

WHAT BUSINESSES SHOULD EXPECT IN POTENTIAL COVID LIABILITY PROTECTION LEGISLATION, & WHAT THEY CAN DO ABOUT IT NOW

Mark Champoux, Sterling J. LeBoeuf, and Daniel A. Richards
Davis Graham & Stubbs

If an employee or customer contracts COVID-19 at a place of business, should that business be held liable? Even though the business followed every bit of health and safety guidance from relevant authorities? These questions are likely top of mind for most business operators, especially as communities reopen and employees return to work. The answers may depend on whether the U.S. Congress passes legislation to limit businesses' liability related to COVID-19.

While legislation is always an uncertain proposition, there is at least some possibility that Congress will pass a liability protection bill in the coming months, as Senate Republicans have said that such legislation must be included in an expected new round of COVID-19 relief measures. In September, Senate Republicans introduced a proposed relief package, which includes a robust liability-limiting bill styled as the SAFE TO WORK Act ("STWA").¹ The Senate's first vote on the package garnered a majority (52 votes) but failed to meet the 60-vote threshold to overcome a filibuster. Even so, negotiations over a COVID-19 relief bill are expected to continue during the remainder of the current Congress and in the new Congress in January, and these talks will undoubtedly include liability protection.

Initially proposed by Senator Cornyn in July, the STWA is seen by many as the liability-related proposal most likely to serve as the starting point for whatever liability protection measures are ultimately included in new relief legislation. By its proposed terms, the STWA's liability-limiting provisions, if enacted, will be retroactive in nature. This means that businesses can act now to take appropriate measures that may maximize the benefit of this potential legislation.

This article will (1) summarize the key features of the STWA, and (2) suggest what businesses should do now about potential liabilities relating to COVID-19 given the possibility of the STWA's enactment (or the enactment of similar legislation).

I. Key Features of the Proposed "Safe to Work Act"

At a high level, the STWA creates an exclusive federal cause of action for claims that a person suffered injury by being exposed to COVID-19 in a workplace or other business setting. This federal cause of action would preempt and supersede state law tort claims and provide various forms of protection against liability for businesses that make reasonable efforts to comply with applicable government standards and guidance.

Scope: The STWA liability provisions would apply to all "coronavirus exposure actions," which include any civil action (i) brought by a person who suffered personal injury or is at risk of suffering personal injury, (ii) against an individual or entity engaged in businesses, services, activities, or accommodations, (iii) alleging that an actual, alleged, feared, or potential for exposure to coronavirus caused the personal injury or risk of personal injury that occurred in the course of the businesses, services, activities, or accommodations of the defendant individual or entity.² The STWA excludes from its scope claims brought by the federal government or by any state, local, or tribal government as well as any claims

¹ S. Amdt. 2652 to S. 178, available at <https://www.congress.gov/amendment/116th-congress/senate-amendment/2652/text>.

² Sec. 2003(4)(A). The STWA separately provides certain liability protections for coronavirus-related medical liability claims against health care providers. This article, however, focuses on the STWA's proposed protections for exposure claims against businesses and employers.

alleging intentional discrimination on the basis of various enumerated protected classes, including sex (which specifically includes pregnancy).³

Federal Cause of Action and Preemption: The STWA would create a federal cause of action as an exclusive remedy for coronavirus exposure claims, which would preempt and supersede other federal, state, or tribal laws that otherwise govern claims for personal injuries related to coronavirus exposure.⁴ The STWA would not, however, preempt state and local laws that “impose[] *stricter limits* on damages or liabilities” or provide “greater protection to defendants” for coronavirus exposure claims.⁵ The STWA also would not preempt or affect (i) a claim for benefits under workers’ compensation programs; (ii) governmental actions under criminal, civil, or administrative enforcement laws; (iii) certain intentional discrimination claims under federal, state, or tribal law; and (iv) a seaman’s right to claim maintenance and cure benefits.⁶

Federal Court Jurisdiction and Removal: The STWA would grant the federal courts concurrent jurisdiction over coronavirus exposure actions and would permit removal to federal court of any such claims initially filed in state court, even if the claim had been filed prior to STWA’s enactment.⁷

Statute of Limitations: The STWA would require that a coronavirus exposure action be filed within one year of the date of actual, alleged, feared, or potential for exposure to coronavirus.⁸

Heightened Pleading Standards and Other Complaint Requirements: For any coronavirus exposure action filed in or removed to federal court, the STWA would require any complaint to plead “with particularity”:

- each element of the plaintiff’s claim;
- “all places and persons visited by the [plaintiff] and all persons who visited the residence of the [plaintiff] during the 14-day-period before the onset of the first symptoms allegedly caused by coronavirus,” and the factual basis for the belief that the defendant’s place of business, rather than all other potential sources of exposure, was the actual source of the plaintiff’s exposure to coronavirus; and
- “each alleged act or omission constituting gross negligence or willful misconduct” that caused the plaintiff’s injury.⁹

The STWA would also require a plaintiff to file certain other documents with the complaint, including specific information describing “the nature and amount of each element of damages and the factual basis for the damages calculation”; a statement of facts demonstrating the defendant acted with the required state of mind; an affidavit of a medical expert who did not treat the plaintiff explaining the basis for the expert’s belief that the plaintiff suffered the alleged injury; and certified medical records documenting the alleged injury.¹⁰

³ Sec. 2003(4)(B).

⁴ Sec. 2121(a)-(b).

⁵ Sec. 2121(b)(2).

⁶ Sec. 2121(b)(3)-(6).

⁷ Sec. 2161(a), (b)(1).

⁸ Sec. 2121(c).

⁹ Sec. 2163(a).

¹⁰ Sec. 2163(b)-(c).

Heightened Standards of Proof, Including Requirement to Prove Business Failed to Comply with Government Standards: To prove liability for exposure to coronavirus, the STWA would require a plaintiff to prove by *clear and convincing evidence* that:

- the business operator “was not making *reasonable efforts* in light of all the circumstances *to comply with the applicable government standards and guidance* in effect at the time of [the alleged exposure-related injury];”
- the business operator “engaged in *gross negligence or willful misconduct* that caused an actual exposure to coronavirus;” and
- “the actual exposure to coronavirus caused the personal injury of the plaintiff.”¹¹

If the business operator is subject to conflicting, non-mandatory government standards and guidance, the plaintiff would have to show by clear and convincing evidence that the business operator failed to make reasonable efforts to comply with “*any* of the conflicting . . . standards and guidance.”¹²

Benefits of a Written Policy: The STWA would provide heightened protections for business operators that establish a written policy to prevent coronavirus exposure. If the business operator “maintained a written or published policy on the mitigation of transmission of coronavirus” at the time of the alleged exposure that complied with, or was more protective than, applicable government standards and guidance, the business operator would be presumed to have taken reasonable measures to comply with applicable government standards and guidance, unless the plaintiff proves the business operator was not complying with its written or published policy.¹³

Damages Limitations: The STWA would limit recoverable money damages in most cases to actual economic losses incurred, with damages for noneconomic losses possible only if the business operator’s conduct was willful rather than just negligent.¹⁴ Punitive damages would also be limited to instances of willful misconduct and could not exceed the amount of compensatory damages awarded.¹⁵ Further, the amount of monetary damages would be reduced by any amount received by the plaintiff from a collateral source, such as his or her health insurance provider—*i.e.*, the collateral source rule would not apply.¹⁶

Limitation on Joint and Several Liability: The STWA would, with limited exceptions, provide for proportional—rather than joint and several—liability allocation. As such, a defendant would be liable “solely for the portion of the judgment that corresponds to the relative and proportionate responsibility of that individual or entity,” with the trier of fact considering the nature of each responsible party’s conduct and the nature and extent of the causal relationship between each individual’s conduct and the damages to plaintiff.¹⁷

Discovery Limitations: In federal court actions, the STWA would not permit discovery prior to the deadline for the defendant to file an answer or motion to dismiss and would stay discovery until the court ruled on any motion to dismiss.¹⁸ It would also allow an immediate interlocutory appeal of any denial of a

¹¹ Sec. 2122(a).

¹² Sec. 2122(b)(1)(A).

¹³ Sec. 2122(b)(2).

¹⁴ Sec. 2162(b)(1).

¹⁵ Sec. 2162(b)(2).

¹⁶ Sec. 2162(b)(3).

¹⁷ Sec. 2162(a).

¹⁸ Sec. 2163(e)(1).

motion to dismiss and stay discovery pending resolution of the appeal.¹⁹ Once discovery proceeds, it would be limited to matters “directly related to material issues contested” in the action.²⁰

Class Action and Multidistrict Litigation Limitations: The STWA would require individual plaintiffs to affirmatively “opt in” to a class action, and would require greater transparency of class counsel’s fee and financing arrangements.²¹ For any multidistrict litigation, the STWA would prohibit transferee judges from trying cases assigned to them absent consent of all parties, and would permit immediate interlocutory appeals of any orders the resolution of which could materially advance the ultimate termination of one or more cases in the multidistrict proceeding.²²

Protection Against Meritless Demands: The STWA would seek to deter meritless demands by creating a federal cause of action allowing defendants to recover compensatory damages and attorneys’ fees incurred in responding to a meritless demand, and would also authorize punitive damages in limited circumstances.²³ The STWA would also permit the U.S. Attorney General to seek civil penalties against anyone engaged in a pattern or practice of making meritless demands for payment for coronavirus exposure.²⁴

Retroactive Application: The STWA’s liability protections would be retroactive to any actions alleging coronavirus exposure after December 1, 2019 and would apply going forward for alleged exposures occurring until at least October 1, 2024 and possibly later.²⁵

Protection from Federal Employment Claims and Enforcement Proceedings and Public Accommodation Liability: The STWA would protect an “employer” (defined to include essentially all private and public employers)²⁶ from being “subject to any enforcement proceeding or liability under any provision of a covered Federal employment law” in connection with coronavirus if the employer:

- “was relying on and generally following applicable government standards and guidance;”
- “knew of the obligation under the relevant provision;” and
- “attempted to satisfy any such obligation by -- (i) exploring options to comply with such obligation[] and with the applicable government standards and guidance (such as through the use of virtual training or remote communication strategies); (ii) implementing interim alternative protections or procedures; or (iii) following guidance issued by the relevant agency with jurisdiction with respect to any exemptions from such obligation.”²⁷

“Covered Federal employment laws” include all of the key federal employment statutes, such as Title VII of the Civil Rights Act of 1964, Title I of the ADA, the ADEA, the OSHA Act, and others.²⁸ The STWA would also limit businesses’ liability and the actions they are required to take to modify their policies, practices, or procedures under federal public accommodation laws (Title III of the ADA and Title II of the

¹⁹ Sec. 2163(f).

²⁰ Sec. 2163(e)(2)(A).

²¹ Sec. 2163(g)(1).

²² Sec. 2163(g)(2).

²³ Sec. 2164.

²⁴ Sec. 2164(e).

²⁵ Sec. 2003(4)(A)(iii)(II).

²⁶ Sec. 2003(8).

²⁷ Sec. 2181(a)(2).

²⁸ Sec. 2181(a)(1).

Civil Rights Act of 1964)²⁹ during a “public health emergency period.”³⁰ Notably, however, it appears the STWA’s protections against federal employment and public accommodation claims would not extend to similar state laws, which exist in most states to varying degrees. This could make the STWA’s protections in this regard somewhat hollow for many businesses.

The STWA would also circumscribe liability (whether arising under state or federal law) related to workplace coronavirus testing and would prohibit plaintiffs from using as evidence of an employment or joint employment relationship various coronavirus related measures, including testing, training, or temporary assistance, taken with respect to a business’s independent contractors or workers employed by another employer.³¹

II. What Can Businesses Do Now to Take Advantage of the STWA If It Is Enacted?

Because the STWA, if enacted, would apply retroactively, there are several steps businesses can take now that will ensure they can maximize the liability-limiting benefits of the STWA. Importantly, some of these recommended steps will help businesses limit their potential liability for coronavirus exposure even if STWA never becomes law.

1. Identify and Seek to Comply with Applicable Government Standards and Guidance

Perhaps the most impactful feature of the STWA is the requirement that a plaintiff prove a business failed to make reasonable efforts to comply with applicable government standards and guidance to mitigate coronavirus exposure. Under the STWA, a business will have a good chance of prevailing if the evidence shows it made good faith, reasonable efforts to adhere to relevant governmental health and safety guidance.

To do so, a business will first need to identify the relevant government standards and guidance, which will depend on the jurisdictions in which the business operates, the type of industry it is in, and other factors, including type of worksite and employee count. Relevant government standards may come from a combination of statutes, regulations, and guidance documents from various federal agencies as well as state and local authorities. The relevant standards for any given business will likely change from time to time as agencies update their guidance based on still-developing scientific information and as communities pass through various phases of economic closure and reopening. Moreover, the relevant standards might intersect or conflict with other bodies of law, including employment and public accommodation laws. Given the wide range of potential sources of applicable guidance and potential conflicts between such guidance and other law, businesses should consult legal counsel to help identify the standards that apply to them.

After identifying relevant standards and guidance, businesses should be sure not only to comply, but to document their compliance efforts in a way that will produce admissible evidence that can be used to defend against any potential claims. Again, businesses should consult legal counsel to determine appropriate ways to implement health and safety standards and to create and maintain admissible records of such activities.

2. Create and Implement a Written Policy to Mitigate Coronavirus Transmission

As noted above, the STWA provides its maximum liability-limiting benefits to businesses that create and adhere to a written policy to mitigate the transmission of coronavirus. Such a policy must be consistent with, or more protective than, applicable government standards and guidance, and the business

²⁹ Sec. 2181(b)(1)(B).

³⁰ Sec. 2181(b)(2).

³¹ Sec. 2183.

must comply with its written policy. Legal counsel can assist businesses in developing a written policy that incorporates the appropriate standards and guidance and in documenting their compliance with such a policy.

3. Consider Strategies in Pending Litigation

Due to the STWA's retroactive application, businesses that are currently facing demands or claims for coronavirus exposure should consider how the prospect of the STWA's enactment might affect its litigation or settlement strategy. For example, if a business is optimistic that the STWA will be enacted, it might consider postponing discussions to settle current claims until after enactment. For claims that are already in active litigation, businesses should consider opportunities to extend the litigation timeline to allow for the possibility that the STWA will pass and apply retroactively. Current litigants should also consider appropriate opportunities to preserve arguments and defenses that would be available under the STWA, while being careful not to rely on a prospective law to the detriment of any protections available under existing law.

4. Utilize Existing Protections Under Federal and State Law

Businesses should also be sure to take advantage of existing liability protection measures under federal and state law. At the federal level, for example, the Public Readiness and Emergency Preparedness (PREP) Act limits legal liability for those who administer certain specified "countermeasures" during a declared public health emergency.³² Under current declarations and guidance by the U.S. Department of Health and Human Services, the PREP Act's protections generally apply to businesses that manufacture, distribute, or administer specific pandemic countermeasures—such as medicines, vaccines, testing equipment, and personal protective equipment ("PPE")—that have been approved or otherwise authorized by the Food and Drug Administration. Separately, the CARES Act—enacted in the Spring of 2020—grants liability protections to volunteer health care providers engaged in certain health care services in response to COVID-19.³³ Neither the PREP Act nor the CARES Act, however, provides the kind of broad protection from exposure claims that is contemplated in the STWA.

Many states have also implemented liability-limiting protections relating to COVID-19. Some of these laws, like the PREP Act and CARES Act, focus on health care services and businesses providing PPE, medicines, and other materials that directly support the health care response to the pandemic. But some states—including, for example, Utah, Wyoming, Oklahoma, North Carolina, and Louisiana—have also enacted broad protections against coronavirus exposure liability for businesses, employing some of the same tools that are proposed in the STWA. The core concept of many of these laws—as with the STWA—is that a business operator's liability to coronavirus exposure claims should be limited where the evidence shows that the business reasonably complied with applicable health and safety standards and guidance. As such, even in the absence of broader federal liability protection in the form of the STWA or similar legislation, businesses should consult legal counsel to ensure they can receive the full benefit of any other liability-limiting provision under federal or state law.

5. Understand that the STWA May Not Be Enacted or May Be Modified

Finally, businesses should never put all their eggs in a basket that depends on the U.S. Congress to do something. Although it is prudent to take certain measures now to maximize the STWA's benefits if it is eventually enacted, businesses should also prepare for the possibility that the STWA is never enacted or that it passes with significant modifications to the current version. In that respect, businesses should

³² See 42 U.S.C. § 247d-6d.

³³ See Coronavirus Aid, Relief, and Economic Security Act (Pub. L. 116-136), Sec. 3215.

prioritize risk reduction strategies that are based on the current state of the law and avoid any conduct inconsistent with those strategies that is premised only on a hope that current laws will be changed. Legal counsel can help businesses develop such strategies and ensure that they can be adapted in the event Congress enacts STWA or some other form of liability protection relating to coronavirus exposure.