



December 3, 2020

Dear Senator or Representative:

We understand that Congress is considering providing a “liability shield” to protect certain businesses from lawsuits alleging that their negligent operations caused customers or employees to be infected with COVID-19. The Center for Science in the Public Interest¹ writes to urge Congress to reject this call for COVID-19 legal immunity, which is troublingly being proposed in the context of legislation that apparently also lacks critical and sorely needed protections for workers.

Both the permanent version of a liability shield proposed in the Safe to Work Act² and the most recent iteration billed as a compromise or a temporary measure³ suffer from the same fatal flaws. First, they incentivize harmful conduct. A liability shield in any form would decimate incentives for businesses to take reasonable steps to reduce infections: it thus poses a substantial risk to public health and is counterproductive to keeping essential businesses operating. Second, it deprives people of redress for negligent conduct. Last, it is unnecessary. The law already adequately shelters businesses that take reasonable precautions to protect employees and the public from contracting COVID-19.

Importantly, existing law already shields companies from non-meritorious lawsuits. State tort law already provides companies with sufficient legal protection and takes into account the context in which any potentially tortious act occurs. To bring a successful claim, any plaintiff would need to establish that a company was negligent, which, according to the Second Restatement of Torts, takes into account the magnitude of risk, the importance of the companies’ operations, industry customs, regulatory guidance, information gaps, and the existence of an emergency.⁴ Since our country’s founding, courts and juries have properly made exactly this sort of fact-specific determination.⁵

In addition, other existing legal structures already limit companies’ exposure to liability—including targeted coronavirus immunity in numerous states, worker’s compensation coverage, damage caps, federal immunity provided to vaccine manufacturers, and liability insurance.⁶ Companies that follow administrative regulations and guidance, adopt industry best practices, and take reasonable precautions will have better outcomes and considerable legal protection.⁷ But a liability shield improperly protects companies that fail to take such reasonable measures, and would deprive victims of the fact-finding tools to ferret out bad actors and seek reasonable compensation for losses.

We value and fully support the efforts of businesses to provide Americans with critical products and services during this health crisis. However, businesses must not sacrifice reasonable safety measures. Unsafe operations have already resulted in business closures and the further

December 3, 2020

spread of COVID-19, which puts workers' and the public's health and safety at risk, threatens supply chains, harms our economy, and further burdens the health care system. Legal accountability provides an essential incentive for businesses to take reasonable measures.

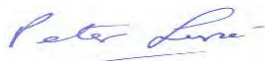
We all need grocery stores, food supply chains, and nursing homes to provide essential services and remain in business. But if grocery stores fail to follow reasonable protective measures, such as requiring social distancing, providing protective gear for their employees, requiring customers to wear masks, and requiring employees to stay home when sick,⁸ employees and customers will get sick,⁹ which will result in the overburdening of our health care system, greater loss of life, and the inability of grocery stores to provide essential services. Far from a theoretical risk, the United Food and Commercial Workers International Union reports that at least 109 grocery workers have died from COVID-19,¹⁰ and a recent study found that 20 percent of grocery workers in one Boston store were positive for COVID-19.¹¹

Nowhere are these issues clearer than in the meatpacking industry where the failure to follow acceptable practices resulted in numerous plant closures and the deaths of at least 254 workers.¹² In one appalling example, the family of a Tyson employee who died of COVID-19 alleges that the facility's managers wagered on how many employees would get COVID-19.¹³ That facility had more than 1,000 employees test positive for COVID-19 in May.¹⁴ A liability shield would gut any incentive these companies have to adequately protect their workforce. A more effective way to keep these plants operating is to implement necessary safety measures, such as requiring the Occupational Health and Safety Administration (OSHA) to issue an Emergency Temporary Standard.¹⁵

Finally, the risks in nursing homes also show why a liability shield is poor policy and would have negative effects on human health and safety. At least 101,000 COVID-19 deaths have been linked to nursing homes.¹⁶ Although the Centers for Medicare & Medicaid Services (CMS) has reported violations in about 3,500 nursing homes since the beginning of the pandemic, CMS has rarely levied significant penalties.¹⁷ For example, a facility with 15 COVID-19 deaths was fined only \$3,250 for failing to ensure staff wore masks.¹⁸ Without accountability, nursing homes will undoubtedly fail to improve their handling of patients.

Indeed, it is the failure to take reasonable measures to protect employees and the public that has led, and will continue to lead, essential businesses to close¹⁹ and has resulted in further community spread of COVID-19.²⁰ That is the true threat to business operations and to our safe economic recovery. We strongly oppose any legislation to immunize businesses that fail to operate in a reasonably safe manner during the COVID-19 pandemic.

Sincerely,



Peter Lurie, M.P.H., M.D.
President and Executive Director



Laura MacCleery
Policy Director

December 3, 2020

Notes

¹ The Center for Science in the Public Interest is a nonprofit organization that advocates for and educates consumers on issues of food safety, nutrition, transparent advertising, and health. We have been actively engaged during this pandemic, supporting food workers, food security, safe food, and reliable food supply chains, and calling out unproven treatments and opportunistic fraudulent schemes.

² *Cornyn Measure Will Protect Health Care Providers, Schools, Charities, and Small Businesses from Frivolous Litigation* (July 27, 2020), <https://bit.ly/37q9xt6>.

³ *Romney, Colleagues Announce Targeted COVID-19 Emergency Relief Framework* (Dec. 1, 2020), <https://bit.ly/2Vv9sP0>.

⁴ Restatement (Second) of Torts, §§ 281, 282, 283, 285, 292, 293, 295A, 296.

⁵ There are other significant impediments to bringing a successful tort action. For example, it will be prohibitively difficult for most individuals to prove that they contracted an illness at a specific location and that they would not have caught the illness had the business taken additional precautions. *Id.* §§ 430–431.

⁶ Paul Dowdell, *Immunity from Liability in the Age of COVID-19: A New Reality for Trial Lawyers?*, Am. Bar. Ass'n (Aug. 31, 2020), <https://bit.ly/3obhZCY> (“As of September 1, 2020, more than a dozen states . . . have passed [liability shield] legislation of their own.”); Russell Gold & Leslie Scism, *States Aim to Expand Workers’ Compensation for Covid-19*, WSJ (April 27, 2020), <https://on.wsj.com/2yWotkP>; *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, Center for Justice and Democracy (June 20, 2019), <https://bit.ly/3f9Em8q>; 42 U.S.C. § 300aa-22.

⁷ For example, the CDC and OSHA issued joint guidance in April for meat processing facilities with recommendations on how to control the spread of COVID-19. The Department of Labor and OSHA issued a related statement saying that “courts often consider compliance with OSHA standards and guidance as evidence in an employer’s favor in litigation” and that they would consider supporting a company in litigation that has “demonstrated good faith attempts to comply with the [guidance] and is sued for alleged workplace exposures.” Kate O’Scannlain & Loren Sweatt, *Statement of Enforcement Policy Regarding Meat and Poultry Processing Facilities*, Dep’t of Labor & OSHA (April 28, 2020), <https://bit.ly/2zCgdH6>.

⁸ The Families First Coronavirus Response Act only required companies with fewer than 500 employees to provide paid leave, which excludes large grocery chains. CSPI has called on Congress to expand the paid sick leave benefits to employers with over 500 employees. *See National Poll: Grocery Shoppers Want Staff to Wear Masks, Have Access to Paid Sick Leave*, CSPI (April 7, 2020), <https://bit.ly/2Yf4zMz>. According to a national survey commissioned by CSPI, 95 percent of Americans feel sick leave benefits are important or very important for preventing the spread of COVID-19. *Id.*

⁹ Kate Gibson & Irina Ivanova, *Grocery Store Workers Fear Getting Sick as Coronavirus Cases Continue to Climb*, CBS News (Nov. 24, 2020), <https://cbsn.ws/2VuwsnE>; Anna North, “*I did not sign up for the military. I signed up for Walmart.*,” VOX (April 23, 2020), <https://bit.ly/3bGRQWZ>; Quentin Fottrell, “*Your Boss Is Playing God’: My Grocery Store Banned Face Masks for Staff. I Don’t Want to Contract Coronavirus. How Can I Stay Safe?*,” MarketWatch (April 6, 2020), <https://on.mktw.net/2KIy01H>.

¹⁰ *America’s Largest Food & Retail Union Calls on CDC for COVID-19 Vaccine Early Access for Essential Workers in Grocery, Meatpacking, and Food Processing on Frontlines of Pandemic as Infections Skyrocket*, UFCW (Dec. 1, 2020), <https://bit.ly/33A69L5>.

¹¹ Fan-Yun Lan *et al.*, *Association between SARS-CoV-2 Infection, Exposure Risk and Mental Health Among a Cohort of Essential Retail Workers in the USA*, 0 J. Environmental & Occupational Medicine 1 (Oct. 30, 2020), <https://bit.ly/2I4f7IY>.

¹² Leah Douglas, *Mapping Covid-19 Outbreaks in the Food System*, Food & Environment Reporting Network (updated Dec. 1, 2020), <https://bit.ly/2Vlu7Fk>.

¹³ Katie Shepherd, *Tyson Foods Managers Had a ‘Winner-Take-All’ Bet on How Many Workers Would Get Covid-19, Lawsuit Alleges*, Washington Post (Nov. 19, 2020), <https://wapo.st/2JDXTTe>.

¹⁴ *Id.*

¹⁵ Committee on Education & Labor, *Heroes Act (H.R. 6800): Worker Support and Safety Provisions* (May. 12, 2020), <https://bit.ly/3mCeN32>.

¹⁶ *More Than 100,000 U.S. Coronavirus Deaths Are Linked to Nursing Home*, N.Y. Times (Updated Nov. 27, 2020), <https://nyti.ms/3fVWxz6>.

¹⁷ Will Englund & Joel Jacobs, *As Pandemic Raged and Thousands Died, Government Regulators Cleared Most Nursing Homes of Infection-Control Violations*, Washington Post (Oct. 29, 2020), <https://wapo.st/3g0SKAx>.

¹⁸ *Id.*

¹⁹ Taylor Telford & Kimberly Kindy, *As they Rushed To Maintain U.S. Meat Supply, Big Processors Saw Plants Become Covid-19 Hot Spots, Worker Illnesses Spike*, Washington Post (April 25, 2020), <https://wapo.st/3g7RRX6>.

²⁰ Caitlin Dickerson & Miriam Jordan, *South Dakota Meat Plant Is Now Country’s Biggest Coronavirus Hot Spot*, NY Times (April 15, 2020), <https://nyti.ms/2yNDZjc>.