

Here's What Employers Need to Know About COVID-19 Liability Shields

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Some federal lawmakers are trying to shield businesses from COVID-19-related lawsuits as they struggle to operate under evolving guidelines during the pandemic. Other lawmakers are concerned that employers would not take proper steps to safeguard workers if they received such protections.

"The COVID-19 pandemic has been a blow to many businesses across the board," said Samuel Lillard, an attorney with Fisher Phillips in Columbus, Ohio. Some were shuttered by governors' orders, while others remained open but struggled to keep their employees safe in the midst of the coronavirus crisis.

"During these difficulties, we have seen a rise in COVID-19 litigation in various parts of the country," Lillard observed.

Employees have filed more than 580 COVID-19-related lawsuits against their employers since March 12, according to data (<https://www.littler.com/publication-press/publication/covid-19-labor-employment-litigation-tracker>) compiled by law firm Littler.

Some states have enacted laws shielding business from some liability, but the legal protections differ from one jurisdiction to another. What businesses qualify for immunity? What actions or omissions are protected? How long does the immunity last?

"State laws regarding COVID-19 civil immunity have varied widely when it comes to key questions," noted Gina Fonte, an attorney with Holland & Knight in Boston.

Federal Legislation Proposed

"A proposed federal law faces an uphill battle due to stalled negotiations over the next coronavirus relief package," Fonte said. The federal Safe to Work Act, S. 4317 ([Many Republican legislators and business groups support a nationwide liability shield. "Republicans want to protect doctors, nurses, school districts and universities from a second epidemic of frivolous lawsuits," said Senate Majority Leader Mitch McConnell, R-Ky.](https://urldefense.proofpoint.com/v2/url?u=https-3A__www.congress.gov_bill_116th-2Dcongress_senate-2Dbill_4317&d=DwMGaQ&c=nQOnw6HHAeKBNxj23OXhOw&r=uwx9QJkKWt0Lh2vkOOmSVajKabYNPVCpSh6dkMkmxk&m=fS4sbJPSGI9Q4Yw-t6D283TdrIcvH2qZWcKuNgJvxrs&s=4tB0w2nP9Lgb36Tyi83q-pqnXo9qEYPDwZZHan_K0E&e=), would temporarily protect businesses, nonprofits, health care providers and educational institutions that follow public health guidelines while still holding businesses accountable for willful misconduct and gross negligence.</p></div><div data-bbox=)

The Society for Human Resource Management (SHRM) supports (<https://advocacy.shrm.org/advocacy/shrm-supports-the-safe-to-work-act/>) the Safe to Work Act. "The legislation would provide timely, targeted and temporary liability relief to organizations as they safely reopen in support of American workers and the economy," SHRM said. "The bill also preserves reasonable recourse for those individuals harmed by truly bad actors."

The purpose of the bill is "to lessen the burdens on interstate commerce by discouraging insubstantial lawsuits relating to COVID-19 while preserving the ability of individuals and businesses that have suffered real injury to obtain complete relief," according to the legislation.

The federal proposal would apply retroactively to pending coronavirus-related actions through at least Sept. 30, 2024.

Many Democrat lawmakers and labor-union leaders who oppose business liability protection say workers are risking their safety to receive a paycheck. "Immunity laws could send dangerous messages that the safety of these workers is not the company's responsibility," said Marc Perrone, president of the United Food and Commercial Workers International Union, at a Senate hearing.

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

State Law Nuances

Although Congress has yet to pass legislation protecting employers from coronavirus-related liability, some states have enacted or proposed their own laws. Employers should review the applicable laws, as some states require employers to follow specific steps for the shield to apply.

Some laws are broad, while others only protect employers in certain industries. For example, Georgia's law (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/georgia-businesses-receive-covid-19-liability-protection.aspx) creates a rebuttable presumption that the plaintiff assumed the risk of exposure, transmission, infection or potential exposure to COVID-19, unless the plaintiff is asserting certain claims involving gross negligence, willful misconduct or reckless behavior. For the presumption to apply, businesses must post specific warnings for customers and employees.

New Jersey's law (<https://www.foxrothschild.com/publications/new-jersey-gives-sweeping-civil-and-criminal-immunity-to-front-line-health-care-providers-battling-covid-19/>) extends COVID-19-related liability protection only to health care providers. The law aims "to ensure that there are no impediments to providing medical treatment related to the COVID-19 emergency," according to the legislation.

These laws don't provide a "get out of jail free card," noted Michael Lotito, an attorney with Littler in San Francisco. Employers generally must show that they acted in good faith and in accordance with federal, state and local guidance.

The types of claims covered may also be limited. State liability shields help businesses defend themselves against tort claims from employees, customers and vendors who alleged that they were exposed to COVID-19. However, these laws generally do not shield employers from COVID-19-related discrimination, disability or leave of absence claims, or lawsuits alleging violations of wage and hour laws.

Tips for Employers

"The key to successfully invoking civil immunity from COVID-19-related actions is the ability to establish that your business made 'reasonable' and 'good-faith' efforts to comply with any applicable government standards and guidance in effect at any given time," Fonte said.

Lillard suggested that employers take the following steps to help protect employees from illness and avoid potential litigation:

- Follow U.S. Centers for Disease Control and Prevention (CDC) guidelines for businesses (<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>), including best practices for social distancing, cleaning and disinfecting (<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>) the workplace, and quarantining.

Note that specific guidelines (<https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html>) apply to critical infrastructure workers.

- Use the Occupational Safety and Health Administration's (OSHA's) most recent guidelines (<https://www.osha.gov/Publications/OSHA4045.pdf>) as a resource when creating return-to-work policies.
- Make sure employees know what measures the business is taking to protect them.
- Stay aware of employees' health while respecting their legal right to privacy.
- Keep reminding employees of the symptoms of COVID-19 and urge them to seek medical attention if they experience symptoms.
- Err on the side of transparency by informing employees of confirmed COVID-19 cases in the workplace while maintaining employees' privacy.
- Stay on top of current and evolving guidelines from the CDC, OSHA, the U.S. Department of Labor (<https://www.dol.gov/agencies/whd/pandemic/>) and state and local governments.

Businesses should designate someone to keep up with evolving COVID-19 guidelines and update policies and practices as needed, Lotito said.

Employers will want to avoid lawsuits altogether, rather than rely on business liability shields, he noted. Be sure to create robust internal complaint resolution systems, he said, so employees can voice their concerns and leaders have an opportunity to resolve issues before they become lawsuits.

"Make sure people know what's going on," Lotito said. "Stop rumors. Open channels for upward communication."

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