



# Legislative Issues

## TCCE Policy Center



### COVID-19 Liability Protection

#### Background

The COVID-19 pandemic has brought on potential problems in a myriad of areas, i.e., medical, educational, business, etc. One of the topics that is creating increasing concern is liability actions that are being or may be brought on by the pandemic and what protections might be afforded against liability.

Provisions in recent federal stimulus legislation would have provided some relief, however they failed to pass. According to a Washington Post article, Republicans in Congress say the protection issue is a red line for any stimulus bill or other COVID-related legislation, with Senate Minority Leader Mitch McConnell warning that such lawsuits could create “a ‘second pandemic’ for companies that are already struggling.”

On the other hand, “Democrats think that is an unnecessary restriction that hurts workers...data shows that workplace transmissions have been relatively high, yet the number of lawsuits has been pretty low.”

A bipartisan compromise was floated in the Senate that would have given some liability protection on federal lawsuits only and just through 2020. McConnell wants state and local lawsuits included.

In January 2021, Governor Greg Abbott called for protection for individuals and companies facing COVID-related lawsuits, according to the Texas Tribune. Texas employees have filed more than 900 complaints against employers dealing with COVID, but the Occupational Health and Safety Administration has dismissed all but about 100 of them.

Texas State Sen. Kelly Hancock (R-North Richland Hills) is planning to introduce “broad liability protection to Texas healthcare providers, first responders, product manufacturers, businesses, schools, houses of worship and other entities,” according to a Texas Civil Justice League news release. Details of the bill have not been released.

#### Arguments for reform:

- **Temporary and Targeted.** Relief should be temporary and targeted. Gross negligence and bad actors should be held accountable. We are simply asking for temporary ‘safe harbor’ protections at the federal level to give employers some degree of assurance that if they follow public health guidelines, they will not face further financial hardships through unwarranted lawsuits. The business community is not seeking blanket immunity. (*U.S. Chamber of Commerce point*)
- **Frivolous Lawsuits.** There potentially will be a flood of frivolous COVID-related lawsuits. Some customers or employees may see the COVID pandemic as an opportunity for “easy money.” A correctly crafted bill could greatly limit them.

- **Sued Out of Business.** Employers following guidance should not be sued out of business. We need assurances that if employers do the right thing and follow the advice of public health experts, they will not face more financial hardships from unwarranted lawsuits. Our hospitals must keep working. Our childcare providers need to support working parents. Our small businesses need to return to revenue so they can return employees to the payroll. (*U.S. Chamber of Commerce point*)
- **Bipartisan and Precedent.** We need bipartisan action and precedent. Democrat and Republican governors alike have extended coronavirus liability protections in their states, including Michigan, North Carolina, Massachusetts, and Pennsylvania. And from the Y2K Act, to post- 9/11 laws, to the Great Recession, Congress has consistently passed bipartisan liability protections to help get the nation back on its feet. (*U.S. Chamber of Commerce point*)
- **Legislation Just in Texas.** Legislation that meets the same standards as described above – temporary and targeted – but limited to the state would be welcome. It would become necessary if federal legislation is not passed.
- **Target Keeps Moving.** As the National Association of Manufacturers recommends, “Acknowledging the ever-evolving patchwork of available advice, industry practices and state responses that combine to make identifying a clear standard of care nearly impossible during a national emergency.”

#### **Arguments against reform:**

- **Disregard state remedies.** State laws provide the way for individuals to sue a business, so any federal legislation would be usurping state law. The state statutes place appropriate boundaries for litigation. And this would likely force a constitutional challenge in the courts.
- **Standard of Proof.** The standard of proof is difficult to attain and in itself can limit the number of cases filed. A complainant would likely have to show not just negligence, but somehow show that the business is where he/she caught the disease.
- **Few cases.** The number of cases being filed is small, countering the argument that frivolous cases will abound and bog down the judicial system. According to Littler Mendelson P.C., “Since March 12, (nationwide) there have been 1,663 lawsuits (including 142 class actions) filed against employers due to alleged labor and employment violations related to the coronavirus (as of January 29, 2021). According to the law firm Fisher Phillips, 86 COVID-related employment litigation cases have been filed in Texas.
- **Blanket immunity.** Blanket immunity would take away punishment for those businesses who decide to ignore safety procedures. Limited scope and limited term are mandatory needs in any legislation on protection.