

May 12, 2020

The Honorable Lindsey Graham
Chairman, Senate Committee on the Judiciary
SD- 224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member, Senate Committee on the Judiciary
SD-152 Dirksen Senate Office Building
Washington, DC 20510

RE: “Examining Liability During the COVID-19 Pandemic” Hearing on May 12, 2020

Dear Chairman Graham and Ranking Member Feinstein:

Our associations collectively thank you for examining the issue of liability during the COVID-19 pandemic. We respectfully request Congress act to protect the businesses that have taken necessary precautions to protect their employees and customers while serving the country during the crisis. The undersigned associations represent industries across the nation that have been recognized as part of the nation’s essential critical infrastructure by the U.S. Department of Homeland Security (DHS). Every day of this crisis, these companies and their employees make a difference in American lives – providing them with food and beverages, water, medication, fuel, financial and other services, and the other necessities of life. As the Committee examines this pressing issue, the undersigned associations urge the Committee to adhere to the following principles:

Provide Protection for Essential Businesses

On March 16th, the Administration updated its guidance on the COVID-19 emergency and said, “If you work in a critical infrastructure industry, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply, you have a special responsibility to maintain your normal work schedule.” The industries represented on this letter have responded to that call and despite some of the most challenging business conditions in the nation’s history, have stayed open to serve their customers over the past several weeks. True to the American spirit, they have overcome many obstacles, made significant changes to their operations, invested heavily in their employees, and kept their doors open to ensure that Americans relying on their goods and services continue to have access to them. These businesses should not be penalized simply for remaining open.

Provide Protection Against Claims of Virus Exposure

The Center for Disease Control (CDC) has noted that COVID-19 has achieved “community spread” in many locations across the country. According to the CDC, “Community spread means people have been infected with the virus in an area, including some who are not sure how or where they became infected.” The unknown source of a particular infection leaves

businesses that have remained open particularly vulnerable to claims that the virus was contracted in the place of business. Since the inception of the virus infection cannot be traced, it will be very challenging, time consuming and expensive for businesses to defend against these claims. Businesses that take appropriate health and safety precautions need protection from the potentially crippling expense and time consumption of defending cases that will be exceedingly difficult to prove or disprove.

Provide Protection for Employers Taking Appropriate Precautions

These businesses are committed to doing the right thing by remaining open and serving the American people during this crisis. At the same time, these businesses have implemented unprecedented virus mitigation protocols such as enhanced cleaning and sanitation practices and social distancing measures to protect their employees, customers and others from exposure. Additionally, employers are working to comply with local, state and federal guidance for workplace safety. These guidelines have changed and evolved over time (often without warning) and, because they were sometimes vague, they were challenging to implement in practice. Furthermore, many employers have faced difficulties acquiring the cleaning supplies and personal protective equipment they need to protect their operations in the way they would like. These uncertainties and compliance challenges will leave room for efforts by some to take advantage of the current crisis with lawsuits against the businesses that, by necessity, kept operating.

Protections Should Not Cover Bad Actors

To be clear, the undersigned organizations do not seek protection for bad actors. Those businesses who willfully ignore the risks of the spread of COVID-19, commit gross negligence and do not adhere to the recommended health and safety guidance should be subject to litigation. This is an important distinction for our organizations. We are not looking for blanket coverage that would allow bad actors to operate without making efforts to provide worker and customer safety. We simply seek protection for those businesses who *are* doing what they can to protect against exposure to the virus. We would note that Linda Lipsen, who heads the American Association for Justice which represents trial lawyers, was recently quoted by Reuters as saying, “If you wanted to write a bill that said that reasonable conduct would be protected - because some of the proponents of immunity don’t seem to understand that - that would be something that we would have no problem with.” We find this encouraging as it suggests to us that there is significant common ground on this issue.

Protection Against Claims of Liability is a Separate Policy Question from Compensation

The question of compensation is separate from broad liability claims brought against a business. The undersigned organizations are not suggesting that compensation for an employee or customer incident is inappropriate. We are particularly sympathetic to the need for an infected individual to be able to support his or her family during and after illness, however, that can happen without subjecting employers to a multiplicity of lawsuits and large legal fees.

Protections Should be Tailored to the Current Crisis

We are not looking to change American tort law on a permanent basis. The COVID-19 pandemic is a unique event and merits its own response that is tied to the needs of this moment. With that in mind, we favor limiting liability protections to this virus and the time during which it is a threat. This is not the time to hash out longstanding questions about the American legal system that are not related to the current crisis.

Given the historic efforts of Congress and the Administration to save businesses large and small as well as American jobs with trillions of dollars in investments, it would be devastating to have these same employers facing a threat to their survival through unjust lawsuits. This is a historic crisis and our businesses have responded in historic ways. We are grateful for the consideration of liability protection by the Committee and feel strongly that this is a necessary piece of our eventual recovery.

Given the threat of expensive and difficult to prove cases against essential employers, we request the Committee to provide leadership and support for liability protection language for businesses designated as essential critical infrastructure by the DHS Cybersecurity and Infrastructure Security Agency's guidance in the next (phase 4) COVID-19 stimulus bill.

We thank the Committee for examining this critical issue and look forward to working with you to reach a solution.

Sincerely,

American Bakers Association
American Beverage Association
American Scallop Association
American Trucking Associations
ATM Industry Association
Coalition of Franchisee Associations
Convenience Distribution Association
Distilled Spirits Council of the United States
Electronic Funds Transfer Association
Electronic Transactions Association
FMI, The Food Industry Association
Franchise Business Services
Global Cold Chain Alliance
Healthcare Distribution Alliance
Independent Lubricant Manufacturers Association
International Foodservice Distributors Association
International Franchise Association
National Armored Car Association
National Association of Chain Drug Stores

National Association of Convenience Stores
National Association of Specialty Pharmacy
National Association of Truckstop Operators
National Cattlemen's Beef Association
National Community Pharmacists Association
National Confectioners Association
National Cotton Council of America
National Fisheries Institute
National Franchisee Association
National Grocers Association
North American Meat Institute
North American Millers Association
Petroleum Marketers Association of America
SNAC International
Society of Independent Gasoline Marketers of America
Tree Care Industry Association
United Fresh Produce Association