



# Federal Legislation Shielding Businesses and Individuals from Tort Liability: A Legal and Historical Overview

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When a person believes that he or she has sustained an injury because of someone else's negligent or wrongful conduct, the injured party can potentially file a [tort lawsuit](#) seeking money damages from the alleged wrongdoer. In recent months, many plaintiffs have filed tort lawsuits alleging that they contracted COVID-19 or otherwise sustained COVID-19-related injuries because of someone else's unlawful conduct. For example, after a Walmart employee contracted COVID-19 and died, his brother filed a lawsuit alleging that Walmart caused the employee's death by negligently failing to provide him with personal protective equipment, enforce social distancing guidelines, and disinfect the store.

Policymakers and commentators have [debated](#) whether Congress should enact legislation reducing defendants' potential exposure to COVID-19-related tort liability. While [some](#) maintain that businesses and individuals need liability protections to induce them to reopen the economy without fear of litigation, [others](#) claim that offering such protections would allow businesses to endanger their employees and the public with impunity. The Senate Committee on the Judiciary has [scheduled a hearing](#) on May 12, 2020 to explore these issues, and [some Members](#) have introduced [legislation](#) proposing to [modify](#) the tort liability rules that apply in COVID-19-related cases.

Although the development of tort law is left largely to the [States](#), Congress has sometimes enacted federal legislation that shields certain defendants from tort liability. This Sidebar catalogues and briefly summarizes several federal statutes that either insulate particular entities from tort liability or otherwise displace the state tort rules that would ordinarily apply. Given their brevity, the summaries in this Sidebar do not necessarily capture all the nuances of these statutes. This Sidebar also does not comprehensively list all federal tort statutes that [preempt](#) or otherwise affect state tort law. The Sidebar concludes by identifying legal issues that Congress may consider if it decides to enact a similar statute protecting certain entities from COVID-19-related liability—or, for that matter, any statute intended to displace or modify state tort law.

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# Examples of Federal Statutes That Displace or Affect State Tort Law

## The National Swine Flu Immunization Program of 1976

Congress enacted the National Swine Flu Immunization Program of 1976 (Swine Flu Act) in response to a swine flu outbreak in the mid-1970s. To encourage agencies, organizations, and individuals to develop, produce, and administer a vaccine to control the outbreak, Congress found it “necessary to protect” those entities from lawsuits filed by persons injured or killed by the vaccine. The Swine Flu Act therefore barred such plaintiffs from suing allegedly liable manufacturers, distributors, and healthcare personnel directly. Instead, the Swine Flu Act required injured parties to seek compensation from the United States. Under specified circumstances, however, the Swine Flu Act also empowered the United States to later sue the responsible manufacturers, distributors, and healthcare professionals to recover the damages it paid to injured parties, as well as its litigation costs.

## The National Childhood Vaccine Injury Act of 1986

As an alternative to tort litigation, the National Childhood Vaccine Injury Act of 1986 (NCVIA) establishes a [no-fault compensation program](#) for persons injured by various vaccines. The NCVIA [bars](#) plaintiffs from filing certain vaccine-related tort lawsuits until (1) they have filed a petition for compensation in the United States Court of Federal Claims, and (2) the court has ruled on that petition. If the plaintiff then elects to file a tort lawsuit rather than accepting the amount of money awarded by the court, the defendant enjoys [various protections](#) from tort liability.

## The Westfall Act

Congress has enacted [several statutes](#) that insulate federal employees from tort liability under specified circumstances. The most comprehensive of these statutes is the [Federal Employees Liability Reform and Tort Compensation Act](#), also known as the [Westfall Act](#). The Westfall Act generally requires plaintiffs injured by torts committed by federal employees acting within the scope of their employment to seek compensation [from the federal government, rather than](#) from the individual employees personally.

## The Bill Emerson Good Samaritan Food Donation Act

Subject to certain exceptions, the [Bill Emerson Good Samaritan Food Donation Act](#) shields various entities that donate food or grocery products to nonprofit organizations from liability for injuries caused by those donated products.

## The Volunteer Protection Act of 1997

Subject to various conditions and exceptions, the [Volunteer Protection Act of 1997](#) (VPA) shields individuals who volunteer for nonprofit organizations or governmental entities from liability for injuries resulting from their acts or omissions. The VPA also contains [similar provisions](#) that protect pilots who fly for public benefit. When the VPA does not categorically insulate volunteers from liability, the VPA limits their liability for [noneconomic losses](#).

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## The Biomaterials Access Assurance Act of 1998

Congress enacted the [Biomaterials Access Assurance Act of 1998](#) (BAAA) to “assure the continued supply of materials for lifesaving medical devices.” Among other things, the BAAA provides that “a biomaterials supplier [shall not be liable](#) for harm to a claimant caused by an implant” except under specified conditions.

## The Y2K Act

The [Y2K Act](#) modified the legal rules that applied to various lawsuits related to the Y2K computer glitch. As relevant here, the Y2K Act [limited the monetary damages](#) that plaintiffs could recover in certain Y2K-related tort lawsuits.

## The Air Transportation Safety and System Stabilization Act

Congress passed the [Air Transportation Safety and System Stabilization Act](#) (ATSSSA) to [assist](#) the air travel industry and other stakeholders following the September 11th terrorist attacks. Among other things, the ATSSSA (1) limited the liability exposure of various entities—including air carriers, aircraft manufacturers, and airport sponsors—for damages resulting from the September 11th attacks; and (2) created the [September 11th Victim Compensation Fund](#) to compensate people injured or killed in the attacks.

## The SAFETY Act

The [Support Anti-terrorism by Fostering Effective Technologies Act of 2002](#) (SAFETY Act) limits the liability exposure of “[a]ny person or entity that sells or otherwise provides” certain anti-terrorism technologies to the federal government or to various other customers. Among other things, the SAFETY Act also creates a [rebuttable presumption](#) that the [government contractor defense](#) will bar such claims under specified conditions.

## The Project BioShield Act of 2004

The [Project BioShield Act of 2004](#) (BioShield Act) protects certain government contractors hired to perform, administer, or support anti-terrorism countermeasure research and development activities. The BioShield Act accomplishes this by [treating those contractors like federal employees](#) under the [Westfall Act](#) described above. Plaintiffs therefore cannot sue these contractors directly, but must instead seek compensation from the United States. If a contractor protected by the BioShield Act commits gross misconduct or violates its contract with the federal government, however, the United States may later [sue that contractor](#) to recover its litigation costs and the damages it paid to the injured party.

## The Protection of Lawful Commerce in Arms Act

The [Protection of Lawful Commerce in Arms Act](#) (PLCAA) prohibits plaintiffs from filing [certain tort lawsuits](#) against gun manufacturers or sellers based on the unlawful misuse of a firearm by the plaintiff or another person. As part of the PLCAA, Congress also enacted the [Child Safety Lock Act of 2005](#) (CSLA), which, among other things, affords [certain liability protections](#) to firearm owners who secure their weapons with gun storage or safety devices.

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## The PREP Act

Subject to various exceptions and conditions, the [Public Readiness and Emergency Preparedness Act](#) (PREP Act) [shields](#) manufacturers, distributors, healthcare providers, and other entities from liability for injuries resulting from the use or administration of certain medical products during a public health emergency. The PREP Act also [created a fund](#) called the Covered Countermeasure Process Fund to compensate injured persons who cannot obtain compensation through litigation because of the PREP Act's liability shield provisions. A [separate CRS product](#) analyzes the PREP Act in greater detail.

## The CARES Act

Under specified circumstances, [Section 3215](#) of the [Coronavirus Aid, Relief, and Economic Security Act](#) (CARES Act) shields healthcare professionals from liability for acts or omissions they commit while performing volunteer healthcare services during the COVID-19 emergency.

[Section 3103](#) of the CARES Act also added certain respiratory protective devices to the list of products covered by the [PREP Act](#).

## Considerations for Congress

Proposals to modify tort law implicate [a number of interests and concerns](#). [On one hand](#), limiting an entity's exposure to litigation and liability can protect that entity from the cost and inconvenience of defending against lawsuits and paying monetary judgments, allowing that entity to devote its time and resources to socially beneficial endeavors. Relatedly, mitigating an entity's liability exposure can encourage that entity to engage in high-risk but socially desirable activities, such as [providing healthcare services](#) during a [public health emergency](#). [On the other hand](#), insulating parties from liability can prevent injured persons from obtaining compensation for their injuries and remove or weaken legal deterrents to careless or wrongful acts or omissions.

If Congress decides to develop and pass legislation insulating particular entities from COVID-19-related tort liability—or, for that matter, any legislation that affects state tort law—it may consider several legal issues. First, because the federal government is a government of [limited powers](#), any legislation that Congress passes must fall under one of Congress's [enumerated powers](#) in the Constitution, like the [Interstate Commerce Clause](#) or the [Spending Clause](#). That constitutional constraint on Congress's power may limit not only the types of tort legislation that Congress can enact, but also the scope of that legislation. For instance, if Congress invokes the [Interstate Commerce Clause](#) as its exclusive source of authority for a COVID-19-related tort law, Congress will [only possess the authority](#) to regulate (1) activities that substantially affect interstate commerce; (2) the channels of interstate commerce; (3) instrumentalities of interstate commerce; and (4) people or things in interstate commerce.

Congress may also consider how it wants the legislation to interact with existing state tort law. The Constitution's [Supremacy Clause](#) empowers Congress to [preempt](#)—that is, displace—state laws that are inconsistent or irreconcilable with federal statutes. Congress can consider including an [express preemption clause](#) in its legislation that precisely specifies the extent to which the statute supersedes state tort statutes and doctrines. Such a clause could take various forms, such as one that completely supplants state law, or one that creates a minimum federal standard that states can surpass if they choose. The [PREP Act's preemption provision](#), for instance, broadly states that “no State . . . may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement” that relates to the PREP Act's subject matter and “is different from, or is in conflict with,” any of the PREP Act's requirements. [Section 3215 of the CARES Act](#), by contrast, saves state laws from preemption if they afford volunteer healthcare professionals “greater protection from liability” than federal law.

Finally, Congress can consider how to define the scope of any tort immunity, and whether to establish an alternative compensation system for injured parties. For example, Congress can categorically bar plaintiffs from filing COVID-19-related tort lawsuits against defendants, or it can create exceptions for cases in which the defendant has allegedly committed gross negligence or [willful misconduct](#). Congress could broadly insulate a wide array of entities from liability, or it could protect only [specified classes of potential defendants](#), like individuals, businesses, or nonprofit organizations. Similarly, Congress could bar plaintiffs from filing any type of tort lawsuit related to the COVID-19 pandemic, or it could only prohibit plaintiffs from asserting certain claims, like [negligence](#) or [medical malpractice](#). If Congress forces injured persons to relinquish their available tort remedies against private entities, it could consider [establishing a fund](#) to compensate those persons outside the litigation process (as it did in the [PREP Act](#) and the [ATSSSA](#)), or interposing the United States as the defendant (as it did in the [Westfall Act](#) and the [BioShield Act](#)). Finally, as an alternative to foreclosing plaintiffs from filing lawsuits, Congress could instead [limit the types and amounts of damages](#) that plaintiffs can recover or [alter the procedures](#) governing how the parties and the court conduct the lawsuit.

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