

**Daniel J. Luker for the Idaho Trial Lawyers Association
Judiciary and Rules Joint Working Group – July 28, 2020**

Written testimony differs from oral testimony due to time constraints and the direction of the discussion.

My name is Daniel Luker and I am an attorney in private practice in Boise and I'm here as a representative of the Idaho Trial Lawyers Association which is an association of Idaho attorneys who represent plaintiffs in civil actions and claimants in workers' compensation. The great majority of our members are small business owners we know what it means to have payroll and overhead pressures, as well as the very real concern about keeping our employees and customers safe.

We want to express our appreciation to the Chairs of this working committee for the invitation to help with this complicated issue in this uncertain time and to all the members for their consideration of this important issue.

ITLA is an organization that fights for our rights under the US and Idaho Constitutions, specifically that "The right to trial by jury shall remain inviolate." At the core of this right is an individual's responsibility for the consequences of their actions. Currently we have a system in Idaho that works. Generally, Idaho Businesses operate in a way that safeguards their patrons and employees, and when they don't there are legal consequences for those actions following established standards.

My father Lynn Luker, a former Chair of the House Judiciary and Rules Committee evaluated legislation with four questions: (1) is government action necessary; (2) will the bill accomplish its purpose; (3) are the financial costs fully disclosed and justified; and (4) are our constitutional rights protected? Those questions remain good reliable measuring sticks for good legislation.

Business and Schools will only be able to reopen when their customers and students feel safe enough to show up. If the public does not feel safe, passing anything limiting liability wont change that. In that instance, no action would have been a better alternative, as government action was not really necessary as it did not accomplish its objective, and instead caused harm by infringing on constitutional rights.

For example, the Boise School District recently advised parents and staff that based on the current Central District Health Category 3 status, if school was to start today all students would be attending virtually. Passing liability reform would not have made a difference, because the decision was based on the exposure risk to students and staff. That risk isn't based on legislation, but rather Idahoan's perceptions of safety.

The harms that give rise to legal claims are real. If someone gets sick and ends up the hospital, that is a real harm. What liability reform really does is shift the responsibility for that loss. It shifts those loses from those who had control over the initial exposure to the public at large through increased health insurance rates, Medicaid expenses, and unfunded losses to our hospitals.

Liability reform has focused on three areas. (1) Employees; (2) governmental entities like schools; and (3) businesses at large.

Employees are protected by the Workers Compensation system. That system already limits the liability of employers and provides a sure and certain benefit plan providing health care so that employees can recover from a work-related injury or illness and return to work. Idaho's workers compensation system works, and it should not be changed. It is a necessary part in assuring employees that if they go to work, they will be safe.

Governmental entities, including schools are protected by the Idaho Tort Claims act. This act already limits the liability of governmental entities and their employees. It protects them when they are doing their job in a good faith manner. These entities already have protection, there is no need to change it, especially since doing so may confuse what protections they have.

Additionally, all businesses are protected under the law because who ever brings a claim has to prove that claim. And whatever action a business takes in responding to crises is judged by their community, who know what was reasonable under the community's specific circumstances. This makes the legal system able to respond to different situations. It is not a one size fits all solution.

Idaho's legal system is robust and up to the task of handling a crisis. We have had wildfires, earthquakes, and dams burst before. The legal system in place was able handle those crises, it can handle this one.

Should the Committee decide that liability reform is necessary that reform should contain clear standards that the public and stake holders can understand. That clarity will allow the public to have confidence that they are being kept safe, and it will allow the stake holders to know what their rights and responsibilities are and avoid decision paralysis.

Additionally, any limitations should be COVID specific, so the public can understand why their constitutional rights are being limited, and it should clearly protect against unreasonable, reckless, and willful disregard for the public's safety. Again, if the public can't be assured that they will be safe, they won't be in businesses, and students won't be in classrooms.

It should also contain a sunset provision, as any curtailment of constitutional rights should be limited and focused. You are looking to solve are temporary problems, not something we plan to be dealing with five years from now.

If you are looking for an example, Utah has passed language that is simple, pointed, and limited.

Finally, it is worth pointing out, that maybe the problem isn't one of liability reform, but rather insurance coverage. This legislature has the ability to mandate that insurance cover certain things, like requiring ICRMP to fully insure schools, including for pandemic related claims, so that they can reopen. If that is your underlying concern, you can do that, that is within the legislature's constitutionally given authority.

If you decide to take action, make sure it's an action that will accomplish the objective of stimulating the economy, and that it is targeted, and easily understandable by the public, and that it is temporary, because at the core what you are doing is limiting rights guaranteed by our Idaho and US Constitutions.

Thank you.

Daniel J. Luker

on behalf of the Idaho Trial Lawyers Association

Constitutional Rights should always be certain



The Idaho Trial Lawyers Association is a group of Idaho attorneys who represent plaintiffs in civil actions and claimants in workers' compensation. **We stand for the right to a jury trial and work to oppose any limits on this individual right.**

The great majority of our members are small business owners. We know what it means to have payroll and overhead pressures and customers. We understand the very real feeling that employers have to the consequences of bringing customers into their place of business and wanting to provide safety for our customers.

Unfortunately, there are those who are grossly overstating fears of liability—which are not founded on any facts—in order to exploit this crisis to get something they have wanted for decades: **immunity when they break the law.**

Blanket legal immunity will prolong the pandemic. Workers, consumers, and students will not return to offices, stores, restaurants, and schools if companies and the government cannot be held accountable when they fail to prioritize health and safety. If no one is responsible, no one is safe.

Immunity Strips Away Our Constitutional Rights

Shielding corporations and the government from accountability that fail to prioritize the health and safety of workers means no recourse and no justice.

A Limited Approach

If action is taken it needs to accomplish the objective of stimulating the economy and allowing the safe reopening of schools. Any proposed legislation needs to be limited in scope, easily understandable by the public, and temporary.

Let's make the health of workers, consumers, and schools the top priority and then watch our businesses and economy rebound.



The 7th Amendment

Our forefathers provided us with the 7th Amendment to empower American citizens and jurors with the responsibility of holding wrongdoers accountable to those they have harmed.



The System Works, Let it

The civil justice system adapts well to a crisis. It is our neighbors and friends who serve on juries and they know the difficulties we all face in a crisis.



Immunity is Bad For Business

If fear wins, we all lose. For our economy to successfully reopen, workers and consumers must feel safe enough to leave their homes to work, shop, recreate, and go about living their lives.