

## Business Liability During COVID-19 Recovery

Businesses of all sizes and types face increased civil liability risks during Massachusetts' phased economic reopening because there are only ways to mitigate, not eliminate, a COVID-19 infection. Employers are eager to protect their workforces and customers, but they need to be protected from damaging litigation if they have taken actions to prevent the spread of COVID-19 outlined in state and federal guidance. Small businesses are particularly fragile, with many already at jeopardy of permanent closure, and one frivolous lawsuit could be an existential risk.

Lawmakers can encourage a smooth reopening by placing temporary limits on legal liability in areas including worker privacy, discrimination, employment practices, and product manufacturing. Safe harbors have been established in the past to protect businesses from exceptional risk in extraordinary situations, and a similar solution should be pursued now.

### What is a liability safe harbor?

A liability safe harbor is a temporary protection for businesses facing exceptional circumstances outside of their control. It limits the scope of civil liability they are subject to during a specific emergency. Typically, these protections require businesses to follow relevant government guidance and include limitations that ensure action can be taken against employers in the case of gross negligence or misconduct. In the case of COVID-19, a liability safe harbor would protect businesses that follow the government's safety guidance and sector-specific protocols from pandemic-related lawsuits.

### A Long List of Liability Concerns

Businesses face a number of different legal risks throughout the economic reopening. The U.S. Chamber of Commerce outlined a [comprehensive list](#) of these risks in their April 13<sup>th</sup> letter to Congress regarding the national return to work. Actions taken so far in Massachusetts and by the U.S. Congress have addressed pressing issues of exposure liability and safe workplace requirements for health care facilities and volunteer health care workers on the frontlines, but more is needed to protect all employers and businesses as they return to a 'new normal'. Temporary liability safe harbors will protect businesses who are following state and federal guidelines from civil liability risks, including:

- **Privacy under HIPAA:** For some workplaces, employers may want or need to access employees' medical information. For example, an employer may require a diagnostic test if an employee travels for work. Medical information usually is protected under the Health Insurance Portability and Accountability Act (HIPAA). A liability safe harbor would allow businesses to collect and share specific health data temporarily in order to limit the spread of COVID-19. Legislation should detail the exact health information employers would have access to, require security to protect the data, and require medical records be destroyed once they are no longer relevant.
- **Discrimination<sup>1</sup>:** Without a liability safe harbor, businesses risk discrimination lawsuits if they use factors like age or underlying health conditions to set back-to-work policies. Paradoxically, they also may face a legal risk if those employees are exposed to or contract the coronavirus. Without clear guidance and a safe harbor, employers who implement policies to protect high-risk employees are exposed to discrimination claims.
- **Workplace Safety:** The Occupational Safety and Health Administration (OSHA) outlines clear requirements for workplaces regarding the use of personal protective equipment (PPE) to maintain safety, but those are designed for workplaces that always require PPE, such as laboratories or construction sites. A safe harbor should permit that PPE used to mitigate the spread of COVID-19 is not be subject to standard OSHA requirements. For example, an employer may allow employees to wear a homemade facemask, rather than a medical-grade mask, given with shortages and limited access to PPE.
- **Employment practices:** Many ordinary employment practices risk greater exposure to litigation because of temporary policy changes from both federal and state governments, as well as internal company policies. For example, it is unclear if an employer provides PPE to independent contractors whether that could be considered a benefit that would indicate they are regular employee. Additionally, employers forced to lay off workers during the emergency may be subject to the WARN Act, which imposes strict advance notice requirements in the case of mass layoffs or worksite closings. That law may be impossible to comply with if a worksite closes due to the infection. Employment practices are complex and clear guidance is an important factor in mitigating exposure for employers.

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<sup>1</sup> Provisions of both the [Americans with Disabilities Act](#) and the [Age Discrimination in Employment Act of 1967](#) could impact business liability during the return to work period.

- **Virus Exposure Liability:** Businesses may be subject to claims for COVID-19 exposure from employees or customers despite their adherence to government safety protocols. A safe harbor can mitigate this risk for business that follows government guidance.
- **Product Liability and the PREP Act:** The Public Readiness and Emergency Act (PREP Act) is invoked during public health emergencies, like the COVID-19 pandemic, to provide a safe harbor for companies directly involved in the manufacturing, testing, distribution and use of medical countermeasures such as personal protective equipment (PPE) and respirators. However, it does not provide protection related to other key countermeasures such as cleaning materials or for manufacturers who have shifted to producing PPE for the first time to combat shortages, leaving these good actors exposed to product liability risks.

### Precedent for Liability Safe Harbor Legislation

Government has implemented liability safe harbors during past emergencies to protect employers, employees, and the economy. These protections provide businesses the confidence that if they operate according to government guidance they will be protected from litigation. Three significant examples of such safe harbors in the past 20 years are the Y2K Act, the 9/11 Victim Compensation Fund, and the SAFETY Act.

While a broad federal liability safe harbor would be most effective, actions already taken in Massachusetts and across the country are helpful, including:

- [The CARES Act](#): The CARES Act extends liability immunity under the Public Readiness and Emergency Preparedness Act (PREP Act) to volunteer health-care providers and medical manufacturers who are producing materials to combat COVID-19 but not to providers and facilities generally or to the broader employer community. Expanding these protections would provide some employers who are directly involved with virus mitigation with immunity from wrongful death and product liability claims related to COVID-19, especially those that are producing PPE for the first time.
- [Chapter 64 of the Acts of 2020](#): Governor Charlie Baker signed legislation to protect health care professionals and facilities from suit or civil liability stemming from providing COVID-19 care.
- [Suspension of the WARN Act in CA](#): Governor Gavin Newsom temporarily suspended provisions of California's Worker Adjustment and Retraining Notification Act (Cal-

WARN) through executive order in March to allow employers flexibility regarding notification requirements and training for layoffs in response to the pandemic.

### **State and Federal Dynamics**

Jurisdiction for a broad safe harbor is challenging to establish and requires coordination between multiple federal agencies and state governments. Reopening strategies vary across states and a clear federal solution to liability concerns is preferable. With a federal liability safe harbor in place, states can offer additional guidance for businesses. However, without federal action to protect employers from liability, Massachusetts will need to address these concerns by adopting its own legislation.