

COVID-19 Legislative Liability Protection
Higher Education Talking Points
May 28, 2020

Need:

To sensibly, safely, and swiftly reopen, colleges and universities require timely, temporary, and targeted federal safe harbor from liability for illness or the spread of illness when good faith efforts are made to comply with applicable local, state, and federal public health standards.

Legislative Ask:

We urge Congress to create an immediate and temporary safe harbor from COVID-19 exposure liability that will permit colleges and universities acting sensibly, carefully, and in good faith to begin to reopen.

However, the safe harbor should not shield gross negligence or willful misconduct. Bad actors also would be held to account by states and municipalities using police and regulatory powers. The system of federal and state workers compensation can also provide additional important protections.

Justification:

Higher education's breadth, economic impact, and role as engine of mobility

There are more than 4,000 colleges and universities in the United States, educating nearly 24.5 million students, employing nearly 4 million Americans, and generating an estimated \$650 billion in economic impact—three percent of America's GDP.

- The catastrophic impact on campus operations and revenues has had a terrible ripple effect on the economies of surrounding communities.
- Encouraging, enabling, and supporting higher education's critical role as an economic engine and as an inextricable part of the fabric of our country's communities is essential to educating and training America's future workforce, preserving employment for millions, and restarting our nation's economy.
- America's colleges and universities are expansive operations that are engaged in every sector of the critical infrastructure necessary to support American communities. They are more like small cities than single-sector businesses. They operate hospitals and medical centers, full service utility companies, and telecommunications and computing networks. They provide housing and food services; run hotels, stadiums, and theaters; and operate retail shops, daycares, gyms, libraries, and museums. In doing so, they employ hundreds of thousands of skilled workers in various trades and professions when operating normally.
- The unprecedented nature of the COVID-19 pandemic poses unique challenges for colleges and universities, which, unlike most traditional businesses, must consider the best way to address safety concerns across multiple operational settings with practical limits on an institution's ability to monitor and control community members' compliance with shared expectations and obligations towards each other.

Developed in support of May 28, 2020, COVID-19 [limited liability protections letter](#) sent to congressional leaders by ACE on behalf of 76 other higher education organizations.

The chilling effect of uncertainty

Our overriding concern is keeping students, faculty, staff, visitors, and local communities safe. But, despite their best efforts to prevent community transmission, colleges and universities cannot guarantee against COVID-19 exposure.

- At this time, there are no widely accepted or well-defined standards of care for colleges and universities as they contemplate whether and how to safely reopen this fall.
- This uncertainty offers an opportunity for after-the-fact lawsuits challenging reasoned decision-making, which, in turn, has a chilling effect on how quickly and completely campuses resume operations.
- We are not seeking to avoid responsibility or to immunize colleges and universities for their own or others' bad acts. Rather, we are in need of certainty around the standard of care *and* the legal liability institutions and those who work for them face regarding COVID-19 exposure claims.
- Without some clarity on the standards of care, as well as temporary, limited liability protections, colleges and universities face enormous transactional costs associated with defending against speculative legal claims around alleged COVID-19 issues, even when they have done everything within their power to keep students, employees, and visitors safe. In addition, these coronavirus-related litigation costs will almost certainly contribute to the permanent closure of institutions that otherwise would have continued to operate as educators and employers.

Lack of federal standards

- We urge the federal government to issue clear, robust, science-based standards as soon as possible that will give colleges and universities a sector-specific roadmap for safe practices. We further urge the federal government to redouble its efforts to ensure that affordable and readily accessible testing and tracing mechanisms, as well as personal protective equipment, are widely available in the next few months.
- But it seems unlikely clear federal standards that reflect not only medical considerations but also traditional regulatory criteria such as cost and feasibility of implementation will be issued in time for campuses to make the many difficult decisions needed to safely reopen this fall. And while some states have enacted laws temporarily limiting liability, a state patchwork provides scant assurance to colleges struggling to make safe reopening decisions.

Summary Points:

- COVID-19 is a national problem requiring a national solution. Colleges and universities draw individuals from all over the country and the world.
- Although tort law is primarily a state matter, it is well-established that Congress can use its power to regulate interstate commerce to promulgate regulatory schemes that temporarily replace current federal and state statutory and common law liabilities for COVID-19.
- Higher education's need for timely, temporary, and targeted liability protections is clear. Congress must act now.

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