

# Pandemic Liability Policy Recommendations

## PART OF THE NAM AMERICAN RENEWAL ACTION PLAN

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Manufacturers of all kinds have been called on to continue to operate as critical infrastructure to support our nation's response to the COVID-19 crisis. They are doing their best to serve the public interest and minimize harm to the American people during these uncertain times. Yet, for that reason, they risk becoming targets in a wave of COVID-related lawsuits or enforcement actions based on product liability, alleged workplace transmission and even Good Samaritan efforts. The present crisis also threatens to exacerbate the recent abuse of "public nuisance" lawsuits that do little to protect everyday Americans.

Manufacturers and the men and women they employ remain committed to serving the needs of the public—to provide food, medical supplies, lifesaving drugs and daily necessities and to support the nation's economic resilience—even in the face of legal uncertainty. This uncertainty, however, threatens to punish good actors and keep countless manufacturers stuck on the sidelines because they cannot take on the added risk of producing new and different equipment to serve the needs of those on the front lines of this pandemic. And it will hamstring America's relief efforts and economic recovery.

The federal government must protect those who have served the needs of the public during this pandemic by enacting targeted legal liability reforms that reduce uncertainty and unlock the full potential of manufacturing in America, as we move from response to recovery and American renewal.

## CREATING RATIONAL RULES FOR THE CRITICAL WORKPLACE

Operating during the global COVID-19 pandemic has created unprecedented uncertainty for manufacturers across the food and beverage, agriculture, aerospace and other essential sectors. They confront new and difficult legal questions every day simply to continue to serve the public. Federal and state recommendations have evolved and changed rapidly, at times leading to confusion even with simple tasks like cleaning a work site with bleach. Recognizing the importance of allocating "medical grade" equipment to health care workers, some manufacturers have even designed and produced masks, separation screens, face shields and hand sanitizer for their own employees to prevent the spread of COVID-19 in their facilities.

Companies must deal with this confusing legal landscape in addition to the already complex regulatory regime that ordinarily covers the workplace. For many manufacturers, this has generated nearly impossible legal compliance quandaries. They are simply doing their best to follow guidance from the CDC, OSHA and state agencies.

Congress should protect the essential companies that have operated in good faith to help sustain the country during this crisis and in accordance with local, state and federal emergency designations by:

- Limiting lawsuits in state and federal courts claiming damages, and enforcement actions claiming penalties, based on COVID-19 exposure from essential manufacturing operations to instances where the manufacturer had actual knowledge that an individual would be exposed to COVID-19 and acted with reckless indifference or conscious disregard as to whether they would contract it;

- Requiring cases based on workplace transmission theories to be pled with particularity and to meet a clear and convincing evidence standard;
- Acknowledging the ever-evolving patchwork of available advice, industry practices and state responses that combine to make identifying a clear standard of care nearly impossible during a national emergency; and
- Providing employers with a safe harbor for collecting and exchanging critical information related to employees' health status and for implementing reasonable measures such as temperature checks to combat workplace transmission of COVID-19.

## PROTECTING GOOD SAMARITANS

Manufacturers across the country have completely redesigned their shop floors to produce critical materials like respirators, face shields, masks, gowns and hand sanitizer for the first time. Others have taken protective equipment that they would have used themselves and donated it to local hospitals, government entities and first responders. Many who ordinarily manufacture this equipment have greatly increased their output to meet critical demand.

State and local Good Samaritan protections vary widely, and many fail to protect manufacturers for these type of actions to help others in a national emergency. Similarly, while the PREP Act provides some protections, it covers only certain FDA-approved or -authorized products, and the months-long backlogs at testing labs make achieving those protections next to impossible.

Congress should remove barriers to producing important materials and protect those who act in good faith, consistent with CDC guidance, by:

- Broadly protecting manufacturers, designers, sellers and distributors of non-federally-approved masks, respirators and other protective equipment from liability for state or federal claims arising out of the use of these items;
- Allowing manufacturers to deploy basic, nonregulated masks and other items designed to slow the spread of COVID-19 in their sites, without fear of liability, to ensure that health care workers on the front lines have priority access to the materials they need;
- Extending volunteer protections for employees who deliver protective equipment to hospitals;
- Generally limiting liability to those who manufactured, sold, designed, distributed or donated a defective product with actual knowledge of the product's defect in conscious disregard for the health and safety of others; and
- Requiring cases based on product liability or volunteer actions to be pled with particularity and to meet a clear and convincing evidence standard similar to existing protections under the PREP Act.

## PREVENTING THE INAPPROPRIATE EXPANSION OF STATE TORTS TO ADDRESS NATIONAL POLICY ISSUES

Even before the COVID-19 crisis, manufacturers faced a growing number of lawsuits based on theories of "public nuisance" or vaguely premised on harm to shareholder value. These usually baseless claims try to get the courts to interfere in areas of public policy that are controlled by federal lawmakers or regulators or that are global in scope. As America prepares to return to work, Congress

should act to protect essential manufacturers from such abusive forms of litigation advanced by special interests.

Congress should safeguard critical industries that must continue to function during a national or global crisis by:

- Placing state public nuisance claims based on the spread of pandemic disease off limits where there has been a declared national emergency;
- Insulating publicly traded companies from derivative claims based on hindsight evaluations of actions deemed inappropriate but conducted in good faith during uncertain times, including the decision to remain operational during the crisis or to close entirely or at specific sites, or for regulatory disclosures made based on the limited and imperfect information available at the time of the disclosure; and
- Preventing the creative use of state tort claims from undermining a response to this crisis or one yet to come.

