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Promoting Fairness and Equity in Wisconsin's Civil Justice System

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To: Wisconsin Legislature
From: R.J. Pirlot, Executive Director
Paige Scobee, Lobbyist
Date: April 10, 2020
Re: Released COVID-19 liability protection measures are inadequate.

Recently, WisPolitics distributed summaries of draft legislation relating to the COVID-19 public health emergency being considered by the Legislature's Republican majorities. Actual bill language has not yet been released.

The Republican majorities appear to be working on necessary, fair liability protections for healthcare providers and their employees who are putting their personal health at potential risk as they work to treat patients and fight this novel coronavirus. **Thank you for including these protections for healthcare providers and their employees.**

Other measures recommended by the Wisconsin Civil Justice Council are either apparently *not* being considered or the language being considered is inadequate.

Enact civil liability limitations for manufacturers of PPE and COVID-19 treatment equipment.

The plain-language summary released by WisPolitics contains problematic provisions related to exemptions from liability for manufacturers producing critical products to address the public health emergency, highlighted below.

From the summary released by WisPolitics:

EXEMPTION FROM CIVIL LIABILITY FOR MANUFACTURE OF MEDICAL SUPPLIES AND EQUIPMENT DURING PUBLIC HEALTH EMERGENCY

Exempt manufacturers, distributors, and sellers of emergency medical supplies and equipment that donate or sell their products **in response to the public health emergency declared under Executive Order 72** (including any extension granted by legislative resolution) from civil liability associated with injury or death caused by those products. **The manufacturer, distributor, or seller would be exempt from civil liability only if the product were sold or donated to a nonprofit organization or unit**

of government at a price that does not exceed the cost of production, defined to include only the cost of inputs, wages, operating the manufacturing facility, and transporting the product. Define emergency medical supplies and equipment as any medical equipment or supplies necessary to limit the spread of, or provide treatment for, a disease associated with a public health emergency, including life support devices, personal protective equipment, cleaning supplies, and any other item determined to be necessary by the Secretary of the Department of Health Services. Specify that the exemption would not apply if the death or injury were caused by a willful act or omission.

[Draft legislative proposal summary p. 7, emphasis added.]

The Wisconsin Civil Justice Council strongly supports exemptions for civil liability for manufacturers of medical equipment associated with COVID-19, but the following two provisions make this particular proposal unworkable:

- **Limiting the civil liability exemption to manufacturers only selling the products at cost provides *no* protection for those businesses who are *already* manufacturing such equipment as part of their regular business model.** Furthermore, this language would provide no financial incentive for manufacturers to repurpose their facilities to make medical equipment. It is not practical to require businesses who in good faith want to help the state by manufacturing critical supplies to choose between 1) selling the products at cost and potentially losing substantial profits in order to receive the liability exemption or 2) selling the products at a standard price point and risking losing millions to frivolous lawsuits filed by aggressive plaintiff attorneys. Private businesses should not be expected forgo their entire business model in order to receive civil liability exemptions that are fair, as the state expects businesses to step up and produce vital equipment. If these provisions are enacted, few if any additional businesses may begin manufacturing equipment associated with COVID-19.
- **The Legislature should not limit the civil liability exemption for manufacturing of critical supplies to only the public health emergency created under Executive Order #72 and any legislative extension.** Even after the current wave of COVID-19 ends, the state may want to begin stockpiling necessary equipment to treat any remaining cases and prepare for a future outbreak. The Legislature should extend the liability exemption for any manufacturer willing to make these critical products, whether in response to or in preparation for any public health emergency.

Bipartisan legislatures and governors across the country have already enacted appropriate liability exemption provisions for manufacturers without these arbitrary limitations. The Wisconsin Legislature and Gov. Evers should do the same.

The Wisconsin Civil Justice Council encourages the legislature to adopt civil liability exemptions for manufacturers of medical equipment used to address COVID-19. But the provisions outlined in the draft summary are unworkable and would not provide a meaningful, effective incentive for manufacturers to take on the risk of making these critical products.

We respectfully encourage you to enact liability protection for manufacturers of all types of respirator masks certified by the National Institute for Occupational Safety and Welfare and any manufacturer who chooses to repurpose their facilities to manufacture personal protective equipment or equipment in response to the COVID-19 public health emergency.

In addition, two other needed protections do not appear to be under consideration by the Legislature.

Enact civil liability protections for employers keeping their workers and workplaces safe.

Enact liability protections, including an exception to the Wisconsin Fair Employment Act for measures to mitigate the COVID-19 outbreak, to allow businesses to screen employees and visitors (e.g., by taking a temperature scan) for signs of illness prior to entering a business or employer facility. Further, provide liability protections for employers who require employees to engage in proper hygiene procedures. **The summary released by WisPolitics gives no indication this necessary liability protection for the broader business community is being considered.**

Enact civil liability protections of persons rendering aid.

Create a civil liability exemption for any person providing aid or support to assist those suffering from the communicable disease or engaged in efforts to combat the spread of the communicable disease identified in an emergency public health order. **The summary released by WisPolitics gives no indication this necessary liability protection for the persons rendering aid is being considered.**

Please feel free to contact R.J. Pirlot if you have any questions at pirlot@hamilton-consulting.com or 608-445-4410 or Paige Scobee at scobee@hamilton-consulting.com or 612-232-2089. On behalf of the broad swath of the business community represented by the Wisconsin Civil Justice Council, we stand ready to work with you.