

## **NAICU Summary of SAFE TO WORK Act**

### **July 31, 2020**

The SAFE TO WORK Act introduced by Senate Republicans would establish liability protections for health care providers and businesses, including educational institutions. The provisions related to institutions of higher education are summarized below.

### **Federal Cause of Action and Preemption**

- The bill would establish an exclusive federal cause of action for coronavirus exposure actions.
- Claims filed in state court could be removed to federal court.
- State laws, including common law, that provide fewer protections to defendants would be preempted.
- State laws that impose stricter limits on liability or damages would not be preempted.
- The bill would not preempt governmental enforcement actions, intentional discrimination claims, or workers' compensation.

### **Standard of Liability**

- Institutions would be shielded from liability for personal injury suits related to coronavirus unless the plaintiff proves three things by clear and convincing evidence:
  - The institution was not making reasonable efforts to comply with applicable government standards and guidance;
  - The institution engaged in gross negligence or willful misconduct; and
  - The actual exposure to coronavirus caused the personal injury.
- If an institution is making reasonable efforts to comply with at least one set of applicable standards – federal, state, or local – then the institution is protected.
  - If one set of conflicting standards is mandatory and the others are not, then the plaintiff has to show a failure to comply with the mandatory standards.
- Institutions that maintain a written policy on coronavirus mitigation that complies with or is more protective than applicable government standards would be presumed to have made reasonable efforts to comply with those standards.
  - Plaintiffs could rebut the presumption by showing that the institution was not complying with its policy.
  - Absence of a written policy or a change in policies and practice could not be used as evidence of liability.
- Institutions would not be held liable for acts or omissions of third parties, unless they have a common law duty of control or the third party is an agent of the institution.

## **Limitations on Damages**

- The bill would limit compensatory and punitive damages.
  - Compensatory damages would be limited to economic losses.
    - Non-economic losses would be available in cases involving willful misconduct.
  - Punitive damages would only be available in cases involving willful misconduct and would be capped at the amount of compensatory damages.
- If found liable, institutions would be required to pay only their proportionate share of damages.

## **Other Procedural Protections**

- The bill would establish a number of procedural protections that make it more difficult for plaintiffs to establish a claim, including:
  - Detailed provisions requiring plaintiffs to plead with specificity, including requirements that the plaintiff's complaint list all the places and people visited in the two weeks prior to the onset of coronavirus symptoms;
  - A requirement that plaintiffs provide medical records and an affidavit from a medical expert; and
  - Limits on discovery.
- The bill would discourage frivolous claims related to coronavirus by: authorizing institutions and the Attorney General to sue plaintiffs and attorneys who file frivolous claims.

## **Statute of Limitations and Effective Dates**

- The statute of limitations on coronavirus claims would be one year.
- The liability safe harbor would apply retroactively to allegations of personal injury that occurred on or after December 1, 2019.
- The liability provisions would expire October 1, 2024 or at the end of the coronavirus emergency declaration, whichever is later.

## **Definitions**

- "Applicable government standards and guidance" would be defined as: (1) any mandatory coronavirus standards or regulations issued by the federal government or state or local government with jurisdiction; and (2) if no mandatory standards apply, any coronavirus guidance, standards, or regulations issued by the federal government or a state or local government with jurisdiction.
- "Gross negligence" would be defined as a conscious, voluntary act or omission in reckless disregard of a legal duty, the consequences to another party, and applicable government standards and guidance.
- "Willful misconduct" would be defined as an act or omission that is taken intentionally to achieve a wrongful purpose, knowingly, without legal or factual justification, and in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit.