

CENTERING ON CORONAVIRUS

# LITIGATING A PANDEMIC

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ALEKSANDRA SRDANOVIC  
POLICY ANALYST  
THE NEW CENTER

# Centering on Coronavirus: Litigating a Pandemic

In just six weeks, over 30 million Americans lost their jobs due to COVID-19. A recent survey from the National Federation of Independent Business (NFIB) revealed that about 70% of small businesses applied for loans through the Paycheck Protection Program (PPP), the first round of which authorized \$349 billion in forgivable loans. Entire sectors of the economy are teetering on the brink, and many large corporations need help to survive until normal economic activities can resume. Both businesses and workers are desperate for our economy to re-open, but just re-opening and hoping for the best will not suffice.

*What American employers and employees need is confidence.* Employees need confidence that when they return to work, there will be adequate health and safety standards in place. And employers need confidence that they will not face a wave of coronavirus-related litigation when they open their doors.

What stands in the way of this confidence is uncertainty. Without clear COVID-19 health and safety guidelines from Congress, employers are left to grapple with a confusing and conflicting patchwork of local, state, and federal regulations. This leads to gaps in health and safety standards, followed inevitably by waves of litigation with the potential to crush small businesses and seriously damage larger ones.

What is the path forward? Some on the political left and right are presenting it as a binary choice: protect workers from health hazards or protect businesses from legal jeopardy. The New Center believes that both are essential and that Congress is uniquely positioned to provide a single, overarching guarantee that cuts through the uncertainty. *The message should be clear: Workers must not be required to jeopardize their health and lives as a condition of employment. They must be protected with tough, realistic, and enforceable standards. And businesses that meet these standards must be able to re-open without fear of litigation.*



### WHAT IS A SAFE HARBOR PROVISION?

A safe harbor is a provision in a law or regulation that affords protection from liability or penalty under specific situations, or if certain conditions are met.

In this issue brief, The New Center will examine previous trends in litigation following national crises, survey lawsuits already underway due to COVID-19, and shed light on where future legal action might emerge as all levels of society—from businesses, to states, to the federal government—gradually re-open. This brief also identifies the kinds of coronavirus-related safe harbor legal protections Congress should consider in the critical weeks ahead.



# Litigation on the Horizon

An uptick in lawsuits following large-scale crises is not a new phenomenon.

In the aftermath of the 9/11 terrorist attacks—which resulted in the deaths of nearly 3,000 civilians, firefighters, law enforcement officials, and military personnel—airlines were among the entities blamed, with lawsuits contending that companies did not properly account for the possibility of terrorist attacks or carry out proper security checks. Legal battles went on in court for years, with American Airlines, United Airlines, and other defendants eventually settling with several plaintiffs. One prominent case involved financial services company Cantor Fitzgerald, which had 658 employees perish in the World Trade Center and settled its suit against American Airlines in 2013 for \$153 million after nine years in court. In another case, developer Larry Silverstein and World Trade Center Properties collected \$95 million in 2017 after settling with American Airlines, United Airlines, and others sued for negligence and lapses in safety protocols.

Fast forward to 2020: as cases of COVID-19 are increasing, so too are the number of class-action lawsuits and complaints. According to law firm Hunton Andrews Kurth, as of May 7, 2020, there are about 900 COVID-19-related complaints nationwide. The majority of these complaints originate from New York, California, and Florida, and range in topic from labor rights to prison conditions to medical malpractice. This illustrates the concern of employers: unclear standards bring waves of potentially crippling litigation. On the other hand, one group of lawsuits against Smithfield Foods highlights the very real gaps in public health protocols and provides early evidence that some employers might be engaging in activities for which they need to be held accountable.

### **Smithfield Foods: A Case Study on Public Health Protocols and Litigation**

On April 4, 2020, Smithfield Foods employee Augustin Rodriguez was hospitalized after contracting COVID-19. Rodriguez succumbed to the disease on April 14, 2020, becoming the first to die in the Sioux Falls, South Dakota plant outbreak. By mid-April 2020, the Sioux Falls Smithfield pork factory would become the nation's largest coronavirus hotspot with over 1,000 cases now directly and indirectly connected to the facility, surpassing the previous hotspot aboard the USS Theodore Roosevelt. The Sioux Falls plant, which is now shuttered indefinitely, was just the first Smithfield location to be hit. A pair of plants in Wisconsin and Missouri have now temporarily closed, while a plant in North Carolina has confirmed cases but no plan in place to shut down yet.

In response to the growing number of cases, a spokesperson for Smithfield Foods claimed that the outbreak was a result of the plant's immigrant population, saying that “living circumstances in certain cultures are different than they are with your traditional American family,” a sentiment recently echoed by Health and Human Services Secretary Alex Azar. Smithfield employees are claiming the opposite. Identified only as “Jane Doe,” a Smithfield employee is suing the company in federal court in Missouri. In a Washington Post piece, Jane Doe alleges, among other things, that Smithfield was aware of the risk of the outbreak for weeks, did not communicate with staff about COVID-19 cases in a timely manner, and was slow to implement safety measures. Doe claims that Smithfield even took actions that were counterproductive to slowing the spread by extending shifts “up to 11 hours—on a faster line, which means we bump into each other more often as we work. We don't even have time to cover our mouths if we sneeze, because the line is moving so fast.”

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On April 28, 2020, President Trump issued an executive order declaring meat and poultry as critical and strategic materials essential to national defense under Section 101(b) of the Defense Production Act. Alongside requiring meat and poultry producers to prioritize certain contracts over others, the order gives the Secretary of Agriculture authority to ensure continued supply. This includes verifying that plants are operating under the joint guidance issued by the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) that focuses on employee safety. However, this guidance from the CDC and OSHA might offer little in the way of enforceable protections for workers, as it is “not a standard or regulation, and it creates no new legal obligations.”

This is a heated issue, and already battle lines are being drawn.

In a letter to Senate Majority Leader Mitch McConnell (R-KY) and House Speaker Nancy Pelosi (D-CA), 20 business groups stated that “while the rest of America has come together to fight this pandemic, some trial lawyers have instead plotted to line their pockets with COVID-19 related lawsuits.” Meanwhile, worker advocacy groups contend that providing overly expansive COVID-19 liability protections would make it harder to hold companies accountable for keeping their employees and customers safe. In an article for Quartz, University of Michigan economics and public policy professor Justin Wolfers stated, “We want businesses to take responsibility. All of tort law is about creating a strong incentive for people and companies to not act badly.”

## What Could Safe Harbor Provisions Look Like?

After the Sago Mine disaster in West Virginia left 12 miners dead, legislators swiftly responded by passing the Mine Improvement and New Emergency Response Act (MINER Act) in 2006. The MINER Act amended the Mine Act of 1977 to improve accident preparedness mechanisms. Congress must do the same thing today in light of the COVID-19 crisis. To date, government agencies such as the CDC and OSHA have provided employers with interim guidance on how best to prepare their workplaces for a national reopening. But that is all it is—guidance.

Instead, Congress needs to pass legislation that outlines not only what health and safety regulations employers must implement, but what protections employees are entitled to should they feel unsafe in the workplace.

While the details remain to be worked out, the general categories are clear. To ensure safe workplaces, the law must specify threshold standards for testing and protective equipment. It must require changes in businesses’ physical layouts, the organization of productions, and disinfecting practices to ensure appropriate social distancing and hygienic standards. And it should protect workers against retaliation and dismissal for bringing what they believe to be unsafe conditions to the attention of their supervisors.



### **What is the difference between a low-, medium-, and high-risk workplace?**

According to OSHA, high-risk jobs include healthcare workers, laboratory personnel, morgue workers, healthcare delivery and support staff, medical transport workers, and mortuary workers. Medium-risk jobs include schools and retail settings. Low-risk jobs are those with minimal occupational contact with the public and other coworkers.

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Acting under the standards provided by Congress, relevant federal agencies and the states can require more from employers depending on a state's unique COVID-19 circumstance—and whether a business is a high-, medium-, or low-risk workplace—but the requirements from Congress would serve as a mandatory baseline. Through these clearly established safeguards, Congress would offer employers a grand bargain: a commitment to keeping their employees and customers safe, in exchange for immunity from undue litigation through safe harbor provisions. And it would offer workers what they want and deserve: the opportunity to support themselves and their families without risking their health, and perhaps even their lives.

Moving from general standards to industry-specific regulations would be challenging, especially when time is of the essence. In order to speed up the process, one option would be to convene a Chamber of Commerce/AFL-CIO working group to sort out the details, with OSHA and the CDC at the table as well. Newly established health standards, as well as accompanying safe harbor provisions, would affect many aspects of the workplace environment, some of which are outlined below with action items for institutions and Congress.

### **Liability for Exposure to COVID-19**

Employers are confronted with a patchwork of conflicting state-based worker compensation laws and how they might apply to exposure to COVID-19 in the workplace. According to law firm McGuireWoods, diseases such as the common cold or flu are usually excluded from worker compensation schemes, and that “coronavirus exposure may be treated similarly.” However, this exclusion has yet to be officially announced by most states. (Some states, like Washington, are an exception. It has issued guidance saying that “under certain circumstances, claims from health care providers and first responders involving COVID-19 may be allowed. Other claims that meet certain criteria for exposure will be considered on a case-by-case basis.”) Plaintiffs are already beginning to test these murky waters. When 51-year-old Wando Evans, a former Walmart associate and Illinois resident, died after contracting COVID-19, his estate decided to sue Walmart for failing to properly respond to the threat of COVID-19.

To facilitate the reopening of the economy, Congress needs to reduce this ambiguity and confusion with a uniform set of health and safety standards upon which federal regulators and state governments can build, but below which they cannot sink. Some economists and workers' advocates take the position that there is no need for new legislation because current tort law already strikes the right balance between employers and employees. If employers operate their businesses in ways that expose workers to avoidable risk, they are on notice that there may well be a substantial price to pay, so they have an incentive to do the right thing.

In ordinary circumstances, this argument makes sense. But the COVID-19 pandemic is different. When workers are injured in the workplace, it is usually clear that the injury is causally linked to performing the job or job-related activities. But with COVID-19 and other infectious diseases, there is no necessary connection between coming down with the disease in the workplace and getting it from the workplace. Even when employers do all they can to reduce the risk of infection, new COVID-19 cases will still be possible, even likely. This is one reason why it makes sense to require employers to take specific steps to minimize risks stemming from workplace conditions and—if they comply—to exempt them from liability for infections their workers nonetheless may experience. It is then the government's responsibility, not the private sector's, to ensure that workers are appropriately supported and compensated should they become infected.

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## Health Privacy Protections

Under new guidance issued by the Equal Employment Opportunity Commission, employers are able to conduct a wide variety of screening measures to determine whether employees have COVID-19, including: asking employees whether they have experienced COVID-19-related symptoms, asking whether they have been tested for COVID-19, and even conducting temperature checks before employees enter the workplace. All information collected about individual employees may be recorded, but it must be kept confidential and it must be stored separately from the employee's non-medical information. If an employer wishes to disclose information about an employee's COVID-19 status, they may provide the information to a relevant public health agency.

Under normal circumstances, employee medical information or changes to their medical status might not affect the day-to-day operations of a business, and could therefore be kept private from other staff. However, if an employee contracts COVID-19 and is required to self-isolate, it would be almost impossible for their identity not to be inadvertently revealed, particularly in smaller work environments. When considering health privacy protections in newly articulated health and safety standards, Congress should build in protections from liability for employers who implement all necessary measures to protect employee health information, even if that information is subsequently revealed due to circumstances beyond their control.

## Personal Protective Equipment (PPE) in the Workplace

The Occupational Safety and Health Administration (OSHA) has provided "Guidance on Preparing Workplaces for COVID-19," which includes new guidance specifically for COVID-19 and also provides an overview of non-COVID-19-related workplace standards. Within this guidance, OSHA notes that "employers are obligated to provide their workers with PPE needed to keep them safe while performing their jobs" and that "the types of PPE required during a COVID-19 outbreak will be based on the risk of being infected with SARS-CoV-2 while working and job tasks that may lead to exposure."

Alongside the regular PPE requirements employers need to fulfill, several states, such as Maryland, New Jersey, New York, and Rhode Island, have issued face-covering (and other PPE) mandates for customer-facing establishments, with some states requiring employers to bear the cost of providing face coverings.

Some employers might find it difficult to provide PPE for their employees because of supply chain disruptions and widespread shortages. And if employers cannot provide mandated equipment to employees, they cannot force their employees to engage in unsafe activities where PPE is required.

In these situations, states and the federal government cannot leave employers to fend for themselves, especially when a critical economic re-opening is at stake. To support employers who are unable to provide PPE, and have exercised good-faith efforts to attain it, Congress could implement a mechanism through which employers could report supply shortages to their respective states. States and the federal government could then work to effectively source and distribute PPE to areas with the greatest need.

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But what happens in a situation where an employer cannot provide PPE—despite good-faith efforts to do so—and employees cannot afford not to return to work while supplies are being sought? In a situation like this, Congress could consider providing employers with the option of short-term PPE waivers. These waivers, to which individual employees could choose to assent, could function to provide employers with a specific time frame (i.e., 30 or 60 days) during which they would be immune from PPE- and exposure-related liabilities while they worked to procure equipment for their employees.

Under this agreement, employees would have the right to choose whether they wished to continue working without PPE. If they chose not to return because they felt unsafe, their absence would be treated as a furlough and therefore eligible for unemployment insurance. Should employees who choose to sign waivers still not have PPE when the allotted time elapses, employers would no longer be protected if employees sought legal recourse.

### **Manufacturers Producing Critical Medical Supplies**

On March 10, 2020, Secretary of Health and Human Services Alex Azar issued a declaration under the Public Readiness and Emergency Preparedness Act (PREP). According to the Department of Health and Human Services, a PREP Act declaration: "provides immunity from liability for claims of loss caused, arising out of, relating to, or resulting from administration or use of countermeasures to disease, threats and conditions determined by the Secretary to constitute a present, or credible risk of a future public health emergency to entities and individuals involved in the development, manufacture, testing, distribution, administration, and use of such countermeasures."

In an advisory opinion issued on April 14, 2020, DHHS outlined the two requirements a qualified pandemic product must satisfy: it must be used for COVID-19, and it must be authorized under an Emergency Use Authorization (EUA), be described in an Emergency Use Instruction (EUI), or be used under an Investigational New Drug (IND) application or an Investigational Device Exemption (IDE). Respirators were later added as qualifying products when the PREP Act was amended through the CARES Act. While the PREP declaration provides immunity from liability for a large swath of manufacturers producing COVID-19 related products, it does not protect them all. For example, breweries and distilleries like Anheuser-Busch that have switched to producing hand sanitizer do not qualify for PREP Act immunity.

In order to encourage companies to continue producing necessary cleaning and disinfectant supplies, as well as other supplies critical in countering COVID-19, Congress could expand the products that qualify for immunity from liability under the PREP Act declaration. At the same time, Congress must address the lack of robust protections for workers both in this issued advisory opinion and the PREP Act itself.

Immunity from liability under the PREP Act is unavailable only in cases involving "death or serious physical injury caused by willful misconduct." Congress should strengthen worker protections by requiring these companies, like all others, to adhere to baseline safety standards and by establishing a mechanism to adjudicate the claims of workers who allege unsafe working conditions. Workers bringing such claims should be protected against retaliation and termination.

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## The Role of Government

So long as the pandemic persists, providing binding protections for workers will be essential. It will also be expensive. To speed up the establishment of safe workplaces, the federal government should offer financial assistance to employers—say, 75% of the costs for reconfiguring and disinfecting their workplaces and for providing the personal protective equipment that workers will need every day.

Workers will also need financial assistance from the government. If they become infected, they should enjoy first-dollar health care coverage for themselves and for co-resident family members until they are able to return to work. To maintain family incomes, the government should also fund sick leave at full salary during the period of the infection. And the worker compensation program should be expanded to cover death or permanent disability stemming from COVID-19.

The COVID-19 pandemic is an emergency. The New Center's proposed response is emergency legislation, targeted to urgent needs, the broader effects of which cannot be fully foreseen. For this reason, this legislation should be crafted to sunset no later than the end of 2022. In the interim, Congress should perform oversight, identify problems, and reenact the portions of the law that effectively promote enduring national goals.

## Conclusion

Although partisans on the right and left seem eager to frame this debate as a classic business vs. labor narrative, the reality is more nuanced. Representative Ro Khanna (D-CA), one of the House's progressive leaders, believes that America cannot “have immunity [for employers] without the protection for workers. We need a clear legislative direction of what worker safety looks like, especially during the COVID crisis.” So does the National Association of Manufacturers, which says in its American Renewal Action Plan that “employees must be able to go out in public and into their places of work confident that proper health precautions are being implemented.”

Just about everyone accepts the principle that the basic interests of both employers and employees need to be coordinated through balanced legislation. The task for Congress is to agree on clear, practical, and enforceable health and safety standards for workers—and to ensure that employers meeting these standards do not have to worry about being targeted for litigation. Businesses want to re-open and workers want to get back to work. Now Congress must provide a legal framework for the confidence they need to do so.

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## **AUTHOR**

Aleksandra Srdanovic

Policy Analyst

[aleksandra@newcenter.org](mailto:aleksandra@newcenter.org)

## **ABOUT CENTERING ON CORONAVIRUS**

Centering on Coronavirus is a new policy series from The New Center that provides insights and analyses of how coronavirus is progressing, how it is impacting our health system, economy and workers, and the extraordinary human, policy, and technological resources that are being mobilized to fight it.

## **ABOUT THE NEW CENTER**

American politics is broken, with the far left and far right making it increasingly impossible to govern. This will not change until a vibrant center emerges with an agenda that appeals to the vast majority of the American people. This is the mission of The New Center, which aims to establish the ideas and the community to create a powerful political center in today's America.

## **THE NEW CENTER**

1808 I Street NW, Fl. 5

Washington, D.C. 20006

[www.newcenter.org](http://www.newcenter.org)

