



July 17, 2020

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Charles Schumer
Minority Leader
United States Senate
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker
House of Representatives
Washington, DC 20515

The Honorable Kevin McCarthy
Minority Leader
House of Representatives
Washington, DC 20515

Dear Leaders McConnell and Schumer, Speaker Pelosi and Leader McCarthy,

American employers and workers are facing a great deal of uncertainty as they seek to find some semblance of “new normal” or “near normal” in their operations. The recent spike in positive COVID-19 cases has only added to the difficulties. Congress can help reduce the burden of uncertainty by providing clarity on the question of liability by including the Get America Back to Work Act (H.R.7528) in the next COVID-19 relief package.

Over the last three months, the Bipartisan Policy Center (BPC) has hosted a series of events exploring the difficult issues facing organizations of all types as they chart a path forward. Several key themes have emerged which we believe should anchor bipartisan Congressional action. One widely shared view is the need to offer some protection from liability, provided that organizations operate in good faith and follow public guidelines in protecting customers, employees, and vendors.

Based on our discussions described below, we believe that H.R. 7528, sponsored by Reps. Garret Graves and Henry Cuellar, strikes a good balance between liability protection and ensuring customer and employee safety. The bill limits liability for those employers “acting in good faith” to comply with guidelines from public health authorities. No such protection is offered to those employers who may act with “gross negligence” or engage in “reckless misconduct” with “flagrant indifference” to safety.

Importantly, the Act is retroactive to January 1, 2020. This recognizes the constantly changing landscape of information in which employers must operate. Early on in the pandemic, face masks were thought to be of little use in stopping the virus’ spread and there was considerable focus on disinfecting surfaces where the virus was thought to be transmittable for considerable



periods of time. Today, masks are mandatory in many places and we have learned that surfaces appear to be less significant in the spread COVID-19. As new knowledge is gained, guidelines change. It is critical not to hold employers' past actions to a present-day standard informed by new findings.

Workers and employers deserve support and clarity as they navigate the difficult months ahead. It is of vital importance that Congress strike a durable bipartisan agreement to encourage economic activity and protect worker health.

Bipartisan Precedent

In the aftermath of previous crises, like the September 11th attacks, Congress demonstrated bipartisan support for liability protection. Congress included Good Samaritan language in the CARES Act to provide protection for volunteer health care professionals during the COVID-19 emergency response. At the state level, Governors in New York and Illinois signed liability shield measures targeted at hospitals and nursing homes. Democratic governors worked with Republican legislatures in North Carolina and Kansas to enact liability protections.

Compliance and Clarity

The call for clarified employer liability protections is often challenged by those arguing that such protection is already available under state tort laws. Under this perspective, regulatory compliance presents adequate defense against lawsuits. Unfortunately, the regulatory compliance defense has been undermined by numerous court decisions.

Moreover, while ultimate vindication is obviously important, employers need protection from the costs and burden of defending inappropriate lawsuits. That need is particularly acute among small and young businesses, which often do not have the resources to survive legal challenges, let alone lengthy litigation. As former Congressman John Delaney pointed out in one of the BPC events, most small business owners do think and act responsibly because they're connected to their communities and have an interest in ensuring their customers and employees are safe. At the same time, bad actors should not be shielded from accountability. Vincent Orange, president of the D.C. Chamber of Commerce reinforced this view stating: "anyone operating in an unsafe manner should be held responsible."

A national standard—one that preempts state and local laws that do not adequately protect customers and employees—is necessary to address the chaos and uncertainty inherent in a patchwork of differing local guidelines. During a BPC discussion about essential employers, participants spoke about the challenges of navigating the diverse legal and regulatory landscape. While guidance has been issued from the Centers for Disease Control, states operate differently and, within those states, local jurisdictions often interpret state guidance in varying ways. A clear standard that adequately protects employer certainty can help ensure a high floor



for customer and employee safety.

The BPC applauds the bipartisan effort by Congressmen Cuellar and Graves to bring some measure of resolution to the broad uncertainty facing employers of all types. We urge the Congress to build upon prior examples of bipartisan cooperation in providing limited liability protection for employers that also protects customers and employees.

Sincerely,

Jason Grumet
President