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## **LIABILITY SAFE HARBORS – NEED FOR LEGISLATION**

### **Why is liability safe harbor legislation necessary?**

We are in the midst of a worldwide pandemic and businesses, nonprofits and other entities, many of whom have and continue to provide essential services, are doing the best they can to protect both their employees and the public. However, a fear of being sued is preventing many entities from reopening even if they follow applicable safety standards and guidance.

### **Aren't businesses and other entities already protected if they comply with applicable COVID-19 standards?**

No. Nothing prevents a person from filing a lawsuit even if it is frivolous or lacks merit. Providing clear safe harbors will discourage these suits. Even a frivolous lawsuit can bankrupt a small business trying to defend itself and a lack of a safe harbor puts larger entities at risk by lawyers filing suits against “deep pocket” companies in the hope of a settlement or a sympathetic jury.

### **Businesses should not be given blanket immunity from lawsuits.**

We agree. The business and nonprofit communities want to do the right thing. We believe that businesses, nonprofits, and other entities should follow applicable standards and guidance to help prevent the spread of the virus. We also believe that if they, in good faith, make this effort, they should be given a safe harbor from liability from lawsuits claiming exposure to the virus.

### **Would the proposed legislation protect those entities that did not follow applicable health care guidance to prevent the spread of the virus?**

No. We are not recommending blanket immunity nor trying to provide protections for any business or entity that did not act in good faith in trying to meet all applicable health and safety standards. The legislation we are supporting goes far beyond merely requiring acting in good faith. We are supporting legislation that mandates acting in compliance with CDC and other applicable guidance in order to attain the safe harbor protections. In fact, setting specific standards to be met will help ensure that more protective measures are put in place to safeguard the public.

### **What about all the deaths that took place in nursing homes?**

Our proposal would require all entities, including nursing homes, to have reasonably met CDC and other applicable guidance in order to avail themselves of the safe harbor protections. It does not provide any additional protections to nursing homes or other entities. Its provisions are much more limited than that given to health care facilities and professionals in P.L. 2020, c. 18.

### **What about bad actors?**

We are not asking to protect bad actors. Businesses that do not comply with applicable federal or state standards or guidance or that act with reckless disregard of those standards, thereby creating an obvious risk of harm, would not meet the safe harbor requirements and would not be afforded any liability protections.

### **Without the threat of tort lawsuits, employers will lose the incentive to take the precautions reasonably necessary to protect workers from exposure to the coronavirus.**

The legislation we are seeking will create the right incentives and the right balance. The “bad actor” exemption ensures there is no incentive for a business or nonprofit to disregard the measures it should take to mitigate the spread of COVID-19. Instead, the legislation would incentivize them to implement applicable standards. As employers resume or continue operations to support the nation’s economic recovery, they have every incentive to keep their workforce safe, healthy and productive. Employers cannot operate without their employees and they need to protect their customers and clients. This is a highly communicable disease, and employers want to keep it out of their workspaces.

### **What if the measures taken under existing standards and guidance are not enough to protect the public from the spread of COVID-19? Shouldn’t lawsuits be allowed to protect the public?**

Businesses, non-profits, and other entities need to be able to know what is expected of them and be assured that if they act in good faith to prevent the spread of COVID-19 that they will have protections from lawsuits. Our court system is generally not well-equipped to make scientific decisions that impact major public health programs or requirements, and court decisions generally affect only the parties to the case. What is needed are standards, determined by health professionals, who use the best knowledge available to them at a point in time. Sound and fair public policy suggests we rely on public health authorities to establish standards of care rather than relying on lawsuits which would seek to apply standards of care retroactively. Failure to establish standards of care in this fashion will create continuing uncertainty and unacceptable risk for businesses, nonprofits, and governmental entities trying to follow best practices.

### **If we provide employers with liability protections, are workers going to be left without protections should they get the virus while at work?**

No. Protection of workers and providing employers a safe harbor liability protection from lawsuits are two totally separate issues. The liability protections being sought are solely for protection from lawsuits from persons other than employees. As for workers, under the existing workers compensation law, if a worker can prove that they contracted the virus at work he or she will be able to file a claim for workers compensation. In fact, the workers compensation statutes provide that this is the worker’s exclusive remedy when injured on the job. The business and non-profits sectors are not asking for any changes to existing worker compensation protections. No employee will lose any rights or protections under the legislation being proposed.