



Testimony Regarding Legislative Response to COVID-19
Mr. Daniel Murray
Kansas State Director, National Federation of Independent Business

House Commerce, Labor and Economic Development Committee
May 14, 2020

Chairman and members of the committee, I am pleased to submit comments related to the recovery of small businesses in the COVID-19 pandemic. NFIB Kansas is the leading small business organization in Kansas representing small and independent businesses. A non-profit, nonpartisan organization founded in 1943, NFIB Kansas represents the consensus views of its almost 4,000 members in Kansas.

The impact from this pandemic, including government stay-at-home orders and mandated non-essential business closures has had a devastating impact on the small business economy. Owners are starting to benefit from the PPP and EIDL small business loan programs as they try to reopen and keep employees on staff. Yet, in addition to needing more flexibility in using the PPP loan to support business operations and liability protection, small business owners need additional low cost financial programs—like the proposed Linked Deposit Program—to help them survive and emerge from the crushing effects of COVID-19.

In our most recent Small Business Economic Trends Survey¹, small business optimism took another dive in April, falling 5.5 points to 90.9, with owners expressing certainty the economy will weaken in the near-term, but expecting it to improve over the next six months. The Optimism Index has fallen 13.6 points over the last two months, with nine of 10 Index components declining in April and one improving.

Real sales expectations in the next six months declined 30 points to a net negative 42 percent, the lowest reading in the survey's 46-year history. The second-lowest reading was net negative 24 percent in April 1980. A net negative 11 percent of all owners (seasonally adjusted) reported higher nominal sales in the past three months, down 19 points from March.

Other key findings from April's Optimism Index included:

- Earnings trends declined 14 points to a net negative 20 percent. Among owners reporting weaker profits, 39 percent blamed weak sales, 16 percent blamed usual seasonal change, six percent cited price changes, four percent cited labor costs, and two percent cited materials costs. For owners reporting higher profits, 63 percent credited sales volumes and 17 percent credited usual seasonal change.
- The percent of owners thinking it's a good time to expand lost 10 points falling to three percent, its lowest level since March 2010.

As reported in our most recent NFIB monthly jobs report, job creation plans fell eight points to a net one percent, the lowest level since December 2012. Three times as many owners reduced employment as reported an increase in their workforce. Forty-seven percent reported hiring or trying to hire (down seven points), but 41 percent (87 percent of those hiring or trying to hire) reported few or no “qualified” applicants for the

positions they were trying to fill. Twenty-four percent (seasonally adjusted) of all owners reported job openings they could not fill in the current period, down 11 points.ⁱⁱ

As you can see from these numbers, the economic outlook of small business owners is uncertain and bleak. And, the full force of the “recession” has not yet been felt as programs such as PPP encourage firms to maintain employment even as the government shutdown reduces business activity. Facing a monumental and complex recovery, small business owners need every viable tool at their disposal. The proposed Linked Deposit Program will provide small businesses with the critical low-interest capital that they need in these trying times.

Last week, NFIB issued a set of Liability Protection Principles, intended to protect small businesses from the threat of unfounded lawsuits as they begin to reopen. An [NFIB survey](#) released this week showed that nearly 70% of small business owners are concerned about liability claims increases, while only 6% are not at all concerned.

As small business owners across America begin the process of reopening, it’s imperative that we establish protections from the threat of lawsuits that exploit the already damaging effects of COVID-19. According to our survey’s results, small business owners are concerned about increases in liability claims when reopening their businesses. We urge the Legislature to address these Liability Protection Principles so that our nation’s small businesses who have fought to survive over the course of this pandemic can get back to work without fear of costly legal battles.

Below is NFIB’s set of Liability Protection Principles designed to address the legal issues of most concern to small business and which should be addressed in any legislation the Legislature passes. To the extent the Kansas Chamber business liability legislation addresses these principles, we support the bill. Our members welcome the inclusion of policy addressing all of these principles if the opportunity presents.

1. **The Workers Compensation system should be the exclusive vehicle employees who suffer serious physical injury at work use to adjudicate their claims.** The workers compensation systems developed in each State are best-situated for determining whether a worker contracted COVID-19 at work and is eligible for compensation as a result. But, we do not think COVID-19, or any other mass communicable virus, can be reasonably proved to have generated at the workplace.

NFIB recommends that the Legislature provide that no separate state tort liability should be permitted for employee injury claims due to the virus. TO THE EXTENT SUCH LIABILITY EXISTS, claims that an employer is liable for physical injury due to COVID-19 should be adjudicated under state workers compensation laws—not the civil courts.

2. **Businesses should be protected from liability to customers and other third-parties unless those customers or parties prove the business knowingly failed to develop and implement a reasonable plan for reducing the risk of exposure to COVID-19 and that failure caused the injury.** When reopening a business both the Occupational Safety and Health Administration and the Centers for Disease Control offer guidelines for keeping workplaces safe. In addition, KDHE and county health departments may also have suggested procedures. These guidelines are instructive; however, they are often not legally binding and should not be used as a “get into court” free card for the unscrupulous trial attorney. Business owners should develop and implement plans to reduce the risk of COVID-19 exposure in the customer and third-party “facing” locations of their business.

NFIB recommends that business owners be shielded from liability from lawsuits brought by customers or other third parties unless the customer or third party proved that the business knowingly failed to develop and implement a reasonable plan to reduce the risk of COVID-19 by customers and other third parties and that the failure caused the injury.

3. **Permitted lawsuits should be limited to persons who experience a serious physical injury due to COVID-19 resulting in hospitalization.** Although there is still much to be learned about COVID-19, one thing scientists do know is that it affects different people in different ways. Indeed, we continue to hear of people who test positive for the virus but experience few if any symptoms.

NFIB recommends that Legislature grant businesses immunity from coronavirus-related litigation except in cases of gross negligence that causes the plaintiff serious physical injury resulting in hospitalization or death. No claims for emotional injury due to contracting the virus should be permitted.

4. **Fines should be imposed on unscrupulous trial attorneys bringing frivolous COVID-19-related lawsuits.** Small business owners do not have in-house counsel and the vast majority cannot afford to hire lawyers to defend their business and reputations in court. Trial lawyers know this and, as a result, small business owners are easy targets for the plaintiff's attorney looking for a quick payout. Trial attorneys should be penalized – not incentivized – for bringing a frivolous COVID-19-related lawsuit.

NFIB recommends that the Legislature impose sanctions on attorneys found to bring a frivolous COVID-19-related claim. In addition to sanctions, the plaintiff's attorney should be required to pay the defendant's attorneys' fees and other costs relating to the litigation.

Re-opening State Economies: Best Practices

Fiscal/Regulatory

Sales Tax Reprieve

Grant small business owners a sales tax reprieve. Allow small business owners to hold on to a portion of the sales tax they collect and provide them with an extended period of time to give that money to the state. (California)

Payroll Tax Holiday

This will allow small business owners to keep money in their pockets for the business and employees.

Tax Deadline Extension

Extend the deadline for other taxes (property, sales) or provide localities with the flexibility to extend tax deadlines.

Waive Tax Interest and Penalties

If not automatic, create a waiver process for small business owners to apply for interest- and penalty-free payments.

Expedited Permitting

Extend business permits that have expired or are set to expire during the declared state of emergency.

Licensing Recognition

Waive unique state licensure requirements to allow workers to go where they are needed and not be burdened by out-of-state licensure requirements.

Business Credit for Quarantined Workers

Develop a credit for small businesses that continue to pay their employees during a stay-at-home order or because of the closure of non-essential businesses.

Sales Tax Holiday

Encourage economic recovery and consumer spending as the state reincorporates businesses into the economy.

Lodging and Meals Tax Holiday

Encourage economic recovery and consumer spending as the state reincorporates businesses into the economy.

Workers' Compensation Premium Deferral and Forgiveness

Prevent increases in workers' compensation premiums. Do not allow COVID-19 to be considered a presumptive occupational illness for workers' compensation purposes.

Create Bridge Loans Programs/Increase Funding for Bridge Loan Programs

Increase resources at the state level for small businesses who were unable to receive EIDL and/or PPLs. Focus on businesses with 20 or less employees.

Regulatory Review

Encourage states to review burdensome rules that will hinder businesses and workers during economic recovery.

Increase State Tax Deductions

Increase current state tax deductions, such as salary, wages, and other compensation as a cost of doing business, which will lower overall small business income tax bills.

Pause New Regulations

Halt all new and pending rules that are not directly related to COVID-19.

Workforce Development

Grant flexibility for continuing education requirements for manufacturers, retailers, installers, mechanics, and professional service firms.

Discourage New Spending

New government spending that is not directly tied to COVID-19 recovery must be avoided.

Liability/Tort

Liability for PPE Manufacturers

Provide limited immunity from civil liability to manufacturers, distributors, and sellers of essential medical supplies. Especially businesses that do not ordinarily make medical supplies that have shifted their production to help.

Tighten Intentional Tort Exception for Workers' Compensation

Prevent employees from suing their employers because they contracted COVID-19 during the course of employment.

Protections for Workers in Essential Businesses

Provide immunity from civil and criminal liability and administrative sanctions (professional and licensing boards and commissions) for workers engaging in a protected business operation.

Labor Mandate Relief

Encourage a temporary halt to:

- Pending minimum wage increases;
- Prevailing wage mandates;

- Expansion or implementation of paid leave programs unrelated to COVID-19;
- Collective bargaining agreement mandates.

Health

Encourage Social Distancing

Allow businesses with the capacity to ensure social distancing such as offices, warehouses, and non-high-volume retailers have adequate space to keep workers and customers apart. Permit re-opening but limit the number of employees/customers in confined areas so that they can accommodate for socially distancing. Place markings to ensure safe spacing in high traffic areas of a business. Establish measures to limit interaction between employees and customers. Stagger breaks to limit the number of people in communal areas.

Emphasize Workplace Safety

Send home any employee who displays symptoms of COVID-19. Encourage workers to report any safety and health concerns to the employer. Emphasize effective hand hygiene among employees including washing hands for at least 20 seconds, especially after going to the bathroom, before eating, and after blowing your nose, coughing, or sneezing. Identify a workplace coordinator responsible for COVID-19 issues and workplace impacts. Execute a facility-wide return to work program where employees will be briefed and trained on the new safety and health measures.

Continue Increased Sanitizing

Increase the frequency of all sanitizing and cleaning measures and requiring additional sanitizing measures for high traffic areas and items.

Re-open Outdoor Industries

Allow industries primarily functioning outdoors to re-open – landscapers, construction, car washes, pavers, builders, etc. While many are currently open, be clear they can return to doing non-essential work as well.

Thank you for the opportunity to provide comments on this important piece of legislation. We urge your support of the measure.

ⁱ NFIB Small Business Economic Trends Survey: <https://www.nfib.com/surveys/small-business-economic-trends/>

ⁱⁱ NFIB Monthly Jobs Report: <https://www.nfib.com/foundations/research-center/monthly-reports/jobs-report/>