

COVID-19: BACK TO BUSINESS: CONGRESS CONSIDERS LIABILITY PROTECTIONS AND SAFETY REGULATIONS FOR EMPLOYERS, HEALTH CARE WORKERS

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By: Pamela J. Garvie, Karishma Shah Page, Steven R. Valentine, Andrew P. Francisco

On May 12, the Senate Judiciary Committee held a hearing to examine the issue of whether the next round of coronavirus (COVID-19) relief legislation should include limits on employees and consumers' ability to sue health care workers, employers, and other businesses for coronavirus-related injuries. The witnesses who testified included members of the business, tourism, education, and legal communities as well as service and employee advocacy groups. The Committee debated whether to grant employers temporary "safe harbor" protections from certain litigation that could bankrupt vulnerable businesses and whether such blanket protections for businesses, which Senate Majority Leader Mitch McConnell (R-KY) has referred to as a "red line" for Republicans on the next round of coronavirus relief legislation, would jeopardize workers' rights. Both Republican and Democratic members agreed that the federal government should protect workers and the public by establishing enforceable, industry-specific regulations designed to stop the spread of COVID-19; however, Republican members maintained that liability protection is also required to alleviate businesses' litigation concerns. Accordingly, we expect Senator Lindsey Graham (R-SC), chair of the Judiciary Committee, Senator John Cornyn (R-TX), and other Republican members to work with Leader McConnell to fashion an employer liability protection bill that is limited in time and scope, with clear exceptions for bad actors.

COVID-related liability is increasingly one of the [most important issues facing employers across the country](#), and K&L Gates is engaged in assisting our clients to think through and understand potential business implications as companies begin to navigate the path to recovery.

TESTIMONY

The Committee heard testimony from six witnesses (links to their written testimony are included):

- Kevin Smartt, CEO of Kwik Chek Convenience Stores, Inc., who testified on behalf of the National Association of Convenience Stores ([testimony](#)).
- Anthony "Marc" Perrone, President of the United Food and Commercial Workers International Union (UFCW), which offers resources, services, and members-only benefits to food, health care, public service, meat packing, poultry, and other food processing industries ([testimony](#)).

- Rebecca Dixon, the executive director of the National Employment Law Project, a nonprofit organization that seeks to strengthen legal protections and support for low-wage workers and the unemployed ([testimony](#)).
- Leroy Tyner, Jr., general counsel of Texas Christian University, who testified at the request of the American Council on Education ([testimony](#)).
- David Vladeck, professor of law at Georgetown University and former Director of the Federal Trade Commission's Bureau of Consumer Protection ([testimony](#)).
- Helen Hill, CEO of Explore Charleston, which represents 850 tourism businesses, 40,000 hospitality workers, and nine municipal governments across South Carolina ([testimony](#)).

KEY ISSUES DISCUSSED

The hearing focused on the two approaches that government takes to control activities that create risks of harm to others: liability in tort and the regulation of safety. As Professor Vladeck noted, tort liability works indirectly, through the deterrent effect of litigation brought after the harm occurs. Standards and other types of safety regulation, on the other hand, modify behavior immediately through requirements imposed independent of whether harm occurs. Much of the hearing focused on the interplay between the two approaches.

Enforceable Safety Standards

Members from both parties joined all six witnesses in lamenting the fact that neither the Occupational Safety and Health Administration (OSHA) nor the Centers for Disease Control and Prevention (CDC) have in place enforceable standards that detail how to protect workers and consumers, thereby leaving employers to choose guidelines from among often-conflicting federal, state, and local authorities. Senator Amy Klobuchar (D-MN), citing the CDC's prior guidance directing people not to wear facemasks, noted that even federal guidelines have been inconsistent, while Chairman Graham stated that the "sooner that we can come up with an OSHA process, the better off we'll be."

For examples of what such guidance should look like, members turned to Mr. Smartt from Kwik Chek Convenience Stores, who in recent weeks has implemented numerous safety protocols for his 47 retail operations, including third-party, medical-grade cleaning and sanitation and company-wide best practices training on how to properly use personal protective equipment, among other topics. UFCW's Mr. Perrone stressed that federal guidelines must apply uniformly across the country.

Senator Diane Feinstein (D-CA) emphasized that, "under state tort laws, a business that acts reasonably and follows workplace safety standards has a defense against liability, and this is a powerful incentive for businesses to proactively work to reduce workplace harm. And that is why it's critical for the federal government to issue workplace standards."

Liability Protection

In addition to enforceable standards, Republican members asserted that Congress should enact a limited form of liability protection for businesses that comply with federally mandated safety standards. Such protections would not shield employers from claims of gross negligence and reckless or intentional misconduct, according to Chairman Graham. The chairman added that he is "not trying to replace the tort system," and is "not going to

preempt all state laws,” but rather is endeavoring “to define limited liability protection in time and scope to deal with a COVID-related reopening of the country and to do so without rewarding bad actors. That’s the challenge.”

Senators Mazie Hirono (D-HI) and Kamala Harris (D-CA) emphasized Ms. Dixon's testimony that liability protection would have a disproportionate effect on minorities.

Other Democratic members, supported by testimony from Professor Vladeck, responded that any liability protection effectively would shield employers from all liability, because the line separating unreasonable or negligent misconduct and gross misconduct turns on the wrongdoer's state-of-mind, which is a factual question not resolved prior to trial. In addition, Professor Vladeck testified that, should the federal government preempt state employment law without making OSHA standards enforceable, an alternative forum to mitigate claims would be required to meet constitutional scrutiny, as Congress did in creating the September 11th Victim Compensation Fund in exchange for victims' agreement not to sue the airlines involved.

Democratic Members, including Senators Feinstein and Dick Durbin (D-IL), echoed Professor Vladeck's opinion that, should federal guidelines become enforceable, liability protections would be unnecessary given that every state already recognizes the regulatory-compliance defense, i.e., that compliance with a regulation provides businesses with a defense to liability. Senator Sheldon Whitehouse (D-RI) added that blanket liability protection would be a disincentive for employers to comply with safety standards and could serve as a bailout for workers' compensation insurers, who would otherwise be liable for on-the-job injuries, including those resulting from COVID-19.

Republican members, including Chairman Graham and Senators Ted Cruz (R-TX) and Chuck Grassley (R-IA), relying on testimony from Mr. Smartt, Ms. Hill, and Texas Christian University's Mr. Tyner, who in particular noted that “[f]or a number of institutions this crisis already poses an existential threat,” countered that the mere possibility of litigation, regardless of the likelihood of success, is enough to prevent many businesses from reopening or expanding skeletal operations, especially small businesses with limited access to capital.

NEXT STEPS

Chairman Graham stressed that Committee members do not yet have a bill in front of them for consideration and that, moving forward, “one primary goal out of this hearing is to get the standards in place for business, for universities, for schools, whether they come from the CDC, OSHA, they need to be out there so that people can understand what’s expected of them, and if they do what’s expected, they don’t have to worry about getting sued. The big hole in the puzzle is that standard.”

These closing remarks from Chairman Graham, who has at times been somewhat sympathetic to the arguments of the trial bar, indicate that although he and other Republican members will continue to pursue limited employer protection legislation, they may seek to strike a balance between tort liability and enforceable safety standards. This approach could result in a compromise with the Democrat-controlled House of Representatives, which earlier this week introduced an additional round of proposed COVID-19 relief that, as expected, included nothing on the liability-protection question.

Members of K&L Gates public policy and law practice group are actively monitoring and engaging on these liability issues on behalf of clients. Companies that wish to better understand the current debate and possible outcomes should contact a member of the public policy team.

KEY CONTACTS



PAMELA J. GARVIE
PARTNER

WASHINGTON DC
+1.202.661.3817
PAMELA.GARVIE@KLGATES.COM



KARISHMA SHAH PAGE
PARTNER

WASHINGTON DC
+1.202.778.9128
KARISHMA.PAGE@KLGATES.COM



STEVEN R. VALENTINE
PARTNER

WASHINGTON DC
+1.202.661.3802
STEVEN.VALENTINE@KLGATES.COM

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