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Immunizing Industry Against COVID-19 Liability

■ Duty, breach, causation, damages — four words that no law student can forget from their first year torts course, but four words that will likely form the basis of COVID-19 civil negligence claims against employers.

The elements are as simple as an MRE (Meal, Ready-to-Eat), the answers are as complicated as the F-35 supply chain.

Do employers have a duty to protect consumers and employees from COVID-19? While far from legal dictum, businesses should exercise reasonable care in protecting employees and consumers from the virus. If a duty exists, has business breached this duty? Just because an employee or consumer contracts the disease at a business, it does not de facto imply that a business has breached a duty of reasonable care.

The biggest point of contention in any COVID-19 liability case will likely be causation. Legal causation is a high bar to meet. In order to prove causation, plaintiffs need to prove that the breach of a duty to protect consumers or employees is the proximate (direct) cause of COVID-19 transmission. Given that so little is still known about transmission of the virus, this appears to be an extremely high bar to satisfy. Unfortunately, mere exposure to a COVID-19 lawsuit can be financially debilitating to employers and is looming large over employers' decision to reopen. So, if winning a case at trial is not the answer to COVID-19 liability, what is?

"I voluntarily agree to assume all of the foregoing risks and accept sole responsibility for any injury." This is the first sentence of a boilerplate waiver that is used across industry for anything from skydiving to renting a car. While signing a waiver satisfies the legal requirements, most of America does not give detailed consideration to the pages of text making up waivers before signing.

Fortunately, in the pre-COVID era waivers of liability were mostly reserved for businesses offering consumers high-risk discretionary recreational activities. Unfortunately, in the post-COVID era businesses are justifiably concerned about liability for decisions as simple as asking paid employees to physically come into work. Also, unfortunately for business, the answer to COVID-19 liability is not as simple as offering employees waivers of liability.

For one, uniformly changing the conditions of employment to include such a waiver would be problematic with many employment contracts. Unilaterally changing the terms of an employment contract can lead to civil liability and other legal issues. The law recognizes that certain activities are inherently dangerous and discretionary; this is why businesses offering high-risk discretionary activities can offer "take it or leave it" waivers of liability to consumers. Going to work isn't generally accepted as a high-risk discretionary activity. If liability waivers are not an effective COVID-19 "vaccine" for businesses, then what is?

Karri Palmetier, an attorney who works with small- and medium-sized businesses to navigate government contracts in Colorado, said, "if businesses open up and reasonably implement safety precautions, they should not be liable." Businesses

should not have absolute immunity, but in order to stimulate the economy, they need to open. Proposed legislative COVID-19 liability protections for businesses that reasonably implement safety precautions would give companies an incentive to operate in an uncertain environment.

Liability protection does not mean liability immunity. Businesses who blatantly subject employees or consumers to unsafe conditions related to COVID-19 should still have liability.

However, businesses that make a good faith effort to comply with safety standards deserve protection from destructive lawsuits; the costs of defending and potential damages would have disproportionate impacts on small and medium businesses. They should not have to choose between closing or facing the risk of potential litigation.

The stakes are especially high lower down in the defense industrial base supply chain. A local restaurant shutting down is a tragedy. However, this pales in comparison to what happens when the single supplier of a part needed for a complicated system, like the F-35, shuts its doors for good.

Supplier shortages of specialized parts was magnified in July 2019. Even though Turkey has been kicked out of the F-35

program after buying the S-400 Triumf missile system from Russia, Lockheed continued to source parts for the F-35 from Turkish suppliers because of difficulty in acquiring specialized parts from U.S. and allied suppliers. A surge of small and medium businesses closing within the defense industrial base would disrupt production of important military systems, which could potentially be a major national security risk.

Companies across all sectors, and especially in the defense industrial base, serve a vital role in our society. Without business, there is no industry, jobs, or tax revenue.

No business deserves a blank check to put employees — or consumers — at risk by forcing them

to return to unsafe production floors where COVID-19 can spread rampant.

Businesses do, however, deserve insulation from a litigation-hungry society looking for a scapegoat. Legislation providing COVID-19 liability protection shields businesses, employees and consumers, while supporting the continued strength and resilience of the defense industrial base. It is unclear if legislation will be the "vaccine" for COVID-19 liability, but it should be part of the dose. **ND**

Joseph Sobekli is a junior fellow at the National Defense Industrial Association.



"The stakes are especially high lower down in the defense industrial base supply chain."