COVID-19 Response: State Liability Protections

Overview

It is critical for all levels of government to consider reasonable reforms that provide clarity and limit frivolous lawsuits related to COVID-19, so health care providers, charities, and businesses can operate and serve their communities in this unprecedented time of need while at the same time, continuing to protect individuals against gross negligence, criminal misconduct, and fraud. Litigation targeting responsible institutions which have followed available guidance and the latest science can erode the trust required for economic recovery, mutually beneficial interactions within communities, and between businesses and customers, health care providers and patients.

Americans from all walks of life have come together to fight COVID-19 pandemic. Front line health care workers, business large and small, faith-based organizations, and nonprofits have stepped up to provide care and relief to the communities they serve. However, these community efforts could be derailed by frivolous lawsuits with the potential to disrupt economic recovery, increase health care costs, and cause the price of goods and services to soar.

Roughly a thousand COVID-19 lawsuits have been filed across the country as of mid-May 2020, and these claims range from negligence lawsuits and medical malpractice to public nuisance and product liability. This litigation could create massive uncertainty as our economy reopens and could impact charities, hospitals, emergency-supply manufacturers, nursing homes, and governments. The bulk of COVID-19-related liability is at the state level, and Americans for Prosperity encourages each state to evaluate their existing civil liability protection laws and adopt proactive legislation to distinguish legitimate from frivolous claims, particularly for lawsuits that could complicate COVID-19 response efforts or establish barriers to economic opportunity or recovery. While Congress considers federal liability protections, state efforts should focus on enacting legislation based on the following principles.

Principles for State COVID-19 Liability Protections

- **Focus on Legislation.** While governors in a number of states have the authority to make changes during a declared emergency or disaster, state legislation can provide greater, long-term certainty.
- **Assess Existing Liability and Tort Reform Provisions.** States should examine their existing liability protections, and may want to bolster existing provisions in the wake of COVID-19 or enact a new chapter dedicated to cross-cutting COVID-19-related protections. For example, liability protections for physicians and front-line health care workers may reside in state Good Samaritan statutes, Uniform Emergency Volunteer Health Practitioners Act (19 states have enacted), or Emergency Management Assistance Compact or other emergency management provisions.
- **Protect Good Samaritans.** State and local Good Samaritan protections, as well as the federal PREP Act, are narrow in scope. States should consider steps to ensure charitable donations of Personal Protective Equipment (PPE) and ventilators, manufacturers, sellers, designers, or distributors of non-federally-approved protective equipment, and employees who deliver equipment are protected from liability.
- **Tailor COVID-19 Liability Protections for Certain Businesses.** States should enact liability protections if the claim is based upon an action or non-action that complied with, or was consistent with, a federal or state statute or regulation, executive order, or public health guidance. These protections should be broad, as responsible institutions are receiving science-based recommendations

or requirements from different levels of government. States should also consider protections specific to businesses that have remained open or re-opened based on government orders, including those deemed "essential" or "critical infrastructure," and discourage claims that can be addressed through the workers' compensation system.

- **Bar COVID-19 Public Nuisance Claims.** There are already signals that institutions are facing lawsuits based on theories of "public nuisance" or vague shareholder value claims. These broad claims confuse national public policy questions with nuisance liability, and could handcuff economic recovery.
- **Distinguish Legitimate COVID-19 Medical Claims.** As the American Tort Reform Association explains: "These lawsuits will include individuals who did not contract coronavirus, experienced symptoms similar to a common flu, or experienced no symptoms at all…. These lawsuits will claim that exposure to coronavirus led a person to experience emotional distress stemming from fear of contracting the disease, the expense of visiting a doctor or testing, or economic loss due to quarantine." States should consider limiting civil liability to individuals who have experienced minimum medical conditions, like diagnosis of COVID-19, or symptoms consistent with COVID-19 that required inpatient hospitalization or resulted in serious illness or death.
- **Consider Adopting a "Recklessness" Standard for COVID-19 Claims.** Rather than strict liability or full waivers, states may want to shift COVID-19-related claims from a negligence standard to a more tailored recklessness standard. As the Mercatus Center recently argued: "While the recklessness standard might still involve litigation and findings of fact by juries, the higher bar provides more legal certainty than a negligence standard because it requires a plaintiff to prove that an entity's actions were so inappropriate that the entity either knew or should have known that its conduct would probably harm others."
- **Continue to Ensure Appropriate Liability for Recklessness, Gross Negligence, Criminal Misconduct, and Fraud.** These recommendations help to distinguish between legitimate and frivolous claims, and are consistent with ensuring civil or criminal liability for these behaviors.