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A Public Health Framework for COVID-19 Business Liability

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Essay submission

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Abstract

Businesses that reopen amid the COVID-19 pandemic face potential legal liability to customers and workers who contract the coronavirus through those enterprises' operations. Federal and state lawmakers are actively considering proposals to narrow or expand such liability. These proposals have important economic and public-health implications. This article presents an analytical framework for evaluating liability regimes in the context of a communicable 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 exposure), potential liability generates incentives for businesses to take precautions that reduce the risk of virus transmission. Ex post (after exposure), liability fears may deter businesses from proactively informing customers and workers that they have been exposed to the virus through the business's operations. To minimize the potentially perverse ex-post consequences of liability without sacrificing significant ex-ante benefits, we propose 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 seek a balance between ex-ante benefits and ex-post costs.

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Introduction

Coronavirus disease 2019 (COVID-19) has visited profound consequences upon virtually every area of American life, including the tort system. Although the “tidal wave”¹ of tort claims that some predicted at the outset of the pandemic has not yet arrived,² the novel coronavirus already has generated a storm surge of legislative activity on the subject of tort reform. As of this writing, four states—Iowa, Louisiana, North Carolina, and Utah—have enacted laws providing businesses with sweeping protection against tort liability for coronavirus exposures.³ Several others have passed narrower measures to limit the liability of health care providers or to shield manufacturers and distributors of personal protective equipment from product liability claims.⁴ All in all, more than one hundred bills to expand or restrict tort liability had been introduced in state legislatures by the beginning of August.⁵ Congress, for its part, remains deadlocked⁶ over a Senate Republican

¹ 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>.

² At the beginning of August, a database maintained by the law firm Hunton Andrews Kurth had logged 3979 coronavirus-related lawsuits in federal and state court, of which fewer than two dozen of which were classified as personal injury or wrongful death claims arising from coronavirus exposures. See Hunton Andrews Kurth, COVID-19 Complaint Tracker, <https://www.huntonak.com/en/covid-19-tracker.html> (last updated August 3, 2020).

³ See Iowa Code Ann. § 686D.4 (Lexis 2020) (limiting premise owner’s liability for COVID-19 exposure to cases of recklessness, actual malice, or intentional exposure); La. Stat. Ann. § 29:773 (Lexis 2020) (limiting business liability for COVID-19 exposure to cases of gross negligence or wanton or reckless misconduct); N.C. Gen. Stat. Ann. § 66-460 (Lexis 2020) (providing “essential businesses” with immunity from customer and employee COVID-19 exposure claims except in cases of gross negligence, reckless misconduct, or intentional infliction of harm); Utah Code Ann. § 78B-4-517 (Lexis 2020) (liability for COVID-19 exposure limited to cases of willful misconduct, recklessness, or intentional infliction of harm).

⁴ For a running list, see Nat’l 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 July 31, 2020).

⁵ See *id.*

⁶ See Jordain Carney, McConnell: Dropping Liability Protections from Coronavirus Deal ‘Not Going to Happen,’ *The Hill* (July 31, 2020), <https://thehill.com/homenews/senate/510085-mcconnell-dropping-liability-protections-from-coronavirus-deal-not-going-to>.

proposal to exempt businesses from liability for coronavirus exposures except in cases of gross negligence or willful misconduct.⁷

Tort liability for coronavirus exposures has important implications for both economic vitality and public health. These two values are often characterized as conflicting,⁸ though in a pandemic, they are just as often complementary. Until the coronavirus is contained, it is difficult to imagine the U.S. economy escaping from its most severe crisis since the Great Depression.⁹ And evidence from past recessions suggests that a long-lasting economic downturn could translate into a significant rise in mortality rates.¹⁰

At its best, tort law can advance economic and public-health objectives. 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 equally, hair salon). A potential patron can easily observe whether a barber is wearing a facemask while cutting hair, but cannot so easily ascertain whether the barber checked her temperature that

⁷ Safeguarding America's Frontline Employees To Offer Work Opportunities Required to Kickstart the Economy Act, S. 4317, 116th Cong., 2nd Sess. (introduced July 27, 2020). The proposal also would raise the victim's burden of proof to a "clear and convincing evidence" standard, and would allow any defendant to remove an exposure-related action from state court to federal court.

⁸ See, e.g., John Boyle, Thomas Brassell & James Dayton, Americans Pick Public Health Over the Economy—Even with Near-Record Unemployment, ICF (Apr. 27, 2020), <https://www.icf.com/insights/health/covid-19-public-health-findings-economic-costs>.

⁹ The 9.5 percent decline in gross domestic product in the second quarter of 2020 is the most severe since the Bureau of Economic Analysis began tracking quarterly GDP in 1947. See Rachel Siegel & Andrew Van Dam, U.S. Economy Contracted at Fastest Quarterly Rate on Record from April to June as Coronavirus Walloped Workers, Businesses, Wash. Post (July 30, 2020), <https://www.washingtonpost.com/business/2020/07/30/gdp-q2-coronavirus>.

¹⁰ See Sarah H. Gordon & Benjamin D. Sommers, Recessions, Poverty, and Mortality in the United States: 1993-2012, 2 Am. J. Health Econ. 489 (2016) (finding that higher unemployment and poverty and lower median household income are correlated with higher all-cause mortality based on county-level fixed-effects model).

morning or properly sanitized surfaces and equipment before the customer's arrival. Liability builds a bridge over that information asymmetry. To be sure, the customer still cannot verify the barber's precautions directly, but the customer does at least know that the barbershop has a financial incentive to take precautions in order to avoid ultimate payment of damages.¹¹ Not only might this boost consumer confidence (thus contributing to economic recovery), but it also can encourage businesses to undertake the difficult-to-verify precautions that will slow the coronavirus's spread.

In some cases, however, tort law can be a hindrance to coronavirus containment rather than a help. To continue with the barbershop example, imagine that a barber tests positive for COVID-19 a day after she cut several clients' hair. Ideally, the barbershop owner would reach out to the positive barber's recent clients and alert them of a potential coronavirus exposure, thus allowing them to self-isolate and seek testing themselves. With fears of liability looming large though, the owner of the barbershop might balk at this step, worried that those telephone calls and emails to customers could be invitations for lawsuits. After all, if the barber and the barbershop owner stay mum, customers who frequent the shop only once every two months might never learn about the site of their exposure (and thus, might never sue). The course that the barbershop might take in order to

¹¹ 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).

Inssofar 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. For present purposes, we set aside the issue of whether waivers will be or ought to be enforced, recognizing that it requires a more detailed treatment.

shield itself from liability is exactly the opposite of what, from a public health perspective, society should want it to follow.

The example above illustrates a familiar tension in tort law between “ex ante” and “ex post” incentives. Ex ante (i.e., before an injury), the threat of tort liability generates incentives for potential injurers to take cost-justified precautions. Ex post (i.e., after injury), the effect of liability may be reversed: fear of lawsuits can deter injurers from taking socially beneficial steps because those steps may increase the risk of personal-injury claims or the expected magnitude of tort judgments and settlements. Scholars have noted this phenomenon in a number of contexts. For instance, James Henderson has examined tort law’s potentially perverse ex-post effect on product safety, pointing out that liability may deter manufacturers from conducting routine safety reviews and implementing safety improvements lest those efforts be cited as evidence that the original product was unsafe.¹² Omri Ben-Shahar has considered the effect of product liability on recall decisions, highlighting the concern that manufacturers may hesitate to recall defective products because a recall announcement is often “taken as a public ‘confession’ . . . that the product is harmful,” thus attracting the attention of injured users and personal-injury lawyers.¹³ And a number of authors have highlighted a similar dynamic in the medical malpractice context, where liability fears may discourage health care providers from informing patients about medical errors.¹⁴

¹² James A. Henderson Jr., *Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U. L. Rev. 765, 772-76. (1983).

¹³ See Omri Ben-Shahar, *How Liability Distorts Incentives of Manufacturers to Recall Products 3-4* (Univ. of Mich. Law Sch., Working Paper, 2005), <https://ssrn.com/abstract=655804>.

¹⁴ See Rae M. Lamb, David M. Studdert, Richard M.J. Bohmer, Donald M. Berwick & Troyen A. Brennan, *Hospital Disclosure Practices: Results of A National Survey*, 22 *Health Affairs*, Mar./Apr. 2003, at 73, 78 exhibit 3 (finding that risk managers at 77 percent of hospitals in a nationally representative sample cited “malpractice fears” as the main barrier to disclosure of medical errors).

This article considers the ex-ante and ex-post effects of coronavirus exposure liability, drawing lessons from other tort law contexts while also accounting for unique features of the COVID-19 challenge. We begin 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. We then present a framework for evaluating the public health consequences of various liability rules. Our analysis leads us to propose concrete changes to tort law designed to align business incentives with public health imperatives. We also suggest modifications to workers' compensation systems aimed at encouraging post-exposure precautions on the part of employers and employees.

To preview: Our proposal would provide businesses with a safe harbor from liability to customers arising out of coronavirus exposure if the business informs those customers via telephone, email, or text message within twenty-four hours of learning about the potential exposure. As explained below, our proposal would not operate as a get-out-of-liability-free card: it would apply only to instances in which businesses proactively initiated post-exposure communication with customers, and it would not apply to claims of gross negligence, recklessness, or willful or intentional exposure. But it would, we suggest, mitigate the potentially perverse ex-post consequences of coronavirus exposure liability without entirely sacrificing significant ex-ante benefits.

I. Current Legal Landscape

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.¹⁵ That standard, though, is easier to recite than to meet.

Customers bringing negligence claims in the COVID-19 context will face several steep obstacles. The first is to show that the business (or, under the doctrine of *respondeat superior*, one of its employees acting within the scope of employment) has breached a duty of care. This may be straightforward in some scenarios—for example, when a plaintiff can establish on the basis of eyewitness evidence that restaurant waitstaff members failed to wear facemasks or other nose-and-mouth coverings while serving diners. But in other contexts, it may be substantially more complicated. For instance, does a railroad breach its duty of care if it fails to enforce a face-covering requirement for passengers on an intercity passenger train, or are exceptions (e.g., for eating and drinking) appropriate? Custom, statute, and regulation are largely uninformative,¹⁶ and so it generally will be left to individual judges and juries to decide what reasonable care requires in particular fact patterns.¹⁷

¹⁵ 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).

¹⁶ As of this writing, Amtrak had adopted the rather difficult-to-maintain position that "[a]ll customers and employees must wear a face covering or mask while on trains" but café cars remain open for takeout service. See *Amtrak Sets a New Standard of Travel*, Amtrak, <https://www.amtrak.com/coronavirus> (last visited Aug. 10, 2020).

¹⁷ Even if there were an industry-wide consensus, that would not necessarily be the end of the story. See, e.g., *Valcaniant v. Detroit Edison Co.*, 679 N.W.2d 689, 694 (Mich. 2004) (noting that "reliance on custom" is a

Establishing that a business has breached its duty of care is just the beginning. Perhaps the most challenging element of negligence for a plaintiff to prove in a coronavirus exposure lawsuit is factual causation: the plaintiff must prove by a preponderance of the evidence (“more likely than not”) that her injury was caused by the defendant’s breach of the duty of care. Consider a customer who alleges that she contracted COVID-19 as a result of a restaurant server’s sneeze.¹⁸ 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 cause of her infection. Causation will be especially difficult to show in settings where COVID-19 is endemic and potential transmission pathways are manifold.

To be sure, there will be some circumstances—say, a cluster of cases linked to individuals who dined indoors at the same restaurant on the same evening in an area where prevalence is otherwise low—in which contact tracing will allow a customer to prove by a preponderance of the evidence that transmission at a particular business led to her infection. But we expect there will be many other instances in which infected individuals have no more than an inkling as to where they might have been exposed. A multistate telephone survey of 350 adults who had tested positive for the

“consideration in whether the defendant acted reasonably,” but rejecting “blind reliance on industry custom”); *The T. J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (L. Hand, J.) (holding that industry custom is never the sole measure of reasonable care because “a whole calling may have unduly lagged” in the adoption of safety precautions).

¹⁸ 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). We use the terms “coronavirus” and “COVID-19” throughout to reflect common—though not always scientific—syntax.

coronavirus found that 54 percent were not aware that they had been within six feet of another COVID-19 patient in the two weeks preceding illness onset.¹⁹ And of those who could identify a recent contact with another person whom they learned was COVID-19-positive, it is far from clear that they would have been able to establish that fact (or the fact of transmission) to a court's satisfaction.

Even when a customer-plaintiff can establish breach of duty and causation, significant additional hurdles remain. In some cases, courts may honor liability waivers that claim to block customers from bringing claims against businesses, though most states impose limits of various sorts on the enforceability of waivers²⁰ (and two states—Louisiana and Virginia—refuse to enforce them in virtually all circumstances²¹). In other cases, courts may conclude that the plaintiff implicitly “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).²² In still 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

¹⁹ Mark W. Tenforde et al., Characteristics of Adult Outpatients and Inpatients with COVID-19 — 11 Academic Medical Centers, United States, March–May 2020, 69 *Morbidity & Mortality Wkly. Rpt.* 841, 845 tbl.3 (July 3, 2020).

²⁰ See, e.g., *Donahue v. Ledgens, Inc.*, 331 P.3d 342, 348 (Alaska 2014) (waiver of negligence in Alaska must use the word “negligence” and must emphasize scope “using simple words and capital letters”); *McShane v. Stirling Ranch Prop. Owners Ass’n*, 393 P.3d 978, 982 (Colo. 2017) (“Because our law has long disfavored such agreements, they must be strictly construed against the party seeking to limit its liability.”). For a fifty-state survey, see Matthiesen, Wickert & Lehrer, S.C., *Exculpatory Agreements and Liability Waivers in All 50 States* (2019), <https://www.mwl-law.com/resources/exculpatory-agreements-liability-waivers-50-states>.

²¹ See *Ramirez v. Fair Grounds Corp.*, 575 So.2d 811 (La. 1991); *Hiatt v. Lake Barcroft Community Ass’n*, 418 S.E.2d 894 (Va. 1992).

²² 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).

damages award reduced. In four states (Alabama, Maryland, North Carolina, and Virginia) plus the District of Columbia, a plaintiff who is partly at fault for her own injury will be barred from recovery entirely.²³

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.²⁴ 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 would otherwise apply..

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 center stage in political debates. One reason may be that COVID-19 liability issues intersect with a long-

²³ 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.*

²⁴ 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.

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.²⁵

A second answer is that in some sectors, causation may be substantially easier to establish, and assumption-of-risk and comparative defenses may be less robust. This is particularly so for the nursing home industry, which has been uniquely hard-hit by COVID-19. As of the end of July, more than 40 percent of U.S. COVID-19 deaths were linked to nursing homes,²⁶ which are simultaneously suffering from reduced revenue (due to fewer admissions) and increased costs (due to added expenses of personal protective equipment and other safety precautions). The threat of nursing-home bankruptcies has public health implications of its own. When an enterprise is deeply under water, its owners have an incentive to make risky gambles that they would forgo if solvent (e.g., to cut spending on safety and to cram more patients into close quarters).²⁷ Moreover, the specter of bankruptcy may make it harder for nursing homes to raise capital in the short-term for

²⁵ As Stephen Sugarman has noted, it was not at all inevitable that tort law would become politicized in the particular way it has—with conservatives advocating for tort reform and liberals defending the status quo. See Stephen D. Sugarman, *Ideological Flip-Flop: American Liberals Are Now the Primary Supporters of Tort Law*, in *II Essays on Tort, Insurance, Law and Society in Honour of Bill W. Dufwa* 1105 (Hugo Tiberg ed., 2006). Tort law’s emphasis on personal responsibility and private enforcement, Sugarman observes, “comfortably resonates with conservative ideology.” *Id.* at 1105. By contrast, liberals—who are often “reluctant to blame individuals for bad social outcomes” and who have greater confidence in public enforcement—might seem like the more natural tort reformers. *Id.* at 1108. Until the 1960s, liberals in the United States sought to transform the tort system and conservatives resisted. *Id.* at 1108-11. Since then, changes in substantive and procedural law have made the tort system friendlier to victims and more hostile to business, causing conservatives to migrate toward the cause of reform. See *id.* at 1111-13. Meanwhile, the sway of the personal injury bar and—in Sugarman’s view—the personal influence of Ralph Nader have pushed liberals to the pro-tort side. See *id.* at 1116-17.

²⁶ See *More than 40% of U.S. Coronavirus Deaths Are Linked to Nursing Homes*, *N.Y. Times* (July 30, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-nursing-homes.html>.

²⁷ See Michael S. Knoll, *Product Liability and Legal Leverage: The Perverse Effect of Stiff Penalties*, 45 *UCLA L. Rev.* 99 (1997).

socially desirable safety investments.²⁸ For all of these reasons, there may be a case for nursing home-specific relief that is broader than the safe harbor we propose for businesses generally. We set aside this issue not because it is unimportant, but—to the contrary—because it is sufficiently consequential and complicated to deserve its own careful treatment.²⁹

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 some businessowners' insurance policies explicitly exclude injuries attributable to viruses.³⁰ For businesses whose insurance coverage excludes communicable

²⁸ This is likeliest in advance of a bankruptcy filing. After the filing of a bankruptcy petition, subsequent loans generally receive administrative-expense priority under 11 U.S.C. § 503(b).

²⁹ Schools reopening amid the pandemic and facing potential lawsuits from the families of students exposed to the coronavirus find themselves in some of the same circumstances as nursing homes: causation probably will be easier for a plaintiff to establish and assumption of risk will be harder for the defendant to show. Schools differ in nursing homes, however, in two important respects. First, differences in disease severity and mortality between older adults and younger children with COVID-19 reduce, though do not eliminate, the likelihood of large damages in student suits. See, e.g., Robert Verity et al., Estimates of the Severity of Coronavirus Disease 2019: A Model-Based Analysis, 20 *Lancet Infectious Disease* 669, 673 tbl.1 (2020) (estimating COVID-19 infection fatality rate of 0.00161 percent in the under-age-10 group and 7.8 percent in the over-age-80 group based on cases in mainland China). Second, public schools in many states already enjoy robust liability protections under sovereign and governmental immunity doctrines. See Tom Baker & Hanina Masud, Liability Risks for After-Hours Use of Public School Property to Reduce Obesity: A 50-State Survey, 80 *J. Sch. Health* 508, 510-11 (2010).

Airlines also share certain characteristics with the nursing-home industry—easier traceability of infections (due, in the airline case, to passenger manifests) and vulnerability to bankruptcy. See, e.g., Susan Haas, Virgin Atlantic Airline Files for U.S. Bankruptcy Protection, Tries to Survive Pandemic Losses, *USA Today* (Aug. 4, 2020), <https://www.usatoday.com/story/travel/news/2020/08/04/virgin-atlantic-airline-files-u-s-bankruptcy-protection/3296485001>. Airlines, though, serve populations that are generally less vulnerable than nursing homes, and in-flight ventilation may reduce transmission risk. See Joseph Allen, Airplanes Don't Make You Sick. Really, *Wash. Post* (May 18, 2020),

<https://www.washingtonpost.com/opinions/2020/05/18/airplanes-dont-make-you-sick-really>. Airlines also enjoy protection from state tort liability under federal law, though the extent to which federal law preempts state tort liability claims is highly uncertain and varies across circuits. For an overview, see Jay B. Sykes & Nicole Vanatko, Cong. Research Serv., Federal Preemption: A Legal Primer (R45825) 7-8 (July 13, 2019).

³⁰ The Insurance Services Office (ISO) supplies the standard policy forms used by most commercial liability insurers in the United States. See *Capital City Real Estate, LLC v. Certain Underwriters at Lloyd's London*, 788 F.3d 375, 379-80 (4th Cir. 2015). In 2006, several years after the outbreak of severe acute respiratory syndrome (SARS), ISO introduced a commercial property insurance exclusion that reads (in relevant part):

disease transmission, the consequence of a coronavirus exposure claim 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 under a cloud of concern about potentially crushing liability.

For many businesses—and especially smaller businesses with shallower pockets—anxieties regarding tort liability are not new. But the current COVID-19 pandemic almost certainly makes those anxieties more intense. 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.³¹ These losses are becoming harder to sustain the longer

“We will not pay for loss or damage resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” See Christopher C. French, *Covid-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 Conn. Ins. L.J. 1, 9 (2020) (quoting policy language). This language has appeared in several policies that have become the subject of COVID-19-related litigation. See, e.g., *Mot. to Dismiss for Failure to State a Claim 2*, *Ybarra Invs., Inc. v. Scottsdale Ins. Co.*, No. 4:20cv1818 (S.D. Tex. filed May 26, 2020); *Mem. of Law in Supp. of Mot. to Dismiss Compl.*, *Kimmel & Silverman, P.C. v. Travelers Prop. Cas. Co. of Am.*, No. 2:20-cv-02351-JMY (E.D. Pa. filed June 17, 2020).

ISO’s rationale for offering this exclusion is somewhat unclear. A 2006 ISO circular states that “the specter of pandemic” raises concerns that insurers “may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.” See Larry Podoshen, Insurance Services Office, *New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria* (July 6, 2006). Others have suggested that the reason for pandemic exclusions is that pandemics—because they are likely to strike all policyholders at the same time—are fundamentally uninsurable risks. As the chief risk and investment officer for the insurer AXA explains, “[t]he reason is simple: in the event of a pandemic, as in the case of war, everyone is affected at the same time. There can therefore be no risk pooling, which is an essential foundation of insurance.” *Covid-19 Crisis: A Tipping Point for the Insurance Sector?*, AXA Mag. (June 10, 2020), <https://www.axa.com/en/magazine/alban-risk-covid19>.

Importantly, the ISO virus exclusion applies to commercial property insurance policies. A standard businessowner’s policy combines property insurance with casualty insurance. See *What Does a Business Owners Policy (BOP) Cover?*, Ins. Info. Inst., <https://www.iii.org/article/what-does-businessowners-policy-bop-cover> (last visited Aug. 5, 2020). According to the insurance industry software provider RiskGenius, the majority of commercial property insurance policies include virus exclusions, but the majority of commercial casualty insurance policies and approximately 80 percent of commercial policies that combine property and casualty insurance do *not* contain virus exclusions. See *Silent COVID Coverage Could Impact Insurance Industry*, Ins. Prospectus, https://www.riskgenius.com/insurance_prospectus/silent-covid-coverage-could-impact-insurance-industry (last visited Aug. 5, 2020).

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that COVID-19 keeps customers away. Liability insurance generally provides less than complete coverage, even under ordinary circumstances.³² 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. Ex Ante vs. Ex Post

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.³³ As noted at the outset, those two values are not as opposed to each other as that frequent framing might suggest. Nonetheless, designing (or redesigning) a liability regime for coronavirus exposures entails

³² 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).

³³ 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”).

difficult tradeoffs. We focus here on the tradeoff between ex-ante and ex-post incentives, which—we argue—is central to the challenge that policymakers face.

Ex ante, tort liability encourages businesses to take additional precautions against the spread of the virus. On the margin, it raises the cost to a business of coronavirus transmission, and therefore increases the incentive for the business to take measures to control the virus's spread. Some of these measures—facemask requirements for employees and customers, easy availability of hand sanitizer, stricter occupancy limits, spacing parties at least six feet apart—cut across contexts. Others are sector-specific. Dine-in restaurants, for example, might shift to curbside pickup and delivery or move tables outdoors.³⁴ Fitness centers might erect shields between exercise machines or set up individual “pods” that allow members to participate in group workout classes while separated by translucent plastic barriers.³⁵ Insofar as liability affects business behavior ex ante, the consequences are likely to be salutary from a public health perspective.³⁶

³⁴ Ctrs. for Disease Control & Prevention, Considerations for Restaurants and Bars (July 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html>.

³⁵ See Ashley Mateo, Can You Really Return to a Gym During Covid-19?, Wall St. J. (July 17, 2020), <https://www.wsj.com/articles/can-you-really-return-to-a-gym-during-covid-19-11594991879>.

³⁶ There is a long-running debate among tort scholars about whether—and to what extent—tort law successfully incentivizes potential injurers to take precautions at all. A number of studies supply evidence of a precautionary effect. See Gary T. Schwartz, Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter, 42 UCLA L. Rev. 377, 423 (1994) (reviewing literature and concluding that “there is evidence persuasively showing that tort law achieves something significant in encouraging safety”); Theodore Eisenberg, The Empirical Effects of Tort Reform, in Research Handbook on the Economics of Torts 513, 541 (Jennifer Arlen ed., 2013) (reviewing literature and concluding that “[e]vidence exists that changes in law that require actors to internalize costs can change behavior”). But cf. W. Jonathan Cardi, Randall D. Penfield & Albert H. Yoon, Does Tort Law Deter Individuals? A Behavioral Science Study, 9 J. Empirical Legal Stud. 567, 570 (2012) (noting that “[s]ome scholars have found limited evidence that tort acts as a weak deterrent with respect to certain behaviors,” while “others have found no evidence of deterrence or even, in a few cases, a negative association”).

To be sure, we can never know with complete confidence that a particular adjustment to the incentives generated by the tort system will yield a behavioral effect in the direction that economic theory predicts. But especially in a pandemic, policymakers do not have the luxury of waiting for certainty before acting. We submit that economic theory—bolstered by empirical evidence from other contexts in which incentives do

There is, to be sure, 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 concerns regarding “victim moral hazard” are attenuated for four 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 the potential for tort recovery.³⁷ Fourth and finally, some relaxation of customer and worker precautions is likely optimal (and thus not, technically, a “moral hazard”³⁸). By encouraging businesses to create safer environments, liability can induce customers and victims to forgo the ultimate precaution: staying home.

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.,

appear to shape behavior—can provide a useful guide for policy even when that guidance is caveated by some uncertainty.

³⁷ In a Gallup survey conducted in early July 2020, 74 percent of Americans reported that they “always” or “very often” wear a facemask outside the home. See Lydia Saad, *Americans’ Social Distancing Steady as Pandemic Worsens*, Gallup (July 20, 2020), <https://news.gallup.com/poll/315872/americans-social-distancing-steady-pandemic-worsens.aspx>. To be sure, self-reports are not always a reliable indicator of actual behavior. Anecdotally, we know of no one who chooses *not* to wear a mask or socially distance because they anticipate a potential tort recovery.

³⁸ See John M. Marshall, *Moral Hazard*, 66 *Am. Econ. Rev.* 880, 880-81 (1976) (arguing that the definition of “moral hazard” should be limited to instances of “misallocation,” rather than “any reallocation resulting from insurance”).

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.

The failure of the federal government and most states to implement comprehensive contact-tracing systems strengthens our concern about the ex-post consequences of tort liability for coronavirus exposure. As of early August, according to an NPR analysis, only three states and the District of Columbia had hired a sufficient number of contact tracers to meet estimated need.³⁹ If post-exposure outreach by businesses were supplementary or superfluous to robust state-run contact tracing efforts, the potentially perverse ex-post consequences of liability might be of reduced importance.⁴⁰ When business outreach is the primary mechanism through which customers and employees will learn about exposures, though, the risk that liability will undermine incentives for outreach becomes more worrisome.

³⁹ See Selena Simmons-Duffin, Coronavirus Cases Are Surging, The Contact Tracing Workforce Is Not, NPR: Morning Edition (Aug. 7, 2020), <https://www.npr.org/sections/health-shots/2020/08/07/899954832/coronavirus-cases-are-surging-the-contact-tracing-workforce-is-not>. The number rises to six states when trained reserve staff is included.

⁴⁰ Which is not to say that our proposal would become irrelevant if a comprehensive state-run contact-tracing regime were in place. Business cooperation with contact tracers may prove to be important to the success of such a system.

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 injury and potentially discouraging mitigation efforts after injury is a familiar from other contexts. As noted above, other scholars have highlighted similar concerns with respect to product liability, where tort law may deter manufacturers from implementing safety improvements or initiating recalls, and with respect to medical malpractice, where liability concerns may deter health care providers from alerting patients and their families to errors.⁴¹ Anup Malani and Ramanan Laxminarayan have noted an analogous dynamic at the international level: countries are reluctant to report outbreaks inside their borders because they fear the trade and tourism consequences. Malani and Laxminarayan suggest that international organizations such as the International Monetary Fund and World Bank should provide aid to countries that report outbreaks so as to “reduc[e] the burden or pain of sanctions after disclosure.”⁴²

We consider a similar approach in the context of COVID-19—though at the level of firms rather than nation-states. “Disclosure” (here, informing customers that they may have been exposed to the coronavirus) potentially triggers “sanctions” in the form of tort claims. In the next part, we explore strategies for reducing the sanctions that follow from promptly alerting customers to potential exposures.

⁴¹ See supra notes 12-14 and accompanying text. Courts have recognized similar tradeoffs. Cf. *Couch v. Astec Indus. Inc.*, 132 N.M. 631, 641 (Ct. App. 2002) (“The courts refusing to recognize post-sale duties generally do so because they believe such duties would inhibit manufacturers from developing innovative safety technology and improving their designs for fear of the expensive and onerous process required to find and warn all past purchasers of a product, or, even more costly, to retrofit the product. . . .”).

⁴² Anup Malani & Ramanan Laxminarayan, Incentives for Reporting Infectious Disease Outbreaks, 47 *Journal of Human Resources* 176, 198 (2011).

III. Liability to Customers: A Proposal

How 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 before turning to the distinct problem of liability to employees.

One possible approach is to impose a duty to warn on businesses once they learn that a customer has been exposed to the virus through their operations. Such a duty almost certainly exists under common law: as summarized by the Restatement (Third) of Torts, when an actor's prior conduct "creates a continuing risk of physical harm," the actor "has a duty to exercise reasonable care to prevent or minimize the harm."⁴³ In theory, the post-exposure duty to warn should encourage businesses to reach out to customers because if they fail to—and a customer subsequently finds out—the customer will sue the business for breach of the duty. In practice, however, we expect that common-law duties will be insufficient to resolve the problem of ex post incentives—for three reasons.

First, the problem we have identified is not solely a problem of businesses learning about potential exposures but staying mum. It is also a problem of businesses failing to make investments that would facilitate post-exposure outreach. Consider a restaurant or barbershop that accepts walk-in customers without a reservation or appointment. Optimally, the restaurant or barbershop would collect cell phone numbers from its walk-ins so that it would be capable of contacting them in the

⁴³ Restatement (Third) of Torts—Liability for Physical and Emotional Harm § 39 (2012); accord Restatement (Second) of Torts § 322 (1965) ("If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.").

event of an exposure. But if maintaining that data simply exposes the business to liability for violating a post-exposure duty to warn, then the business has much less of an incentive to collect the information in the first place. Whether a business is capable of contacting customers *ex post* is thus likely to depend upon difficult-to-verify investments that the business makes *ex ante*.⁴⁴

Second, and notwithstanding the existence of a post-exposure duty to warn, some businesses may calculate 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). This is especially true where state-run contact-tracing operations are threadbare. If infected customers are unlikely to learn about the site of their exposure absent affirmative outreach, then the threat of liability for violating the post-exposure duty to warn is largely empty.

Third, even when an infected customer learns that a business has violated its post-exposure duty to warn, it is far from clear that the customer will be able to recover for the duty-to-warn failure under general tort law principles. Typically, plaintiffs can recover only for damages that *they* have suffered as a consequence of the defendant's breach. But of course, a defendant's failure to alert a plaintiff of an exposure *after the fact* cannot be the *cause* of the plaintiff's infection. In this respect, the application of the post-injury duty-to-warn doctrine to the COVID-19 context differs from other warning contexts, such as a physician's duty to warn a patient of ongoing health risks from

⁴⁴ In theory, courts or regulators could hold businesses liable for failing to make *ex-ante* investments in contact tracing infrastructure. Exactly what steps any particular business could have taken to facilitate contact tracing, though, will be highly business-specific, significantly complicating efforts to articulate and enforce standards or rules.

a flawed medical procedure⁴⁵ and a manufacturer's duty to warn consumers of defects that come to the manufacturer's attention after the time of sale.⁴⁶ In those other contexts, the person to whom the duty to warn is owed generally will be the same as the person who will be injured by the failure to warn. In the customer coronavirus exposure context, by contrast, the person most likely injured by the failure to warn is a contact of the exposed customer rather than the customer herself.

We note three important qualifications to the arguments in the previous paragraphs. First, and perhaps most speculatively, if an antiviral treatment becomes available that can stop the progression of the infection when administered before symptoms emerge, then an exposed customer may be able to argue that she herself was injured by a business's failure to warn because—but for the failure—she would have received the antiviral treatment. There is, moreover, some evidence (primarily from rhesus monkey studies) suggesting that the drug remdesivir—if administered shortly after coronavirus exposure—can significantly reduce disease severity.⁴⁷ As of this writing, however, priority access to the limited supply of remdesivir is allocated to hospitalized patients who require supplemental oxygenation—not to individuals recently exposed.⁴⁸ Thus a theory of injury along the lines of “if you had alerted me sooner, I would have taken remdesivir before the disease progressed” remains highly implausible.⁴⁹

⁴⁵ See, e.g., *Tresemmer v. Barke*, 86 Cal. App. 3d 656 (1978) (holding that physician had duty to warn patient about ongoing risk of injury from insertion of the Dalkon Shield contraceptive intrauterine device when evidence of risk emerged two years after patient's procedure).

⁴⁶ See Restatement (Third) of Torts—Products Liability § 10 cmt. a (1998) (collecting cases recognizing post-sale duty to warn).

⁴⁷ See Emmie de Wit, Prophylactic and Therapeutic Remdesivir (GS-5734) Treatment in the Rhesus Macaque Model of MERS-CoV Infection, 117 PNAS 6771 (2020); Brandi N. Williamson et al., Clinical Benefit of Remdesivir Rhesus Macaques Infected with SARS-CoV-2, *Nature* (June 9, 2020) (online first), <https://doi.org/10.1038/s41586-020-2423-5>.

⁴⁸ See Nat'l Insts. of Health, COVID-19 Treatment Guidelines: Remdesivir (July 24, 2020), <https://www.covid19treatmentguidelines.nih.gov/antiviral-therapy/remdesivir>.

⁴⁹ Even more speculatively, the use of phylogenetic analysis to establish viral lineage may ultimately make it easier for plaintiffs to trace their infection back to a particular source. While these methods have been

Second, and somewhat more plausibly, family members and other close contacts of exposed customers (second-degree exposures) who contract COVID-19 may bring failure-to-warn claims against businesses that do not reach out to customers (first-degree exposures), on the theory that—but for the business’s failure to warn—the exposed customer would have self-isolated and thus would not have exposed the close contact. Lawsuits arising out of second-degree exposures, though, will face especially high causation hurdles. The plaintiff will need to prove two links in the transmission pathway, when proving one link is already hard enough. Moreover, the plaintiff will need to show that her exposure occurred *because of* the failure to warn—in other words, that (a) she was exposed to the virus *after* the business, if it had fulfilled its duty, would have reached out to the exposed customer, and (b) the exposed customer would have self-isolated if she had been informed in due course.

Third, even if businesses face a low probability of being sued successfully for violating a common-law duty to warn customers post-exposure, and even if compensatory damages in those cases are likely to be small relative to social costs, the threat of punitive damages may amplify the deterrent effect of the common-law duty.⁵⁰ The deterrence effect of punitive damages in this context, though, is limited by two factors. One is the “judgment-proof problem.”⁵¹ The amount

employed by infectious-disease researchers to map the virus’s progression at the metropolitan area level, see Jacob Lemieux et al., Introduction and Spread of SARS-CoV-2 in the Greater Boston Area (June 4, 2020) (preprint), <https://virological.org/t/introduction-and-spread-of-sars-cov-2-in-the-greater-boston-area/503>, these methods have not yet reached the point that they can be used by individual litigants to determine where they were exposed.

⁵⁰ On the use of punitive damages to amplify deterrence in cases where the defendant is likely to escape detection, see generally A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998). On the use of punitive damages to amplify deterrence in cases where the social costs of a defendant’s act or omission significantly exceed the private costs borne by the plaintiff, see generally Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347 (2003).

⁵¹ See Polinsky & Shavell, *supra* note __, at 933.

of punitive damages that can be collected from any given defendant is effectively capped by the defendant's total assets (and often by less than that amount, due to structures that confer limited liability). Another is U.S. Supreme Court case law, which strongly discourages punitive damages awards that are ten times compensatory damages or more,⁵² and which prohibits punitive damages awards based on harms to third parties.⁵³

None of this is to suggest that the common-law duty to mitigate damage after injury should be eliminated or relaxed in the COVID-19 context. The existence of the duty may, at the very least, have expressive value even if it is unlikely to result in many successful claims.⁵⁴ But the post-exposure duty to warn is, we believe, insufficient to resolve the problem of ex-post incentives.

A potentially more promising approach is to create a liability safe harbor for businesses that contact customers within a certain window after the business learns of an exposure. We recommend a window of twenty-four hours from the time the business learned or reasonably should have learned of the potential exposure.⁵⁵ For example, once a server informs a restaurant that she has tested positive for COVID-19, the restaurant would have twenty-four hours to inform customers who came into contact with the server about the potential exposure. If the business spoke with the

⁵² See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (declining “to impose a bright-line ratio which a punitive damages award cannot exceed” but stating that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process”).

⁵³ See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1060 (2007) (holding that a punitive damages award based “in part upon [the jury’s] desire to *punish* the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent) . . . would amount to a taking of ‘property’ from the defendant without due process”).

⁵⁴ On the expressive function of tort law, see generally Scott Hershowitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. Tort Law no. 2 (2018).

⁵⁵ The 24-hour and 14-day windows track a Virginia requirement that employers must alert employees within 24 hours if it learns of a positive COVID-19 test result for another employee who was present at work within the previous 14 days. See 16VAC25-220-40(8)(a).

customer, left a voicemail message, or sent an email or text message during that timeframe, the business would fall within the scope of the safe harbor.⁵⁶ The safe harbor would be available only for fourteen days from the time of exposure—a timeframe chosen to match the upper bound of the incubation period for COVID-19.⁵⁷ That is, informing a customer about an exposure more than fourteen days after it occurred will not trigger the safe harbor (even if the alert comes twenty-four 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 also suggest that the safe harbor be limited to claims of ordinary negligence, and thus would not apply to claims of gross negligence, recklessness, willful misconduct, or intentional exposure.

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.

⁵⁶ We leave the precise details of the requisite communication to safe-harbor drafters. One can imagine, for example, either a requirement that a representative of the business either have a live telephone conversation with the customer or leave at least two messages (via voicemail, email, text, or some combination of the above).

⁵⁷ 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).

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 will shield them from suit. 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 fourteen-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, thus facilitating post-exposure outreach. A restaurant or barbershop that accepts walk-in customers, for example, could begin asking for those customers' names and phone numbers (which, in turn, would allow the business to reduce its own liability risk in the event of a coronavirus exposure). Thus, while the existence of the safe harbor may marginally reduce the incentive of businesses to take some ex-ante precautions, it may increase the incentive of businesses to take other ex-ante precautions.

The safe-harbor approach has the virtue of administrative simplicity. No legislature or court would need to specify in advance which individuals a business must contact in the event of an exposure. Rather, the very fact that the business had contacted the customer within the twenty-four-hour window after a coronavirus exposure would be a complete defense to a claim of ordinary negligence arising out of that exposure. This feature of our proposal means that the scope of the safe harbor would be robust to changes in public health guidance. For example, as of this writing, the CDC recommends that contact tracers reach out to any person who was within six feet of a COVID-19 patient for at least fifteen minutes within the forty-eight-hour period before that patient

first experienced symptoms. (For COVID-19 patients who test positive but do not have any symptoms, the relevant forty-eight-hour window is the forty-eight-hour period before the test specimen was collected.)⁵⁸ This “6-15-48” rule may well change over the course of the pandemic. The scope of the safe harbor, however, would remain the same. Hypothetically, if “6-15-48” becomes “6-15-72,” and the business reaches out to customers who came into prolonged proximity of an infected individual in the three days before symptom onset or specimen collection, then the safe harbor would apply to any claim brought by those contacted customers. If the business reaches out to a narrower range of individuals than what the Centers for Disease Control and Prevention recommends, the scope of the safe harbor would be correspondingly narrower too.

The safe-harbor approach also has the virtue of political plausibility. With Republican lawmakers in Washington generally arguing for significant limits on liability and Democrats defending the status quo,⁵⁹ the safe-harbor proposal strikes a compromise between those polar positions. To be clear, this is *not* the primary purpose of the proposal: we seek to strike a balance between ex-ante and ex-post incentives, not a balance between the political left and right. Framed differently, our proposal does *not* compromise on public health, but instead aims to adjust the tort liability system so as to better promote public health. The safe harbor’s compatibility with political exigencies is a benefit, but not a motivation.

⁵⁸ Ctrs. for Disease Control & Prevention, Public Health Guidance for Community-Related Exposure (July 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>.

⁵⁹ See Ana Swanson & Alan Rappeport, Liability Shield Is a Stumbling Block as Lawmakers Debate Relief, N.Y. Times (Aug. 5, 2020), <https://www.nytimes.com/2020/08/05/us/politics/liability-shield-business-coronavirus.html>.

The mention of national politics raises the question of whether such a safe harbor, if adopted, should be adopted at the federal level or the state level. Historically, tort law has fallen within the domain of the states, and state-level experimentation can assist the development of innovative, evidence-based solutions. That said, federal preemption of state common-law tort law claims is not unusual,⁶⁰ and a congressional statute establishing the proposed safe harbor would likely lie well within Congress's Commerce Clause powers given the significant cross-border effects of COVID-19.⁶¹ While we favor the state-by-state approach, we recognize that congressional enactment is no doubt the quicker route to the implementation of our proposal nationwide.

IV. Liability to Employees: Two Proposals

The proposal in the previous part addressed liability to *customers*. Liability to *employees* raises a similar but not identical set of challenges. In particular, any change affecting employer liability to employees for coronavirus exposure must account for the institutional details of state workers' compensation regimes.

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'

⁶⁰ For an overview and analysis in the products liability context, see generally Catherine M. Sharkey, Products Liability Preemption: An Institutional Approach, 76 Geo. Wash. L. Rev. 449 (2008).

⁶¹ See, e.g., *Taylor v. United States*, 136 S. Ct. 2074, 2080 (2016) (reaffirming that Congress has the "power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce") (internal quotation marks omitted).

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.⁶² The ex-ante effects of workers' 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.⁶³

⁶² 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).

⁶³ See, e.g., Kevin Krause, Dallas Meat Plant Workers Say Company Refused To Close Despite COVID-19 Outbreak, Dallas Morning News (Apr. 28, 2020), <https://www.dallasnews.com/business/local-companies/2020/04/28/dallas-meat-plant-workers-say-company-refused-to-close-despite-covid-19-outbreak>.

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.⁶⁴ The presumption does not apply if the employee worked exclusively from home, and the presumption can be rebutted by the employer. Wyoming has adopted a similar rebuttable presumption via statute.⁶⁵ The Illinois Workers' Compensation Commission withdrew an analogous measure after a defeat in state court.⁶⁶ Several other states have adopted presumptions of workplace exposure for healthcare and public-safety first responders or—more broadly—for all essential workers. Still more are currently considering presumptive-causation legislation.⁶⁷

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

⁶⁴ 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>.

⁶⁵ Wyoming's presumption applies to any employee covered by workers' compensation, without a fourteen-day window or a work-from-home exception, though presumably the presumption could be rebutted successfully under those circumstances. See Wyo. Stat. Ann. 27-14-102(a)(xi)(A) (West 2020).

⁶⁶ 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>.

⁶⁷ See Josh Cunningham, COVID-19: Workers' Compensation, National Conference of State Legislatures (July 28, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx>.

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.)

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 fourteen 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 twenty-four hours of learning about the exposure or fourteen 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.⁶⁸

Importantly, both a presumptive-causation rule for workers' compensation claims and a gross-negligence carveout from the workers' compensation grand bargain could exist simultaneously. In our view, both have the potential to generate public-health benefits. Here, as is often the case, innovative states have taken the lead. Their early experiences are likely to inform efforts at legal change elsewhere.

Conclusion

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. 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." A gross-negligence cause of action for employees exposed to the coronavirus on the job can serve an additional salutary function, though we acknowledge that there, the deviation from the grand bargain is somewhat sharper.

⁶⁸ 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).

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 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.