of a joint employment relationship or an employment relationship for any employer to provide or require of another employer or independent contractor:

- coronavirus policies, procedures, or training;
- personal protective equipment or training;
- cleaning or disinfecting services or the means for such cleaning or disinfecting;
- workplace testing for coronavirus; or
- temporary assistance due to coronavirus, including financial assistance or other health and safety benefits.

WARN Act Exception

The bill creates an exception to the WARN Act's notice requirement for employment losses that the result from the COVID-19 pandemic.