

The Illinois Defense Counsel, an organization whose members are committed to protecting and improving civil justice in Illinois, opposes HB 5769 as it unfairly targets businesses and their owners. This bill's provisions are contrary to well-established bedrock principles of law in this and every other state.

First, this bill abrogates, in time of emergency or disaster, the doctrine that workers compensation benefits are to be the exclusive remedy between an injured worker and her employer. This would eliminate, albeit temporarily, over a hundred years of settled law between employers and employees. In addition, this bill, 1) fails to adequately provide for the notice of specific duty to be placed on an employer, 2) places blame on people within the business and outside the business who may be unconnected to the decision and implementation of the business' PPE policy, 3) creates a limitless private cause of action that includes penalties on the employer and exposure to judicial license revocation based on one violation, and 4) places liability on an owner for hiring an independent contractor.

First, while a concerted effort to protect workers and the public in a pandemic is laudable, the imposition of the duty to comply instantly with any disaster proclamation by the Governor under the Illinois Emergency Management Act or executive order in furtherance thereof, is wholly unrealistic and likely unconstitutionally vague as the requirements of the statute are bereft of notice. This is particularly true where businesses do not know if they are included until the order is issued and could not possibly prepare for every kind of emergency. To wit, it is unknowable until there is a disaster proclamation who will be an "essential employer" and thus subject to the law. There is the potential for an employer to have no reason to consider itself an "essential employer" until some unforeseen time when the governor designates it as one. At the moment the proclamation is made, that employer becomes potentially liable. In addition, it is also unfair to employers to face exposure to suits based on violation of this legislation because it fails to set forth a clear delineation of which PPE is to be issued by the employer for the specific risks to be encountered. It would impose a huge burden on employers to require them to somehow know or guess that face masks are an appropriate deterrent even when the scientific community is divided.

Second, the proposed legislation extends liability to "owner" and "operator." The definition of "owner" appears to reach to shareholders and "owner" means a person or entity that has legal ownership of the essential employer." Use of the defined term "operator" extends liability to "any officer, member or partner." "Operator" also encompasses "management" or "operational" control. This appears to subject a vast array of persons who never anticipated liability for what a foreman may allow his workers to wear or not wear on a worksite.

Third, the bill encompasses relief to a "person" who suffers "actual damage." This would seem to include not only employees, but members of the public at large. Further, the term "employee" encompasses volunteers and thus a non-profit charity could expose itself to liability when volunteers show up without proper PPE. Under the bill, the PPE has to be proper garb to perform work in "a shipyard, marine terminal, longshoring, general industry or construction." The church pastor would conceivably face liability in this scenario. In so doing, this bill would chill the willingness of aid groups and volunteers to provide assistance when it is most needed.

The bill also does not limit the type of relief available. However, the bill does provide for treble of whatever those damages are, plus punitive damages and could lead to a court ordering an employer's license to conduct business in the state to be forfeited, suspended, revoked, or enjoined. This an extraordinary extent of relief that will be effective immediately upon enactment, including to the current pandemic. The bill also provides no defense based on the unavailability of the proper PPE and would effectively require every employer to have every kind of PPE to be prepared for every kind of situation. Law firms would have to consider the purchase of hazmat suits, radiological protection, and rebreathers, but, as the bill is essentially strict liability, there is no consideration in the bill for the circumstance in which an employer takes reasonable steps, but encounters an unforeseeable circumstance. Hospitals, which find themselves without PPE, would have to send workers home, which would cause great harm to the public.

Fourth, at common law, the hiring of an independent contractor removes liability and responsibility of an owner as to that specific work. An owner is not liable unless it retains control over operative details or means and methods of work. The bill would place liability on owners for hiring independent contractors which would make that type of employment arrangement less likely, which would harm all involved.

This bill is a case of the "fighting the last war." It is an overbroad and unreasonable response to circumstances that no one could have foreseen. Its inclusion of undefined and draconian remedies is unjustifiable in a strict liability statute. HB5769 should be defeated.