

SAFE TO WORK Act Summary
August 1, 2020

Section 2 – Findings and Purposes

- The bill is intended to lessen the burdens on interstate commerce by discouraging insubstantial lawsuits relating to COVID-19 while preserving the ability of individuals and businesses that have suffered real injury to obtain complete relief.
- Congress has the power to regulate interstate commerce and has the duty to act when interstate commerce is threatened and damaged. Congress can deploy its power over interstate commerce to promote a prudent reopening of businesses & other organizations (including colleges & universities).
- Congress must safeguard its investment of taxpayer dollars under the CARES Act and other coronavirus legislation, including by preventing the diversion of such funds to cover the costs of litigation.
- There is a risk of a tidal wave of meritless exposure lawsuits that poses a substantial risk to interstate commerce. And such risk isn't purely local – it's necessarily national in scale. A patchwork of local & state rules governing liability creates tremendous unpredictability for everyone participating in interstate commerce. The aggregation of each individual potential liability risk poses a substantial & unprecedented threat to interstate commerce.
- Congress has the authority to determine the jurisdiction of the courts of the U.S., to set standards for causes of action they can hear, and to establish the rules by which those causes of action should proceed. But such rules must be temporary & carefully tailored.

Section 121 – Federal Cause of Action (re Liability Limitations for Individuals and Entities Engaged in Businesses, Services, Activities, or Accommodations)

- Creates a federal cause of action for coronavirus exposure claims that is the exclusive remedy for all claims against a defendant for personal injury caused by an actual, alleged, feared or potential exposure to coronavirus.
- This cause of action covers all alleged injuries that arise from conduct taking between December 1, 2019 and the later of either the end of the coronavirus emergency declaration or October 1, 2024. It governs all cases, including those pending on the date of enactment.
- Sets a one-year statute of limitations.

- The cause of action governs any covered claim against almost any defendant, including colleges and universities and other nonprofit entities, as long as those defendants are engaging in conduct subject to Congress’s regulation authority under the Interstate and Foreign Commerce Clauses.
- Preempts state laws that impose liability for coronavirus exposure *except for* state laws that impose stronger liability limitations. In other words, the statute imposes a floor on liability, but makes clear that states are free to further limit liability for coronavirus exposure.
- Does not preempt or interfere with workers’ compensation schemes, government enforcement actions, or claims of intentional discrimination on the basis of race, color, national origin, religion, sex (including pregnancy, disability, genetic info, or age).
- Does not abrogate state sovereign immunity.

Section 122 – Requirements for Liability & Safe Harbor

- A defendant is not liable for actual, alleged, feared, or potential for exposure to coronavirus unless the *plaintiff* proves by *clear and convincing evidence* (a heightened burden of proof) that the defendant:
 - *Was not making reasonable efforts in light of all the circumstances* to comply with the applicable government standards & guidance in effect at the time of the claimed exposure;
 - Engaged in *gross negligence* or *willful misconduct that caused an actual exposure to coronavirus*; and
 - The *actual exposure caused the personal injury* to the plaintiff.
- If the defendant was not subject to mandatory standards (as defined in the bill), the defendant can claim the benefit of the safe harbor as long as it followed some set of applicable public health guidelines. If multiple sets of applicable mandatory guidelines conflict, compliance with one set will satisfy the safe harbor.
- A defendant’s change to its policy, practice, or procedure before or after the exposure will not be considered evidence of liability under the Act.

Section 141 – Federal Cause of Action (re Health Care Providers)

- Creates an exclusive federal cause of action for coronavirus-related medical liability actions.
- Covers all alleged injuries that arise from conduct taking place between December 1, 2019 and the later of either the end of the coronavirus emergency declaration or October 1, 2024. It governs all cases, including those pending on the date of enactment.
- Sets a one-year statute of limitations.
- Applies to health care providers, including doctors, nurses, facilities, administrators, and volunteers.
- As with coronavirus exposure actions, preempts all state laws that impose liability on broader grounds *except for* state laws that impose further liability limitations.
- Does not preempt the Public Readiness and Emergency Preparedness (PREP) Act, government enforcement actions, claims of intentional discrimination, or extant federal laws governing vaccine injuries.
- Does not preempt or interfere with workers' compensation schemes, government enforcement actions, or claims of intentional discrimination on the basis of race, color, national origin, religion, sex (including pregnancy, disability, genetic info, or age).
- Does not abrogate state sovereign immunity.
- A health care provider defendant will not be liable in a coronavirus-related medical liability action unless the *plaintiff* proves by *clear and convincing evidence*:
 - Gross negligence or willful misconduct by the health care provider; and
 - That the alleged harm, damage, breach, or tort resulting in the personal injury was directly caused by the alleged gross negligence or willful misconduct.
- Omissions or decisions resulting for a resource or staffing shortage will not be considered willful misconduct or gross negligence.
- [NB: the definition of "coronavirus-related health care services" includes services provided by a health care provider that relate to "the care of any individual who is admitted to, presents to, receives services from, or resides at, a health care provider *for any purpose during the period of a Federal emergency declaration concerning coronavirus, if such provider's decisions or activities with respect to such individual are impacted as a result of coronavirus.*" This definition, when considered in conjunction with the definition of "coronavirus-related medical liability action" suggests that medical

liability claims relating to non-COVID-19 treatments affected by the pandemic (e.g., delayed or canceled non-coronavirus surgeries) may be covered by the safe harbor.]

Section 161 – Jurisdiction

- Gives federal district courts *concurrent original jurisdiction* of any coronavirus-related action, meaning that plaintiffs can file coronavirus-related lawsuits in either federal or state court and defendants in state court can “remove” their cases to federal court.

Section 162 – Limitations on Suit

- Forecloses joint and several liability (except in cases of fraud or intentional injury) and instead requires defendants to pay their proportionate share of damages owed to a plaintiff.
- Limits compensatory damages to economic losses and prohibits punitive damages, except in cases involving intentional misconduct. Monetary damages will be reduced by the amount of compensation the plaintiff received from another source, such as insurance.
- Preempts state laws that permit liability on broader grounds, or authorize higher damages, than those contained in the bill. *Does not* preempt or supersede state laws that provide *greater* limitations on the liability of a defendant, on joint and several liability, and/or on the damages that can be recovered from a defendant.

Section 163 – Procedures for Suit in District Courts

- For any coronavirus-related action filed in or removed to a district court, the plaintiff must “plead with particularity” (i.e., provide a who, what, where, and when of the case), including:
 - Each element of the plaintiff’s claim;
 - All places and persons visited by the person on whose behalf the complaint was filed – and all people who visited that person’s residence during the 14-day period before the onset of the first symptoms allegedly caused by coronavirus; and
 - Each alleged act or omissions constituting gross negligence or willful misconduct that resulted in personal injury.
- For any action in which monetary damages are requested, the plaintiff must provide separate statements concerning the nature and amount of damages sought.

- The plaintiff must verify – by affidavit under oath – that the pleading is true to the plaintiff’s knowledge.
- The plaintiff must file with the complaint an affidavit by a physician or other qualified medical expert (who did not treat the plaintiff) that explains the basis for the physician’s belief that the plaintiff suffered the personal injury alleged in the complaint. The plaintiff must also file certified medical records documenting the alleged personal injury.
- The bill limits discovery (the formal process of exchanging information between the parties about the witness and evidence to be presented at trial) in various ways.
- Sets out certain requirements for and limitations on class actions and multidistrict litigation.

Section 164 – Demand Letters; Cause of Action

- Creates a cause of action for recovery of compensatory and punitive damages and attorney’s costs and fees for meritless demand letters (i.e., demands for compensation in exchange for settling, waiving, or otherwise not pursuing legal claims). Gives the Attorney General authority to enforce these provisions through a civil action, which can assess a civil penalty of up to \$50,000 per transmitted demand letter.

Section 181 – Limitation on Violations Under Specific (Labor & Employment) Laws

- Protects employers from liability under federal labor and employment laws, including the Occupational Safety and Health Act (OSHA); the Fair Labor Standards Act (FLSA); the Age Discrimination in Employment Act (ADEA); the Worker Adjustment and Retraining Notification (WARN) Act; Title VII of the Civil Rights Act of 1964; Title II of the Genetic Information Nondiscrimination Act (GINA); and Title I of the Americans with Disabilities Act (ADA), for actions taken to comply with coronavirus-related public-health guidance and regulations.
- Protects businesses & employers from liability under the ADA and Civil Rights Act of 1964 when they cannot offer requested accommodations because they would pose a serious risk to public health.

Section 182 – Liability for Conducting Testing at Workplace

- Forecloses lawsuits for injuries caused by workplace coronavirus testing unless the injuries were caused by gross negligence or intentional misconduct of the employment or other person.

Section 183 – Joint Employment and Independent Contracting

- Provides that offering coronavirus-related assistance to an independent contractor or to the employee of another employer does not create an employment relationship between the person who provided the assistance and the person who received it.

Section 184 – Exclusion of Certain (Worker Adjustment and Retraining Act) Notification Requirements as a Result of the COVID-19 Public Health

- Creates an exception to employer notification laws that normally require a notice period for employment decisions made due to the coronavirus emergency.