

## **UNSAFE HARBORS: The Problem with Unsafe Immunity Proposals**

The public believes that immunizing unsafe businesses and industries from legal accountability would jeopardize the health and safety of workers, consumers, and everyone who enters those workplaces.<sup>1</sup> Legal immunity would be extremely damaging to the nation’s economic recovery.

However, some are suggesting that compliance with government-issued “guidelines” covering workers and consumers should confer immunity on businesses – even if such guidelines relieve unsafe businesses of their responsibility to protect the public. These proposals – sometimes called “safe harbors” – would endanger public health and safety, are completely unnecessary under current law, and would upend public health flexibility, which many states are trying to preserve.

**The federal government’s pandemic guidelines have already been infected by politics and will lead to new workplace dangers, particularly if allowed to immunize unsafe businesses.**

- The Trump Administration has rejected and blocked publication of Centers for Disease Control and Prevention (CDC) health and safety reopening guidelines as “overly prescriptive” and is now pursuing reopening guidelines “against the advice of public health experts.”<sup>2</sup> Such guidelines, based on political and not scientific considerations, have no place operating as legal health and safety standards.
- As evidenced by current loose policies from both the Occupational Safety and Health Administration (OSHA)<sup>3</sup> and the CDC,<sup>4</sup> rejection of stronger CDC recommendations

---

<sup>1</sup> “Survey Finds Bipartisan Opposition to Guaranteeing Businesses Immunity from COVID Lawsuits,” Memo to Interested Parties from Geoff Garin and Guy Molyneux, May 6, 2020, <https://www.justice.org/sites/default/files/Hart%20Research%20Poll%20on%20Business%20Liability%20Immunity.pdf>

<sup>2</sup> Abby Goodnough and Maggie Haberman, “White House Rejects C.D.C.’s Coronavirus Reopening Plan,” *New York Times*, May 7, 2020, <https://www.nytimes.com/2020/05/07/us/politics/trump-cdc.html>. See also, Jason Dearen, “AP Exclusive: Docs show top WH officials buried CDC report,” *Associated Press*, May 9, 2020, <https://apnews.com/9c4d5284ba4769d3b98aa05232201f88> (“The trove of emails show the nation’s top public health experts at the Centers for Disease Control and Prevention spending weeks working on guidance to help the country deal with a public health emergency, only to see their work quashed by political appointees with little explanation.”)

<sup>3</sup> OSHA has substantially stepped back from its role to protect the health and safety of workers during this pandemic, and is dangerously relying on employers to self-police. See Noam Scheiber, “Protecting Workers From

noted above, and the recent Executive Order on disease-ridden meat processing plants,<sup>5</sup> it seems apparent that strong, mandatory safety rules will not be forthcoming from this Administration. Therefore, it will likely be conferring immunity on businesses that follow only vague suggestions, or those who say they “tried” to comply with a standard instead of actually making a workplace safe. Immunity for such practices would basically give blanket immunity for doing little or nothing to protect workplaces.

- The promise of immunity will create perverse incentives for businesses to follow guidelines even if they are outdated or obsolete, making businesses less safe. It will disrupt incentives under current law, which establishes a business’s duty to simply take reasonable steps and exercise reasonable care to operate safely.<sup>6</sup>
- It is fundamentally unfair to workers and consumers to have their cases judged by liability standards written by agencies and individuals whose intent is to immunize an industry or business, a policy the Trump Administration has said on numerous occasions that it aims to implement.<sup>7</sup>

**Guidelines should never be used as legal standards in a court case because, in addition to being biased and weak, they can be contradictory and confusing.**

- It is impossible to develop a single authoritative federal policy for every situation, let alone to trust biased and weak federal agencies to suddenly become the sole arbiter of acceptable safety practice.<sup>8</sup> While some standards may be clear and easily complied with,

---

Coronavirus: OSHA Leaves It to Employers,” *New York Times*, April 22, 2020,

<https://www.nytimes.com/2020/04/22/business/economy/coronavirus-osha-workers.html>

<sup>4</sup> See, e.g., current CDC Guidelines, which say businesses “should plan to respond in a flexible way to varying levels of disease transmission in the community and be prepared to refine their business response plans as needed,” and, for example, merely “[c]onsider establishing policies and practices for social distancing.” Centers for Disease Control and Prevention, “Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19),” <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

<sup>5</sup> Executive Order on the Food Supply Chain and the Defense Production Act, May 1, 2020,

<https://crsreports.congress.gov/product/pdf/LSB/LSB10456>. See Liz Crampton and Gabby Orr, “Trump orders meat plants to stay open, but won’t mandate safety protections,” *Politico*, April 29, 2020,

<https://www.politico.com/news/2020/04/28/trump-to-order-meat-plants-to-stay-open-215555> (“The order did not detail additional precautions companies should take to protect workers, which has led to worries among unions and other worker groups. The Agriculture Department has deferred to the CDC and OSHA instead of issuing its own rules. OSHA, however, has not imposed mandatory safety rules and instead only issued recommendations.”)

<sup>6</sup> Timothy D. Lytton, “Opinion: Businesses don’t need special immunity from coronavirus liability – Mitch McConnell is wrong about a coming ‘avalanche’ of ‘frivolous’ lawsuits,” *Marketwatch*, May 5, 2020, <https://www.marketwatch.com/story/businesses-dont-need-special-immunity-from-coronavirus-liability-mitch-mcconnell-is-wrong-about-a-coming-avalanche-of-frivolous-lawsuits-2020-05-01?f>

<sup>7</sup> See, e.g., John Culhane, “Trump and McConnell’s COVID-19 Liability Protections Are Completely Unnecessary,” *Slate*, May 8, 2020, <https://slate.com/news-and-politics/2020/05/trump-mcconnell-covid-19-liability-immunity-plan.html>; Josh Wingrove, “White House Vows Liability Protections for Businesses Facing Coronavirus Claims,” *Insurance Journal*, April 23, 2020, <https://www.insurancejournal.com/news/national/2020/04/23/566103.htm>

<sup>8</sup> As noted earlier, in addition to the politicization of the CDC, OSHA has substantially stepped back from its role to protect the health and safety of workers during this pandemic. See Noam Scheiber, “Protecting Workers From

others, coming from different parts of the government, may be complicated and contradictory. And there may be good reason for a business to vary from a guideline. Immunity for following federal guidelines will fortify inflexibility at a time when businesses need to be flexible.

- The U.S. Chamber of Commerce itself argued these very points in a recent letter to Congress, saying that a “one-size-fits-all regulatory approach is simply impossible when talking about adapting safety measures for every workplace in America. This approach will prevent businesses from making the appropriate adaptations necessary to ensure that their workplaces are as safe as possible. A heavy-handed regulatory approach will make it more difficult for safety measures to be quickly adjusted to reflect the changing reality of combatting the coronavirus.”<sup>9</sup>

### **Current state law standards have developed over centuries to deal with these kinds of situations and are perfectly able to do so.**

- State law standards are already so reasonable that only in cases where a company acted unreasonably or worse can victims succeed against a business, and where a victim can prove a causal link between an illness and a business operation.<sup>10</sup> Companies that choose to operate unreasonably should not be rewarded and subsidized with immunity.
- Every state already has a regulatory and tort litigation structure that balances laws and regulations against legal rights, including how much weight to attach to breach of laws and regulations in a case (*i.e.*, “regulatory defense”). In light of these well-established systems, some states are establishing flexible COVID-19 guidelines, while others are choosing more rigid rules. If federal guidelines are allowed to suddenly override all of these laws in all 50 states, it will not only usurp a state’s right to decide what is best for it but also upset the careful legal balance that each state has already crafted for protecting public health and safety. This will cause even more disruption and chaos in states – the very last thing they need right now.

---

Coronavirus: OSHA Leaves It to Employers,” *New York Times*, April 22, 2020,

<https://www.nytimes.com/2020/04/22/business/economy/coronavirus-osa-workers.html>

<sup>9</sup> Letter from U.S. Chamber of Commerce and Council of State Chambers, April 28, 2020,

<https://www.uschamber.com/letters-congress/joint-letter-reopening-the-economy>

<sup>10</sup> Timothy D. Lytton, “Opinion: Businesses don’t need special immunity from coronavirus liability – Mitch

McConnell is wrong about a coming ‘avalanche’ of ‘frivolous’ lawsuits,” *Marketwatch*, May 5, 2020,

<https://www.marketwatch.com/story/businesses-dont-need-special-immunity-from-coronavirus-liability-mitch-mcconnell-is-wrong-about-a-coming-avalanche-of-frivolous-lawsuits-2020-05-01?f> (“To successfully sue a business for COVID-19 transmission, a patron would have to prove that he or she contracted COVID-19 from the business and not from some other source. However, most people infected with COVID-19 currently have no reliable way of identifying the source of their infection. The gap of three to 11 days between infection and illness, the difficulty of recalling all of one’s contacts during that interval and limited testing for the virus present formidable obstacles to establishing causation.”)