

Reasonable Federal Liability Protections for Construction

Support Reasonable Federal Liability Limitations for COVID-19 Exposure Claims for Lower Risk, Good Actor Construction Firms

Action Needed:

- Bar legal presumptions in workers' compensation claims that a lower-risk exposure industry employee with COVID-19 contracted the virus while at work.
- Targeted and reasonable liability protections against legal claims arising from the current pandemic to protect businesses following recognized safety and health protocols to guard against the spread of COVID-19.

Background

- **Unreasonable Lawsuits Could Hinder Essential Construction Work, Jobs, and Economic Growth.** Thanks to the safe and essential work of construction firms throughout the nation, emergency hospitals and medical facilities, drinking water and wastewater treatment, transportation, energy and communication, affordable multifamily housing and the rest of the nation's critical infrastructure continue to be built, maintained, and improved. Without reasonable liability safe harbors for good actor construction firms following recognized safety and health protocols, the uncertainty surrounding COVID-19 and the sheer weight of anticipated litigation could hinder the essential work that the nation needs the construction industry to perform for many years to come. The threat of unreasonable exposure-related lawsuits could threaten businesses, even though it is determined they are lower risk and can operate safely by following the guidelines of the appropriate health authorities. AGC is advocating for sensible legal reform policies that strike the right balance.

AGC Message: Construction is Not a High-Risk Exposure Industry

- **The Construction Industry Generally Falls Within the Lower Exposure Risk Level.** According to the Occupational Safety and Health Administration's recently updated [guidance](#) for construction employers, most construction work falls within the "lower" risk classification because it does not require workers to be in contact with suspected or known COVID-19 cases or with customers, visitors or members of the public.ⁱ This is in contrast to healthcare and medical transport workers that interact with the public and have a very high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedures.

Problem: Presumption of COVID-19 Injury for Workers' Compensation Claims Could Extend to Unreasonably Broad Scope of Workers; Threatens to Implode Workers Compensation System

- **Presumption Policies Only Make Sense for Workers Who Can't Avoid Constant Contact with the Public.** Increasingly, state regulators are taking action to expand the availability of workers' compensation benefits to certain employees who test positive for COVID-19. Some of these actions suspend limitations or exclusions otherwise prohibiting compensation for illness to which the general public is exposed. Others relax the worker's evidentiary burden to prove the virus was contracted in the course of employment.ⁱⁱ Notable, at least one state has passed a *wide-reaching* rebuttable presumption that *any* employee who contracts the coronavirus is covered by workers compensation; several states are looking to create similar presumptions.

Action Needed:

- The objective is to facilitate the prompt but safe resumption and continuation of lawful business activity without fear of crushing liability from COVID-19 lawsuits, and to ensure that the vast sums to federal money spent to support the economy are not redirected to opportunistic lawyers or litigation.

- **AGC ASK:** The undifferentiating application of a workers' compensation presumption for a COVID-19 diagnosis to a broad scope of workers will irrationally burden the workers' compensation system with costs it is not designed to bear, and can be expected to significantly drive up the costs that employers pay for insurance. Congress should bar states from enacting workers' compensation claim presumptions that irrationally treat all job classifications the same – or at equal risk of exposure to COVID-19 – because higher risk jobs, like healthcare or morgue workers, are inherently different from lower risk construction jobs.

Problem: Limited, State Liability Protections Cover Only High-Risk, Public-Facing Workers; Overlook Other Essential Industries

- **Other Essential Industries, like Construction, Have Been Overlooked in Passing Sensible Liability Protections.** Several states have addressed liability concerns stemming from COVID-19. As of publication of this position paper, at least nine governors have limited the liability of *health care workers* when providing medical care in support of the state's COVID-19 response. These states include Arizona, Connecticut, Illinois, Kentucky, Michigan, Mississippi, New Jersey, New York, and Pennsylvania.ⁱⁱⁱ (Note: Governors mostly have used emergency powers to grant liability protections, and state courts may invalidate those executive orders; therefore, federal legislation is needed.)
- **AGC ASK:** The limited, state liability protections extend only to occupations considered high-risk for exposure to COVID-19, when in fact, lower-risk employers are similarly subject to lawsuits and require reasonable protection. Congress must pass legislation related to the pandemic and economic recovery to assure lower-risk employers, like construction firms, will not face frivolous lawsuits if they make reasonable efforts to follow relevant guidelines during the crisis and after reopening.

Problem: Frivolous Exposure Suits Threaten Business Continuity

- **There is no way to guarantee against the spread of COVID-19 and companies that make reasonable efforts to avoid accidents may still be liable and forced to pay the high cost of damages that ensue.** Construction employers face a range of claims, from employment claims and worker's compensation filings to personal injury and even wrongful death lawsuits.^{iv} AGC is pleased to associate itself with the many calls for reasonable protection from the potentially devastating litigation for all businesses that struggle to pull the country through and out of its current crisis, including the many small, minority and women-owned business enterprises that make up such a large and growing segment of the construction industry. Businesses they closely track and follow health authority guidance concerning safe workspaces (such as the U.S. Centers for Disease Control and Prevention's guidance) and follow the guidance most applicable to the physical location where employees will work (such as state or local guidance) should have limited protections from liability, even if someone gets sick on their jobsite.
- **AGC ASK:** For the construction industry, protection from unbridled tort litigation is a high priority. Congress must pass legislation that would generally limit liability for COVID-19 exposures to those situations where a business has engaged in gross negligence, willful misconduct, intentional criminal misconduct, or intentional infliction of harm, as two states have already done.^v There's precedent for Congress passing timely and targeted liability protections on a bipartisan basis.^{vi}

ⁱ Occupational Safety and Health Administration (OSHA) Guidance on Preparing Workplaces for COVID-19 at <https://www.osha.gov/Publications/OSHA3990.pdf>; on May 27, 2020, OSHA updated its [guidance](#) for employers performing construction work of all types.

ⁱⁱ Some states have amended their workers' compensation rules to make receiving workers' compensation benefits less burdensome for certain workers, according to [data collected by law firm Ogletree Deakins](#).

ⁱⁱⁱ **Ariz. Exec. Order No. 2020-27** (Apr. 9, 2020) (limiting liability of licensed health care professionals, registered volunteer health care professions, emergency medical care techs, healthcare institutions, and entities operating modular field treatment facilities to gross negligence or reckless or willful misconduct).

Conn. Exec. Order No. 7V (Apr. 7, 2020) (limiting liability of health care professionals and facilities to acts or omissions that constitute a crime, involve fraud, malice, gross negligence, willful misconduct, or would constitute a false claim).

Ill. COVID-19 Exec. Order No. 17 (Apr. 1, 2020) (limiting liability of health care facilities, professionals, and volunteers to gross negligence or willful misconduct).

Ky. S.B. 150 (enacted Mar. 30, 2020) (providing that health care providers and businesses that make protective equipment in response to COVID-19 that ordinarily do not make such products are generally not subject to liability for ordinary negligence).

Mich. Exec. Order No. 2020-30 (Mar. 29, 2020) (limiting liability of any licensed health care professional or designated health care facility to gross negligence).

Miss. Exec. Order No. 1471 (Apr. 10, 2020) (limiting liability of healthcare professionals and facilities to acts or omissions that constitute a crime, fraud, malice, reckless disregard, willful misconduct, or would otherwise constitute a false claim).

N.J. Exec. Order No. 112 (Apr. 1, 2020) (limiting liability of any licensed health care professional or individual granted a temporary license to practice in connection with the state's COVID-19 response to acts or omissions that constitute a crime, actual fraud, gross negligence or willful misconduct).

N.Y. Exec. Order No. 202.10 (Mar. 23, 2020) (limiting liability of medical professionals to gross negligence).

N.Y. S. 7506 / A. 9506 (Apr. 3, 2020) (limiting liability of health care facilities and providers acting in good faith to willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm).

Pennsylvania - Order of the Governor of the Commonwealth of Pennsylvania to Enhance Protections for Health Care Professionals (affords healthcare practitioners protection against liability for good faith actions taken in response to the call to supplement the healthcare provider workforce during the COVID-19 pandemic).

^{iv} While construction companies exclude members of the public from their jobsites, construction workers go home each day, and there, they interact with the other members of their communities. While the workers compensation system does a good job of allocating the risk that employees will suffer injuries or contract illnesses during their employment, many of the state laws have exceptions to their protections from tort liability and contractors routinely find themselves working with and around others' employees. While claimants might find it difficult to prove the causation required for tort liability for a COVID-19 infection, their lawyers know that juries will remain unpredictable. Without some kind of safe harbor for construction companies, the uncertainty surrounding COVID-19 and the sheer weight of tort litigation, without regard to its outcome, could hinder the essential work that the nation needs the construction industry to perform for many years to come. A host of employment laws also merit attention. They include privacy, disability and even anti-discrimination laws that could have the unintended effect of discouraging if not preventing construction companies from doing all that might reasonably be expected of them. The current pandemic is an unprecedented event that such laws do not contemplate and do not make prudent exceptions. Along with a tailored safe harbor from tort claims for viral infections, construction companies require a safe harbor from liability under such laws for good faith efforts to prevent such infections.

^v State examples include: **Utah S.B. 3007** (May 4, 2020) (provides Utah business owners immunity from civil liability for damages or an injury resulting from exposure of an individual to COVID-19 on the business premises – except if engage in willful misconduct, reckless infliction of harm or intentional infliction of harm); **North Carolina S.B. 704** (May 4, 2020) (provides immunity for essential businesses (as determined by the North Carolina Department of Revenue) against claims of negligence for injuries arising out of COVID-19 that occur between March 27, 2020, and the expiration of the governor's state of emergency order – except claims of gross negligence, reckless misconduct or infliction of intentional harm).

^{vi} See [Mike Carvin white paper](#), *Constitutionality of Proposed Federal Liability Limitations for COVID-19 Exposure Claims*, discussing the constitutionality of federal COVID-related liability reforms.