

## Sens. Say Safety Regs Must Precede COVID-19 Biz Immunity

By [Y. Peter Kang](#)

Law360 (May 12, 2020, 10:10 PM EDT) -- Republican and Democratic senators agreed at a panel hearing Tuesday that the federal government needs to issue enforceable workplace standards before any federal law can be passed that would shield businesses from civil lawsuits in connection with worker and customer COVID-19 infections.

During a Senate Judiciary Committee meeting to discuss a possible liability shield for businesses — a topic that Senate Majority Leader Mitch McConnell, R-Ky., has said will be a top Republican priority for the next coronavirus relief bill — senators on both sides of the aisle expressed concerns that there is no de facto standard of care since safety guidelines issued by the [Centers for Disease Control](#) and Prevention and the [Occupational Safety and Health Administration](#) are merely recommendations that are not enforceable.

"The sooner we can come up with a regulatory, OSHA-driven process to allow big, small and intermediate businesses [guidance], the better off we'll be," said Committee Chairman Lindsey Graham, R-S.C., after witnesses representing employers and employees said they would all welcome clear, enforceable and industry-specific guidelines for business operation best practices.

The panel's top Democrat, Sen. Dianne Feinstein of California, said it is critical for the federal government to issue specific coronavirus-related standards for workplaces.

"But so far OSHA has failed to do so," she said. "Furthermore, it has been reported that the [Trump] administration is preventing the CDC from issuing its own detailed guidelines on how to safely reopen businesses."

David Vladeck, a [Georgetown University Law Center](#) professor, testified that enforceable regulatory guidelines will allow companies to mount a regulatory compliance defense should they be sued over an infection.

"We urgently need science-based COVID-19 enforceable guidelines from public health agencies. Those guidelines not only safeguard the public but at the same time they provide the standards of liability," he said. "Compliance with those guidelines would eliminate any liability risk."

Vladeck also testified that granting immunity to businesses is unnecessary because plaintiffs bringing COVID-19 infection cases must overcome the substantial legal hurdle of establishing causation. He explained that the lack of a robust contact tracing system in the U.S. makes it virtually impossible for a retail customer to prove he or she was infected at any given establishment.

"Someone who has been out and about on the streets and contracts the virus, there's no way in the world they will be able to say it's Mr. Smith's fault," he said.

Sen. Patrick Leahy, D-Vt., stated that if a "bad actor" business knows it can't be sued, "there's not much of an incentive for them to do the things they should do," [echoing concerns](#) posed by plaintiffs injury attorneys.

The sweeping Democratic proposal for the next relief bill, [offered Tuesday](#) in the [U.S. House of Representatives](#), notably does not include the top Republican priority of a liability shield. McConnell has set a "red line," saying any relief bill must include pandemic-related liability protections for businesses and other entities that follow public health guidelines.

In a Senate floor speech Tuesday, McConnell said he and Sen. John Cornyn, R-Texas, are developing a bill with "a legal safe harbor for businesses, nonprofits, governments, workers and schools who are following public health guidelines to the best of their ability." The bill would not provide immunity for "actual gross negligence and intentional misconduct" but would prevent "a second epidemic of frivolous lawsuits."

But during Tuesday's hearing, Sen. Dick Durbin, D-Ill., took umbrage with McConnell's assertion that a "tidal wave" of coronavirus-related lawsuits will inundate the legal system if business liability shields aren't enacted. Durbin said of the 958 COVID-19 suits filed thus far, 27 were for personal injury and nine were for medical malpractice. The bulk of the lawsuits centered around prison conditions and insurance coverage disputes, he added.

"When you consider that we've had 1.3 million Americans diagnosed with COVID-19, the fact that only nine [medical malpractice] lawsuits were filed, whether frivolous or serious, does not suggest a tidal wave of lawsuits," he said.

Democrats have not been enthusiastic about McConnell's push for business immunity.

"We believe that the requirements that are in place to protect consumers and patients and others are there for a reason," Steny H. Hoyer, D-Md, the House majority leader, told reporters Tuesday. "Undermining those protections is not somewhere we would want to go."