

A Public Health Framework for COVID-19 Business Liability

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Version: May 26, 2020

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ABSTRACT

Businesses that reopen amid the COVID-19 pandemic face possible legal liability to customers and workers who contract the novel coronavirus as a result of those enterprises' operations. Federal and state lawmakers are actively considering proposals to narrow or expand the scope of such liability. These proposals have important implications not only for economic activity but also for public health. This article presents an analytical framework for evaluating liability regimes in the context of a communicable and deadly disease. The framework highlights the contrasting public-health consequences of liability before and after a customer or worker is exposed to the virus. Ex ante (before an exposure), the specter of liability generates incentives for businesses to take precautions that reduce the risk of virus transmission. Ex post (after an exposure), fear of liability may deter businesses from proactively informing customers and workers that they have been exposed to the virus through the business's operations. The desire on the part of businesses to spare themselves from litigation may interfere with comprehensive contact-tracing efforts. To minimize the potentially perverse ex-post consequences of liability without sacrificing significant ex-ante benefits, the article proposes a limited safe harbor from liability for businesses that promptly contact customers and workers after learning about a possible exposure. The article also suggests changes to workers' compensation rules that are designed to strike a balance between ex-ante benefits and ex-post costs.

Introduction

As more states lift or loosen stay-at-home orders, lawmakers are turning their attention to the issue of tort liability for businesses whose operations result in customers or workers contracting coronavirus disease 2019 (COVID-19). Senate Majority Leader Mitch McConnell has said that a “red line” for Republicans in negotiations over a further COVID-19-related aid package is that any legislation must include broad liability protection for businesses.¹ Senator Ted Cruz has predicted a “tidal wave” of lawsuits if businesses reopen under existing liability rules.² The state of Utah already has enacted a law that relieves businesses of liability to plaintiffs who contract COVID-19 unless the business engages in willful misconduct or inflicts harm recklessly or intentionally.³ Legislatures in several other states are actively considering similar bills.⁴

Liability regimes for infectious-disease exposures have potentially important implications for public health amid a pandemic. With the specter of large tort damages awards looming, businesses will have stronger incentives to take precautions that reduce the risk of viral transmission. This “ex ante” effect—the effect of tort liability on behavior *before* an exposure occurs—can aid efforts to stop the virus’s spread. However, liability fears also may discourage some businesses from proactively informing customers and employees who have been exposed to the virus as a result of the business’s operations. This “ex post” effect—the effect of tort liability on behavior after an exposure—can interfere with containment of the virus. A challenge in designing a liability regime for COVID-19 is striking an appropriate balance between ex-ante public-health benefits and ex-post public-health costs.

This brief article begins by surveying the existing legal landscape with respect to tort liability for businesses whose operations expose customers and workers to the risk of contracting COVID-19. It then presents a framework for evaluating the public health consequences of various liability rules. It ends with a concrete proposal for a tailored liability regime that aligns business incentives with public health imperatives. Specifically, we propose a safe harbor from liability for businesses that promptly inform customers of potential exposures. We also suggest modifications to workers’ compensation systems aimed at encouraging post-exposure precautions on the part of employers and employees.

I. Current Legal Landscape

¹ Carney J. McConnell, Cornyn working on bill to expand liability protections for businesses. *The Hill* (May 12, 2020), <https://thehill.com/homenews/senate/497316-mcconnell-cornyn-working-on-bill-to-expand-liability-protections>.

² Justine Coleman, Cruz Predicts 'Tidal Wave' of Lawsuits Against Reopening Small Businesses Without Legislation, *The Hill* (May 6, 2020), <https://thehill.com/homenews/senate/496351-cruz-predicts-tidal-wave-of-lawsuits-against-reopening-small-businesses>.

³ S.B. 3007 (2020) (Utah), <https://le.utah.gov/~2020S3/bills/static/SB3007.html>.

⁴ National Conference of State Legislatures. State Action on Coronavirus (COVID-19), <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx> (last updated May 18, 2020).

In the United States, the scope of business liability for injuries to customers is defined primarily by the laws of the fifty states and the District of Columbia. In all jurisdictions, absent a specific carveout, customers injured as a result of a business's operations can bring claims for the tort of negligence. A business generally will be liable for negligence if it breached its duty of "reasonable care" to customers and a customer suffered an injury caused by that breach.⁵

Customers bringing negligence claims in the COVID-19 context will face several steep obstacles. Most challengingly, a customer-plaintiff must prove by a preponderance of the evidence ("more likely than not") that her injury was caused by the business-defendant's breach of the duty of care. Consider a customer who alleges that she was exposed to SARS-CoV-2 and thereafter contracted COVID-19 as a result of a restaurant server's sneeze.⁶ The customer would bear the burden of proving, to a judge's or jury's satisfaction, that the server's sneeze—rather than an interaction with a relative, co-worker, acquaintance, employee of another business, or sidewalk passerby—was the proximate cause of her infection. Causation will be especially difficult to show in settings where COVID-19 is endemic and potential transmission pathways are manifold.

Even when a customer-plaintiff can establish that she contracted COVID-19 as a result of a business's negligence, additional hurdles remain. In some cases, courts may conclude that the plaintiff "assumed the risk" of contracting COVID-19—and thus forfeited her right to recovery—because she participated in an activity with a known risk of transmission (e.g., a group fitness class at a gym).⁷ In other cases, a judge or jury may find that the plaintiff failed to take reasonable self-protective measures (e.g., wearing a facemask or regularly washing hands), and thus was party at fault for her own infection. Under the comparative negligence doctrine followed by the overwhelming majority of states, a plaintiff who is partly at fault for her own injury will have her damages award reduced. In four states (Alabama, Maryland, North Carolina, and Virginia) plus

⁵ Under the Restatement (Second) of Torts, "a possessor of land" is generally "subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety." Restatement (Second) of Torts § 341 (1965). A "possessor of land" includes a business that owns or leases its premises; an "invitee" includes a business visitor (e.g., customer or employee). See *id.* §§ 328E, 332. The land possessor's duty of reasonable care under the Second Restatement applies only when the possessor "should expect that [invitees] will not discover or realize the danger, or will fail to protect themselves against it." *Id.* § 341. A land possessor's duty of "reasonable care" under the Restatement (Third) sweeps more broadly, and generally includes all entrants to land except for flagrant trespassers. See Restatement (Third) of Torts §§ 51, 52 (2012). Some states still follow the Second Restatement's rule. See, e.g., *Smith v. Smith*, 563 S.W.3d 14, 17-18 (Ky. 2018). Others follow the Third Restatement's approach. See, e.g., *Ludman v. Davenport Assumption High School*, 895 N.W.2d 902, 909-10 (Iowa 2017).

⁶ Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) is the official name of the virus that causes COVID-19. See World Health Organization, Technical Guidance: Naming the Coronavirus Disease (COVID-19) and the Virus That Causes It (2020), [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it). Thus, one is "exposed to SARS-CoV-2" and "contracts COVID-19."

⁷ See, e.g., *Naiwa v. Cedar Fair, L.P.*, 290 P.3d 1158, 1163 (Cal. 2012); *Trupia v. Lake George Central School District*, 927 N.E.2d 547, 548-49 (N.Y. 2010).

the District of Columbia, a plaintiff who is partly at fault for her own injury will be barred from recovery entirely.⁸

Tort claims arising out of virus exposures in the workplace face all of the above obstacles plus one more: every state and the District of Columbia follows some version of the workers' compensation exclusivity doctrine. That doctrine forms one side of the so-called "grand bargain" of workers' compensation, under which employers must provide no-fault insurance for employees injured on the job and employees generally lose the right to recover in tort.⁹ The workers' compensation exclusivity doctrine does not apply to independent contractors or to employees injured by a defendant other than her employer. Nonetheless, the doctrine dramatically limits the set of COVID-19 cases to which tort liability potentially applies.

Given the formidable legal obstacles facing customers and workers seeking to sue businesses for COVID-19-related injuries, one might wonder why liability issues suddenly have taken centerstage in political debates. One reason may be that COVID-19 liability issues intersect with a long-running, ideologically freighted battle over tort liability more generally. Like other COVID-19-related controversies over abortion clinic access, gun store openings, and religious exemptions from shelter-in-place orders, the tort liability debate can be understood only against the backdrop of the decades-old disputes that preceded it. A second answer is that in some sectors (e.g., nursing homes), causation may be substantially easier to establish, and assumption-of-risk and comparative defenses may be less robust. The particular problem of nursing home liability likely requires its own separate discussion.

But even where legal hurdles facing customers and workers are daunting, some plaintiffs likely will succeed in securing large judgments or settlements. Intense media coverage of occasional outsized verdicts may amplify the behavioral effects of those recoveries. Liability fears may be exacerbated further by the fact that many commercial general liability policies include explicit exclusions for communicable disease transmissions.¹⁰ For businesses whose insurance coverage excludes communicable disease transmission, the consequence of a coronavirus exposure claim

⁸ See Eli K. Best & John J. Donohue, III, *Jury Nullification in Modified Comparative Negligence Regimes*, 79 *University of Chicago Law Review* 945, 949-50 (2012). Comparative negligence regimes fall into two general categories. In "pure" comparative negligence states, a plaintiff's recovery is reduced by the percentage of fault attributable to her. In "modified" comparative negligence states, the same pure-comparative-negligence rule applies unless the plaintiff's fault is assessed to be at least as great (or in some iterations, greater than) the defendant's fault, in which case the plaintiff recovers nothing. South Dakota allows a plaintiff to recover full damages if her own fault is "slight" in comparison with the defendant's fault, but cuts off recovery entirely if the plaintiff's fault is more than slight. *Id.*

⁹ See Emily A. Spieler, (Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017, 69 *Rutgers University Law Review* 891 (2017). In forty-eight states and the District of Columbia, workers' compensation coverage is generally compulsory. Texas allows employers to opt out of providing coverage, though they then expose themselves to tort claims for on-the-job injuries. Congressional Research Service, *Workers' Compensation: Overview and Issues* 22-23 (updated Feb. 18, 2020). The Oklahoma legislature sought to switch from a compulsory scheme to an opt-out system, but the state supreme court struck down the opt-out law under the state constitution. See *Vasquez v. Dillard*, 2016 OK 89.

¹⁰ See Christopher J. Boggs, *Coronavirus and the CGL*, *Insurance Journal: Big I Insights* (Mar. 25, 2020), <https://www.insurancejournal.com/blogs/big-i-insights/2020/03/25/562354.htm>.

is that the business will be left on its own to litigate and potentially settle or pay damages on the claim. Until a vaccine emerges or a comprehensive testing-and-tracing scheme succeeds in containing the virus, business owners may continue to live with the anxiety of crushing liability.

For many businesses—and especially smaller businesses with shallower pockets—anxieties regarding tort liability are not new. But amid the current COVID-19 pandemic, these anxieties can turn into trepidation. Many businesses—especially bars, restaurants, and other enterprises in which customers are in close physical contact with employees and fellow patrons—already are suffering devastating economic losses.¹¹ These losses are becoming hard to sustain the longer that stay-at-home orders persist, and even as businesses are given the permission by government officials to reopen, they will each face difficult choices about whether to resume operations and in what fashion. Liability insurance generally provides less than complete coverage, even under ordinary circumstances.¹² And in the context of a communicable disease that may be excluded from insurance coverage, a lawsuit (even one that is ultimately unsuccessful) can be an existential threat to a business’s survival. At the same time, a case of COVID-19 can cause financial devastation for the individuals and families on the plaintiff side of exposure-related lawsuits, especially where an infection results in the death or long-term disability of a breadwinner. These predicaments ought not to dissuade us from addressing liability from a public health perspective. Rather, they underscore the importance of analyzing the public health consequences with due attention to the unique economic considerations at play.

II. Frameworks for Analysis

Debates over business liability for coronavirus exposures so far have been framed largely in now-familiar terms of restarting the economy versus protecting public health.¹³ A separate strand of arguments emphasizes the need for federal and state authorities to issue more detailed rules—rather than amorphous standards—for businesses that are reopening.¹⁴ We address these two

¹¹ To offer two striking projections: The reservation software company OpenTable estimates that COVID-19 will cause 25 percent of restaurants in the United States to fail. See Alexandra Kelley, *1 in 4 Restaurants Won’t Reopen After Coronavirus Pandemic: OpenTable CEO*, *The Hill* (May 15, 2020), <https://thehill.com/changing-america/resilience/smart-cities/497969-one-in-four-us-restaurants-wont-reopen-after>. And a survey of small businesses conducted by Facebook and the Small Business Roundtable found that 11 percent of small businesses expected to fail in the next three months if current conditions continue. Facebook & Small Business Roundtable, *State of Small Business Report 3* (May 2020), <https://dataforgood.fb.com/wp-content/uploads/2020/05/SMBReport.pdf>.

¹² See Christopher Hodges, *Law and Corporate Behavior: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* 79 (2015) (reporting estimate that small businesses pay approximately 20 percent of tort-related costs out of pocket).

¹³ See, e.g., Jim Spencer, *Senate Panel Debates Employer Immunity From COVID-19 Lawsuits*, *Minneapolis Star-Tribune* (May 12, 2020), <https://www.startribune.com/senate-panel-debates-employer-immunity-from-covid-19-lawsuits/570419712> (reporting remarks by Senator John Cornyn (R.-Tex.), who argued that liability limits are “required to relieve a ‘stressed’ economy,” and Senator Amy Klobuchar (D.-Minn.), who responded that immunity for businesses would leave workers and consumers “unprotected”).

¹⁴ See, e.g., Pamela Boykoff, *Debate Emerges: Should Businesses Be Protected From Covid-19 Lawsuits*, *CNN* (Apr. 29, 2020), <https://www.cnn.com/2020/04/29/business/business-liability-congress/index.html> (quoting Matthew

frames (“economy vs. public health” and “rules vs. standards”) before introducing a third—and, we suggest, more generative—approach to the issue.

A. Economy vs. Public Health

Business liability for coronavirus exposures has potential implications for both economic vitality and public health. Yet the liability issue cannot be reduced to a simple tradeoff between these two values. In some circumstances, liability limitations can be a hindrance to economic activity rather than an aid. Likewise, expansive liability can be a threat to public health rather than a support. Designing an effective liability regime requires careful attention to economic and public health considerations, but it requires much more than simply prioritizing one above the other.

Restarting the economy and protecting public health in and after a pandemic are largely complementary goals. A second wave of COVID-19 cases would likely trigger another round of business closures, so the economic outlook and the public health prognosis are inextricably linked. Moreover, for regular economic activity to resume, not only will businesses need to reopen, but customers will need to come. As long as would-be customers harbor acute fears of contracting COVID-19 in restaurants and stores, sales volumes at those establishments will remain depressed.

Concerns about tort liability may, to be sure, undermine business confidence. But the absence of tort liability also may undermine consumer confidence. This is especially true in environments of asymmetric information, where customers cannot easily verify whether businesses have undertaken appropriate precautions. Consider, for example, a barbershop or hair salon. A potential patron can easily observe whether a barber or hairdresser is wearing a facemask, but cannot so easily ascertain whether the barber or hairdresser checked her temperature that morning, took a COVID-19 test within the last week, or was recently exposed to an infected coworker. Liability serves as a way to bridge this information asymmetry: the customer still cannot verify the seller’s precautions directly, but the customer does at least know that the seller has an incentive to take precautions in order to avoid ultimate payment of damages.¹⁵

The previous paragraphs emphasized the circumstances in which liability can contribute to economic recovery, but liability also has the potential to undermine public health (and with it,

Shay, president of the National Retail Federation, who argues that businesses should be exempt from liability if they follow “appropriate guidelines”).

¹⁵ On the role of seller liability in bridging information asymmetries, see generally Michael Spence, *Consumer Misperceptions, Product Failure and Producer Liability*, 44 *Review of Economic Studies* 561 (1977). Note that sellers may choose to opt into liability by contract even if tort law does not mandate it. Likewise, consumers may choose to opt out of liability even where tort law provides it as a default. Liability waivers are honored in some—though not all—consumer settings. For the canonical statement of the circumstances in which liability waivers will be upheld, see *Tunkl v. Regents of the University of California*, 383 P.2d 441 (Cal. 1963).

Insofar as jurisdictions honor liability opt-ins and opt-outs, the prevailing tort law rule operates as a default. One potential reason to disallow opt-out is that infections generate significant negative externalities through the exposure of others. Note also that the COVID-19 immunity legislation already enacted in Utah appears not expressly allow parties to opt into liability. See S.B. 3007, *supra* note 3.

economic health). The deleterious effects of liability on public health occur primarily ex post (after exposure). We explore these issues at greater length below. For now, the key point is that the economy-versus-public health frame fails to capture the central policy challenge, which is to craft a liability regime that vindicates both values.

B. Rules vs. Standards

A second frame for the COVID-19 liability debate is in terms of "rules" versus "standards." By "rules," we refer to legal directives that determine in advance what conduct is permissible (e.g., tables in restaurants must be spaced six feet apart). By "standards," we refer to legal directives that state a general objective but leave it to individual actors and adjudicators to determine whether conduct is compliant (e.g., tables in restaurants must be separated by a reasonable distance).¹⁶ The negligence doctrine's "reasonable care" requirement is an oft-cited example of a standard. An increasingly common refrain in discussions of COVID-19 liability—repeated by voices across the political spectrum—is that directives for businesses ought to be more rule-like rather than standard-like so businesses know in advance what conduct is and is not required.¹⁷

We are sympathetic to these calls for "rulification" but also cognizant of their limits. The stark reality is that federal, state, and local authorities will never be able to specify a complete set of rules for all facilities at all phases of the pandemic. Consider the impressively detailed 63-page reopening plan produced by the Centers for Disease Control and Prevention (though subsequently shelved by the Trump administration).¹⁸ Some of the document's instructions take the form of rules—for example, businesses and nonprofit organizations are told to provide hand sanitizer with "at least 60 percent alcohol," and employers are told to "[c]ancel all group events, gatherings, or meetings of more than 10 people" during the first phase of reopening.¹⁹ But most of the instructions leave substantial leeway for interpretation. For example, child care programs are told to "consider keeping the same child care providers with the same group each day"; schools are told to "encourage parents to keep sick children home"; restaurants and bars are told to "[c]onsider assigning vulnerable workers" to "duties that minimize their contact with customers and other employees"; and so on.

¹⁶ For an influential and insightful account of the rules/standards dichotomy, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557 (1992).

¹⁷ See, e.g., Editorial, *McConnell's Rush to Protect Businesses Endangers Everyone Else*, *New York Times* (May 15, 2020) (arguing that federal authorities should supply businesses with "good, clear and mandatory guidelines"), <https://www.nytimes.com/2020/05/15/opinion/coronavirus-liability-business-safety.html>; Adam J. White, *Congress Needs to Solve the COVID-19 Liability Problem*, *The Bulwark* (Apr. 29, 2020), <https://thebulwark.com/congress-needs-to-solve-the-covid-19-liability-problem> (calling for "precise legislation," e.g., "cleaning all surfaces a particular number of times per day").

¹⁸ See Abby Goodnough & Maggie Haberman, *White House Rejects C.D.C.'s Coronavirus Reopening Plan*, *New York Times* (May 7, 2020), <https://www.nytimes.com/2020/05/07/us/politics/trump-cdc.html>.

¹⁹ Sections of the document were obtained by the *New York Times* and posted at: <https://int.nyt.com/data/documenthelper/6935-CDC-opening-guidelines/e1a8802d0d76b3eb43a8/optimized/full.pdf>.

And how could it be any other way? Physical configurations, staffing capabilities, client populations, and material resources vary widely across businesses, nonprofit organizations, and schools. Even sector-specific directives will likely leave much to frontline discretion. Inevitably, it will remain up to individual childcare centers to determine whether keeping particular providers and children together throughout the day is feasible; it will be left to individual teachers and principals to decide whether a certain student with a light cough but no fever ought to be sent home; and it will be up to restaurant owners and managers to decide whether a young and otherwise-healthy employee who has suffered from moderate asthma since childhood ought to tend bar on Saturday night (or perhaps only on less trafficked weekdays). Guidance can be more rule-like or less rule-like, but it cannot realistically encompass all contingencies.

Beyond the level-of-detail challenge, there is the additional question of whether guidance should be binding or advisory for liability purposes. Under the tort law doctrine of negligence per se, an actor who violates a health or safety law is generally presumed to have breached her duty of care (though the presumption is rebuttable if the actor can prove that her deviation from the law was justified).²⁰ One can imagine a corollary rule of “reasonableness per se,” whereby adherence to health or safety guidelines leads to a presumption of *non*-negligence. Something like a “reasonableness per se” rule—with a conclusive rather than rebuttable presumption of non-negligence in the event of guideline compliance—appears to be what the U.S. Chamber of Commerce is now advocating.²¹

But it bears emphasis that even under a “reasonableness per se” rule, liability will often hinge upon an adjudicator’s determination of whether an actor has complied with a relatively vague standard. Did the school do enough to encourage parents to keep a particular child home? Did the restaurant owner accord appropriate weight to the asthmatic bartender’s vulnerability? Barring a switch to a no-fault system or the elimination of tort liability altogether, there is no live alternative to a hybrid regime that mixes rules and standards together.

C. Ex Ante vs. Ex Post

A third framework for evaluating the role of tort liability during and after a pandemic focuses on the distinction between ex ante and ex post effects. Tort liability can affect the behavior of businesses, customers, and workers before an exposure occurs (ex ante) or after an exposure (ex post). Oftentimes, policies that incentivize public health-promoting behavior ex ante will have the opposite consequences ex post (and vice versa).

Ex ante, liability generates incentives for businesses to take additional precautions against the spread of the virus. For example, restaurants may require all servers to wear facemasks, impose

²⁰ See, e.g., Cal. Evid. Code § 669(a); *Tedla v. Ellman*, 19 N.E. 2d 987 (N.Y. 1939).

²¹ See Erica Werner & Tom Hamburger, *White House and Congress Clash Over Liability Protections for Businesses as Firms Cautiously Weigh Virus Reopening Plans*, Wash. Post (May 3, 2020), <https://www.washingtonpost.com/us-policy/2020/05/03/congress-coronavirus-legal-liability/> (“The U.S. Chamber of Commerce is seeking . . . a “safe harbor” against customer lawsuits for businesses that have followed public health guidelines . . .”).

stricter occupancy limits, and sanitize surfaces more frequently in order to reduce the risk of virus transmission and resulting lawsuits. Airlines—which are treated as “common carriers” under state tort law and generally owe a duty of the highest care toward their passengers²²—may institute temperature checks for all passengers before they can board the aircraft in order to lower transmission and litigation risk. Indeed, Frontier Airlines already has announced that it will adopt such a policy using contact-free thermometers.²³

From a public health perspective, the ex-ante effects of business liability are largely salutary. That is, we want businesses to take all reasonable care to reduce the likelihood of infection and contagion. There is some risk that customers and workers will take fewer precautions on their own if they believe they can recover damages in the event of infection, but this “victim moral hazard” is attenuated for three reasons. First, comparative negligence principles operate as checks on victim moral hazard—many plaintiffs who fail to take reasonable precautions themselves can expect to see their recoveries reduced or eliminated. Second, in light of the aforementioned legal obstacles to recovery, risk-averse customers and workers may accord little weight in their own behavioral calculations to the relatively low probability of a tort award. Third, most people do not want to contract COVID-19 or to spread it to others and will take precautions against infection and contagion regardless of liability consequences.

The ex-post effects of business liability are less straightforward. Consider a restaurant owner who learns that a server has tested positive for COVID-19. The specter of liability may motivate the owner to alert customers who came into close contact with the server in the last several days (e.g., by matching receipts to telephone numbers and email addresses in the restaurant’s reservation system). The owner may anticipate that if she fails to alert customers of a potential exposure and they subsequently find out, then they may cite the owner’s inaction as evidence of negligence. But it is likewise possible that liability will have an opposite effect: the owner may choose *not* to alert customers because she fears that customers—if they knew the source of their infection—would sue. Customers then may fail to take precautions such as isolating themselves or obtaining a COVID-19 test because they do not know they have been exposed. This lack of knowledge may exacerbate the virus’s spread.

Note that the tradeoff between ex-ante benefits and ex-post costs of liability is not new to the COVID-19 context. The tension between incentivizing precautions before exposure and potentially discouraging the dissemination of information after exposure can arise for any infectious disease with a long latency period and/or symptoms that may not be identifiable immediately. Legal liability for HIV exposure, for example, presents similar challenges. Lessons from past epidemics and pandemics can help to inform the construction of COVID-19 liability

²² See, e.g., *Andrews v. United Airlines*, 24 F.3d 39, 40 (9th Cir. 1994); *Raube v. American Airlines, Inc.*, 539 F. Supp. 2d 1028, 1034 (N.D. Ill. 2008).

²³ Hannah Sampson, *Frontier Just Became the First U.S. Airline To Require Passenger Temperature Screening*, *Wash. Post* (May 8, 2020), <https://www.washingtonpost.com/travel/2020/05/07/frontier-just-became-first-us-airline-require-passenger-temperature-screening>.

regimes, and lessons learned in the COVID-19 context will likely yield insights for fighting future scourges.²⁴

III. Striking a Balance

How, then, should policymakers balance the likely beneficial ex-ante public health effects of liability and the potentially perverse ex-post consequences? We begin by considering the question of liability to customers, and then turn to the separate but related issue of liability to employees covered by workers' compensation schemes.

A. Liability to Customers

One possible approach is to impose a separate duty to warn on businesses once they learn that a customer or worker has been exposed to the virus through their operations. This strategy of layering liability on top of liability aims to offset the potentially perverse ex-post effects explored above with an even more powerful incentive for businesses to alert customers of the risk that they have contracted COVID-19.

This double-liability approach comes with a number of flaws. Some businesses nonetheless may choose to gamble, calculating that they are better off saying nothing (and risk being sued for violating two duties) rather than reaching out (and face a greater risk of being sued for violating one). Allowing a plaintiff to recover based on a defendant's failure to warn her about exposure ex post also collides with the general principle that plaintiffs can recover only for damages they have suffered as a consequence of the defendant's breach. A defendant's failure to alert a plaintiff of an exposure *after the fact* cannot be the *cause* of the plaintiff's COVID-19-related injuries (unless an antiviral treatment becomes available that can stop the progression of the infection if administered early on). Perhaps the fear of failure-to-warn liability arising out of second-degree exposures (i.e., claims by family members and acquaintances that they were exposed to the virus by someone who was exposed to the virus by the business) will be sufficient to incentivize businesses to alert customers of first-degree exposures. But lawsuits arising out of second-degree exposures will face even higher causation hurdles: the plaintiff would need to show not only that she was exposed to the virus by a particular customer, but also that the particular customer was exposed to the virus by the business.

An alternative approach—and we think a more promising one—is to create a liability safe harbor for businesses that contact customers within a certain window after the business learns of an exposure. We suggest a window of 24 hours from the time the business learned or reasonably should have learned of the potential exposure. For example, once a server informs a restaurant

²⁴ On the history of contact tracing and applicable legal frameworks, see generally Lawrence O. Gostin & James G. Jr. Hodge, *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 5 *Duke Journal of Gender Law & Policy* 9 (1998). The question of tort liability at the domestic level is analogous to the challenge at the international level of incentivizing countries to report infectious disease outbreaks. See Anup Malani & Ramanan Laxminarayan, *Incentives for Reporting Infectious Disease Outbreaks*, 47 *Journal of Human Resources* 176 (2011).

that she has tested positive for COVID-19, the restaurant would have 24 hours to inform customers who came into contact with the server about the potential exposure. If the business spoke with the customer, left a voicemail message, or sent an email during that timeframe, the business would fall within the scope of the safe harbor. The safe harbor would be available only for 14 days from the time of exposure—a timeframe chosen to match the upper bound of the incubation period for COVID-19.²⁵ That is, informing a customer about an exposure more than 14 days after it occurred will not trigger the safe harbor (even if the alert comes 24 hours after the business *learned* of the weeks-ago exposure). Any customer who is not informed during the relevant timeframe would retain access to preexisting tort law remedies.

We do not expect that every business will make use of the safe harbor with respect to every potential exposure. Identifying and contacting potentially exposed customers will be relatively easy for some businesses (e.g., a restaurant that collects email addresses and telephone numbers via an app such as OpenTable). It will be nearly impossible for other businesses (e.g., a stall at a farmers' market that takes payments in cash). The purpose of the safe harbor is to ensure that businesses that *can* identify and contact customers to alert them of potential exposures are not deterred by tort liability from doing so. If the business cannot identify and contact customers, then there is less risk that tort liability will lead to deleterious ex-post consequences.

Such a safe harbor could, concededly, weaken the ex-ante public health benefit of liability: businesses may take fewer precautions if they know that promptly alerting customers and workers afterwards functions as a get-out-of-liability-free card. But this concern is outweighed by three considerations. First, the availability of the safe harbor would be far from assured. If the business does not learn about the potential exposure within the 14-day window, it cannot exculpate itself from liability. Second, few reputation-conscious businesses will want to find themselves in a situation where they must inform customers about a potential exposure on their premises. Third, the safe harbor's existence may have the ex-ante (pre-exposure) benefit of motivating businesses to maintain more detailed records of their customers' identities and contact information, which will be essential to comprehensive contact tracing efforts.

B. Liability to Employees

Liability to employees raises a similar but not identical set of challenges. As noted, workers' compensation arrangements are "no fault": the employee's ability to recover does not depend upon proving that the employer failed to exercise reasonable care. Workers' compensation still can generate incentives for employers to take ex-ante precautions against workplace injuries: employers that self-insure will want to reduce the frequency of injuries and resulting payouts, while employers that pay experience-rated premiums for insurance will want to reduce claims by their employees in order to keep premiums down.²⁶ The ex-ante effects of workers'

²⁵ Stephen A. Lauer et al., The Incubation Period of Coronavirus Disease 2019 (COVID-19) From Publicly Reported Confirmed Cases: Estimation and Application, 172 *Annals of Internal Medicine* 577 (2020).

²⁶ See Michael J. Moore & W. Kip Viscusi, Promoting Safety Through Workers' Compensation: The Efficacy and Net Wage Costs of Injury Insurance, 20 *RAND Journal of Economics* 499 (1989).

compensation on employee precautions potentially cut in the opposite direction, though again, moral hazard may be mitigated by self-preservation instincts.

Insofar as employers internalize the cost of injuries attributable to their workplaces through self-insurance or experience-rated premiums, employers have a financial incentive *not* to inform employees about potential exposures: if the employee does not know that she contracted COVID-19 as a result of a workplace exposure, then she may be less likely to file a workers' compensation claim. This is not to suggest that all employers will hide the fact of a potential exposure from their employees. Some will act appropriately for moral reasons or to preserve employee goodwill. Others will act promptly in order to minimize the spread of the virus among their workforce or prevent employees from passing the virus along to customers (who then may file lawsuits of their own). Still, concerns about perverse ex-post incentives are not trivial, especially amid allegations that employers in some industries (e.g., meat processing) were slow to warn workers about COVID-19 risks.²⁷

One approach to the workers' compensation issue, already adopted by executive order in California, is to establish a presumption that any employee who tests positive for COVID-19 within 14 days of performing services for an employer was exposed to the virus on the job.²⁸ The presumption does not apply if the employee worked exclusively from home, and the presumption can be rebutted by the employer. (The Illinois Workers' Compensation Commission withdrew a similar measure after a defeat in state court.²⁹) Several other states have adopted presumptions of workplace exposure for healthcare and public-safety first responders, and still more are considering presumptive-causation legislation.³⁰

Presumptive causation rules have nuanced ex-ante and ex-post effects. Ex ante, these rules strengthen employers' precautionary incentives, as they increase the likelihood of liability in the event of a workplace exposure. Absent a presumptive causation rule, employers (and their insurers) may not internalize the full cost of workplace exposures because some exposures that do occur on the job will not result in successful claims. But because these rules also increase the probability that an employee will receive compensation (both for workplace and non-workplace exposures), presumptive causation rules can engender employee moral hazard. The worry is that employees will be less risk-averse in their daily lives—on and off the job—in the view that if they contract COVID-19 and experience severe outcomes, they can receive workers' compensation benefits. (This concern is, again, mitigated by employees' self-preservation instincts and their likely desire not to infect others.)

²⁷ See, e.g., Kevin Krause, *Dallas Meat Plant Workers Say Company Refused To Close Despite COVID-19 Outbreak*, *Dallas Morning News* (Apr. 28, 2020).

²⁸ Exec. Order No. N-62-20 (May 6, 2020) (Cal.), <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf>.

²⁹ See Robert Iafolla, *Workers' Comp Systems Poised for Deluge of Covid-19 Claims*, *Bloomberg Law* (May 8, 2020), <https://news.bloomberglaw.com/daily-labor-report/workers-comp-systems-poised-for-deluge-of-covid-19-claims>.

³⁰ See Josh Cunningham, *COVID-19: Workers' Compensation*, *National Conference of State Legislatures* (May 13, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx>.

Ex post, the likely public health effects of presumptive causation rules are on the whole positive. These rules encourage employers to alert employees of workplace exposures (or, more precisely, lower the disincentive for disclosure), because now there is less to gain from suppressing such information: the employer is likely on the hook either way once the employee develops symptoms, and the employer's best bet is to mitigate the risk of spread through its workforce. Perhaps most importantly, presumptive causation rules can encourage employees without paid sick leave to seek out testing and, if they test positive, stay home. Under a law like California's, an employee who obtains a positive COVID-19 test within 14 days from her last day of service qualifies for the causation presumption, and the sooner she obtains a positive test, the sooner she will likely begin collecting workers' compensation benefits.

Another approach to the liability-to-employees issue—which can be adopted in tandem with the presumption causation rule—is to avail a tort remedy to employees who contract COVID-19 as a result of an employer's gross negligence while also allowing employers the same safe harbor that we describe above (i.e., no liability if the employer informs the employee before the earlier of 24 hours of learning about the exposure or 14 days of the exposure's occurrence). Note, though, that in most states, this would mark a significant break from the grand bargain: with rare exceptions, the workers' compensation exclusivity doctrine applies even to gross negligence claims.³¹ Insofar as the current tide appears to be toward limiting—not expanding—the scope of tort liability for virus exposures, this last proposal may be a political nonstarter, despite its potential merits.

Conclusion

Historically, tort law has fallen within the domain of the states, and state-level experimentation can assist the development of common, evidence-based solutions. The analysis here suggests that a liability safe harbor for businesses that promptly alert customers to potential exposures can serve to balance the ex-ante benefits of liability with possible ex-post costs. Full details of such a safe harbor will require further elaboration, and a model statute may provide a useful starting point for states as they embark on their own legislative efforts. Such a safe harbor can be supplemented by a presumptive causation rule in the workers' compensation context, which would improve ex-post incentives for employers and employees without radically disrupting the workers' compensation “grand bargain.”

Most importantly, the analysis here underscores that a well-tailored liability regime is an important element of a comprehensive COVID-19 containment framework. Legal scholars and public health professionals have an important role to play in developing a set of rules that can harness the positive incentive effects of tort liability while minimizing the potentially perverse

³¹ Texas is a rare exception in this regard, and even there, the exception is limited: employers that have not opted out of the state's workers' compensation regime are liable in tort for gross negligence only if the gross negligence resulted in an employee's death and the employee's surviving spouse or heirs then sue. See Tex. Lab. Code Ann. § 408.001(b); *Arnold v. Renken & Kuentz Transportation Co.*, 936 S.W.2d 57, 59 (Tex. App. 1996).

consequences. Investments in such a regime can yield dividends in the immediate effort to contain COVID-19 while also aiding in the future management of other infectious diseases.