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Dear Chair Bynum, Representative Moore-Green and Judiciary Committee members:

You had asked us for a response to the concerns raised by Ms. Barrie. Mr. Baxter and I had a chance to confer. For the purposes of meeting today's deadline, I am submitting these remarks on behalf of OTLA.

Specific businesses needing specific assistance are much easier than broad categories.

Ms. Barrie's presentation laid out dozens of different industries seeking to shift financial burdens onto consumers, students, and patients. **Under which specific instances does the legislature want to shift these burdens? In response to slide 4 of Ms. Barrie's presentation, do we want immunity for the concert promoter or airline who refuses to provide a refund to a cancelled event or flight? Is it for the technical school that charges tuition and then cancels the class? Is it for the nursing home that told family members they were providing high quality treatment when in fact the loved one was being neglected? Ms. Barrie did a very good job laying out with specificity the issues around first-time manufacturers of PPE.** The detailed response on that specific topic is listed below.

In direct response to Representative Moore-Green's question: **Business owners, non-profits and educational institutions should get the protection from liability they purchased in good faith in the private sector insurance market.** We should make sure the laws governing that market are enforced before new laws gets passed. Just this afternoon a case was filed by Gordon Sondland against an insurance company that failed to live up to its contractual promise.

<https://www.oregonlive.com/business/2020/05/sondland-goes-to-court-to-force-insurer-to-cover-his-hotel-chains-7-million-plus-in-losses.html>

Ms. Barrie also presented concerns that businesses have regarding liability in relation to consumers and employees.

Business owners are worried about being liable for harm to consumers

Businesses are fearful of liability during the process of re-opening. **Ms. James from Legislative Counsel did a stellar job explaining why businesses have little to fear from litigation in regard to contaminating customers with Covid.** For customers that have brief interactions with businesses in the course of a day filled with interactions, consumers who fall ill will have a very difficult time proving that their illness was caused by one certain store. Even in instances in which the business fails to provide sanitizer, fails to require masks, fails to send home infected employees, and fails to require social distancing, proving causation will be nearly impossible. Contact tracing is very unlikely to provide proof beyond a reasonable doubt that a specific business caused a specific consumer's illness.

Businesses are fearful of liability if they refuse to provide service to customers not wearing masks. For decades, businesses have refused service to customers not wearing shirts. Business have refused service to customers not wearing shoes. Masks are no different. This is not an issue of Constitutional rights. The Constitution dictates that Oregonians cannot be denied service because of their race, ethnic background, sexual orientation, or disability. Perhaps there is an accommodation for a shopper with a disability that precludes her from wearing a mask. Businesses have accommodated disabilities for many years. Business owners refuse to allow dogs in their store, unless they are a service animal. We understand that a sliver of the public believe it is their Constitutional right to not wear a mask inside a place of business. There is no need to pass a law because a handful of people are confused about their rights. **The legislature should not pass laws based on fears when existing laws will protect responsible business owners.**

Business owners are worried about being liable for harm to employees

Workers are already being fired for reporting unsafe working conditions (see the story from Marion County in my original testimony). Workers are being asked (or required or coerced) to work with little or no tested protective equipment. The Governor allowed companies to stay open if they met certain guidelines. There was extensive testimony on this issue in House Business and Labor Committee earlier this week. OR-OSHA reported 4,500 complaints regarding worker safety. Whistleblower protection, workplace safety, and access to adequate leave are all

critical issues. **These are issues that particularly impact workers of color and women since they fill many of these dangerous jobs (farm workers, food processing workers, nursing home and other long term care workers, janitorial workers, hospital orderlies and support staff, grocery and retail clerks, group home care providers, personal support workers). These workers and their advocates need to be part of this conversation.** We would urge the legislature to consider taking additional action to protect the rights and health of these vulnerable workers who are predominantly low-wage.

Patient Safety Liability

First and foremost the communities most impacted should have a seat at the table. Seniors, people of color, people with disabilities, and low-wage workers have been hit hardest by the health impact of Covid-19. They should be engaged in the discussion to limit their rights.

Second specific examples in which immunity should be granted would be really helpful in furthering the conversation.

Per instructions in advance of the hearing, we did not delve far into this issue in our prepared remarks. This issue has received a lot of attention nationally and from the Trump administration. For the legislature to attempt to pass a law that can cover many different sets of facts seems like government overreach. In one case, a patient may visit the ER in the middle of the pandemic complaining of chest pains, get turned away, and then suffer a heart attack at home. Another patient may come into the ER with chest pains and a very blue complexion, get turned away in the middle of the pandemic, and then suffer a heart attack at home. A third person may come to the ER with chest pains, go home and return, be sent away a second time and return a third time only to be sent home, and then suffer a heart attack.

Does the legislature really want to pass a law in which Section 87 deals with blue lips, Section 88 deals with the “three trips to the ER exception,” and Section 89 provides for exceptions based on zip codes and regions? Is the “three trips to the ER exception” different if the patient was seen by three different doctors who concluded that the symptoms were such that the patient could be sent away, then if the patient was summarily dismissed without every seeing a doctor?

Do we have facilities that provided disparate treatment to people based on conditions other than health (age, disability, etc)? Should patients harmed by medical negligence during the pandemic have their 7th Amendment rights

restricted. A woman gave birth outside the metropolitan area in late March after the Executive Orders were enacted. She was left in labor for three days instead of getting a C-Section, and the baby will now suffer from permanent brain damage. Should she be precluded from telling her story to a jury and seeking justice for her family because of her bad timing? She would be precluded from doing so under the proposals coming forth from the liability reform coalition.

Again, an element of patient safety that causes grave concern is the disparate health impact of the pandemic. Will blanket denial of patients' rights disproportionately impact vulnerable communities? We strongly urge the legislature to engage with the affected communities.

Liability of Manufacturers of Personal Protective Equipment

The language we have seen in LC 29, Sections 42-43 (below) is a decent start. The gold standard would include the following provisions so that people asked to wear the untested material can provide informed consent. This is particularly important now that we have an example of a whistleblower fired over workplace safety issues.

1. No immunity for companies that normally make PPE. The only manufacturers that would be immune would be those that normally make something else (shoes, clothing, etc.) We would assume that prison industries would be granted the immunity.
2. Workers have to be informed that the equipment is untested. They have to sign a piece of paper saying they've been notified. If the employer is asked to produce the document later and cannot, it will be presumed that the document never existed. This would be a requirement of employers not manufacturers, yet it is still critical. If you work in a hospital and your employer provides a mask, you'll assume it has been tested and works. There needs to be written record that they know they might be getting something no more useful than a bandanna.
3. Employers should exhaust their supplies of tested PPE before using untested PPE. This would be a requirement of employers not manufacturers. This was specifically highlighted by nurses as an issue.
4. Where applicable (probably non-medical situations), the worker provided untested PPE can refuse to work if they don't feel safe, without retaliation. My understanding is that licensed medical professionals cannot refuse to provide care. However, non-licensed hospital staff and other front-line workers should have this explicit right.

5. Workers who were required to report to work under the Executive Order who contract COVID-19 shall be presumed to have contracted it on the job.
6. Volunteers should also have their medical bills paid for if they contract the virus.

(Excerpt from LC 29)

PERSONAL PROTECTIVE EQUIPMENT

IMMUNITY FROM LIABILITY

SECTION 42. (1) As used in this section, “personal protective equipment” means a product designed to create a barrier to penetration of substances or solid, liquid, or airborne particles, including but not limited to surgical masks, gowns and related surgical apparel, that is:

- (a) Produced in response to the declaration of a state of emergency issued by the Governor on March 8, 2020;**
- (b) Produced by a person who did not offer personal protective equipment for sale on December 31, 2019; and**
- (c) Donated, or sold at a price that does not exceed the cost required to manufacture, the personal protective equipment.**

(2) A person who produces, manufactures, distributes, dispenses, administers or prescribes the use of personal protective equipment is immune from civil liability for any damages resulting from the use of the personal protective equipment.

(3) This section does not limit the liability of a person for gross negligence or for reckless, wanton or intentional misconduct.

SECTION 43. Section 42 of this 2020 special session Act applies to claims arising on or after March 8, 2020.

Proposed Action Items for the Legislature

1. **Business owners, non profits and educational institutions should get the protection from liability they purchased in good faith in the private sector.** We urge the legislature to consider a bill in 2021 to provide more small business protection regarding business interruption insurance.
2. **Get a clear and specific list of items for which immunity is sought.** In response to slide 4 of Ms. Barrie’s presentation, do we want immunity for the concert promoter or airline who refuses to provide a refund to a cancelled event or flight? Is it for the technical school that charges tuition and then cancels the class?
3. **Make sure the right stakeholders are involved in the conversations.** Engage those disproportionately impacted by the health impacts of Covid-19 (seniors, people of color, people with disabilities) in these safety discussions. Recognize that workers are facing a different set of circumstances than

consumers, and that the laws involved are very different as well. Workers' rights advocates need to be engaged in this conversation.

4. Aggressively work with the Chief Justice to keep courtroom doors open for small businesses who are being denied insurance coverage they have paid for.
5. Aggressively consider relief for small businesses facing issues with landlords, mortgage holders, or debt collectors.
6. Crack down on payday lenders marketing themselves as lawsuit lenders.
7. Protect the 7th Amendment right of Oregonians to protect their rights for themselves without government intervention.
8. Protect first-time manufacturers of personal protective gear who have stepped up in our hour of need, but don't transfer the liability onto those who either unknowingly or against their will are forced to use untested PPE.
9. Consider the interplay of blanket immunity with other hurdles to full-blown litigation: forced arbitration, alternative dispute resolution, mediation, court-annexed arbitration, small claims court.
10. Guard against government over-reaction to unfounded fears.

I look forward to the ongoing discussion of this topic.

Arthur Towers, Political Director