

Senate Committee on the Judiciary
Examining Liability During the COVID-19 Pandemic

May 12, 2020

2:30 PM

G50 Dirksen Senate Office Building

Purpose

The purpose of this hearing was to discuss liability protections for business owners as America gradually reopens, while protecting consumers from exposure to COVID-19.

Members Present

Chairman Graham, Ranking Member Feinstein, Senators Cornyn, Grassley, Leahey, Tillis, Durbin, Lee, Whitehouse, Holly, Klobuchar, Crus, Coons, Herono, and Harris

Witnesses

Mr. Kevin Smartt

Chief Executive Officer, Kwik Chek Convenience Stores

Mr. Anthony “Marc” Perrone

International President, United Food and Commercial Workers International Union

Ms. Rebecca Dixon

Executive Director, National Employment Law Project

Mr. Lee Tyner

General Counsel and Member of the Leadership Team, Texas Christian University

Mr. David Vladeck

A.B. Chettle Chair in Civil Procedure and Professor, Georgetown University Law Center

Ms. Helen Hill

Chief Executive Officer, Explore Charleston

Opening Statements

Chairman Graham said that the Committee is looking to find ways to safely re-open the country. The federal role in creating liability protection needs to be limited. The goal is to assure those who are opening their businesses with the right procedures and social distancing protocols that they do not have to worry about being sued on top of everything else. Chairman Graham stated that he is trying to find liability protections in a way that makes sense, yet always being mindful of public health. He thanked all the witnesses for being a part of the conversation today as each state is also experiencing this pandemic differently.

Sen. Cornyn said that he agrees with the Chairman. This hearing is to provoke conversation to protect businesses while also ensuring the safety of the public. Activities such as football and resuming academic routines stimulates the economy and is necessary.

Ranking Member Feinstein said that frontline workers continued to deliver essential services during this time. There are more than 10,000 COVID-19 meat packing plant cases and 45 of these individuals have died. One reason for these pockets of infections are unsafe working environments. There are pressures of individuals going into work rather than staying home when they are sick. Businesses are concerned they will face lawsuits if someone becomes infected. This is why it is critical for the federal government to issue COVID-19 related standards. Human life depends on this if America is to reopen and return to normalcy. Prior to the pandemic, businesses had guidelines they were to abide by. This is no different. Some will argue that existing laws already cover the federal capabilities in addressing these safety measures. But more needs to be done.

Testimony

Mr. Smartt said all of his businesses have strived to keep their doors open with essential items like food and fuel during this pandemic. They have had to overcome many obstacles to adapt their daily operations. Since early March, they have implemented intense cleaning protocols to ensure the safety of their employees and consumers. On April 22, they followed the new internal protocols by closing down one of their stores after an employee tested positive and recommended other employees self-isolate. They notified the public about the incident to keep others safe. Volume in fuel has been down by 40%, and they have kept paying employees their full paycheck. Because of this, they are asking the federal government to protect these essential businesses, tailor liability protections for those who are compliant but do not protect bad actors, separately evaluate any questions of compensation for people who get sick from the question of whether and when businesses should be liable, and make these protections temporary. No one can protect from every risk of infection with the nature of this crisis, but businesses are doing what they can for the public.

Mr. Perrone said the United Food and Commercial Workers International Union (UFCW) is America's largest food and retail union representing 3.1 million facilities. Essential works are on the frontlines of the crisis every day. This crisis would be so much worse if it was not for the hard work from these workers. In order to protect the food supply, America should protect the workers. He said that 162 of his members have died from COVID-19. He said that Occupational Safety and Health Administration (OSHA) has failed to enforce protections in response to COVID-19. They support strong protections because everyone agrees that these workers are essential, even the President. To be clear, this is not anti-business, it is about being pro-safety. He said that it is both the facility owner and the federal government's responsibility to protect these workers. These protections include PPE, contact tracing, social distancing, and providing sick pay. This virus does not care whether you're a Republican or a Democrat, this is about safety for our nation's food workers.

Ms. Dixon said the National Employment Law Project strives to strengthen protections and build power for workers in the U.S. including the unemployed. Worker health is public health. America cannot reopen businesses if workers and the public are not kept safe. This would lead to new hot spots if there is a lack of adequate protections. Due to historic inequities, the impact is also uneven. About 87% occupations in the U.S. can be classified as racially segregated. She said this country has done a poor job in providing equal rights, benefits, and protections for people of color and immigrants. Racial minorities and immigrants are more likely to be essential workers. She also mentioned the failure of OSHA in their mandate to protect workers during the pandemic. Workers' compensation is the only remedy because it is a no-fault system. Congress should join forces with workers and businesses to come up with a way to ensure safety while also protecting workers from the virus.

Mr. Tyner said he wants to focus on two main points. First, our nation's university campuses are major economic drivers and must return to somewhat normal operations. Second, universities need certainty around the standard of care. University of Texas in Austin generates more than \$8.2 billion in business activity for Austin, Texas. Encouraging and enabling higher education is important. However, there needs to be a safe way to do so. Two of the major challenges are financials and how to reopen campuses safely. The fact that no one knows where the "liability cliff" lies, they will avoid resuming any and all activity for these major drivers of the economy altogether. The spread of the virus is inevitable. Uncertainties are impacting decisions. Universities also operate their own healthcare facilities and other types of facilities, which means universities face

several cliff issues. Universities need a clear definition of the standards, and targeted protections during this crisis. Without this, America cannot expect a robust reopening of universities.

Mr. Vladeck said he is anxious about getting the country back to normalcy. He wants to make it clear that businesses that are reasonable are already protected from liability. But science and evidence directed standards are necessary to safely reopen. Large segments of the public are skeptical of reopening and granting immunity enhances the skepticism. There are only two ways the government can protect its citizens from irresponsible conduct - regulation or liability rules. The government has not yet given the public this. Some have suggested that instead of blanket immunity, Congress should give immunity to only those who engage in negligent or irresponsible conduct, not gross negligence or gross conduct. This idea should be redacted because it trivializes serious risks and it is an unworkable standard. He stated that the only certain approach is providing standards that are backed by science.

Ms. Hill said she has great concern for the tourism industry. Over half of the tourism jobs, approximately 8 million, have been lost. The economic impact is 9 times greater than after the 9/11 attacks. Traveling is a hallmark of our freedom in this country. She said that she has never been more proud of the travel agency because of the way they responded, as a whole, to the virus. But now this industry is looking to reopen their businesses. Without guidance, there can be no reopening of business and travel. That is why this industry is seeking temporary liability protections. Although the travel industry has responded well amid the pandemic, they are asking for help when protecting their customers and reopening their businesses.

Questions and Answers

Chairman Graham asked if federal agencies like OSHA have issued guidelines specific to protecting the workforce and stopping the spread of the virus. **Mr. Smartt, Mr. Perrone, Ms. Dixon, Mr. Tyner, Mr. Vladeck,** and **Ms. Hill** said yes. **Chairman Graham** asked if limited liability protection without rewarding bad actors can be done. **Mr. Vladeck** said he thinks it can be done, but it is not wise. **Mr. Smartt** said it is necessary. **Chairman Graham** asked if it is possible to navigate reopening without bankruptcy from lawsuits. **Mr. Perrone** said yes.

Ranking Member Feinstein asked how a customer of a particular business could prove they were infected at a particular business. **Mr. Vladeck** said you cannot because of how the virus is transmitted. **Ranking Member Feinstein** asked if there is precedent for broad immunization of businesses from liability. **Mr. Vladeck** said no. **Ranking Member Feinstein** asked what the consequences would be if Congress were to pass the protections currently being proposed. **Mr. Vladeck** said assuming that there was a way to define gross negligence, it would not be actionable, and there would be all sorts of irresponsible conduct. **Ranking Member Feinstein** asked if this proposal were to become law, would there be any liability. **Mr. Vladeck** said it would be very hard to prove liability. **Ranking Member Feinstein** asked if Mr. Vladeck was saying not to pass this proposal because of liability. **Mr. Vladeck** said not to pass this proposal because the best way to protect the public and business is to do what Chairman Graham suggested - to force public agencies to give guidance.

Sen. Grassley asked if the mere threat of a lawsuit can impact a business owner's decision making in the midst of the pandemic. **Mr. Smartt** said businesses act hesitantly without certainty. **Ms. Hill** said fear is holding a lot of businesses back and instilling confidence would help. **Sen. Grassley** asked if predictability in the legal system directly relates to America's economic recovery from the pandemic. **Mr. Smartt, Ms. Hill,** and **Mr. Tyner** said yes. **Sen. Grassley** asked if it would be difficult

without clarity from Congress for business owners to prove that exposure did not happen on their premises. **Mr. Smartt**, **Ms. Hill**, and **Mr. Tyner** said yes. **Sen. Grassley** asked Mr. Smartt about the risks that his business has been exposed to as an essential service. **Mr. Smartt** said they had to have the conversations on how long this would go on given the crisis.

Sen. Leahey asked why lawsuits are important to compel bad actors to change their behaviors. **Mr. Perrone** said that in the absence of clear, enforceable regulations, the workers should have an avenue to go through the regulatory process. **Sen. Leahey** asked how the prevalence of mandatory arbitration causes a wave of litigation. **Ms. Dixon** said that businesses are suing other businesses and forcing arbitration, leading to workers being coerced into signing these agreements. **Sen. Leahey** asked if additional shields against lawsuits are redundant. **Ms. Dixon** said yes. **Sen. Leahey** asked if it would be better for states to protect their respective businesses versus blanket immunity. **Mr. Vladeck** said yes, because states are at the frontlines in response to this crisis.

Sen. Tillis asked if Mr. Tyner has seen an increase in the kinds of cases where students are claiming “irreparable harm” due to finishing courses online versus in-person. **Mr. Tyner** said he has seen about 50 suits and class actions when universities were simply following the rules. **Sen. Tillis** asked what Mr. Vladeck would advise businesses who are in the areas with higher risk to do. **Mr. Vladeck** said that enforceable guidance to ensure public safety is needed.

Sen. Durbin asked if Congress should come up with science-based guidelines to help businesses. **Mr. Smartt** said yes.

Sen. Lee asked if modifying the removal statute so that federal courts can hear civil liability cases involving citizens of different states would help businesses better navigate legal risk when reopening. **Mr. Vladeck** said that diversity cases can already be removed providing that the defendant is not a resident of state. **Sen. Lee** asked if Congress would constitutionally be capable of supplementing the state’s substantive law to that degree necessary to create a safe harbor for COVID-19. **Mr. Vladeck** said he does not believe so, and that he thinks that it would be unconstitutional.

Sen. Whitehouse asked if there were a federal standard of care that OSHA or CDC came up with and the business was compliant with those standards, would that be a legal defense to a liability lawsuit. **Mr. Vladeck** said yes, every state recognizes regulatory liability defense.

Sen. Holly asked if it is constitutionally sufficient that the federal government establishes a standard of care when it comes to COVID-19 and then provides an exclusive remedy. **Mr. Vladeck** said yes, but an immunity bill is not pre-emption. **Sen. Holly** asked if Congress has to replace one remedy with another remedy in order for pre-emption to be constitutionally valid. **Mr. Vladeck** said yes. **Sen. Holly** asked if there are better legal mechanisms to compensate deserving businesses. **Mr. Vladeck** said first responders who do not have viable legal claims should receive that help.

Sen. Klobuchar asked why requiring the Labor Department to provide guidelines for business to follow is important. **Mr. Perrone** said right now, OSHA says to follow CDC guidelines but those are not enforceable. **Ms. Dixon** said workers do not have enforceable recourse if their employers are not following the guidelines. So then they have to make a choice between their health and income.

Sen. Cruz asked about the threat of lawsuits that convenience stores are facing and how that affects decisions. **Mr. Smartt** said the little things like obtaining masks suddenly per CDC guidelines was a

liability they felt as well. **Sen. Cruz** asked what effects the changing guidelines have on their businesses. **Mr. Smartt** said the cost of litigation and of course, the health of his employees and customers are big concerns.

Sen. Coons asked if the witnesses believe the federal government has set clear, science-based, enforceable standards for what is expected of employers to protect their workers. **Mr. Smartt** and **Mr. Perrone** said no. **Sen. Coons** asked how a new immunity law prevents an irresponsible employer who has endangered the lives of employees and consumers and how that would provide incentive for better behavior. **Ms. Dixon** said if there is no rule, America will be relying on the honor system.

Sen. Herono asked if negligence needs to be proven. **Mr. Vladeck** said yes, causation must be shown. **Sen. Herono** asked about if there is a disproportionate impact that a blanket immunity would have on the minority population. **Ms. Dixon** said yes.

Sen. Harris asked that if it is correct that in 49 states, employers are to carry worker's compensation insurance, and if it is correct that large businesses that carry workers' compensation cannot be sued by their employees for negligence. She also asked if it is correct that forced arbitration agreements prohibit workers from seeking justice in courtrooms. **Ms. Dixon** said yes, all three of those are correct.