

# White Paper: The Covid Pandemic’s Impact on Work Law

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## **I. Major Earthshaking Phenomena Invariably Change Employment Laws**

### **A. Introduction**

At the time of writing, Johns Hopkins University of Medicine, consolidating data from a number of sources, is reporting an excess of 27 million cases of COVID-19 and 455,000 deaths in the United States.<sup>1</sup> The sheer scale of the COVID-19 pandemic ensures that it has touched nearly every aspect of our lives, perhaps no part more than the ways working people put food on

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<sup>1</sup> <https://coronavirus.jhu.edu/map.html>

the table: employment. Employment laws are usually based upon existing norms and expectations of what average work is like, but COVID has dramatically altered those norms and the circumstances of “typical” work lives. Thus, the laws of work no longer fit the current circumstances. Some systems are stretched to the brink, and some new work orders have never before been attempted on this scale. This pandemic is destined to bring about legal changes. Moreover, policy makers and interest groups see some silver lining in the opportunity to bring about reform in areas where the pandemic has highlighted problems with current laws.

This white paper is an attempt to identify some of those features in the changing legal landscape. The research was conducted during the transition between administrations, after President Biden’s election, but before he took office and a new Congress was sworn in, thus in some areas it may not be up to date. We share it to provide the legal community with insight into what is in play.

In the interest of getting this changing information out as quickly as possible, we have not subjected the footnotes to the kind of source-checking documentation customarily associated with law reviews, but we hope that these citations can lead readers to additional sources in this rapidly changing field. Nonetheless, we believe that the White paper is useful in demonstrating the current range and directions of legal adaptation to this pandemic.

The work is based upon the collective research of law students in Professor Lea VanderVelde’s fall 2020 course on Employment Law at the University of Iowa College of Law. Research contributors include Kevin Sharp, Talera Jensen, Elizabeth P. Lovell, Drew Driesen, Flossie Neale, Kevin Kim, Chandler Mores, Hayley Sherman, Nicholas Day, Anthony Fitzpatrick, Kevin Illg, Scott DuPlessis, Peter Murray, David Salmon, Isabella Neuberger, Jacklyn Vasquez, Tanner Krob, and Michaela Crawford. Special thanks to Jen Sherer, Director of the Labor Center at the University of Iowa. Lea VanderVelde assembled the topics and provided light editing.

This White paper is not and should not be taken as legal advice. The contents are intended for general information purposes only. The views set forth herein are the personal views of the contributing authors and do not necessarily reflect those of the University of Iowa Law School.

## B. Historically Pandemics have always affected Work Law

*At least three historical epidemics have created major changes in work law. Some had immediate effects, whether temporary or permanent, and some had second generation effects.*

### **“The straits of masters and the scarcity of servants:” in the Wake of the Bubonic Plague**

Both the bubonic plague (1347-51) and the current coronavirus pandemic show how legal regimes ensure that labor power meets the need of capital even in the face of a health crisis. An episode of *Planet Money*, “After the Plague,” surveyed how the bubonic plague reshaped the labor market. In the podcast, historian Anne McCants describes how the plague destroyed human capital while preserving fixed capital – land, tools, workshops – which left the owning class relatively powerless to bargain with workers. Agricultural laborers in Italy were able to negotiate for

expensive livestock in their contracts. Wages rose sharply, often doubling. The shortage of workers meant workers had power to demand higher wages that afforded them a higher standard of living and access to luxury goods. In response to this surge in worker and consumer power, laws passed to maintain economic hierarchies.<sup>2</sup>

In England, in 1357, as a result of the plague, the Statute of Laborers was passed. That law in fact set the stage for some legal distinctions that continue today, such as the employee/independent contractor distinction. The law set a *maximum* wage and mandated that those who were able to work do so. This mandate was in response to situation that workers were, “not willing to serve unless they receive[d] excessive wages.” This is stated directly by those who crafted the statute: “We [King Edward]...have held deliberation and treaty concerning [the shortage of laborers] with the prelates and nobles and other learned men.” These individuals had the most to lose from a more empowered workforce. The statute prescribes that workers, “take only wages liveries, mead, or salary which, in the places he sought to serve, were accustomed to be paid in the twentieth year of our reign of England, or the five or six common years next proceeding.” This provision froze wages to pre-plague levels as a means to limit the power that laborers had to demand higher wages. Finally, the statute requires able persons to work and not sit idle and beg and forbade people from giving support to these “sound beggars...under the colour of piety or alms.” The provision explains that without these mandates to work, people would “refuse to labor so long as they can live from begging alms.”<sup>3</sup>

The coronavirus pandemic has killed a much lower percentage of the population than the bubonic plague. The bubonic plague wiped out half of the workforce in Europe. Nonetheless, the restrictions on gatherings, lockdowns and stay-at-home orders, and mandated shuttering of some businesses have similarly decreased the number of workers who are able to report for work. In some fields, this results in a similar predicament: fixed capital – restaurant kitchens, movie theater seats, office buildings – with drastically less labor power to operate it.

The Washington Post reported in July of this year on the debate between political leaders whether to extend the \$600 weekly federal unemployment benefit. GOP leaders and business executives were concerned that continuing the payments incentivized minimum-wage workers to stay home rather than return to work. In the coronavirus context, the CARES Act individual benefits represent a two-fold threat to this system: the pressure to increase wages in response to more lucrative benefits drives down surplus profits, and the disincentive to work means that costly fixed capital remains idle. The concerns of landowners and workers guilds from seven hundred

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<sup>2</sup> Background sources on how the Bubonic Plague affected labor regulation. Erica Werner, Jeff Stein and Seung Min Kim, Economic Relief Talks Ramp Up as GOP Releases Bill; Democrats, White House Officials Meet, Washington Post, July 27, 2020; Karl Marx, Capital: Volume I, (1976) (Ben Fowkes trans.); Manny Fernandez et al, Out of Work in America, New York Times, October 23, 2020; Michael Corkery & Sapna Maheshwari, Virus Cases Rise, but Hazard Pay for Retail Workers Doesn't, New York Times, November 19, 2020; Planet Money: After the Plague, National Public Radio (Sept. 16, 2020) (<https://www.npr.org/2020/09/16/913735599/after-the-plague>); The Statute of Laborers of 1351, accessed through The Avalon Project, Yale Law School. (<https://avalon.law.yale.edu/medieval/statlab.asp>)

<sup>3</sup> There is a fascinating history of anti-mendicancy screeds, treatises and morality plays from the middle ages. See, for example, the writings of William of Saint Amour, who wrote that too many able-bodied people begged instead of worked, masking their laziness as piety and falsely claiming to follow in the footsteps of religious orders who took in alms to support themselves.

years ago echo into our present moment.

One critical difference between the Statute of Laborers and COVID-19 economic relief is that the former was passed after the pandemic to adjust the resulting labor market whereas current policies are being debated in the midst of the pandemic. However, the tightening of the labor market does not seem to be sustaining wage increases for workers, even essential ones, as reported in the New York Times this November: cash bonuses for workers at Amazon and Walmart fizzled by the end of the summer and unless the proposed increase in the minimum wage is passed, no new wage increases are planned.

### **“A revolution of empowerment:” Polio Survivors’ Role in Advocating for Disabled Workers**

Health crises may also enliven a call to action to protect worker’s rights, as is the case with polio. Polio has caused death and paralysis in humans for centuries, but there was a particularly severe outbreak in the 1940’s and 1950’s when polio killed or disabled over 500,000 people per year worldwide. An estimated 10-20 million individuals worldwide are living with post-polio disabilities. Those who experience post-polio syndrome have symptoms like muscle atrophy, paralysis, and chronic fatigue, among others.

These lasting physiological effects had labor economic consequences, according to a 2016 study in the *Journal of Neurology*. The study of post-polio individuals in Denmark found an interesting duality (which was replicated in studies from Norway and Minneapolis, USA): polio survivors, both paralyzed and non, achieved higher education levels than the general population, but lower employment rates than the general population. The authors attribute the higher education rate to polio survivors compensating for physical disability by pursuing more education and the lower employment rate to the range of neurological and muscular problems that limit jobs polio survivors may pursue. The Norwegian study found that the lasting polio disabilities were, “decisive for their choice of profession.”<sup>4</sup>

There were also legal consequences down the line. One of polio’s survivors Justin Dart, is known as the “godfather of the ADA.” Dart served as the chair of the President’s Committee on Employment of People with Disabilities. Dart lived for decades with post-polio syndrome, after contracting a severe case at age eighteen. Although he achieved a teaching degree from the University of Houston, he was denied teaching positions because of widespread doubts about a wheelchair-bound polio survivor’s ability to manage a classroom.

Lennard Davis opens his comprehensive history of the ADA, *Enabling Acts*, with stories of politicians who had been personally affected by disability – Orrin Hatch had a relative with polio, “who worked every day until he died,” and George H.W. Bush’s uncle had polio. Mary Lou Breslin, another prominent disability rights advocate, contracted polio in the mid-1950’s. Her

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<sup>4</sup> Background sources for this section: Appointment of Justin W. Dart, Jr., as Chairman of the Presidents Committee On Employment of People With Disabilities, 2 Pub. Papers 1024-25 (July 26, 1989); Fred Fay & Fred Pelka, Peace Profile: Justin Dart, Jr., 14 Peace Rev. 481 (2002); Lennard J. Davis, *Enabling Acts* (2015) Beacon Press; Nete Munk Nielsen et al, Long-Term Socio-Economic Consequences and Health Care Costs of Poliomyelitis: A Historical Cohort Study Involving 3606 Polio Patients, 263 J. of Neurology 1120-1128 (2016).

convalescence at Warm Springs Institute in Georgia, the polio facility created by Franklin Delano Roosevelt, opened her eyes to the racial disparities in polio treatment: black polio survivors were housed in windowless basements and used segregated facilities whereas the care she received as a wealthy white woman was second to none. One of the drafters of early ADA language, Bob Burgdorf, had an atrophied right arm due to a childhood polio case and was denied employment as an electrician on the basis of his disability. He instead attended law school and worked as a disability rights lawyer. His story seems to bear out the findings of the Nielsen study – polio survivors who access higher levels of education because they were excluded from trade jobs. The close connections to polio created a moral and emotional motivation in these drafters, activists, and politicians.

The lingering effects of COVID-19 and the memory of those who suffered from it may instill a similar shared moral and emotional response. A generation of COVID-19 survivors could also lead to a more expansive recognition and accommodation of disability in the workplace. Although the full range of long-term physiological effects of COVID-19 are still being discovered (chronic fatigue syndrome, diminished lung capacity, kidney damage), workers who survived COVID-19 and have lingering health effects will certainly find themselves litigating to have their conditions covered, even in the more expansive definition of disability under the 2008 ADA Amendments Act (24 U.S.C. §12102). If COVID survivor-workers with lingering conditions are unable to receive accommodations to perform the job they once held, they may, like the polio survivors, take up the cause of activism to provide protections and accommodations for those workers once heralded as ‘essential workers’ and ‘healthcare heroes.’

Another sustained effect of COVID-19 will likely be the waning importance of working from a company’s offices. This increased flexibility in workplaces would be a boon for employees who seek a wider range of reasonable accommodations for their disability. Disabled employees who were previously unable to navigate the physical infrastructure of an office and commute – that ‘decisive’ factor described by Nielsen – may now see a new range of work opportunities available to them by working from home.

### **The Office Closet: HIV/AIDS, Surveillance, and Private Lives of Gays in the Workplace**

The HIV/AIDS crisis highlights two factors which have potential resonance today: 1) the precarity of workers who depend on employers for their health insurance and 2) how health crises give employers incentive to monitor employees’ personal lives.

HIV/AIDS historians Sarah Schulman and Jim Hubbard argue that as soon as effective pharmaceuticals became available, the AIDS movement was stratified into those who could afford to access treatment and those who could not. Annual courses of azidothymidine (AZT), the earliest effective HIV/AIDS drug, were expensive for those without insurance.<sup>5</sup> Employers argued that

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<sup>5</sup> Jonathan Bell, *Between Private and Public: AIDS, Health Care Capitalism, and the Politics of Respectability in 1980’s America*, 31 *J. Am. Studies* 159-183 (2018); Phil Tiemeyer, *Plane Queer: Labor, Sexuality, and AIDS in the History of Male Flight Attendants* (2013) University of California Press; Marc Linder, *What is an Employee? Why It Does, But Should Not, Matter*, 7 *L. & Inequality* 155 (1989); Natasha Singer, *The Hot New Covid Tech Is Wearable and Constantly Tracks You*, *New York Times*, Nov. 15, 2020; Sarah Schulman, *Stage Struck*, (1998) Duke University Press

these additional healthcare costs justified their intrusion into employees’ personal lives.

Jonathan Bell chronicles three ways in which employers would exclude employees with HIV/AIDS from employer-sponsored health coverage. First, employers would outright fire workers who they suspected or knew to be gay (regardless of HIV status) or have AIDS, leading workers with AIDS to name “specific” and discrete conditions for which they were seeking treatment, rather than revealing that these conditions were all associated with AIDS. Second, health insurers would provide memos on how to weed out gay and HIV/AIDS-infected employees often going as far as sending investigators to interview neighbors of an employee about the company they kept or to check letterboxes to see if two men were cohabiting an apartment. Finally, employers would strategically cut benefits or shift to more cost-saving plans, allowing them to re-investigate employees for eligibility and cap yearly and lifetime benefit amounts for AIDS treatments.

Many of these methods are now illegal after the ADA, the Affordable Care Act and anti-discrimination statutes, but the issue of employee privacy persists. The intrusion into employees’ private lives during the peak of the AIDS crisis helps frame the current concern with employee privacy during the coronavirus pandemic. Do employers have a bona fide interest in monitoring (or disciplining) employee behaviors that expose them to health risks?

The case of Gär Traynor, who was reinstated to his job as a United flight attendant after an arbitrator found that his HIV-positive status did not create a safety hazard for customers, showed that the nonexistent risk of contracting HIV/AIDS from casual contact in the workplace could not justify the employer’s discipline. However, casual contact during the coronavirus pandemic is far riskier due to the airborne and fomite transmission of the virus. Now, the social lives and acquaintances of employees may be well within the employer’s acceptable surveillance scope. Untethering healthcare from employment would reduce the precarity of workers and likely protect them from employers’ incentive to monitor personal details about their health. However, given the risk of coronavirus spread from casual contact, employers may be justified in disciplining employees who engage in health-risk behaviors, unlike employers who terminated workers with HIV/AIDS.<sup>6</sup>

Pandemic	Bubonic Plague 14 <sup>th</sup> Century	1918 Influenza Pandemic	2019 Coronavirus Pandemic
Effect on Wages	Wages doubled in many areas, workers bargained for more lucrative employment contracts across Europe. Worker power	Localized increases in wages where the pandemic hit hardest persisting after the pandemic.	Some temporary wage increases and bonuses that have not persisted as long as the pandemic

<sup>6</sup> Readers may wish to examine the pandemic of 1918 influenza. Thomas A. Garrett, Economic Impacts of the 1918 Influenza Pandemic (2007) from the Federal Reserve Bank of Saint Louis.

	to demand wages persisted for years.		
Reason for this effect	Widespread death, half of workforce killed. Very low mobility of workforce prevented equalization of the labor market. Interventions like Statute of laborers required to equalize labor market (with limited effectiveness).	Localized severe outbreaks that affected working-age individuals hardest. Relatively low mobility delayed equalization of the labor market.	Open question, Garrett posited that (1) much higher worker mobility and (2) job portability (remote work) would lead to immediate or rapid equalization of the labor market. Labor market affected primarily by temporary public health closures of workplaces and less so by death of workers (though non-negligible number.)

## II. Health Related Laws impacted by COVID

### A. OSHA

Covid-19 is yet another chapter in OSHA’s troubled history of effectively being suspended in times of crisis in favor of business interests and austerity, often when the safety of workplaces is most needed. Covid-19 exposes this weakness in a very acute way, as the numbers of worker infections and deaths rise sharply while the federal agency’s inactivity leaves it to state agencies to intervene in OSHA’s absence. Trends in OSHA management over time suggest only a mild corrective departure from this historical precedent.

Aside from a recordkeeping requirement that the law mandates,<sup>7</sup> OSHA has not made any new rules on Covid-19 enforcement. Instead, it has released a slew of non-binding guidance to suggest that employers use their discretion when protecting employees from the pandemic.<sup>8</sup> Guidance includes mask use, social distancing, and sanitation measures, and since these provisions are only guidance they are not federally enforceable. OSHA insists that its prior rules, such as the Bloodborne Pathogens Standard and PPE standards, are sufficient to cover all necessary COVID-19 control measures.<sup>9</sup>

While the agency sees its response as “nimble” and conservative lawmakers compared the Covid-19 response to the Obama administration’s H1N1 and Ebola responses, the Subcommittee on Workforce Protections derided OSHA’s response as inadequate.<sup>10</sup> Labor unions and other

<sup>7</sup> 1 29 CFR 1904, <https://www.osha.gov/laws-regs/regulations/standardnumber/1904>.

<sup>8</sup> 2 COVID-19: Control and Prevention, OSHA, <https://www.osha.gov/SLTC/covid-19/controlprevention.html> (last accessed Nov. 30, 2020).

<sup>9</sup> 3 COVID-19: Standards, OSHA, <https://www.osha.gov/SLTC/covid-19/standards.html> (last accessed Nov. 30, 2020).

<sup>10</sup> 4 Bruce Rolfsen, OSHA Chief Grilled on Virus Enforcement, Lack of Rulemaking, OCCUPATIONAL SAFETY & HEALTH REPORTER (May 18, 2020), <https://news.bloomberglaw.com/safety/osha-virus-enforcement-gets-house-hearing-scrutiny>.

workers' advocates have repeatedly stated that the agency's response is dangerously insufficient and unnecessarily places workers in harm's way.<sup>11</sup> Massive outbreaks in food processing plants—namely Smithfield Foods in Sioux Falls, SD, and Tyson Foods in Waterloo, IA, each with upwards of 1,000 cases and several deaths—are some of the hardest hit parts of the country, even with the underreported statistics nationwide.<sup>12</sup> In fact, nearly 8% of early Covid-19 cases can be traced back to meatpacking plants.<sup>13</sup>

Recently, the ACLU of Iowa and seven other labor and civil rights groups filed a federal complaint against Iowa OSHA, alleging that as of October 4, approximately 150 COVID complaints were filed and 97% of the cases were closed without investigation.<sup>14</sup> On November 18, news broke that supervisors at the Tyson plant in Waterloo, Iowa, created a betting pool on how many workers would contract the disease.<sup>15</sup> That same news article detailed how one employee vomited at work but stayed at the plant; supervisors downplayed the risk of contracting the disease. Iowa OSHA previously investigated the Waterloo plant but closed the case in late June—even after five fatalities and 1,000 sick workers.<sup>16</sup> OSHA state programs are required to be “at least as effective as” federal OSHA.

The Trump administration played a major role in the disempowerment of OSHA. Prior presidential administrations oversaw more robust OSHA programs, including more inspections and press releases.<sup>17</sup> John Henshaw, OSHA leader during the Bush administration, expressed disappointment in particular with the Trump agency's lack of policy around meatpacking industries.<sup>18</sup> Jordan Barab from OSHA's Obama era expressed woe about the initial exemption for Covid-19 recordkeeping requirements. Multiple former officials were perplexed that the agency did not issue an emergency temporary standard. OSHA spokespeople cite the extant Covid-19 related complaints issued, but the surprisingly low number (and low penalty) of citations is a result of the agency's reluctance to enforce any standard. The Smithfield plant referenced above, regarded as a

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<sup>11</sup> 5 Kate Gibson, OSHA has failed to protect workers from COVID-19, unions say, CBS NEWS (Oct. 9, 2020), <https://www.cbsnews.com/news/osha-covid-19-guidlines-protection-failed- unions-accuse/>.

<sup>12</sup> 6 Coronavirus in the U.S.: Latest Map and Case Count, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last accessed Nov. 30, 2020).

<sup>13</sup> 7 Mike Dorning, Meatpacking Link Found in Up to 8% of Early U.S. Covid Cases, OCCUPATIONAL SAFETY & HEALTH REPORTER (Nov. 23, 2020), <https://news.bloomberglaw.com/safety/meatpacking-link-is-found-in-up-to-8-of-early-u-s-covid-cases>.

<sup>14</sup> Complaint from Rita Bettis Austen, at 2.

<sup>15</sup> Clark Kauffman, *Lawsuit: Tyson Managers Bet Money on How Many Workers Would Contract COVID-19*, COURIER (Nov. 18, 2020), [https://wfcourier.com/news/local/lawsuit-tyson-managers-bet-money-on-how-many-workers-would-contract-covid-19/article\\_c148b4b8-5bb5-5068-9f03-cc81eff099cc.html](https://wfcourier.com/news/local/lawsuit-tyson-managers-bet-money-on-how-many-workers-would-contract-covid-19/article_c148b4b8-5bb5-5068-9f03-cc81eff099cc.html); *see also* Sydney Czyzon, *WATCH NOW: Waterloo Tyson Workers Walk off the Job, Say Plant Has Closed*, WATERLOO-CEDAR FALLS COURIER (Nov. 19, 2020), [https://wfcourier.com/news/tyson-suspends-managers-named-in-lawsuit-alleging-betting-on-covid-19-inside-waterloo-plant/article\\_1b659a0e-9a49-565f-84a8-1b71476c68fa.html](https://wfcourier.com/news/tyson-suspends-managers-named-in-lawsuit-alleging-betting-on-covid-19-inside-waterloo-plant/article_1b659a0e-9a49-565f-84a8-1b71476c68fa.html).

<sup>16</sup> Complaint from Rita Bettis Austen, at 2.

<sup>17</sup> 8 Deborah Berkowitz, WORKER SAFETY IN CRISIS: THE COST OF A WEAKENED OSHA, NAT'L EMP. L. PROJ. (Apr. 28, 2020), <https://www.nelp.org/publication/worker-safety-crisis-cost-weakened-osha/>.

<sup>18</sup> 9 Noam Scheiber, Protecting Workers From Coronavirus: OSHA Leaves It to Employers, N.Y. TIMES (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/business/economy/coronavirus-osha-workers.html>.

disaster scenario, was fined a paltry \$13,000 for its continuing unsafe operation that gave Covid-19 to hundreds of workers and killed four.<sup>19</sup>

Despite their seemingly unanimous opinion on Covid-19, past OSHA administrations have always been at the whim of an unstable political universe. The “societal regime” of the 1970s that created OSHA was soon upended by Reagan’s “efficiency regime,” with most political action around OSHA centered on its deregulation.<sup>20</sup> The Clinton era furthered these deregulation efforts. The Bush era administration melded austerity measures on the one hand with high-profile inspections on extremely hazardous and noncompliant sites on the other. The cumulative effect is an agency that is more beholden to political interests than to the public welfare.

The D.C. Circuit rejected a federal AFL-CIO suit early on that pushed for OSHA to release a nationwide standard.<sup>21</sup> In the judges’ opinion, they bowed to Chevron deference of OSHA’s decision to offer guidance instead of rules. Union leaders, on the other hand, believed it was the “unprecedented nature of the Covid-19 pandemic” (using the court’s words) that requires OSHA to issue a federal standard.<sup>22</sup>

Because the federal agency decided to issue discretionary guidance instead of enforcement measures, it is left to the states to handle Covid-19 in the workplace. In those states that have OSHA “state plans,” states are responsible for the administration and enforcement of federal OSHA standards, as well as retaining the authority to adopt state standards above and beyond those set by federal OSHA. Most states, however, are simply not equipped to create exhaustive standards and fund rigorous inspection regimes necessary to curtail the pandemic in many industries. Despite these limitations, several states have responded to this lack of action with their own OSHA rules.

Virginia became the first state to enact state OSHA workers’ safety regulations in the wake of the pandemic.<sup>23</sup> Later in the fall, Michigan, Oregon, and California followed.<sup>24</sup> The governors of

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<sup>19</sup> 10 Kate Gibson, 4 meat workers at a Smithfield plant died from COVID-19 — the feds fined the company \$13,494, CBS NEWS (Sep. 11, 2020), <https://www.cbsnews.com/news/4-smithfield-workers-died-sioux-falls-osha-fined-13494/>.

<sup>20</sup> 11 James Vike, *The Bureaucracy as a Battleground: Contentious Politics Surrounding OSHA 1980-2004*, 35 *POLIT. & POL’Y* 3, 570 (2007), [https://onlinelibrary.wiley.com/doi/full/10.1111/j.1747-1346.2007.00073.x?casa\\_token=AfZMQCYuZdMAAAAA%3Ab0pPiQODwJLTzrDK0ePKsFMKUnVEb8e8o\\_QPeF9klg7V2yOyFDsVanwrPNsdv8ObinxXaT7gYawiNGA](https://onlinelibrary.wiley.com/doi/full/10.1111/j.1747-1346.2007.00073.x?casa_token=AfZMQCYuZdMAAAAA%3Ab0pPiQODwJLTzrDK0ePKsFMKUnVEb8e8o_QPeF9klg7V2yOyFDsVanwrPNsdv8ObinxXaT7gYawiNGA).

<sup>21</sup> Brief, *In re: AFL-CIO*, No. 19-1158 (D.C. Cir., June 11, 2020), <https://www.bloomberglaw.com/public/desktop/document/InreAmericanFederationofLaboraDocKetNo2001158DCCirMay182020CourtD?1606678015>.

<sup>22</sup> 13 Fatima Hussein & Robert Iafolla, D.C. Cir. Rejects AFL-CIO Request for Emergency Virus Standard, *OCCUPATIONAL SAFETY & HEALTH REPORTER* (June 11, 2020), <https://news.bloomberglaw.com/safety/d-c-cir-rejects-afl-cio-request-for-emergency-virus-standard>.

<sup>23</sup> 14 §16 VA C25-220 (July 15, 2020), <https://www.doli.virginia.gov/wp-content/uploads/2020/07/COVID-19-Emergency-Temporary-Standard-FOR-PUBLIC-DISTRIBUTION-FINAL-7.17.2020.pdf>.

<sup>24</sup> Michigan: Emergency Order MCL 333.2253 (Oct. 9, 2020), [https://www.michigan.gov/documents/coronavirus/MDHHS\\_epidemic\\_order\\_\\_Gatherings\\_masks\\_bars\\_sports\\_-\\_FINAL\\_signed\\_704740\\_7.pdf](https://www.michigan.gov/documents/coronavirus/MDHHS_epidemic_order__Gatherings_masks_bars_sports_-_FINAL_signed_704740_7.pdf).

Oregon: 437-001-0744 (Nov. 16, 2020), <https://osha.oregon.gov/OSHARules/div1/437-001-0744.pdf>

Nevada and New Jersey issued executive orders in response to the virus, as well. Virginia's rule required OSHA-covered employers 30 days to train workers in COVID-19 protection measures and 60 days for employers to create an infectious disease preparedness response plan. While the rule is primarily seen as affecting manufacturing, agriculture, construction, retail, and service industry employees, it also covers office workers. For example, a building owner has to notify tenants any time a worker in the building is discovered to be infected and disclose which floor the sick worker was assigned to. The rule will stay in effect for six months, and it carries fines that can exceed \$130,000 for violations. However, the rule does not create standards for compensation of employees on leave for Covid-19 nor does it set concrete parameters for employers, relying on "feasibility" as the standard to reach.<sup>25</sup>

Michigan's rule requires assessments for employee Covid-19 risks, a virus response plan for each covered employer, and workplace cleaning and training procedures. The MIOSHA rules remain in effect for six months. The rule came as a response to the Michigan Supreme Court's decision to strike down Gov. Gretchen Whitmer's executive orders on workplace safety. The state's emergency rules also include Covid-19 safety requirements specific to certain industries, including food processing, manufacturing, construction, retail, and restaurants, and bars. For example, the rules advise meat processing companies to stagger worker shifts to minimize the number of employees in a facility at any one time and assign the same group of employees to the same shifts to minimize worker contact. For a heavily industrialized state like Michigan, this rule sees ample support from business and labor interests alike. On the other hand, the Republican legislature also enacted liability protections for businesses that follow Covid-19 procedures, reducing the ability for employees to sue in non-OSHA-covered workplaces.<sup>26</sup>

Oregon's emergency rule is expected to stay in effect for at least six months, or until it's replaced by a permanent regulation next year. It requires employers to assess risks their workers face from Covid-19 and to develop an infection control plan within two months. Businesses criticize the rule as lumping a new set of requirements on the preexisting Oregon Health Authority mandates. Worker advocacy groups also criticize the rule as too ambiguous, possibly allowing for less-protective options. For example, the rule requires employers to supply protective clothing to workers providing direct care to patients with confirmed or suspected Covid-19 infections, but it gives them the option of providing federally approved respirators or loose-fitting masks. Jessica Giannettino Villatoro, political director of the Oregon AFL-CIO, said the rule could have set stricter requirements for ventilation systems, especially for industries that have experienced high infection rates, such as food processing and corrections. The new rule sets several other compliance deadlines with employers that are listed in an "exceptional risk" category, such as healthcare providers, nursing homes, police and other emergency first responders, and funeral homes.

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California: OSHSB-98 §3205 (Nov. 19, 2020), <https://www.dir.ca.gov/oshsb/documents/COVID-19-Prevention-Emergency-txtbrdconsider.pdf>.

<sup>25</sup> 18 Bruce Rolfsen, Virginia's First-in-U.S. Worker Virus Safety Rule Takes Effect, DAILY LABOR REPORT (July 27, 2020), <https://news.bloomberglaw.com/daily-labor-report/virginias-first-in-u-s-worker-virus-safety-rule-takes-effect?context=article-related>.

<sup>26</sup> 19 Fatima Hussein, Michigan OSHA Issues Emergency Covid-19 Worker Safety Rules, DAILY LABOR REPORT (Oct. 15, 2020), <https://news.bloomberglaw.com/daily-labor-report/michigan-osa-issues-emergency-covid-19-worker-safety-rules?context=article-related>.

Employers in that group face the most stringent mandates. The rule includes strict ventilation and sanitation requirements for employers.<sup>27</sup>

California OSHA enacted its emergency workplace safety rule in November. Since the prior CAOSHA emergency rule only applied to health care facilities, the state government wanted to expand the rule to all employers. There is of course quite some pushback by business advocates and support from worker's advocates, especially because California's economy is the largest in the country. Many of the state's 19 million workers have expressed relief at the ruling, which requires that employers must implement an effective Covid-19 prevention program. Those measures can be merged into the employer's existing injury and illness prevention program, according to the terms of the measure. The aggressive rule gives employers only 10 days to comply with its requirements. Employers' Covid-19 programs must include provisions that match the rule's mandates including wearing masks, social distancing, free virus testing, regular cleaning, evaluating building ventilation, and medical leave for employees who are or may be infected with the virus. Employees will be required to wear masks when indoors and outdoors if working within 6 feet of another person. Workplaces that have an outbreak of virus cases must take additional precautions, the rule says. If a site has three cases within 14 days, free testing must be offered to workers and continue at least once a week until no new cases are found for at least two weeks. If a workplace has a major outbreak—defined as 20 or more instances within 30 days—the employer must offer free tests to workers at least twice a week until the site goes 14 days without a new virus case, install hospital-grade air filters if the ventilation system can handle the air flow, and determine the workplace factors that contributed to the outbreak.<sup>28</sup>

On May 7, Nevada's governor successfully issued worker pre-screening standards<sup>29</sup> after the EEOC allowed these practices to proceed within the limitations of the Americans with Disabilities Act.<sup>30</sup> New Jersey's governor issued an executive order for worker safety protocols on October 28.<sup>31</sup> This latter action was primarily in response to a six-month campaign by the Protect NJ Workers Coalition.<sup>32</sup> These two rules are both more precarious than the other state OSHA rules listed because the legislature did not endorse either rule.

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<sup>27</sup> 20 Bruce Rolfsen, Oregon OSHA Adopts Its Own Workplace Virus Protection Rule, DAILY LABOR REPORT (Nov. 6, 2020), <https://news.bloomberglaw.com/daily-labor-report/oregon-oshadopts-its-own-workplace-virus-protection-rule?context=article-related>.

<sup>28</sup> Bruce Rolfsen, California Worker Safety Regulators Approve Covid-19 Rule, DAILY LABOR REPORT (Nov. 19, 2020), <https://news.bloomberglaw.com/daily-labor-report/california-worker-safety-regulators-approve-covid-19-rule?context=search&index=0>.

<sup>29</sup> 22 Gov. Sisolak: Nevada ready for Phase 1 reopening on Saturday, with statewide standards, NEVADA HEALTH RESPONSE (May 7, 2020), <https://nvhealthresponse.nv.gov/wp-content/uploads/2020/05/Press-release-Phase-1-Reopening-Details.pdf>.

<sup>30</sup> 23 What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, E.E.O.C. (Sep. 8, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>31</sup> 24 NJ Executive Order No. 192, <https://d31hzhk6di2h5.cloudfront.net/20201028/19/3c/51/92/2a5c234763a1097c754c7997/EO-192.pdf>

<sup>32</sup> 25 Brent Johnson, N.J. mandates workplace COVID-19 safety rules as cases spike, citing lack of federal standards, NJ.COM (Oct. 29, 2020), <https://www.nj.com/coronavirus/2020/10/nj-mandates-workplace-covid-19-safety-rules-as-cases-spike-citing-lack-of-federal-standards.html>.

The cumulative effect of these regulations is yet to be determined, simply because there has not been enough time to collect the data on their effectiveness. However, there has been positive feedback from workers' rights groups about these programs, as well as the valid criticism from a variety of interest groups. It also does not prevent speculation on how the future of OSHA will proceed with a new administration and a pandemic with no clear end in sight. These state examples may very well provide case studies for the Biden administration to determine what does and does not help with workplace safety measures.

OSHA will continue to be a remedial measure instead of a regulatory operation as long as the big business interests are determining its rigor. Biden will probably empower OSHA somewhat during his first few months in office. Biden's close contacts to union leaders, particularly the AFL-CIO, show at least some consideration for workers' issues during the pandemic.

President Biden could issue an emergency temporary standard. Such an emergency order does not require a public comment period for the rule and the standard would take effect immediately on its publication. Congressional Democrats have called for a rule written in consultation with the national Centers for Disease Control and Prevention, employee representatives, and professional associations. They also call to reverse Trump-era policies restricting OSHA's press releases.<sup>33</sup> Overall, the possibility of a future federal OSHA mandate is quite strong.

## OSHA and Essential Workers

As the COVID-19 pandemic threatened U.S. food supply chains, then-President Trump invoked the Defense Production Act to keep, among other things, meat processing plants open, declaring the meatpacking industry "critical infrastructure to protect against disruptions to the food supply." The consequence was to designate packing house employees as essential workers. (We discuss essential workers in detail again in a section at the end of the white paper.)

This kind of declaration, which is rarely invoked, dates back to World War II, when in 1942, President Franklin D. Roosevelt issued an executive order that took control of labor relations under the war powers. Roosevelt's order established the National War Labor Board (NWLB) which sought to adjudicate "labor disputes which might interrupt work which contributes to the effective prosecution of war." The NWLB "replaced free collective bargaining for the duration of the war" and supplanted the NLRB's jurisdiction in any "labor dispute . . . which threaten[ed] the war effort."<sup>34</sup> Labor rights were thereby suspended in deference to the emergency powers of the President and the successful prosecution of war. Ultimately, the NWLB and the War Powers Act of 1941 set the stage for the passage of the 1950 Defense Production Act, which aimed to officially grant the President the ability by executive order to "direct private companies to prioritize orders from the federal government."

Just as the steel industry was deemed "essential" to the WWII war effort, the meatpacking industry was declared essential in fighting the economic effects wrought by COVID-19. President Trump's

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<sup>33</sup> Bruce Rolfsen & Fatima Hussein, Key to Biden OSHA Transition, Virus Rule Is Naming Deputy First, DAILY LABOR REPORT (Nov. 23, 2020), <https://news.bloomberglaw.com/safety/key-to-biden-osha-transition-virus-rule-is-naming-deputy-first>.

<sup>34</sup> See M. K., The National War Labor Board and the National Labor Relations Act, 92 U. PENN. L. REV. 196 (1943).

executive order subordinated unions and organized labor to economic concerns related to the COVID-19 crisis. Indeed, changes to working conditions such as “occupational exposure to the coronavirus” would be subject to collective bargaining without the executive order. Consonant with the executive order, the NLRB’s General Counsel declared that employers are “permitted to, at least initially act unilaterally [and thereby suspend relevant union contracts] during emergencies such as COVID-19 so long as [their] actions are reasonably related to the emergency situation.” Enabling employers’ unilateral action in this way created an imbalance in a circumstance where union pleas for on-the-job protective measures, even basic mask requirements, were met with employer intransigence and even judicial dismissal.

The workers at a Smithfield Foods Inc. meatpacking plant in Missouri, having exhausted all avenues of employee-employer negotiations, were compelled to file suit. The case, *Rural Community Workers Alliance v. Smithfield Foods*, includes allegations by the plaintiff organization that Smithfield had failed to protect its workers from COVID-19 through a lack of social distancing, prohibition of sanitary breaks, prevention of workers’ ability to cover their faces when sneezing/coughing, penalization of sick workers, and failure to implement comprehensive testing and contact tracing. Nevertheless, the court granted Smithfield’s motion to dismiss on the grounds that 1) the issue of workplace safety under COVID-19 fell specially under OSHA’s “mission” and, thus, jurisdiction; and 2) deferring to OSHA/USDA “will ensure uniform national enforcement of the Joint Guidance.”

But the Missouri court’s expectation that OSHA would bring about uniform enforcement was contradicted by a similar suit brought by meat workers at a Maid-Rite Specialty Foods plant in Pennsylvania against OSHA, alleging a failure “to protect essential workers from dangerous conditions that could expose them to the coronavirus.” Indeed, after workers reported the situation to OSHA, including a lack of PPE, social distancing, and sanitation policies, the agency requested an investigation and report from the company into the allegations. “Within a week, the company responded to OSHA, explaining that 6-foot physical distancing wasn’t possible on the production line, but it had given masks to its workers, staggered breaks and done deep cleanings at the facility.” Upon receipt of Maid-Rite’s report, OSHA summarily closed its investigation.

As of December 2020, 551 meatpacking plants had suffered COVID-19 outbreaks, at least 49,479 workers have tested positive, and over 250 have died. “OSHA’s refusal to adopt COVID-19 standards has meant employers have had no legal obligation to provide workers with adequate PPE, such as N95 respirators, or training in how to wear, clean, and store PPE to prevent infection at work. Even the provision and use of inexpensive and widely available cloth masks has remained optional and controversial in many workplaces in the absence of an OSHA rule.”

Within the OSH nomenclature, there is an important distinction between PPE (which provides proven protection to the wearer from an exposure or hazard) and “source control” which prevents spread of an infectious agent (what most cloth masks do) but doesn’t fully protect the wearer. N95 or fitted respirators ARE properly considered PPE by OSHA and use of them in the workplace should trigger associated training and fit testing requirements under the existing OSHA PPE standard. I think most OSH experts would say 1) all workers in exposed settings should be getting N95s or better, 2) that in the absence of this continually elusive standard of protection, absolutely masks should be worn by all to protect others, but this does not mean we should improperly categorize masks as PPE or give workers the impression that they offer that level of protection. So OSHA’s refusal to set enforceable standards for mask wearing as source control is indeed one failure, but the real failure is absence of a standard requiring actual PPE (N95 or better). Just wanted to clarify that it is unlikely that even a strong enforceable rule on masks would (or should) ever come under the PPE standard.

OSHA has issued just two fines amounting to \$29,000 within the meatpacking industry, in stark contrast to “initial penalties totaling over \$1 million to dozens of health care facilities and nursing homes.” This partly reflects the staffing shortages which marked the agency under the Trump Administration. In fact, when the pandemic began hitting workplaces across the country, OSHA was staffed at its lowest levels since its founding in 1971. It was only until late November that the number of inspectors was increased by 38, “but still 70 fewer than the agency had in fiscal 2014” and far below what is required to adequately address the widespread health and safety violations workers are regularly subjected to.<sup>35</sup>

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<sup>35</sup> See, e.g., Michael Hirtzer, Warren, Booker Scorn ‘Feckless’ OSHA on Meat Plants’ Virus Cases, BLOOMBERG LAW (Sep. 22, 2020), [https://www.bloomberglaw.com/product/blaw/document/X5H7F67800000?criteria\\_id=96b1d1f65c83f2d151c55493dd8ecc95&searchGuid=3f1ced9a-61c6-4b82-90cc-274c08d8b927&search32=d2xghokBPP4sVT6pzLcYww%3D%3DSAh5JiAre3j77gbp4bsoTnQza-6wqFv7Ivr4R5QqhjIPOYQtdNgp-yoNIGXm1VOCFMJ\\_hc4U\\_BJWOAbDhGDwZveUdGb3AtWtWbRNvYMEoeqZ8XvSTWn\\_KPoxOO9QsPiObyuy3iuqeOBg9MHzBgCstFKCTntSd6iztK3HArtPy46mFDUNu9Mtrg3kep4TNy5Oaa20dxgI-OozrBbzHsRC4Xq3fsL6BxU\\_YQQEbp6a-fGKQfPVIS3dg2Cclf0lUf1aBUwu5LGi-rhsUE9Lu5QRzhqCj1KKmyft9YaFwEqNblIuRvhewcnZCTm6swv-ZHgLqPITwNV\\_H8GwCl8CyU6--T31nx1XRhN\\_S7kGzRAelkaIoGDJgpgGfCd20wloFkwCta5zXymki7sKEV085w%3D%3D](https://www.bloomberglaw.com/product/blaw/document/X5H7F67800000?criteria_id=96b1d1f65c83f2d151c55493dd8ecc95&searchGuid=3f1ced9a-61c6-4b82-90cc-274c08d8b927&search32=d2xghokBPP4sVT6pzLcYww%3D%3DSAh5JiAre3j77gbp4bsoTnQza-6wqFv7Ivr4R5QqhjIPOYQtdNgp-yoNIGXm1VOCFMJ_hc4U_BJWOAbDhGDwZveUdGb3AtWtWbRNvYMEoeqZ8XvSTWn_KPoxOO9QsPiObyuy3iuqeOBg9MHzBgCstFKCTntSd6iztK3HArtPy46mFDUNu9Mtrg3kep4TNy5Oaa20dxgI-OozrBbzHsRC4Xq3fsL6BxU_YQQEbp6a-fGKQfPVIS3dg2Cclf0lUf1aBUwu5LGi-rhsUE9Lu5QRzhqCj1KKmyft9YaFwEqNblIuRvhewcnZCTm6swv-ZHgLqPITwNV_H8GwCl8CyU6--T31nx1XRhN_S7kGzRAelkaIoGDJgpgGfCd20wloFkwCta5zXymki7sKEV085w%3D%3D); Mike Dorning et al., *U.S. Is Falling Further Behind Rivals in Meat-Worker Safety*, BLOOMBERG LAW (Sep. 21, 2020), [https://www.bloomberglaw.com/product/blaw/document/X74V90DG000000?criteria\\_id=2b9fc68610e2c1c4e0b0ad9d78c001b6&searchGuid=dfaf1eca-b6d9-4481-80b6-e7a33b5319bb&search32=hqbeV2QVd5SOIURIUmWgag%3D%3DUX9la8YTxEjearePVaBYGsFbozxZUtQpkFlzHZFQ\\_sXPBHX4Khn7\\_kKUIWeY75NqtiJwu54Auxd6br5gs-QYhDmxUm\\_8eG04GbGyJYIoKF8vz07evQ1K7CT-lzLJ9tVMON4PKagauhF3hS5zBfWZY04Vp3giGFtiWyn\\_zQPgjh8fQC39SWEz9UP6MzDBxvGtmy4WsgcIM6Qg09aDimpNnUIwVwVz-GAtGJp-HALYlcA3mAcadIpdNrxw4XAASDqAe](https://www.bloomberglaw.com/product/blaw/document/X74V90DG000000?criteria_id=2b9fc68610e2c1c4e0b0ad9d78c001b6&searchGuid=dfaf1eca-b6d9-4481-80b6-e7a33b5319bb&search32=hqbeV2QVd5SOIURIUmWgag%3D%3DUX9la8YTxEjearePVaBYGsFbozxZUtQpkFlzHZFQ_sXPBHX4Khn7_kKUIWeY75NqtiJwu54Auxd6br5gs-QYhDmxUm_8eG04GbGyJYIoKF8vz07evQ1K7CT-lzLJ9tVMON4PKagauhF3hS5zBfWZY04Vp3giGFtiWyn_zQPgjh8fQC39SWEz9UP6MzDBxvGtmy4WsgcIM6Qg09aDimpNnUIwVwVz-GAtGJp-HALYlcA3mAcadIpdNrxw4XAASDqAe); Michael Hirtzer & Millie Munshi, *Scant Sick Leave Puts U.S. Poultry Workers at Risk: Supply Lines*, BLOOMBERG LAW (Aug. 14, 2020), [https://www.bloomberglaw.com/product/blaw/document/X8TOMJQO000000?criteria\\_id=5ed45251681a11d7324d4326c2b48d2c&searchGuid=8744c2d5-b6f4-4a5a-b17f-bb494ecbf9b3&search32=uVpfqZQ7QYb\\_odY4QrRoPQ%3D%3DGsQdasvBCcymGffAnD-1bOWqf8U8echi7VtvGHn1kVAt-1SpnKrDKel2QbpIiOIW44SwuxHbCmiYQwrub98GIUHKX3uW-eCemMI05yOkVr-6gisOYht7G8Qjwkg9Ja6CWyDyIAZEXOyglTQh0OHE3CtVLlctAYW2kYvTzrcRLvpKw2dq\\_n5N4UO8cAGO8IWrExVNNiakWaTvt46mJvdmrqgJQ1VVaxOEK6bk5oGYVZWkeQndCk1bE5N2SY8z2oUOwrIVScST1CRXpqV2yaOylSmYoVyvIV909NCspX3\\_FixjvetKTzioQJYQilC3Wx1RjTDqLIUW\\_Zilah7I3yY\\_Yvbn07h4L7nIYdK0LFXgpGBD0Djdrge3HUxFrTkVivxwLacqofYlzM-9b\\_G\\_r9IiaF6bqC\\_lcUNZyCHxobQAK%3D](https://www.bloomberglaw.com/product/blaw/document/X8TOMJQO000000?criteria_id=5ed45251681a11d7324d4326c2b48d2c&searchGuid=8744c2d5-b6f4-4a5a-b17f-bb494ecbf9b3&search32=uVpfqZQ7QYb_odY4QrRoPQ%3D%3DGsQdasvBCcymGffAnD-1bOWqf8U8echi7VtvGHn1kVAt-1SpnKrDKel2QbpIiOIW44SwuxHbCmiYQwrub98GIUHKX3uW-eCemMI05yOkVr-6gisOYht7G8Qjwkg9Ja6CWyDyIAZEXOyglTQh0OHE3CtVLlctAYW2kYvTzrcRLvpKw2dq_n5N4UO8cAGO8IWrExVNNiakWaTvt46mJvdmrqgJQ1VVaxOEK6bk5oGYVZWkeQndCk1bE5N2SY8z2oUOwrIVScST1CRXpqV2yaOylSmYoVyvIV909NCspX3_FixjvetKTzioQJYQilC3Wx1RjTDqLIUW_Zilah7I3yY_Yvbn07h4L7nIYdK0LFXgpGBD0Djdrge3HUxFrTkVivxwLacqofYlzM-9b_G_r9IiaF6bqC_lcUNZyCHxobQAK%3D); Tatiana Freitas, *Thousands of Meat Workers Sent Home in Fresh U.S. Supply Threat*, BLOOMBERG LAW (Dec. 4, 2020), [https://www.bloomberglaw.com/product/blaw/document/X62I2S9K000000?criteria\\_id=2b9fc68610e2c1c4e0b0ad9d78c001b6&searchGuid=7fc0f5ce-2ea7-427b-a1bf-977f9c62b34d&search32=hYczOPswRtK1jVpCnEKNQg%3D%3DouX5FHw0T3PEKbhtedVT8h\\_OLNU31S6gw6qVklkTn6Vk5AHHxNvPhB8gE97bm3\\_3lu1DNfEPxAo3kkm9s\\_XF4CJuMaVCh4LL0qc7H9wW\\_MfeURmotHJfurr39nQHs2vWYck1gCHX1MAYUI-xo3RE5EcvQca1p4vYMJk1ZHfKUg-U5Pmz5IQ6sn\\_5Oikd\\_HKy1jjuo3A1v7dk6Te9Q8BCynppvX8htkSRnRPKrywe8RBF0b1OvkGt5XnXhjWgT71](https://www.bloomberglaw.com/product/blaw/document/X62I2S9K000000?criteria_id=2b9fc68610e2c1c4e0b0ad9d78c001b6&searchGuid=7fc0f5ce-2ea7-427b-a1bf-977f9c62b34d&search32=hYczOPswRtK1jVpCnEKNQg%3D%3DouX5FHw0T3PEKbhtedVT8h_OLNU31S6gw6qVklkTn6Vk5AHHxNvPhB8gE97bm3_3lu1DNfEPxAo3kkm9s_XF4CJuMaVCh4LL0qc7H9wW_MfeURmotHJfurr39nQHs2vWYck1gCHX1MAYUI-xo3RE5EcvQca1p4vYMJk1ZHfKUg-U5Pmz5IQ6sn_5Oikd_HKy1jjuo3A1v7dk6Te9Q8BCynppvX8htkSRnRPKrywe8RBF0b1OvkGt5XnXhjWgT71); Kimberly Kindy, *More Than 200 Meat Plant Workers in the U.S. Have Died of Covid-19. Federal Regulators Just Issued Two Modest Fines*, WASH. POST (Sep. 13, 2020), [https://www.washingtonpost.com/national/osha-covid-meat-plant-fines/2020/09/13/1dca3e14-f395-11ea-bc45-e5d48ab44b9f\\_story.html](https://www.washingtonpost.com/national/osha-covid-meat-plant-fines/2020/09/13/1dca3e14-f395-11ea-bc45-e5d48ab44b9f_story.html); Noam Scheiber, *OSHA Criticized for Lax Regulation of Meatpacking in Pandemic*, NY TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/business/economy/osha-coronavirus-meat.html>.

However, the shortcomings of OSHA extend beyond its staffing limitations and reflect a fundamental unwillingness to utilize its full regulatory reach. Indeed, the Families First Coronavirus Response Act (FFCRA) granted OSHA the authority to implement an “Emergency Temporary Standard (ETS),” requiring employers in any sector that it or the CDC designates as an “elevated risk” to “develop and implement a comprehensive infectious disease exposure control plan to protect health care workers from exposure to [COVID-19].” To date, OSHA has failed to implement an ETS for many of the riskiest sectors, namely the meatpacking industry, and has actively challenged union calls to do so. The AFL-CIO has filed suit on numerous occasions throughout the pandemic, seeking to compel OSHA to order an ETS but each of its cases have been swiftly dismissed by the D.C. Circuit, granting extreme deference to OSHA and its handling of COVID-19 as well as quixotically noting it “reasonably determined an ETS was not necessary” in light of OSHA’s other regulatory tools at its disposal.

While OSHA has yet to specifically define its standard for designating a sector as an elevated risk, it is difficult to see how the meatpacking industry falls outside the scope of vulnerable sectors contemplated by the FFCRA. To be sure, the nature of meat production is marked by “frigid temperatures, cramped conditions, long hours,” and grueling production quotas/line speeds, which fosters an environment abnormally susceptible to COVID-19 transmission.<sup>36</sup> In addition to the high rates of meat workers falling ill and dying, communities in close proximity to meatpacking plants experience rates of COVID-19 transmission twice as high as the national average and 50% higher death rates.

Nevertheless, as the Biden Administration begins its transition and OSHA awaits new leadership from the incoming Secretary of Labor, many far-reaching, structural changes are expected in OSHA’s regulation of health and safety standards under COVID-19. As President-elect, President Biden has released a “4-Point Plan for Our Essential Workers” which called for the immediate release and enforcement of an ETS “to give employers and frontline employees ‘specific, enforceable guidance’ on reducing on-the-job exposure to COVID-19.” Further, increased enforcement is also expected which will likely take the form of elevated citations and fines and greater emphasis on “respiratory and PPE standards, as well as the broader use of OSHA’s general duty clause which applies to hazards not anticipated.” Enhanced whistleblower protections for workers “who provide information and cooperate with OSHA inspections” are also expected to be promptly implemented by the Biden Administration.

Some municipalities have taken more aggressive steps. In recognition of these deficiencies, the current de-unionized nature of “essential” work and lax OSHA enforcement, the nation’s most populous county, Los Angeles County, has formed worker public health councils “who meet with management to plan and troubleshoot compliance” with public health initiatives and orders under the COVID-19 crisis. Similar councils may arise in other areas, not just to secure workers’ interests under COVID-19, but also to ensure other health and safety measures are adhered to beyond the pandemic as the pandemic has demonstrated the value of essential work and workers’ welfare.<sup>37</sup>

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<sup>36</sup> See also Jennifer Dillard, *A Slaughterhouse Nightmare: Psychological Harm Suffered By Slaughterhouse Employees and the Possibility of Redress Through Legal Reform*, 15 GEO. J. ON POVERTY L. & POL’Y 391 (2008).

<sup>37</sup> See also Celine McNicholas et al., *Why Unions Are Good for Workers—Especially in a Crisis like COVID-19*, EPI (Aug. 25, 2020), <https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/>; Ken Jacobs et al., *Workers as Health Monitors: An Assessment of LA County’s Workplace Public Health Council*

## Paid Sick Leave: A Luxury Many Do Not Have

With COVID-19's high transmissibility rate, the potential severity of the disease, and the need to quarantine for up to two weeks after having been in close contact with someone who has COVID-19, "the current global pandemic highlights the importance of paid leave for workers who are unable to work because of an illness or temporary disability."<sup>38</sup> Employees need to be able to take time away from their workplace in order to follow the CDC's recommendation of quarantining. However, some employees cannot take their work home, making sick leave all the more necessary. Nevertheless, the sad truth is that many working Americans cannot take time away from their place of employment because they cannot afford the loss of income or because they could lose their jobs. This puts the workplace, the employee's own health, and their colleagues at grave risk. Before COVID-19: Sick and Family Leave Availability Before COVID-19, the United States had no federal law requiring paid sick leave for the private sector. Of wealthy industrialized countries, only the United States and South Korea lack guaranteed paid medical leave for serious illness. According to the Federal Bureau of Labor Statistics, roughly 33.6 million people, which constitutes 24% of civilian workers, still do not have access to this paid leave. The proportion of people who have this access is greatly correlated to their wage distribution. According to the 2019 National Compensation Survey ("NCS"), 92% of workers in the top quarter of earnings have access to some form of paid leave, as compared to only 51% of those in the bottom quarter. Sadly, for those in the lowest tenth of earnings, only 31% have paid sick leave.

Nevertheless, the United States does have a federal law that requires unpaid leave in cases of family and medical emergency. Congress adopted the Family and Medical Leave Act ("FMLA") in 1993. It provides that eligible employers allow up to 12 weeks of job-protected unpaid leave for certain medical situations related to either the employee or their immediate family. To be eligible for FMLA leave, the employee must work for a covered employer. Typically, private employers with 50 or more employees are covered by this law. An employer with fewer than 50 employees is not covered, but may be subject to state family and medical leave laws. Government agencies are covered by the FMLA regardless of number of employees. Nevertheless, even if one works for a covered employer, there are certain additional restrictions on eligibility. For instance, employees must have been working for the covered employer for at least 12 months, have worked at least 1,250 hours in the last 12 months, and have worked at a location where the employer employs at least 50 employees within 75 miles.

This federal Act does not supersede any provision of a state or local law that provides greater family or medical leave rights. State laws may differ from this federal Act in terms of:

1. Coverage provided (i.e., the state's coverage may extend to smaller employers);
2. Amount of leave allowed;
3. Eligibility; and

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*Proposal*, UC BERKELEY LAB. CTR. (July 21, 2020), <https://laborcenter.berkeley.edu/workers-as-health-monitors-an-assessment-of-la-countys-workplace-public-health-council-proposal/>.

<sup>38</sup> See Contagion Nation 2020.

#### 4. Acceptable sick or family reasoning for leave.

Currently, only about 25% of states require paid sick leave: 13 states and the District of Columbia. Connecticut was the first state to require paid sick leave to private-sector employees in 2011, with California joining them in 2014 with their passage of the Healthy Workplace, Healthy Family Act. In the following years, Massachusetts, Maryland, Oregon, Vermont, Michigan, Arizona, Washington, New Jersey, Rhode Island, and Nevada followed. Maine's paid sick leave is expected to take effect in 2021. The rules and regulations provided by the states vary. For example, Massachusetts provides one hour of paid sick time for every 30 hours worked, while Connecticut provides one hour for every 40 hours worked. Most of these state laws also provide paid "safe days" that allow survivors of domestic violence, sexual assault, and stalking to seek services related to the incidents.

Other than these thirteen states, a few metropolitan areas, such as Philadelphia, Cook County, Illinois, and the Twin Cities in Minnesota, have implemented their own paid leave laws that allow workers to earn paid sick days to recover from a short-term illness, care for a sick family member, or seek routine medical care. COVID-specific legislative responses In response to the coronavirus pandemic, Congress passed the Families First Coronavirus Response Act ("FFCRA") under Title I of the FMLA, which is in effect until December 31, 2020. Among the FFCRA provisions is the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("EFMLEA"). This temporary emergency legislation provided Americans with access to paid job-protected leave if they needed to take any time off for virus-related reasons. Such reasons include experiencing COVID-19 symptoms, the need to self-quarantine, and also caring for a sick or quarantined family member. To help employers offset this benefit's cost, the FFCRA provides employers with reimbursement through refundable tax credits as administered by the Department of Treasury.

The FCCRA covers private employers with fewer than 500 employees and certain public employers. However, the smaller private employers (with fewer than 50 employees) may qualify for an exemption. Most federal government employees are covered under Title II of the FMLA. Title II was not amended under FCCRA; those government employees are not covered by these expanded family and medical leave provisions. If the employee is an essential healthcare provider or emergency first responder, they may not be eligible for the leave under the FFCRA. All employees are strongly encouraged to refer to the Department of Labor ("DOL") for further guidance on eligibility as it is "spotty."

Under the EPSLA provisions, eligible workers can receive up to two weeks (or 80 hours) of job-protected paid leave with their continued health insurance (capped at \$511/day). Under the EFMLEA, qualifying employees can receive up to twelve workweeks of job-protected leave with health insurance. The initial two weeks are unpaid; however, the additional time (up to 10 extra weeks thereafter) will be paid at two-thirds of the employee's regular rate (up to \$200/day). Such leave can be granted when an eligible employee cannot work because of a need to care for a child whose school or place of care is closed or whose childcare provider is unavailable due to COVID-19. Nevertheless, the final rule implementing both the EPSLA and EFMLEA provisions has a work-availability requirement. Therefore, it excludes from these benefits employees whose

employers do not have work for them to complete.

Some of the several employer-friendly limitations of the FFCRA came under fire in a recent case brought to the United States District Court for the Southern District of New York. On August 3, 2020, Judge J. Paul Oetken upheld four of these limitations. Specifically, the Court struck down the DOL's regulations regarding

1. work-availability requirement due to lack of sufficient explanation for the limitation,
2. the broad definition of "health care provider,"
3. the requirement that employees obtain employer approval for intermittent leave, and
4. the requirement that employees provide documentation before taking FFCRA leave.

In response to this ruling, the DOL's Wage and Hour Division announced revisions in September that helped clarify workers' rights and employers' responsibilities under the FFCRA paid leave. The revisions:

1. Reaffirmed and provided an additional explanation for the requirement that employees may take FFCRA leave only if work would otherwise be available to them.
2. Reaffirmed and provided an additional explanation for the requirement that an employee obtain employer approval to take FFCRA leave intermittently.
3. Revised the definition of "healthcare provider" to include only employees who meet the FMLA definition.
4. Clarified that employees must provide required documentation supporting their need for FFCRA.

Many workers still find themselves excluded under this temporary provision. Business leaders pushed to limit the people eligible for the plan. The program's exclusion of companies with more than 500 employees disqualified roughly half the workforce. Additionally, allowing companies with under 50 people to opt-out could exclude an additional quarter of workers. Some of these workers may have sick leave already provided to them by their employers; however, that is not to discount the fact that this federal COVID-19 response still excludes up to 106 million workers from this paid leave protection. It is believed that the COVID-19 expansions, that expired on December 31, 2020, will be renewed. President Biden announced his COVID-19 advisory board, comprised of scientists, doctors, and public health experts just days after his election was confirmed. As part of the plan, Biden has promised to (1) push for a national mask mandate, (2) protect and restore the Affordable Care Act, (3) provide free COVID-19 testing for all citizens, and (4) provide paid sick leave and caregiving leave. If Biden's team can execute on this plan, there would be a sense of security, especially critical to those employees on the lower end of the pay distribution.

## B. Workers' Compensation Insurance for COVID Illness

As number of work-related infections increased, it was only inevitable that COVID-19-related workers' compensation claims would start to flood the system. The pandemic has sent employers and state governments scrambling to figure out how COVID-19-related claims should be handled

and what changes, if any, are needed. Many states have also issued executive orders, enacted new legislation, and made changes to existing administrative policies to either expand or exclude coverage of COVID-19.

One of the main issues related to COVID-19 workers' compensation claims is determining whether COVID-19 is an illness covered by existing statutes. Although workers' compensation typically covers both injuries and occupational diseases, the definitions vary according to the state. Some states exclude "ordinary diseases of life," which would include the common cold or flu.<sup>39</sup> In order for an employee to successfully prove COVID-19 as an occupational disease, the employee must show: 1) that it arose out of and was contracted in the course and scope of employment; and 2) that it arose out of conditions peculiar to work which created a risk of contracting the disease in a greater degree and in a different manner than in the public generally.<sup>40</sup> Under this statutory language, a recent claim at a Tyson Foods processing plant was denied.<sup>41</sup> Tyson referenced Iowa state law as specifically stating, "disease with an equal likelihood of being contracted outside the workplace are not compensable as an occupational disease."<sup>42</sup> This may change on appeal.

In July, responding to pressure from businesses, the Senate proposed the Safe-to-Work Act, which aimed to protect businesses from COVID-19 liability through a uniform, nationwide law.<sup>43</sup> Nearly a dozen states have already enacted legislation limiting liability—however, the details of state laws vary widely. The proposal was designed to heighten the burden of proof and pleading requirements for claimants and preempt existing state laws, except those providing greater immunity to employers and insurance companies.<sup>44</sup> Under the proposal, damages were limited to economic losses—except in cases of willful misconduct. Even in cases of willful misconduct, punitive damages were capped at an amount equal to the compensatory damages awarded to the claimant. This proposal is unlikely to pass under the new Biden administration, and changed configuration of the Senate.

In states where COVID-19 is not covered under workers' compensation, some firms have advised employers to seek advance releases or waivers of liability from their workers to further

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<sup>39</sup> See David C. Lindsay and Erinn L. Rigney, COVID-19: Reopening Resources for Business--Examining Employer Liability Series--Workers' Compensation and Civil Liability Concerns, K&L GATES HUB (May 16, 2020), <https://www.klgates.com/covid-19-reopening-resources-for-businessexamining-employer-liability-seriesworkers-compensation-and-civil-liability-concerns-5-29-2020>.

<sup>40</sup> Orders and Other Authority or Guidance to Provide Workers' Compensation (WC) Coverage for COVID-19, Ogletree Deakins (Oct. 22, 2020), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwik09K\\_o\\_tAhXxD1kFHQz3AusQFjADegQIBhAC&url=https%3A%2F%2Fogletree.com%2Fapp%2Fuploads%2F covid-19%2FCOVID-19-Workers-Compensation-Coverage.pdf%3FVersion%3D12&usg=AOvVaw16M3sK8QmeD9O3A8IU1Y-J](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwik09K_o_tAhXxD1kFHQz3AusQFjADegQIBhAC&url=https%3A%2F%2Fogletree.com%2Fapp%2Fuploads%2F covid-19%2FCOVID-19-Workers-Compensation-Coverage.pdf%3FVersion%3D12&usg=AOvVaw16M3sK8QmeD9O3A8IU1Y-J)

<sup>41</sup> See Postmedia Breaking News.

<sup>42</sup> Id.

<sup>43</sup> See Holland & Knight.

<sup>44</sup> See Cory Kallheim, Civil Liability Protections in the Safe to Work Act, Leading Age (July 28, 2020), <https://www.leadingage.org/legislation/civil-liability-protections-safe-work-act>

minimize risks of liability.<sup>45</sup> Under these waivers, employees would promise not to pursue legal remedies from contracting COVID-19 in the workplace. It's not clear whether this waiver of a statutorily provided entitlement was supported by any consideration. Currently, most states recognize waivers of liability—with some statutory exceptions and variations, but Montana, Louisiana, and Virginia do not.<sup>46</sup> Montana, Louisiana, and Virginia prohibit the use of waivers outright. Generally, waivers will not replace the requirement to maintain a safe and compliant workplace. As of November 2020, there have been no court rulings on the enforceability of such liability waivers. With the use of waivers, however, companies risk damaging their reputation and image, both to potential new talent and to consumers.

A key issue in COVID-19 workers' compensation claims is the problem of proof: whether employees can demonstrate they contracted COVID-19 at the workplace. For example, out of sixty COVID-19-related cases a New York workers' compensation lawyer has taken, only two have been accepted—the rest are currently being challenged.<sup>47</sup> The difficulty in proving that one contracted COVID-19 at work allows employers to point the blame in a number of directions. The contagious nature of the disease, limited access to testing, and difficulties with tracing make this problem of proof more difficult for employees.

However, at least 14 states have responded to the pandemic by making it easier for some employees to receive workers' compensation benefits for COVID-19-related claims.<sup>48</sup> In these states, the burden of proof is placed on companies and insurers to prove the infection did not occur at work. However, most of these new rules apply only to healthcare workers and first responders. For example, in California, Governor Newsom signed two laws introducing expanded obligations related to COVID-19.<sup>49</sup> Senate Bill 1159 provides the presumption under law that an employee contracted COVID-19 at the workplace. The burden is on employers and insurance companies to present any evidence the employee contracted the virus outside of employment. Assembly Bill 685 requires both private and public employers to provide written notice of potential exposure to COVID-19 to all employees and subcontractors on work premises during an infection period. The bill also requires employers to notify the local public agency of outbreaks. The bill authorizes the state OSHA to protect workers from potential harm by prohibiting entry into a contaminated workplace. The agency is also given authority to shut down any workplace or process creating a

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<sup>45</sup> See Jones Day White Paper.

<sup>46</sup> See Gabrielle Sigel et al., Can Businesses 'Waive' Goodbye to COVID-19 Liability? Basic Principles of Third Party Liability Waivers and CGL Insurance Protections, *Mealey's Litig. Rep. Ins. Bad Faith* 34(13) (Nov. 10, 2020)

<sup>47</sup> Bryce Covert, COVID-19 Workers' Comp Claims are Being Held Up or Denied, *THE INTERCEPT* (Sep. 7, 2020), <https://theintercept.com/2020/09/07/coronavirus-workers-compensation-claims-labor/>

<sup>48</sup> Tom Hals and Tom Polansek, Meatpackers Deny Workers Benefits for COVID-19 Deaths, Illnesses, *POSTMEDIA BREAKING NEWS* (Sep. 29, 2020)

<sup>49</sup> Ruth Zadikany and Holly A. Farless, California Imposes New COVID-19 Notice and Reporting Requirements on Employers, Increases Workers' Compensation Coverage and Expands Cal/OSHA's Authority (Oct. 1, 2020), <https://www.lexology.com/library/detail.aspx?g=>



compensation coverage could indirectly reduce overall costs by incentivizing safer working conditions--and thus, reducing the potential for further spread.

Also, with COVID-19 slowing the processing of claims, there is likely to be a huge backlog. Those claimants who are in considerable financial trouble may agree to settlements in order to have access to funds within a reasonable amount of time.

The pandemic has changed the rules of workers' compensation in different directions in different states. Some states moved to explicitly exclude coverage for COVID-19-related cases, while others provided increased protection for certain workers—primarily essential workers.<sup>54</sup>

### **III. Laws Regulating Labor Markets and Unemployment Insurance as impacted by COVID**

#### **A. Worker Shortages and Occupational Licensing**

Licensing requirements for various professions in the United States have been around since the beginning of the republic. By nature, these laws make it more difficult for individuals to enter licensed professions by requiring applications that take time, resources, or finances to afford the education and training required to attain a license. Opponents of professional licensing argue that it creates artificial scarcity by imposing overly strict barriers to entry, monopolizes access to professions, and serves primarily to benefit those already entrenched. However, proponents of occupational licensure argue that it serves the public welfare. Governments retain a strong interest in ensuring that certain professions that might bring significant harm to the public (such as doctors and lawyers) should be qualified and held to high standards. On the one hand, licensing serves the important functions of ensuring competence in professional practices, discouraging scams, and assuaging the concerns of consumers ill-equipped to evaluate that competence for themselves. On the other hand, when taken too far, licensing can create insurmountable barriers to entry, raise prices, and entrench existing oligopolies.<sup>55</sup> Few would argue that licensure is completely unjustified, but the range and boundaries of what professions should be licensed and how remains contested as a policy matter.<sup>56</sup>

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<sup>54</sup> Other sources of information may be found other white papers: COVID-19 Civil Immunity Under Proposed Federal SAFE TO WORK Act and State laws, HOLLAND & KNIGHT ALERT (Aug. 13, 2020), <https://www.hklaw.com/en/insights/publications/2020/08/covid19-civil-immunity-under-proposed-federal-safe-to-work-act>; Joseph J. Zelasko, COVID-19 Waivers: The Benefits and the Pitfalls, JONES DAY WHITE PAPER (June 2020), <https://www.jonesday.com/en/insights/2020/06/covid19-waivers-the-benefits-and-the-pitfalls>; and Liability Waivers Related to COVID-19 in the United States, Bryan Cave Leighton Paisner (May 18, 2020), <https://www.bclplaw.com/en-US/insights/liability-waivers-related-to-covid-19-in-the-united-states.html>

<sup>55</sup> *Id.* at 12–16; Kleiner & Krueger, at S198–99; *see also* Morris M. Kleiner & Robert T. Kurdle, *Does Regulation Improve Outputs and Increase Prices?: The Case of Dentistry* 26 (Nat'l Bureau of Econ. Rsch., Working Paper No. 5869, 1997), [https://www.nber.org/system/files/working\\_papers/w5869/w5869.pdf](https://www.nber.org/system/files/working_papers/w5869/w5869.pdf) (“Our multivariate estimates showed that increased [dental] licensing restrictiveness did not improve dental health, but did raise the prices of basic dental services.”).

<sup>56</sup> The Supreme Court, however, has repeatedly upheld the propriety and constitutionality of state regulation of certain professions through occupational licensure as an exercise of states' inherent police power, guaranteed by the Tenth Amendment to the U.S. Constitution. The Court applies a simple rational basis test to determine the constitutionality of

COVID-19 created massive, unexpected increases in demand for certain professional services, leading to shortfalls in the supply of professionals. Occupational-licensing regimes hamper new professionals from filling those ranks quickly. In response, some states have suspended large chunks of their licensing regimes outright. A few states, such as Maine,<sup>57</sup> have done so through omnibus legislation, but most have relied on governors' legislatively granted emergency powers.<sup>58</sup> Understandably, much of the focus has been on the changes in healthcare-related fields. But there are parallels in other occupations.<sup>59</sup> Licensing has grown over the last half century, from less than 5% of the workforce in the 1950s<sup>60</sup> to over 25 percent.<sup>61</sup>

As a highly contagious virus, COVID-19 made it difficult for some licensed professionals to comply with the requirements necessary to keep his or her license up to date, just as the pandemic has made it difficult for drivers to update their drivers' licenses. In addition to producing huge economic losses, Covid-19 has also created "a major reallocation shock" in that it has led to "large . . . increases in demand at certain firms."<sup>62</sup> Given the sheer scale of licensed occupation,<sup>63</sup>

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various economic regulations. The test holds that for enactments that do not involve a suspect classification which might warrant stricter review (such as one affecting a "discrete and insular minority"), courts should uphold the law so long as (1) it involves a legitimate state interest; and (2) there is a rational connection between that interest and the means by which the statute seeks to achieve it. The application of this test to occupational licensure can be seen most clearly in the Court's decision in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). There, the Court upheld the constitutionality of a law that prevented opticians from crafting eyeglass lenses without a prescription from either an ophthalmologist or an optometrist. The Court reasoned that even if the law "may exact a needless, wasteful requirement in many cases" and may not be of sound policy, so long as the state articulated a rational reason for the policy for that measure it should not be struck down. The regulation of specific occupations is usually wholly within states' police power.

<sup>57</sup> An Act to Implement Provisions Necessary to the Health, Welfare and Safety of the Citizens of Maine in Response to the COVID-19 Public Health Emergency, L.D. 2167, 129th Leg., 2d Sess. (Maine 2020).

<sup>58</sup> See Ethan Bayne, Conor Norris, & Edward Timmons, *A Primer on Emergency Occupational Licensing Reforms for Combating COVID-19 Appendix: Details on Enacted Licensing Reforms*, CTR. FOR STUDY OCCUPATIONAL REG., <https://csorsfu.com/a-primer-on-emergency-occupational-licensing-reforms-for-combating-covid-19-appendix-details-on-enacted-licensing-reforms>.

<sup>59</sup> See generally DICK M. CARPENTER, LISA KNEPPER, ANGELA C. ERICKSON, & JOHN K. ROSS, INST. FOR JUST., LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING (2012), <https://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf> (summarizing the breadth and extent of licensing regimes on a state-by-state basis).

<sup>60</sup> Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173, S175 (2013).

<sup>61</sup> E.g., DEP'T TREASURY OFF. ECON. POL'Y, COUNCIL ECON. ADVISERS, & DEP'T LAB., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 6 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf).

<sup>62</sup> Jose Maria Barrero, Nicholas Bloom, & Steven J. Davis, *COVID-19 is Also a Reallocation Shock* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27137, 2020), [https://www.nber.org/system/files/working\\_papers/w27137/w27137.pdf](https://www.nber.org/system/files/working_papers/w27137/w27137.pdf).

<sup>63</sup> Haley Holik, *Deregulation Should Last Post-COVID*, HILL (June 2, 2020), <https://thehill.com/blogs/congress-blog/politics/500770-deregulation-should-last-post-covid>; see also CARPENTER, KNEPPER, ERICKSON, & ROSS, at 9 ("[S]even of the 102 occupations studied are licensed in all 50 states and the District of Columbia: pest control applicator, vegetation pesticide handler, cosmetologist, EMT, truck driver, school bus driver and city bus driver. Another eight occupations are licensed in 40 to 50 states. Thus, the vast majority of these occupations are licensed in fewer than 40 states, and five are licensed in only one state each: florist, forest worker, fire sprinkler system tester,

some licensed fields may experience dramatic spikes in demand. Because occupational licensing necessarily reduces the supply of workers in a profession, firms in certain fields may struggle to keep up with demand.<sup>64</sup> At the same time, licensure requirements vary significantly from state to state,<sup>65</sup> making it difficult for professionals to practice across state lines or move to a new state where demand for their services is higher.<sup>66</sup>

Accordingly, many states have relaxed licensing requirements for non-medical fields as well as medical ones. These changes, however, have not been uniform. Some states have adopted a broad approach, introducing reciprocity regimes that apply to nearly all state-granted licenses. These regimes may be either temporary or permanent. Shortly before the onset of the pandemic, in 2019, Arizona became the first state to adopt a universal license-recognition law.<sup>67</sup> Arizona’s “law allows people licensed in another state to quickly obtain an equivalent license when they move to Arizona,” reducing the time, money, and documentation obtaining a new license would otherwise require.<sup>68</sup> While Arizona’s shift occurred prior to the pandemic, in the year or so since, at least four other states have followed suit—including, very recently, Iowa.<sup>69</sup> Governor Kim Reynolds signed Iowa’s license-reciprocity regime into law on June 25, 2020<sup>70</sup> and specifically remarked that she saw the reciprocity law as “an opportunity” to attract workers to Iowa in the wake of COVID-19.<sup>71</sup>

While Arizona and Iowa’s changes represent permanent legislative solutions, other states have introduced broad license-reciprocity regimes intended to last only for the duration of the pandemic. In Alaska, for example, the governor issued a proclamation that permits “a professional or occupational licensing board . . . [to] grant a license, permit, or certificate on an expedited basis to an individual who holds a corresponding license, permit, or certificate in good standing in

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conveyor operator and non-contractor pipelayer. On average, the occupations on this list are licensed in about 22 states.”).

<sup>64</sup> Edward J. Timmons, Ethan Bayne, & Conor Norris, *A Primer on Emergency Occupational Licensing Reforms for Combating COVID-19*, MERCATUS CTR. (Mar. 26, 2020), <https://www.mercatus.org/publications/covid-19-policy-brief-series/primer-emergency-occupational-licensing-reforms-combating>.

<sup>65</sup> See CARPENTER, KNEPPER, ERICKSON, & ROSS, at 11–24.

<sup>66</sup> Timmons, Bayne, & Norris.

<sup>67</sup> Jeffrey A. Singer, *States Lead The Way in Coronavirus Crisis With Emergency Removal of Occupational Licensing Obstacles—Why Not Make Them Permanent?*, CATO INST. (Mar. 18, 2020, 1:17 PM), <https://www.cato.org/blog/states-lead-way-coronavirus-crisis-emergency-removal-occupational-licensing-obstacles-why-not>.

<sup>68</sup> Mark Flatten, *I, 200+ Arizonans Get Freedom to Work Under State’s New Universal Recognition Law*, GOLDWATER INST. (June 15, 2020), <https://goldwaterinstitute.org/freetoworksuccess>.

<sup>69</sup> IOWA CODE § 272C.12 (2020); see also Walt Rodgers, *Iowa is Advancing Freedom with Licensing Reform*, GAZETTE (June 18, 2020), <https://www.thegazette.com/subject/opinion/guest-columnist/iowa-is-advancing-freedom-with-licensing-reform-20200618>.

<sup>70</sup> HF 2627, 88th Gen. Assemb., Reg. Sess. (Iowa 2020).

<sup>71</sup> Grace Zaplatynsky, *Gov. Reynolds Talks COVID-19, Licensing in Kanawha*, GLOBE GAZETTE (July 18, 2020), [https://globegazette.com/community/brittnewstribune/gov-reynolds-talks-covid-19-licensing-in-kanawha/article\\_f75ac195-d714-5d1f-981c-dcc103b5242b.html](https://globegazette.com/community/brittnewstribune/gov-reynolds-talks-covid-19-licensing-in-kanawha/article_f75ac195-d714-5d1f-981c-dcc103b5242b.html).

another jurisdiction to the extent necessary to respond to the public health disaster emergency.”<sup>72</sup> Other states, such as Kansas<sup>73</sup> and Mississippi,<sup>74</sup> have in place laws that, once triggered by an emergency declaration, automatically permit out-of-state license-holders to practice in the state for the duration of the emergency. However, typically, if the license-holder remains in the state after the emergency has subsided, he or she will then be subjected to the state’s ordinary licensing regulations.<sup>75</sup>

Other states have taken a more moderate approach, focusing on the requirements necessary for licensure upkeep or renewal rather than the license-granting process itself. This appears to have been the most common approach to COVID-19 relief from occupational-licensing requirements.<sup>76</sup> Generally, this approach entails some combination of a grace period for the renewal of all state-issued licenses and suspended or reduced standards for completing tasks ordinarily necessary to maintain licenses—such as completing continuing-education courses. The critical difference among states is one of state-agency discretion. In the District of Columbia, for example, all occupational licenses “that expire during the declared emergency will be considered valid, and people will have until 45 days after the declared emergency is over to renew their licenses.”<sup>77</sup> Numerous states, such as Nevada<sup>78</sup> and Oklahoma,<sup>79</sup> have taken a similar approach, although the exact length of the post-emergency grace period differs. In Idaho, by contrast, “[s]tate licensing agencies and departments are authorized to temporarily exercise enforcement discretion” in regard to licensure.<sup>80</sup> Rather than providing for a universal extension, Idaho has thus left the decision of whether to suspend licensure requirements to the individual agencies.

Meanwhile, other states have taken a targeted, rather than shotgun, approach by offering a temporary reprieve from licensing requirements only for those professions for which COVID-19 has created unexpected demand. Again, the field most obviously implicated is healthcare.<sup>81</sup> But it is

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<sup>72</sup> Bayne, Norris, & Timmons.

<sup>73</sup> KAN. STAT. ANN. § 66-1284 (2020).

<sup>74</sup> MISS. CODE ANN. § 27-113-7 (2020).

<sup>75</sup> *E.g.*, KAN. STAT. ANN. § 66-1284(b)(1) (limiting the statute’s effect to the duration of the “disaster response period”).

<sup>76</sup> *See* Bayne, Norris, & Timmons.

<sup>77</sup> D.C. Admin. Order No. 2020-02 (Mar. 13, 2020), [https://dchealth.dc.gov/sites/default/files/dc/sites/doh/page\\_content/attachments/Order%20-%20Licensure%20Waivers.20.03.13.pdf](https://dchealth.dc.gov/sites/default/files/dc/sites/doh/page_content/attachments/Order%20-%20Licensure%20Waivers.20.03.13.pdf).

<sup>78</sup> Nev. Declaration of Emergency Directive No. 9 (Apr. 1, 2020), [https://gov.nv.gov/News/Emergency\\_Orders/2020/2020-04-01\\_-\\_COVID-19\\_Declaration\\_of\\_Emergency\\_Directive\\_009\\_\(Revised\)](https://gov.nv.gov/News/Emergency_Orders/2020/2020-04-01_-_COVID-19_Declaration_of_Emergency_Directive_009_(Revised)).

<sup>79</sup> OKLA. ADMIN. CODE § 310:2-3-8 (2020).

<sup>80</sup> Idaho Proclamation (Mar. 13, 2020), [https://gov.idaho.gov/wp-content/uploads/sites/74/2020/03/covid-19-declaration\\_final.pdf](https://gov.idaho.gov/wp-content/uploads/sites/74/2020/03/covid-19-declaration_final.pdf).E

<sup>81</sup> *See generally* Iris Hentze, *COVID-19: Occupational Licensing During Public Emergencies*, NAT’L CONF. ST. LEGISLATURES, (Oct. 30, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-occupational->

not the only one. Iowa, for example, recognized a potential shortage in teachers at the beginning of the pandemic and decided to temporarily waive teacher licensure requirements.<sup>82</sup> It appears to be the only state to have done so. Meanwhile, states like Connecticut<sup>83</sup> and Florida,<sup>84</sup> perhaps anticipating the mental-health fallout from COVID-19's restrictions on personal interaction, provided for temporary licensure for social workers, therapists, and counselors, in addition to traditional medical workers. Connecticut has also waived certain licensing requirements "to maintain a sufficient capacity of childcare services."<sup>85</sup> The specific fields for which licensure will be waived necessarily vary based on the needs of each state.

In rare cases, licensing requirements are not governed by state law at all but instead under exclusive federal jurisdiction. The classic example is that of airline pilots. COVID-19 resulted in a substantial collapse in air travel,<sup>86</sup> creating a rather thorny problem for an industry in which licensure is closely tied to flight hours. The Federal Aviation Administration ("FAA"), concerned that "persons [would] attempt to satisfy certain [licensure] requirements . . . despite the fact that compliance would require acting contrary to the national social distancing guidelines," responded by implementing emergency regulations.<sup>87</sup> For example, pre-COVID FAA regulations required a second-in-command on an aircraft to have, "within the previous 12 calendar months, . . . performed and logged pilot time in the [particular] type of aircraft or in a flight simulator that represents the type of aircraft." To provide relief from the difficulties associated with meeting this goal during a pandemic, the emergency regulations added a three-month grace period. Additional relief has been provided for various "training, recency, checking, testing, duration, and renewal requirements."

Advocates of licensing reform<sup>88</sup> see the pandemic as an opportunity for states to introduce lasting reform hoping that the temporary reciprocity will become permanent.<sup>89</sup> Ultimately, one

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licensing-in-public-emergencies.aspx (documenting healthcare-specific licensing responses to COVID-19).

<sup>82</sup> Iowa Proclamation (May 5, 2020), <https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Proclamation%20-%202020.05.20.pdf>.

<sup>83</sup> Conn. Exec. Order No. 7V (Apr. 7, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7V.pdf?la=en>.

<sup>84</sup> Fla. Exec. Order No. 20-52 (Mar. 9, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-52.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-52.pdf).

<sup>85</sup> Conn. Exec. Order No. 7B (Mar. 14, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7B.pdf?la=en%20>.

<sup>86</sup> *Third Quarter 2020 Air Fare Drops to New Low as Passenger Numbers Decline*, BUREAU TRANSP. STATS. (Jan. 19, 2021), <https://www.bts.gov/newsroom/third-quarter-2020-air-fare-drops-new-low-passenger-numbers-decline>.

<sup>87</sup> Relief for Certain Persons and Operations During the Coronavirus Disease 2019 (COVID-19) Outbreak, 85 Fed. Reg. 26326 (2020).

<sup>88</sup> Paul Sherman, *Unlicensed Haircuts Are Only the Beginning*, ATLANTIC (Apr. 15, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/coronavirus-strikes-blow-economic-liberty/610015>; see also Mason Hunt, *Emergency Changes to Occupational Licensing Laws Should Persist After Pandemic, Expert Says*, ARIZ. ST. UNIV. (Mar. 27, 2020), <https://asunow.asu.edu/20200327-emergency-changes-occupational-licensing-laws-should-persist-after-pandemic-passes>.

<sup>89</sup> Singer.

expects that most changes made to healthcare licensing (with a few exceptions, such as those related to, e.g., telemedicine) will gradually fade away as we emerge from the pandemic. Many of the temporary suspensions of licensing requirements in non-medical fields are likely to meet the same fate because they were promulgated pursuant to governors' emergency powers, rather than legislation. As a result, they come with sunset provisions tied to the duration of any declared emergency.

Somewhat counterintuitively, then, the approach to licensing reform that may have the best prospects for continued post-COVID-19 vitality is also the most radical. As already noted, the broad-based approach to license reciprocity that took root in Mountain West states like Arizona, Montana, and Utah has started to spread across the country.<sup>90</sup> While to date only a handful of states have adopted universal license reciprocity, that handful emerged in relatively quick succession. Furthermore, occupational-licensing reform may benefit from having no obvious partisan valence. The Obama administration advocated for “adopt[ing] institutional reforms that promote a more careful and individualized approach to occupational regulation . . . and harmoniz[ing] requirements across States.”<sup>91</sup> Meanwhile, some of the most prominent advocates of occupational-licensing reform on the state level—like Governor Doug Ducey of Arizona<sup>92</sup>—have been Republicans. The success of reciprocity-based reforms in states as different as Arizona, Iowa, and New Jersey further suggests the approach may have cross-ideological appeal.<sup>93</sup>

In the health care field specifically, states have relaxed licensing requirements for health care providers by waiving in-state licensure requirements, expanding telehealth options, and making it easier to attain and keep licensure for current, prospective, and former licensees, since these enactments are tied to state emergency declarations and most will not last past the end of the pandemic. However, they highlight the need for uniform regulation of emergency licensure for physicians and may lead to expanded care options currently constrained by state licensure systems, such as telehealth, after the pandemic has ended.

Occupational licensure of medical professionals is governed primarily by state medical boards that set their own standards for physician, nurse, therapist, and other medical professional certification. They generally require that individuals be licensed within that state in order to practice medicine within their borders, attend an accredited school, and meet other practice requirements. Although each state imposes different certification requirements, many of these requirements have converged over the years.

This model of licensure, however, faces significant challenges as hospital beds fill up and

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<sup>90</sup> See Khadija Murad, *Universal Licensure Recognition*, NAT'L CONF. ST. LEGISLATURES, (Apr. 3, 2020), <https://www.ncsl.org/research/labor-and-employment/universal-licensure-recognition.aspx#:~:text=What%20Is%20Universal%20Licensure%20Recognition%3F,as%20valid%20in%20another%20state.>

<sup>91</sup> DEP'T TREASURY OFF. ECON. POL'Y, COUNCIL ECON. ADVISERS, & DEP'T LAB., at 43, 56.

<sup>92</sup> Press Release, Off. of Gov. Doug Ducey, Brief: Arizona Leading on Occupational Licensing Reform (June 20, 2019), <https://azgovernor.gov/governor/news/2019/06/brief-arizona-leading-occupational-licensing-reform>.

<sup>93</sup> See Murad.

doctors and nurses become overworked and overburdened. Health care providers have also suffered a great deal of stress and rates of burnout far beyond that of the rest of the population. Therefore, there has been a strong need for additional manpower in hospitals across the country as many experience personnel shortages. This emergency need for more medical professionals has led to changes in the licensing system in almost every state and jurisdiction.

States have also made it easier to allow for current licensees to stay licensed. Many states have expanded the time period for renewal of licenses so long as the public health emergency lasts.<sup>94</sup> They have also waived certain continuing education and license upkeep activities in light of the pandemic.<sup>95</sup> A few states have even explored a fast-track to licensure to those on the cusp of entering the professions, namely recent medical school graduates entering residencies.<sup>96</sup> This was especially considered in the early days of the pandemic by some of the hardest-hit states, particularly New York.<sup>97</sup> Along similar lines, states have also let particular retired or inactive former licensees whose registration have lapsed gain licensure through an expedited process, allowing them to rejoin the medical workforce and treat patients.<sup>98</sup> Unsurprisingly, this strategy has been less successful at providing manpower, as retired health care providers are more likely to be elderly, and therefore more susceptible to the virus than other potential workers.<sup>99</sup>

These enactments are obviously emergency measures, designed to address the immediate reality of the pandemic and ensure an adequate supply of health care providers to the frontlines of treatment. No measure demonstrates skepticism of the current medical licensing regime, and states will likely revert to their pre-pandemic regulations after COVID-19 has been curtailed or eliminated. Nonetheless, changes in medical occupational licensure may remain.

First, the inconsistent patchwork of state emergency licensures may lead to calls for greater federal regulation to ensure proper coordination in an emergency, or the rise of interstate compacts or adoptions of model acts providing for similar measures. COVID-19 has thrown this particular issue in sharp relief. Most current regulation, such as UEVHPA, assumes a single or a handful of disaster states, in which physicians from other states might pour in to help for a limited time. Here, however, the COVID-19 pandemic has dragged on for months and led to declared public health

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<sup>94</sup> *U.S. States and Territories Modifying Licensure Requirements for Physicians in Response to COVID-19*, FED. ST. MED. BDS. (last updated Jan. 26, 2021), <https://www.fsmb.org/siteassets/advocacy/pdf/state-emergency-declarations-licensures-requirements-covid-19.pdf>.

<sup>95</sup> *States Modifying Continuing Medical Education Requirements in Response to COVID-19*, FED. OF STATE MED. BDS. (last updated Jan. 22, 2021), <https://www.fsmb.org/siteassets/advocacy/pdf/states-modifying-continuing-medical-education-requirements.pdf>.

<sup>96</sup> Paul J. Larkin, Jr., *COVID-19 and the Provisional Licensing of Qualified Medical School Graduates as Physicians*, 76 WASH. & LEE L. REV. ONLINE 81, 82-83 (2020); Robert A. Harrington, Mitchell S.V. Elkind & Ivor J. Benjamin, *Protecting Medical Trainees on the COVID-19 Frontlines Saves Us All*, 141 CIRCULATION 775, 776 (2020).

<sup>97</sup> See, e.g., Emma Goldberg, *Early Graduation Could Send Medical Students to Virus Front Lines*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/health/coronavirus-medical-students-graduation.html>.

<sup>98</sup> *U.S. States and Territories Expediting Licensure for Inactive/Retired Licensees in Response to COVID-19*, FED. OF STATE MED. BDS. (last updated Jan. 26, 2021), <https://www.fsmb.org/siteassets/advocacy/pdf/states-expediting-licensure-for-inactive-retired-licensees-in-response-to-covid19.pdf>.

<sup>99</sup> ETHAN BAYNE, CONOR NORRIS & EDWARD TIMMONS, MERCATUS CTR., A PRIMER ON EMERGENCY OCCUPATIONAL LICENSING REFORMS FOR COMBATING COVID-19 5–6 (2020) (available at [https://www.mercatus.org/system/files/timmons\\_bayne\\_and\\_norris\\_-\\_policy\\_brief\\_-\\_covid\\_series\\_-\\_a\\_primer\\_on\\_emergency\\_occupational\\_licensing\\_reforms\\_for\\_combating\\_covid-19\\_-\\_v1.pdf](https://www.mercatus.org/system/files/timmons_bayne_and_norris_-_policy_brief_-_covid_series_-_a_primer_on_emergency_occupational_licensing_reforms_for_combating_covid-19_-_v1.pdf)).

emergencies in all fifty states, almost unprecedented in U.S. history.<sup>100</sup> Current regulation at the state and the federal level related to licensure is ill-equipped to deal with this novel situation. States need not rewrite how they license health care providers to make it easier to license individuals, however. At the very least, though, governments could make it easier for physicians to cross state lines in public health emergencies by providing clearer, uniform guidelines as to how health care providers may attain emergency licensure.<sup>101</sup>

Finally, the rise of telemedicine during the pandemic demonstrates the possibility of new care options that could solve other public health problems, but that are currently hampered by state licensure regulation. For instance, although many mental health practitioners previously utilized face-to-face conferences rather than telehealth to meet with their clients, the pandemic has proven telehealth to be a robust treatment tool for therapy, with few of the downsides or ill effects they may have imagined.<sup>102</sup> Telehealth could hence remain a useful tool for treating patients after the pandemic. This is particularly true in areas where therapists may be distant or hard to access, and where an internet connection could suffice for a lack of treatment options. In such mental health deserts, occupational licensure regimes could be relaxed to allow for out-of-state mental health professionals to treat patients over the internet.<sup>103</sup> The pandemic has been an opportunity to expand care options through this medium and may allow providers to expand care options after it is over, so long as states make allowances for these technologies in their occupational licensure schemes.<sup>104</sup>

## B. COVID's Impact on Unemployment Insurance

The restructuring and closure of workplaces has forced many people to register for unemployment, a number of them for the first time in their lives. The COVID-19 pandemic has turned life as we know it upside down and spurred record numbers of unemployment and unemployment claims. Over 9 million Americans applied for some form of unemployment by the end of March alone. While the Bureau of Labor Statistics is reporting a decline in the unemployment rate as recently as October 2020, the number of long-term unemployed has more

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<sup>100</sup> Samuel Wonacott, *All 50 States Have Active Declared Emergencies Related to the Coronavirus Pandemic*, BALLOTPEDIA NEWS (July 29, 2020), <https://news.ballotpedia.org/2020/07/29/all-50-states-have-active-declared-emergencies-related-to-the-coronavirus-pandemic/>.

<sup>101</sup> See Bill Marino, Rosehen Prasad & Amar Gupta, *A Case for Federal Regulation of Telemedicine in the Wake of the Affordable Care Act*, 16 COLUM. SCI. & TECH. L. REV. 274, 289–92 (2015).

<sup>102</sup> See Jeff Wilser, *Teletherapy, Popular in the Pandemic, May Outlast It*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/well/mind/teletherapy-mental-health-coronavirus.html>.

<sup>103</sup> See, e.g., Kevin Dayaratna, Paul J. Larkin, Jr. & John O'Shea, *Reforming American Medical Licensure*, 42 HARV. J.L. & PUB. POL'Y 253, 266 (2019); Christine S. Wilson & Pallavi Guniganti, *Deregulating Health Care in a Pandemic—and Beyond*, 34 ANTITRUST 14, 18 (2020).

<sup>104</sup> See, e.g., *Using Telehealth Services*, CTRS. FOR DISEASE CONTROL AND PREVENTION (last updated June 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/telehealth.html>; Bill Marino, Rosehen Prasad & Amar Gupta, *A Case for Federal Regulation of Telemedicine in the Wake of the Affordable Care Act*, 16 COLUM. SCI. & TECH. L. REV. 274, 282–83, 293–96 (2015).

than doubled, signifying segments of the workforce in which the unemployed are failing to find new work.<sup>105</sup>

The purpose of unemployment insurance has always been to help people find work. This is why there are requirements that a beneficiary be searching for work and have been previously employed. This makes the system work as a buffer to the volatility of the job market, essentially paying out benefits so as to keep working people and their families able to pay rent, eat, and educate their children *as if* they were employed until they can find work again.

Typically, unemployment compensation is only available for previously employed individuals who have involuntarily lost their jobs through no fault of their own. If the employee was let go because the employer had to cut costs, for example, then the employee is eligible for unemployment benefits. Employees who quit their job voluntarily are generally ineligible for unemployment. Employees who were fired for reasons of misfeasance, malfeasance, or absenteeism are also ineligible. Now, in light of the pandemic, absenteeism as a grounds for ineligibility is being reexamined.

Because unemployment compensation programs in this country are only meant to be anti-cyclical programs, the pandemic is complicating the system in unexpected ways. Even industries that had previously been thought to be recession-proof, such as food and beverage, are being hit hard by the pandemic and the restrictions that have come with it. This is forcing the nation to reimagine the role of unemployment compensation programs. With such uncertainty about when normal life will resume, it is hard to imagine that a benefit system meant to prop workers up through temporary bouts of joblessness will be able to keep individuals afloat for a longer, indeterminate amount of time without a substantial restructuring of the program.

## **1. The CARES Act and Changes to the Unemployment Insurance System**

The pandemic has sent shockwaves through the unemployment insurance system, and has created substantial changes, although some of these are only temporary. Unemployment as a system continues to be by and large on the state level, with the federal government establishing guidelines for the state agencies. However, the Coronavirus Aid, Relief, and Economic Security (CARES) Act marks a unique assumption of unemployment responsibility by the federal government. The Act was passed in March 2020 in response to record unemployment rates in the same month.<sup>106</sup> The Act applies to individuals who have been unemployed or partially unemployed, or unable to work due to a number of reasons related to COVID-19. The Act substantially altered important issues in employment law, maybe most importantly the Act expanded the value and reach of unemployment insurance in a number of ways.

First, the Act created the Federal Pandemic Unemployment Compensation program, which temporarily added \$600 to weekly unemployment insurance benefits between April 5, and July 31,

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<sup>105</sup> U.S. Bureau of Labor Statistics Unemployment Rates for States, <https://www.bls.gov/web/laus/laumstrk.htm> (last modified Nov. 20, 2020).

<sup>106</sup> State of Iowa and Federal Response to Covid-19 -- Taxation, <https://www.legis.iowa.gov/docs/publications/LU/1136176.pdf> (last accessed Nov. 29, 2020).

2020.<sup>107</sup> Next, the CARES Act created the Pandemic Emergency Unemployment Compensation (PEUC) program which extended by 13 weeks the period to which unemployment insurance could be received from 26 weeks (in the typical states that allowed a maximum duration of 26 weeks) to 39 weeks, through the end of 2020. Additionally, the Act created Pandemic Unemployment Assistance (PUA), which expanded the pool of people eligible to receive unemployment insurance during the pandemic. For example, self-employed workers, independent contractors, gig workers, and freelancers, were added to the eligible group by the Act allowing them to apply for unemployment insurance during the pandemic when they otherwise have not been in the class of eligible individuals for unemployment insurance.<sup>108</sup>

The Act did not intrude on the state-level unemployment system beyond increasing funding and providing flexibility to the state agencies.<sup>109</sup> For example, the Act authorized state agencies to provide PUA for individuals who would not usually be covered by unemployment, such as the self-employed. While CARES enabled the extension of normal unemployment by 13 weeks, programs like the PUA were entirely new, providing up to 39 weeks of benefits for those who qualify.<sup>110</sup>

For those who received unemployment insurance, especially during the initial months of the pandemic, reports show that money was helping individuals' savings and also being put back into the economy. From March to July of 2020 the additional \$600 weekly benefit helped increase the spending of the unemployed by 22 percent.<sup>111</sup> However, this number declined at the expiration of the benefits. In August the spending of the unemployed fell back down by 14%. In the four-month period between March and July the unemployed also roughly doubled their liquid savings. But, in August, numbers suggest unemployed spent almost two-thirds of this accumulated savings in just that month alone. These numbers show just how important the additional weekly federal benefits were to people taking advantage of unemployment benefits.

## 2. A Closer Look at Unemployment Insurance in Iowa, Illinois, and North Carolina

Legislative response to the pandemic was not limited to the federal government. In Iowa, for example, the work search requirement for benefits was temporarily waived, but Iowa ended this waiver in September 2020, as well as the requirement that an employee use all paid leave before filing.<sup>112</sup> The approach in Iowa has been largely individualized, withholding benefits from

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<sup>107</sup> Gregory Acs & Michael Karpman, *Employment, Income, and Unemployment Insurance during the COVID-19 Pandemic*, URBAN INST. (July 2, 2020), [https://www.urban.org/sites/default/files/publication/102485/employment-income-and-unemployment-insurance-during-the-covid-19-pandemic\\_1.pdf](https://www.urban.org/sites/default/files/publication/102485/employment-income-and-unemployment-insurance-during-the-covid-19-pandemic_1.pdf).

<sup>108</sup> Andrew Stettner & Elizabeth Pancotti, *12 Million Workers Facing Jobless Benefit Cliff on December 26*, Report, THE CENTURY FOUND. (Nov. 18, 2020), <https://tcf.org/content/report/12-million-workers-facing-jobless-benefit-cliff-december-26/?agreed=1>.

<sup>109</sup> Carmen Reinicke, *A mind-boggling 30 million people have filed for unemployment in 6 weeks*, BUS. INSIDER (May 20, 2020) <https://www.businessinsider.com/us-unemployment-likely-higher-than-jobless-claims-show-coronavirus-jobs-2020-5>

<sup>110</sup> Greg Iacurci, *Congress stalled on stimulus talks and time is running out as millions face a 'benefits cliff'*, CNBC (Nov. 28, 2020), <https://www.cnbc.com/2020/11/28/congress-stalled-on-stimulus-talks-as-millions-face-a-benefits-cliff.html>.

<sup>111</sup> Diana Farrell et. al, *The Unemployment Benefit Boost: Initial Trends in Spending and Saving When the \$600 Supplement Ended* (Oct. 16, 2020), Available at SSRN: <https://ssrn.com/abstract=3715660>.

<sup>112</sup> *Guidance for Employers and Employees on Workers' Rights and Safety*, Ill. Dep't Pub. Health, <https://dph.illinois.gov/covid19/community-guidance/workplace-health-and-safety-guidance/employee-employer->

individuals who have not tested positive for COVID, but may have a loved-one suffering from symptoms, with the exception of guardians without access to childcare. This differs from the state of Illinois, where eligibility is determined on a case-by-case basis looking for “good cause.”<sup>113</sup>

It is worth mentioning that the unemployment situation will always remain downstream of other policies. Illinois and Iowa are both following the CARES Act’s guidelines and expanded coverage, but differ significantly in business policies which influence how many people will be in need of expanded benefits. Illinois has enacted a number of restrictions on restaurants and businesses, as well as quarantine and shelter-in-place requirements in hard-hit areas like Chicago.<sup>114</sup> Iowa has allowed bars and clubs to stay open with restrictions, while the Iowa governor’s office has released several emergency proclamations without rigorous enforcement.<sup>115</sup>

Illinois peaked at 519,269 new unemployment claims in April 2020, reducing by around 80% to a low of 121,523 in August and up to 121,523 in September.<sup>116</sup> In Iowa, April’s peak of 157,324 claims has come down to 14% of that number with 22,890 new claims in September.<sup>117</sup> Of course, new claims only tell a small part of the story, but the similarity of per capita numbers in these two states with significantly different population, policies, and industries shows the overarching significance of the federal Act. On a national level, states without declining unemployment are outliers, although no states show a return to 2019 numbers.<sup>118</sup>

COVID-19 has highlighted the inadequacy of some state’s unemployment insurance systems as record numbers of people have tried to gain access to benefits. North Carolina is probably worst. The state has touted a sub-par unemployment insurance system for years, COVID-19 just pulled back the curtain. Aside from the lessened maximum benefit duration, in 2019 a mere 9.1% of people without jobs in the state of North Carolina received unemployment insurance benefits which was the lowest rate in the nation.<sup>119</sup> For reference, the typical rate in other states is in the neighborhood of 50%.<sup>120</sup> North Carolina also ranks last in actually getting out payments in a timely manner, which can be crucial especially in times like these where people are so depending on these benefits. An additional problem COVID has exposed in systems across America is labor

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rights-and-safety.

<sup>113</sup> Shruti Date Singh, *Chicago Projects \$2 Billion Deficit Through 2021 on Pandemic (2)*, BLOOMBERG L. (Aug. 31, 2020), <https://www.bloomberglaw.com/product/blaw/document/XAQ3NOEO000000>.

<sup>114</sup> COVID-19: US State Policy Report, NAT’L L. REV., Nov. 25, 2020), <https://www.natlawreview.com/article/covid-19-us-state-policy-report-november-25-2020>.

<sup>115</sup> Illinois Department of Employment Security, UI Program Data, [https://www2.illinois.gov/ides/lmi/Pages/Unemployment\\_Insurance\\_Program\\_Data.aspx](https://www2.illinois.gov/ides/lmi/Pages/Unemployment_Insurance_Program_Data.aspx) (last accessed Nov. 29, 2020).

<sup>116</sup> Iowa Unemployment Insurance Benefit Payments and Claims, <https://mydata.iowa.gov/Economic-Statistics/Iowa-Unemployment-Insurance-Benefit-Payments-and-C/jpje-kkb9/data> (last accessed Nov. 29, 2020).

<sup>117</sup> U.S. Department of Labor Provides \$100 Million To States To Combat Unemployment Insurance Fraud, DEP’T. OF LAB., (Sept. 1, 2020). <https://www.dol.gov/newsroom/releases/eta/eta20200901>.

<sup>118</sup> Unemployment Rates for States, U.S. BUREAU OF LAB. STATISTICS (Nov. 20, 2020), <https://www.bls.gov/web/laus/laumstrk.htm>.

<sup>119</sup> Alicia Adamczyk, *The U.S. unemployment system was already broken. Then the coronavirus pandemic hit*, CNBC (Oct. 8, 2020), <https://www.cnn.com/2020/10/08/coronavirus-spotlight-broken-us-unemployment-system.html>.

<sup>120</sup> *Id.*

offices being overwhelmed by claims of unemployment.<sup>121</sup> The number of claims that have come in have been exhausting for many outdated computer systems to take in states throughout the country. Especially in March when the pandemic was just beginning the number of claims greatly outweighed the actual number of people being paid nationwide, which was likely a result of the computer systems and labor offices being overwhelmed nationwide.

### 3. The Future of Unemployment Insurance

While the immediate future of extended emergency unemployment compensation is up in the air as a new administration takes office and the Democrats take control of Congress, the pandemic continues to shape and change the traditional way of life and systems and institutions that have been in place for years. The changes to qualification standards for unemployment compensation that have taken place since the enactment of the CARES Act are illustrative of some of the ways unemployment insurance as we know it may change beyond the pandemic. Is this pandemic an opportunity to restructure unemployment in the U.S., or should the priority be to preserve the existing unemployment insurance structures?

This speculation is relevant to the COVID-19 pandemic because the temporary removal of work- search requirements in states like Iowa, as well as the CARES Act enabling benefits regardless of local employment rates, indicates a growing acknowledgement that providing welfare in many circumstances may be a more important objective than ensuring their return to the same or similar jobs.

A major change could be an expansion of “good cause” to receive unemployment to include quitting to obtain education or training in another field, accompanied by requirements and standards to prevent fraud. Unemployment insurance programs have sometimes paid out benefits to individuals who quit their jobs for good cause, even before the pandemic. While the standards for good cause differ significantly by state, this is one way in which unemployment could act as a stepping stone to *better* employment. When an employee is constructively discharged, unemployment benefits act as the means for that individual to find new work at a workplace where they will not face unfair or dangerous treatment. The COVID-19 pandemic is an opportunity to expand this undervalued aspect of unemployment insurance.

The standard of absenteeism—which under normal circumstances would render an employee ineligible for unemployment compensation due to excessive absence or tardiness—has shifted during the pandemic. Employers are grappling with new and evolving regulations and standards for employees who are sick or have come in contact with an infected person. Under PUA, an individual can qualify if they are diagnosed or experiencing symptoms of COVID-19, have a household member who is sick, are providing care for a household member with COVID-19, or if a child in their household is sick or unable to attend school due to closures due to COVID-19. Once PUA expires, it is unclear whether these standards will remain in place. Will workers who have to quarantine more than once due to exposure be eligible for unemployment? For example, teachers who may be required to quarantine repeatedly may exceed their allocated sick days. Will they then qualify for unemployment compensation? As the pandemic continues and even as the vaccine are administered, quarantine guidelines will continue to change, and unemployment compensation eligibility standards will change along with them.

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<sup>121</sup> Manuel Kovalski & Louise Sheiner, *How does unemployment insurance work? And how is it changing during the coronavirus pandemic?*, Brookings (July 20, 2020), <https://www.brookings.edu/blog/up-front/2020/07/20/how-does-unemployment-insurance-work-and-how-is-it-changing-during-the-coronavirus-pandemic/>.

The pandemic also complicates the relationship between voluntary quitting employment and unemployment eligibility. Is genuine fear of contracting the virus something that allows an employee to be eligible for unemployment? Additionally, an employee’s “genuine and reasonable fear for their own safety” *may* be considered good cause for the employee to depart, rendering the person eligible. Of course, what is “genuine and reasonable” is a subjective standard and does not provide a clear answer to the question of the employee’s eligibility.<sup>122</sup> There have been no published rulings or regulations permitting employees to take a sick day due to fear of the pandemic.

The pandemic could prompt a major overhaul in how unemployment insurance programs work. Given the disparities in state unemployment benefits (Massachusetts offers up to \$1220 for 26 weeks while Georgia’s benefits max out at \$365 for 12 weeks, as a glaring example)<sup>123</sup> and the success of nationalized programs in Europe, unemployment insurance schemes could be federalized in the future. State unemployment infrastructures have struggled to keep up with the heavy demand, and many are using outdated technology.<sup>124</sup> A nationalization of the programs could help mitigate some of these infrastructural problems and bring some parity to the inconsistencies in available unemployment compensation across the nation. It is also possible that unemployment benefits could continue to extend beyond the traditional pool of eligible workers and gig workers, independent contractors, and part-time workers could remain eligible for unemployment beyond the current emergency programs. Additionally, previously required job search requirements have been temporarily waived, and perhaps they won’t be revived.

When the federal government sends out stimulus checks which have no bearing on benefits, the states seem to catch a windfall as their claims decrease. Similarly, when the Department of Labor provides tens of millions of dollars to state agencies, it is odd to see a lack of standards for those agencies. American voters and taxpayers have deemed it beneficial to have the federal government involved in work law, yet during the COVID-19 pandemic, their involvement is not much beyond funding.

President Biden’s proposed American Rescue Plan includes supplemental unemployment benefits, potentially up to \$400 a week, similar to the additional relief that was part of the CARES Act.<sup>125</sup> Congress is also exploring adding automatic stabilizers to the plan—that is, if the economy does better than expected, the supplemental benefits will automatically contract in response, and vice versa.

At present, the return on investment by taxpayers and working people is a promise of a return to 2019 labor relations, but those relations were unable to deal with a challenge like a global

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<sup>122</sup> Jacob Korder, *The New York State Unemployment Insurance System: “Pre” and “Post” Pandemic*, Webinar, City Bar Center for Continuing Legal Education (June 10, 2020), [https://www.westlaw.com/Document/Ibf2f2bd4252111ebbea4f0dc9fb69570/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/Ibf2f2bd4252111ebbea4f0dc9fb69570/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

<sup>123</sup> Allana Akhtar, *The Pandemic is Giving the US a Chance to Fix its Embarrassing Unemployment Benefits. Top Economists Tell Us What the Future of This Crucial System Could Look Like.*, BUS. INSIDER (Sept. 3, 2020), <https://www.businessinsider.com/heres-whats-next-for-unemployment-insurance-in-the-us-2020-5>.

<sup>124</sup> Peter S. Goodman, Patricia Cohen and Rachel Chaundler, *European Workers Draw Paychecks. American Workers Scrounge for Food.*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/07/03/business/economy/europe-us-jobless-coronavirus.html>.

<sup>125</sup> Christopher Condon, Reade Pickert and Olivia Rockeman, *How U.S. Economic Stimulus Can Be Put on Autopilot*, WASH. POST (Feb. 3, 2021), [https://www.washingtonpost.com/business/how-us-economic-stimulus-can-be-put-on-autopilot/2021/02/02/f70da380-651b-11eb-bab8-707f8769d785\\_story.html](https://www.washingtonpost.com/business/how-us-economic-stimulus-can-be-put-on-autopilot/2021/02/02/f70da380-651b-11eb-bab8-707f8769d785_story.html).

pandemic. Over the next year, working people in the US will have access to more opportunities or fewer, and our economic system will be more globally competitive, or less. The questions that need to be answered about policy and work in the US will guide these decisions, and millions of people have more time and access now to follow the policy discussions and make their voices heard.

### C. An Epidemic of Wage Theft

Policy experts predict, based on historical trends, that the COVID-19 pandemic—and the economic recession that is to follow—will lead to a major increase in wage theft, a decrease in worker complaints, and reductions in state and federal enforcement agency budgets.<sup>126</sup> Additionally, the increasing prevalence of telecommuting across a wide range of sectors has created new challenges for workers and broadened the scope of professions, particularly telecommuting workers that are uniquely vulnerable to wage theft. The pandemic will probably exacerbate those conditions which have historically caused wage theft.<sup>127</sup> Wage theft often occurs when employers are pressed to cut corners, and the pandemic has placed considerable pressure on firms to cut corners. As these issues intensify, however, it appears the pandemic may actually accelerate policy reform by accentuating the vulnerability of workers under current employment laws. Ensuring a Minimum Wage for Tipped Workers The Fair Labor Standards Act (FLSA) allows employers to pay tipped workers a direct wage as low as \$2.13 per hour so long as the tips these workers receive bring their hourly wage up to the federal minimum wage (this practice is known as a tip credit). Tipped workers are thus technically guaranteed a minimum wage, but employers commonly commit wage theft by failing to make up the difference for workers whose tips do not actually reach the minimum wage threshold.<sup>128</sup> This dynamic has been exacerbated by the pandemic as tips nationwide have decreased by as much as 90% according to the labor advocacy group, One Fair Wage.<sup>129</sup> While these losses in tipping revenue have resulted in the widespread closure of bars and restaurants, the pandemic has had a surprising effect on wages for restaurant employees. In fact, many restaurants have actually been forced to increase wages in order to retain a workforce in light of the substantial health risk to food service employees. The analytics firm Black Box Intelligence has found that line cooks saw a 5.2% increase in hourly wages in the second quarter of 2020 as compared to the same period in 2019.<sup>130</sup> Likewise, the fast-food chain Chipotle has reported more than \$30 million in bonuses and assistance pay to its restaurant employees. More broadly, the pandemic, coupled with growing support for the Black Lives Matter and #MeToo movements, has reinvigorated debates about pay equity for restaurant workers and has many industry and labor leaders considering ending the tip credit system altogether. One Fair

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<sup>126</sup> Janice Fine, Daniel Galvin, Jenn Round & Hana Shepherd, Washington Center for Equitable Growth, MAINTAINING EFFECTIVE U.S. LABOR STANDARDS ENFORCEMENT THROUGH THE CORONAVIRUS RECESSION (September 3, 2020), <https://equitablegrowth.org/research-paper/maintaining-effective-u-s-labor-standards-enforcement-through-the-coronavirus-recession/?longform=true>.

<sup>127</sup> Noam Scheiber, Stiffing Workers on Wages Grows Worse with Recession, N.Y. TIMES, September 3, 2020, <https://www.nytimes.com/2020/09/03/business/economy/wage-theft-recession.html>.

<sup>128</sup> Sarah B. Andrea, COVID-19 is hitting tipped workers hard, THE CONVERSATION (August 12, 2020), <https://theconversation.com/covid-19-is-hitting-tipped-workers-hard-141515>.

<sup>129</sup> Samantha Fields, With tips down, some restaurants have raised wages for servers. Will it last?, MARKETPLACE (July 13, 2020), <https://www.marketplace.org/2020/07/13/with-tips-down-some-restaurants-have-raised-wages-for-servers-will-it-last/>.

<sup>130</sup> Nancy Luna, Compensation: Pandemic forces restaurant industry to rethink wages, tip credit, NATION'S RESTAURANT NEWS, September 16, 2020, <https://www.nrn.com/workforce/compensation-pandemic-forces-restaurant-industry-rethink-wages-tip-credit>.

Wage has found that tipped-based wages aggravate race- and gender-based pay gaps (the organization reported a differential of nearly \$5 per hour in tipped wages between Black women and white men nationwide).<sup>131</sup> Thus, paying all restaurant workers a living wage has been coupled with restaurant owners' own needs to ensure high levels of service quality. If the strategy continues to prove successful, it is likely that policymakers may follow suit and amend the FLSA or its various state-law equivalents to end the tip credit system. Implementing More Inclusive Tests for Worker Classification The misclassification of workers as independent contractors rather than employees is another common cause of wage theft. Employers across many sectors have characterized their employees as independent contractors to avoid paying minimum wage and overtime. The pandemic is likely to exacerbate this dynamic as employers now have an additional incentive to misclassify their employees in order to avoid the high cost of certain benefits like unemployment insurance and paid sick leave.<sup>132</sup> On the other hand, even well-intentioned employers have been considering changing the status of their workers from W-2 to 1099 in order to reduce overhead and keep more workers on the payroll. Furthermore, recent high-profile lawsuits and ballot measures have exposed the plight of gig workers and the challenges they face in securing "employee" status under existing laws.<sup>133</sup> As more and more workers are left without employment protections, it is likely that legislators will be forced to change the definition of employee to be more inclusive of new and historically misclassified kinds of employment. Indeed, states like California and New Jersey have already implemented the new ABC test for classifying workers, which includes a presumption that a worker is an employee unless the employer can demonstrate that the worker performs their work free from the employer's control, that the work performed is outside the usual course of the employer's business, and that the worker customarily engages in the work performed as a part of an independent and established trade or occupation.<sup>134</sup> More states will likely follow in implementing similar changes as the pandemic continues.

II. Causes of Wage Theft for Telecommuting Workers Another major feature of the pandemic has been a dramatic increase in the number and type of employees working from home. Historically, telecommuting has been an opportunity disproportionately afforded to higher-wage, salaried employees. To reduce the spread of the virus, however, many companies have begun offering workers the option to telecommute. Worker advocates should begin considering the following issues when assessing a worker's wage theft claim.

Reporting Hours Worked and Privacy Concerns One of the keys to avoiding wage theft is ensuring that both employees and their employers have accurate records of all their hours worked. This is particularly important for telecommuting workers because their workdays may not always be continuous as they likely would be while reporting to an office. Regardless of how workers choose to break up their daily work schedule, they must be compensated in full for all time spent working. The advantage of the telecommuting arrangement is that it typically makes workers responsible for documenting, totaling, and reporting their hours to the supervisor. This prevents employers from intentionally or

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<sup>131</sup> *Id.*

<sup>132</sup> Lina Moe, Covid-19 Shows Why Wrongly Labeling Workers As 'Contractors' Must Stop, CENTER FOR NEW YORK CITY AFFAIRS (March 25, 2020), <http://www.centernyc.org/urban-matters-2/2020/3/25/covid-19-shows-why-wrongly-labeling-workers-as-contractors-must-stop>.

<sup>133</sup> Rebecca Smith, Independent Contractors and Covid-19: Working Without Protections, NATIONAL EMPLOYMENT LAW PROJECT (last accessed November 30, 2020), <https://www.nelp.org/publication/independent-contractors-covid-19-working-without-protections/>.

<sup>134</sup> Jeffrey H. Ruzal & Carly Baratt, Epstein Becker & Green, Wondering How to Retain Employees Without Going Bankrupt During the COVID-19 Crisis? Independent Contractor Reclassification Is Not the Answer, WAGE & HOUR DEFENSE BLOG (April 6, 2020), <https://www.wagehourblog.com/2020/04/articles/coronavirus-covid-19/wondering-how-to-retain-employees-without-going-bankrupt-during-the-covid-19-crisis-independent-contractor-reclassification-is-not-the-answer/>.

unintentionally misrepresenting the amount of work performed by employees.<sup>135</sup>The disadvantage of the telecommuting arrangement, however, is that employers may use invasive monitoring technologies to track the hours of their employees. In the wake of COVID-19, software has been developed to track everything from mouse clicks to internet history to video surveillance, thereby allowing employers to monitor hours worked and worker productivity.<sup>136</sup> Unfortunately, there are very few legal protections available for workers concerned about breaches of privacy—especially if the worker is using technology provided by their employer.<sup>137</sup>Time Spent CommutingAs the home becomes the primary worksite for more employees, the time they spend commuting to the office or to meetings may become compensable. The Portal to Portal Act of 1947, which amended and clarified the FLSA, relieves most employers of any obligation to compensate employees for time spent on their regular commute to and from their primary work site at the beginning and end of the workday. However, when the primary work site is the home and employees are occasionally required to be physically present at some other location, then the time spent commuting is properly considered “hours worked” for the purposes of the FLSA. This time is likely not compensable, however, for employers who implement hybrid plans in which employees may still be required to routinely report to the office a few days per week. The key issue is whether the location to which the worker is reporting is a primary worksite (a fact-intensive determination that is predominantly influenced by how regularly and how long the worker is expected to be there).<sup>138</sup>Time Spent On-Call or Waiting for WorkCompensation for time spent on-call or waiting for work has also emerged as a potential wage theft issue for telecommuting employees. As a result of the pandemic, many businesses have experienced reduced demand for their products and services, creating smaller workloads for employees and forcing many more employees than usual to wait for work or remain on-call. Telecommuting employees may be entitled to compensation for their time spent on-call or waiting for work if, during this time, they are unable to use the time for their own benefit. Conversely, if they are able to use this time to rest, perform personal chores, socialize, or some other similar activity, then the time is likely not compensable.<sup>139</sup> Additionally, if the time periods spent on-call are short in duration or unpredictable, then they are likely compensable because it would be difficult for employees to use the time for their own benefit.<sup>140</sup>Exempt Employees Performing Non-Exempt TasksAnother effect of the pandemic has been the restructuring and oftentimes down-sizing of many companies. As employers reorganize their workforce, many employees may temporarily or even permanently take on new or different duties. Such changes

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<sup>135</sup> Mark E. Tabakman, Telecommuting Raises a Host of Thorny Issues: Employers Beware, N.J. LAW JOURNAL (June 25, 2020), <https://www.law.com/njlwjournal/2020/06/25/telecommuting-raises-a-host-of-thorny-issues-employers-beware/>.

<sup>136</sup> Tom Spiggle, Can Employers Monitor Employees Who Work From Home Due To The Coronavirus?, FORBES (May 21, 2020), <https://www.forbes.com/sites/tomspiggle/2020/05/21/can-employers-monitor-employees-who-work-from-home-due-to-the-coronavirus/?sh=6a2c3fed2fb7>.

<sup>137</sup> Lorelai Laird, What Are Your Privacy Rights When You Work From Home?, LEGAL ZOOM (June 23, 2020), <https://www.legalzoom.com/articles/what-are-your-privacy-rights-when-you-work-from-home>.

<sup>138</sup> Jon Steingart, Pandemic Pay Issues For Wage And Hour Lawyers To Watch, LAW360 (September 24, 2020), <https://www.law360.com/articles/1313518/pandemic-pay-issues-for-wage-and-hour-lawyers-to-watch>.

<sup>139</sup> Joseph U. Leonoro, Be Aware of the Wage and Hour Implications of Telecommuting, HR DAILY ADVISOR (February 10, 2017), <https://hrdailyadvisor.blr.com/2017/02/10/aware-wage-hour-implications-telecommuting/>.

<sup>140</sup> Jeffrey H. Ruzal & Carly Baratt, Epstein Becker & Green, Work from Home Policies During COVID-19: Limiting Non-Exempt Employee Compensation for Waiting Time and On-Call Time, WAGE & HOUR DEFENSE BLOG (March 25, 2020), <https://www.wagehourblog.com/2020/03/articles/coronavirus-covid-19/work-from-home-policies-during-covid-19-limiting-non-exempt-employee-compensation-for-waiting-time-and-on-call-time/>.

could open up the possibility of wage and hour violations if an exempt employee (i.e., a salaried employee that is paid a weekly wage) is directed to perform the customary tasks of a non-exempt employee (i.e., an employee that is paid an hourly wage). If, for example, an exempt employee began primarily performing the tasks typical of non-exempt employees, then that exempt employee would lose their exempt status and must be granted the same minimum wage and overtime protections that are all afforded to all other workers covered by the FLSA. While federal law does allow exempt employees to perform non-exempt work in the case of genuine emergency situations, changes in the nature of their work over an extended period of time (e.g., the duration of the pandemic) are not included within this narrow exception.<sup>141</sup>

### **Potential Policy Reform to Prevent Wage Theft**

Finally, the combination of a major increase in wage theft and the installation of a new and supposedly more worker-friendly federal executive is likely to lead to significant changes in the way that wage theft is prevented and employment protections are enforced. Strategic Enforcement of Employment Regulations Currently, wage and hour regulations are primarily administered through complaint-based systems of enforcement wherein employers are investigated after an employee has alleged wrongdoing. This approach suffers from serious limitations. It relies on workers being socially and economically secure enough to come forward and complain, it only allows illegal employment practices to be corrected after they have caused injury, and it results in considerable delays in providing remedies to impacted workers. Departments of labor could more effectively prevent wage theft before it occurs and incentivize broader compliance with employment laws by employers by investing resources into proactive inspections of high-risk industries.<sup>142</sup> In addition, legislatures could work to end loopholes for employer noncompliance and create harsher penalties to improve deterrence effects. To this end, California passed AB 3075 in September of 2020, which prevents employers from closing and then reopening under a different name to avoid paying wages owed to workers.<sup>143</sup> The California bill also streamlined the complaint procedure to allow both state and local agencies to assist workers with enforcement regardless of where the worker reported the violation. Bills like this highlight the ineffective nature of current enforcement strategies but are also hopefully indications that federal and state governments will actively work to improve enforcement. Strengthening Whistleblower Protections To the extent that complaint-based systems of enforcement remain in place, however, strengthening whistleblower protections is crucial to ensure that workers are able to voice their complaints and are protected from retaliation by their employers. Whistleblower and retaliation protections vary significantly from state to state; however, there are a number of proposed legislative reforms that could make it safer for workers to seek the enforcement of wage protections. For example, federal or state

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<sup>141</sup> Jeffrey H. Ruzal & Carly Baratt, Epstein Becker & Green, COVID-19, Work-from-Home Policies, and Maintaining Wage and Hour Compliance, WAGE & HOUR DEFENSE BLOG (March 10, 2020), <https://www.wagehourblog.com/2020/03/articles/wage-hour-class-actions/covid-19-work-from-home-policies-and-maintaining-wage-and-hour-compliance/>.

<sup>142</sup> Janice Fine, et. al.

<sup>143</sup> SEIU Local 1000, Gov. Newsom Signature Helps Prevent Pandemic Wage Theft (September 30, 2020), <https://www.seiu1000.org/post/gov-newsom-signature-helps-prevent-pandemic-wage-theft>.

legislatures could create a rebuttable presumption that adverse actions taken within a certain time period are retaliatory. Legislatures could also provide clearer and more comprehensive definitions of the types of enforcement activity that are protected and lower the standard of causation that employees are required to prove to show that an adverse employment action was retaliatory.<sup>144</sup>

#### **IV. The Intra-Firm Legal Boundaries between Employees and their Employers**

Changed working conditions for millions of employees have called into question those laws regulating the legal classification of workers and the rights of workers vis-a-vis their employers.

##### **A. Classification as Employee or Independent Contractor**

##### **1. Pandemic Effects on the Gig-Economy**

The gig-economy is a relatively recent phenomenon in employment and labor law. "In a gig economy, temporary, flexible jobs are commonplace, and companies tend toward hiring independent contractors and freelancers instead of full-time employees."<sup>145</sup> The central issue with gig workers is whether they should be deemed "employees" or "independent contractors." This classification has vast implications for the overall expenses of a company and for the workers themselves. Employers must pay their employees benefits such as sick leave, provide overtime payment, and guarantee minimum wages. Conversely, independent contractors are not subject to most benefits and protections, and employers are generally not liable for their actions. Companies like Uber utilize this cost leverage and survive by using independent contractors in myriad ways to push their brand and product while paying lower costs for the work. This practice can be sustainable, yet it is limited to the political, legal, and societal consequences involving gig-economy workers' rights and duties.

Uber, Rover, Lyft, DoorDash, and AirBnB, all provide their services in a "gig" format. Furthermore, judicial and legislative determinations over the gig-economy can also affect larger employers and independent contractor economies that typically involve immigrant workers in agriculture, manufacturing, and construction. This new structure of employment relations has taken front stage as a preeminent issue in modern employment law. Questions of employee classification and independent contractor protections have been brought up in scholastic and legislative endeavors but most recently, the Covid-19 pandemic has introduced secondary considerations and has directly affected the gig-economy.

Uber and the State of California have provided the primary battleground over the legality of lucrative gig-economy practices and policies. In May 2020, California Attorney General Xavier Becerra and attorneys from major California cities sued Uber and Lyft, arguing that the drivers should be classified as employees under the state's "Assembly Bill 5 (AB-5)" law that went into

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<sup>144</sup> Janice Fine, et. al.

<sup>145</sup> Gig Economy, INVESTOPEDIA (Apr. 13, 2020). <https://www.investopedia.com/terms/g/gig-economy.asp>

effect at the beginning of 2020.<sup>146</sup> The State has incentive to transition gig-economy workers into full-fledged employees through the enforcement of AB-5. "The UC Berkeley Labor Center found that if the companies treated drivers as employees, they would have paid \$413 million into California's unemployment insurance between 2014 and 2019 [and] [t]he state recently borrowed \$348 million from the federal government to make unemployment insurance payments to Californians."<sup>147</sup> Conversely, Uber warned that this forced shift would have unwanted consequences to consumers, as they will be forced to raise prices by 120% in some areas.<sup>148</sup> Further analysis of this lawsuit and the economic effects of AB-5 are crucial as they provide context for the effects Covid-19 has had on the gig-economy.

AB-5 expands on the ruling of the 2018 California Supreme Court case of *Dynamex Operations West, Inc. v. Superior Court of Los Angeles (Dynamex)*<sup>149</sup> by only permitting companies to designate their workers as independent contractors if they pass the "ABC" test. Essentially, AB-5 codified the three-prong test used in *Dynamex* to determine whether a worker is an independent contractor or employee.<sup>150</sup> Under *Dynamex*, a worker is classified as an employee by default, unless a company can prove that worker: (1) is free from the control and direction of the hirer over their work; (2) performs work that is outside the usual course of the hiring entity's business; and (3) is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.<sup>151</sup>

The codification of *Dynamex* through AB-5 has specific implications for hiring parties in California. First, it shifts the burden of proof onto hiring parties to prove their hires are independent contractors rather than employees. Additionally, it creates a bright-line criterium for practices which would characterize workers as independent contractor or employees. AB-5 specifically targets corporations attempting to capitalize on the cost benefits of hiring independent contractors while simultaneously seeking the benefits of using employees in their workforce. Before AB-5, simply titling a job or containing the words "independent contractor" might be enough to classify workers as independent contractors, and litigation was the only recourse for independent contractors to change their legal status to employees. Since litigation is expensive and time-consuming, it was more prudent for misclassified workers to seek new opportunities. Essentially, AB-5 strengthened protections for workers in California. Now, as employees, these individuals are "entitled to a minimum wage, expense reimbursements, employee benefits, rest breaks, and the

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<sup>146</sup> Lauren Feiner, California AG and Cities Sue Uber and Lyft, Alleging they Misclassified Workers as Contractors, CNBC (May 5, 2020, 1:52 PM). <https://www.cnbc.com/2020/05/05/california-ag-cities-sue-uber-and-lyft-over-worker-classification.html>

<sup>147</sup> Erin Mulvaney, Gig Economy Feels Bite of California Law in Uber, Lyft Loss, BLOOMBERG (Aug. 11, 2020, 12:21 PM). <https://news.bloomberglaw.com/daily-labor-report/gig-economy-feels-bite-of-california-law-after-uber-lyft-loss>

<sup>148</sup> Uber, Analysis on Impacts of Drive Reclassification, MEDIUM, (May 28, 2020).

<sup>149</sup> *Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 7 (Cal. 2018).

<sup>150</sup> California Assembly Bill 5 (AB5), INVESTOPEDIA (Nov. 4, 2020).

<sup>151</sup> *Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 7 (Cal. 2018).

other benefits afforded to employees under California state law."<sup>152</sup>

The California lawsuit's outcome will have drastic effects on California's gig-economy and set persuasive precedent throughout the nation. Consequently, companies utilizing the gig-economy have rigorously fought against it. Uber has claimed their drivers' classification as independent contractors passes the "ABC" test because their drivers are not a part of their ordinary business.<sup>153</sup> Thus, Uber argues that they have no control over their drivers within the independently established ride-hailing trade. Additionally, as push back against litigation, Uber and Lyft have proposed establishing a \$21-per-hour minimum wage for California drivers instead of reclassifying their drivers as employees. Finally, gig-economy companies pledged \$90 million on a ballot initiative for the 2020 election, which sought to side-step the language of AB-5. This initiative appeared on ballots as Proposition 22.

The procedural posture and circumstances surrounding this lawsuit have not been straightforward. After a California judge wrote an injunction requiring Uber and Lyft to convert their California drivers from independent contractors to employees while the lawsuit was being argued, Uber and Lyft threatened to pull out of the California market entirely.<sup>154</sup> Eventually, the court relented and granted a reprieve from the order. After the reprieve, Uber and Lyft stayed in the California market and campaigned for citizens to vote in favor of Proposition 22 in the upcoming Presidential Election. Finally, before the election, an appeals court reversed the reprieve and again required Uber and Lyft to classify their drivers as employees.<sup>155</sup> While a legal issue would typically be handled through legislative or judicial means, the Covid-19 pandemic has added additional twists and considerations to the gig-economy while inviting stricter scrutiny into the economic environment.

The Covid-19 pandemic has provided new obstacles while blurring the lines between independent contractors and employees in the gig-economy. First, gig-economy usage is down due to the nature of the pandemic. People are more cognizant of their health and of interacting with strangers outside of their immediate household.<sup>156</sup> Thus, the gig-economy has been underutilized, especially in the ride-hailing industries. This downward pressure has forced Uber to push back against AB-5 and the California lawsuits to an even greater extent, as they likely cannot afford the financial obligations to switch workers to employees while battling decreased revenue brought on

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<sup>152</sup> California Assembly Bill 5 (AB5), INVESTOPEDIA (Nov. 4, 2020).

<sup>153</sup> Annie Palmer, Uber Says Drivers Aren't Part of its 'Usual Course' of Business, CNBC (Sep. 11, 2019, 4:41 PM). <https://www.cnbc.com/2019/09/11/california-passes-assembly-bill-5-for-gig-workers.html>

<sup>154</sup> Uber, Lyft Must Convert Drivers into Employees, Judge Rules, BLOOMBERG (Aug. 10, 2020, 6:09 PM); see also Shannon Bond, Uber, Lyft Will Not Suspend Service in California After Court Gives Them More Time, NPR (Aug. 20, 2020 5:01 PM). <https://www.npr.org/2020/08/20/903927809/uber-lyft-will-not-suspend-service-in-california-after-court-gives-them-more-tim>

<sup>155</sup> Sara Ashley O'Brien & CNN Business, Uber and Lyft Must Reclassify Drivers as Employees, Appeals Court Finds, CNN (Oct. 23, 2020 1:19 AM).

<sup>156</sup> Scott A. Scanlon, Dale M. Zupsansky, & Stephen Sawicki, Covid-19's Impact on the Gig Economy, HUNT SCANLON MEDIA (Oct. 16, 2020). <https://huntscanlon.com/covid-19s-impact-on-the-gig-economy/> How the Covid-19 Pandemic has Disrupted Demand in Gig Economy, U. CHI. NEWS (Aug. 19, 2020).

by the Covid-19 pandemic. Thus, the result of the ongoing legal battle in California is of extreme importance to Uber and the rest of the gig economy — who undoubtedly face similar financial crunches.

Additionally, misclassified workers fear they do not receive protections from employers that they would receive if they were correctly classified as employees. The Covid-19 pandemic has created this pressure and has directly affected the employment practice of gig-economy employers by forcing them to provide expanded services to their independent contractors in an attempt to quell concerns. Uber has implemented "Door-to-Door Safety Standards" aimed at appeasing their drivers and the populace.<sup>157</sup> Among other things, these standards seek to feed and provide free travel to healthcare workers, provide disinfectants to drivers, and implement a mask mandate while using their ride-hailing service. While these measures may be respected on a societal level, they concurrently blur the level of control deferred to independent contractors. Thus, they encourage proponents of the California lawsuit and AB-5 who argue gig-economy workers should be classified as employees.

The Covid-19 pandemic has additionally exacerbated concerns for the subset of individuals who are championing the California litigation as a way to unionize their workforce and receive the protections and benefits they think they deserve. Typically, employees are legally obligated to receive overtime pay and they may also receive benefits such as paid leave. These perks would help offset the pandemic's risks. Nevertheless, because of their classification as independent contractors, gig-economy workers might be trapped working regardless of the current health and safety risks without offsetting any of that risk.

Many gig-economy workers prefer their independent contractor status and have sided with Uber in the recent litigation.<sup>158</sup> These workers fear losing their income, their freedom to work when they want to, and the ability to control their work. However, the Covid-19 pandemic is creating economic pressures on these individuals regardless of their personal risk assessment of the health situation. Covid-19 has led to an increase in competition for gig-economy workers.<sup>159</sup> Laid-off or furloughed employees, due to the Covid-19 pandemic, have entered the gig-economy looking for new sources of income and have swamped the market. An increase in supply may provide a diminished income for all independent contractors and result in the same economic effect that these "pro-Uber" independent contractors feared. Thus, the internal split over the appropriate direction of classification for gig-economy workers extends into the workers themselves with both sides affected by Covid-19.

Fortunately, California has not had to wait until the conclusion of the lawsuit against Uber to receive an answer over gig-economy worker classification. In the November Presidential election, Proposition 22 was passed and effectively side-stepped AB-5 and the *Dynamex* "ABC" test by

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<sup>157</sup> See UBER CORONAVIRUS. <https://www.uber.com/us/en/coronavirus/>

<sup>158</sup> City News Service & Lemor Abrams, California Judge Rules Uber, Lyft Drivers are Employees, CBS 8 (Aug. 10, 2020, 10:06 PM). <https://www.cbs8.com/article/news/local/california-judge-rules-uber-lyft-drivers-are-employees-assembly-bill-5/509-164705d0-ba3b-4b6d-aa89-90419e9de9bc>

<sup>159</sup> Scott A. Scanlon, Dale M. Zupsansky, & Stephen Sawicki, et. al.

classifying ride-hail and delivery drivers as independent contractors while forfeiting some concessions on benefits, including a minimum earnings guarantee based on "engaged time" when a driver is fulfilling a ride or delivery request, but not the time they spend waiting for a gig.<sup>160</sup>

The litigation and legislative fallout of California's political and legal battle will undoubtedly send ripples throughout the nation and act as a catalyst for other states to interpret their classification of gig-economy workers. For example, New Jersey, Massachusetts, and Connecticut also use the *Dynamex* "ABC" test for determining who is an independent contractor. Additionally, Massachusetts has sued Uber and Lyft over driver classification, and New Jersey fined Uber \$650 million for not paying unemployment and disability insurance taxes due to misclassifying drivers as independent contractors. Finally, other states, including New York and Illinois, have considered worker classification legislation similar to AB-5.<sup>161</sup>

Since the passage of Proposition 22, Uber advocated similar statutes in other states, to extend the favorable financial burden of Proposition 22 to other jurisdictions.<sup>162</sup> These standards act as a solid middle-ground for weighing the advantages and concerns of gig-economy workers while also considering Uber's corporate arguments. However, it is not without faults. Critics of Proposition 22, and thus similar statutes, argue these statutes would continue to mischaracterize the work performed within the gig-economy while favoring corporations at the direct expense of individual workers.

In direct contention with Uber's legislative push, other states are continuing the fight that California started — they believe gig-economy workers should be considered employees, and the Covid-19 pandemic is another example of why correct characterizations are essential. However, since worker classification is established under each state's laws, and thus individual states must introduce their own legislation, classification may become a politicized battle with mixed results spreading throughout the nation.” As current and upcoming challenges — such as the Covid-19 pandemic — will continue to affect how companies operate, these challenges may exacerbate the continuing divide between the gig-economy and worker classifications in a myriad of directions based on the overarching laws of any specific state. Until a Supreme Court ruling clearly defines the law, the gig-economy will evolve in vastly different ways between the States and ultimately remain under extensive pressure from external crises such as the Covid-19 pandemic. Effects of Sustained Work-from-Home on the customary classification tests for Independent Contractors The Covid-19 Pandemic has thrust tens of millions of workers in the United States into full-time remote work, which could impact their legal classification as either independent contractor or employee.

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<sup>160</sup> Sara Ashley O'Brien & CNN Business. As it currently stands, the gig-economy will seemingly survive in California. (Sara Ashley O'Brien & CNN Business) <https://www.cnn.com/2020/10/23/tech/uber-lyft-california-appeal/index.html> (U. Chi.) <https://news.uchicago.edu/story/how-covid-19-pandemic-has-disrupted-demand-gig-economy>

<sup>161</sup> Eli Rosenberg, Gig Economy Bills Move Forward in Other Blue States, After California Clears the Way, WASH. POST (Jan. 17, 2020 5:00 AM). <https://www.washingtonpost.com/business/2020/01/17/gig-economy-bills-move-forward-other-blue-states-after-california-clears-way/>

<sup>162</sup> Cyrus Farivar, Uber, Lyft Could Expand New California Gig Economy Model to Other States, Experts Say, NBCNEWS (Nov. 5, 2020, 4:01 AM). (Cyrus Farivar) <https://www.nbcnews.com/business/business-news/uber-lyft-could-expand-new-california-gig-economy-model-other-n1246533>).

This classification has extensive consequences for statutory coverage, since most statutes regulate only those who are covered as employees and do not cover those workers classified as independent contractors.

The legal classification of a worker as an independent contractor or as an employee has wide reaching implications on how the law treats that worker. For example, the classification between an independent contractor or employee dictates whether a particular law or set of protections applies to the worker at all. The classification is usually analyzed through a balancing test focusing on the relationship between the worker and the employer.

Both the Fair Labor Standards Act (FLSA) and the worker's compensation systems in the United States use balancing tests to determine a worker's classification as either an employee or independent contractor. Protections under both the FLSA and worker's compensation are reserved only for workers that are classified as employees.

Courts have developed various tests to evaluate whether a worker would be classified as an independent contractor or an employee for worker's compensation throughout the years. These tests are always balancing tests that weigh a series of factors related to the relationship between employer and worker to determine which way their relationship will be classified. In each case, the court's balancing test evaluated between 6 and 10 different factors in determining the classification of the employment relationship. The emphasis of these factor tests is placed on the extent to which the employer has control over the worker and on the worker's economic dependence on the employer.

The most commonly used test to determine worker classification is the balancing test outlined in *Donovan*.<sup>163</sup> The *Donovan* test evaluates (1) the nature and degree of control over how work is performed, (2) the worker's opportunity for profit and loss, (3) the worker's investment in equipment and materials, (4) if the work being performed is a special skill, (5) the permanency and duration of the relationship between the employer and worker, (6) whether the work is an integral part of the employer's business, and lastly, (7) the degree of economic dependence the worker has on the employer. This test places prime importance on the degree of control and economic dependence elements. While the test weighs all seven of the factors considered, these two are most important in determining the classification.

Since the COVID-19 Pandemic's explosive arrival in the United States at the beginning of 2020, the country's workforce has undergone rapid widespread changes in how and where their work is done. The need for social distancing has prompted employers to move nearly all work that can be conducted remotely to be done remotely. For those jobs that cannot be performed remotely, this has meant heavy increases in safety procedures and the use of personal protective equipment (PPE). Nearly all workers have seen at least some alteration in their work arrangements.

As corporate offices have moved their staff into remote work, some companies have stated their intent to phase back to in-person work as soon as it can be done safely, while other companies, including prominent tech companies such as Twitter, have gone as far as committing to a

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<sup>163</sup> *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376 (3d Cir. 1985).

permanent and indefinite shift to working remotely.<sup>164</sup> Some companies are opting to incorporate more flexible “core hours” structures in place of the traditional workday. Workers across the country have taken this opportunity to become more mobile, move to other states or work while traveling.<sup>165</sup>

For many frontline blue-collar workers, the COVID-19 Pandemic has brought a very different set of changes to their working relationships. These changes have impacted workers in frontline jobs traditionally classified as employees such as nurses, retail employees, restaurant workers and many others. Most notably however, it has also impacted many workers that have been classified as independent contractors, such as gig economy workers and commercial vehicle operators. These workers have seen widespread overhauls in how they conduct their day-to-day work due to COVID-19. This has included mandatory use of PPE such as masks, restrictions related to social distancing with other workers and customers, and other restrictions used to help prevent the pandemic’s spread. These directives are notable intrusions of employer control into the details of the work being conducted by workers who previously had enjoyed a fairly large degree of freedom from the companies they work for. Some of these additional controls may be temporary, but some of the health and safety changes put in place due to the pandemic may be here to stay. This phenomenon will likely impact several of the factors that go into the employee or independent contractor classification analysis. The factor weighted most heavily in the *Donovan* test for both the court’s FLSA and worker’s compensation analyses is employer control, which is also the factor that is shifting due to the pandemic. In addition to employer control, there are likely to be changes in the factor of investment in equipment and materials as well.

For white collar office workers, the transition to remote work has relaxed the control by their employer. Workers are now more able to choose their location and alter the times that they work throughout the day. This newfound flexibility will impact the factor of the test weighing employer control. When workers have increased autonomy, they are more likely to be classified as independent contractors. Additionally, many employers have provided generous remote work equipment packages, for their white-collar office workers. However, in nearly all circumstances these workers are now also increasingly using their own equipment at home whether it be a simple desk or an entire home office set-up.<sup>166</sup> Nearly all of the changes in this industry will tilt the scales in the classification balancing test away from employee and toward independent contractor status. This has the potential to disrupt the classifications of working relationships in one of the largest employment sectors in the United States. That is, unless the factors evolve along with the new

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<sup>164</sup> Kate Conger, Facebook Starts Planning for Permanent Remote Workers, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/2020/05/21/technology/facebook-remote-work-coronavirus.html?searchResultPosition=2>.

<sup>165</sup> Jessica Powell, The Rise of Remote Work Can Be Unexpectedly Liberating, N.Y. TIMES (Sept. 25, 2020), <https://www.nytimes.com/2020/09/25/opinion/remote-work-from-home-office.html?searchResultPosition=1>; David Streitfeld, The Long, Unhappy History of Working From Home, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/06/29/technology/working-from-home-failure.html>; Olivia Rockeman, Free to Work Remotely, Young Americans Are Covid Road Tripping, BLOOMBERG NEWS (Oct. 1, 2020), [https://www.bloomberg.com/news/articles/2020-10-01/covid-news-remote-work-lets-young-americans-take-road-trips?utm\\_source=pocket-newtab](https://www.bloomberg.com/news/articles/2020-10-01/covid-news-remote-work-lets-young-americans-take-road-trips?utm_source=pocket-newtab).

<sup>166</sup> Joan T. A. Gabel & Nancy Mansfield, On the Increasing Presence of Remote Employees: An Analysis of the Internet’s Impact on Employment Law As It Relates to Teleworkers, U. Ill. J.L. Tech. & Pol’y, 233 (2001).

norms.

On the other side of the scale, workers usually classified as independent contractors such as gig economy workers (Uber, Door Dash, etc.), commercial truck drivers, and construction contractors have seen increased control from employers through the enactment of health and safety measures.<sup>167</sup> These workers are now required to wear PPE such as facemasks to protect them and those that they interact with while working. In many cases this PPE is being provided by employers to ensure that all workers are using it regardless of their current classification status. Furthermore, the actions workers take while conducting their work have become more tightly controlled such as the maintaining of at least six feet from customers and fellow workers whenever possible. This increased degree of control moves the workers closer to becoming classified as employees rather than independent contractors. Unlike their white-collar office worker peers, blue-collar workers that have often been classified as independent contractors are seeing changes in their industries that push them closer to an employee classification.

These two countervailing changes, moving office workers in the direction of independent contractors and gig workers in the direction of employees could result in the dissolution of the boundaries in this classification altogether. Many have argued that the classification is a false dichotomy, and that all workers should be covered by these laws. On the other hand, this classification and distinction between employees and independent contractors has been around since the Statute of Laborers was passed after the Bubonic Plague, several pandemics ago.

## B. Employee Privacy During COVID-19

With minimal applicable law, employers have looked to federal guidance and best practices to combat coronavirus in the workplace.<sup>168</sup> This often leaves employers trying to balance public safety against employees' desire to keep health information private.<sup>169</sup> This balancing act will undoubtedly lead to litigation and courts should generally value public safety over employee privacy concerns. However, it is unlikely that employee privacy in regard to health information will continue to be subverted after the pandemic subsides.<sup>170</sup>

Preventing the spread of coronavirus in the workplace will inevitably involve intrusions into the normally private sphere of employee health information, as employers may require employees to report on their health and undergo medical testing. Unfortunately, the law does not

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<sup>167</sup> David Gonzalez, How Gig Workers Are Weathering the Virus Shutdown, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/nyregion/coronavirus-new-york-freelance-gig-workers.html?searchResultPosition=8>.

<sup>168</sup> Ian Carleton Schaefer & Brock J. Seraphin, *Rule 5: Yes, My Employer Can Do That: Balancing Employers' Rights and Responsibilities with Employee Privacy – Return to Work in the Time of COVID-19*, NAT'L L. REV. (Sept. 10, 2020), <https://www.natlawreview.com/article/rule-5-yes-my-employer-can-do-balancing-employers-rights-and-responsibilities>.

<sup>169</sup> Allison Grande, *Employers Face Privacy Balancing Act in Coronavirus Fight*, LAW 360 (March 12, 2020, 10:07 PM), <https://www.law360.com/articles/1252737/employers-face-privacy-balancing-act-in-coronavirus-fight>

<sup>170</sup> See Mike Juang, *Here's What Employers Can and Can't Do When They Take Your Temperature in Return to Work*, CNBC (May 29, 2020, 12:45 PM), <https://www.cnbc.com/2020/05/29/what-employers-can-legally-ask-about-coronavirus-in-return-to-work.html>.

provide definitive answers as to what boundaries employers must respect. At first, HIPAA appears to provide guidance, as it protects the confidentiality of medical information.<sup>171</sup> However, HIPAA generally only applies to health care providers and health care plans.<sup>172</sup> Consequently, unless an employer obtained an employee's medical information from their group health care plan, HIPAA will not regulate the employer's use of employee medical information.<sup>173</sup> Because most employers are obtaining health information directly from their employees, HIPAA largely does not protect employees' privacy in this area currently.<sup>174</sup>

The ADA provides some guidance, as it generally limits what medical information employers may seek from their employees.<sup>175</sup> However, the ADA contains an exception that allows employers to inquire into employees' health as long as the inquiry is job related and a business necessity, but employers must keep this information confidential.<sup>176</sup> Because this exception is vague, the EEOC has released guidance, based on CDC guidelines, clarifying what actions will not violate the ADA right now. Employers, therefore, have consistently looked to CDC and EEOC guidance to determine what they can ask of their employees and states are routinely directing employers to follow this federal guidance.<sup>177</sup> Because there are no answers regarding what employers should ask of their employees, employers generally follow best practices in conjunction with these guidelines.<sup>178</sup>

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<sup>171</sup> See David J. Reis et al., *Employee Privacy with Respect to COVID-19*, ARNOLD & PORTER (Apr. 2, 2020), <https://www.arnoldporter.com/en/perspectives/publications/2020/04/employee-privacy-with-respect-to-covid>.

<sup>172</sup> See *id.*; Allison Grande, *Employers Face Privacy Balancing Act in Coronavirus Fight*, LAW 360 (March 12, 2020, 10:07 PM), <https://www.law360.com/articles/1252737/employers-face-privacy-balancing-act-in-coronavirus-fight>;

<sup>173</sup> David J. Reis et al., *Employee Privacy with Respect to COVID-19*, ARNOLD & PORTER (Apr. 2, 2020), <https://www.arnoldporter.com/en/perspectives/publications/2020/04/employee-privacy-with-respect-to-covid>; Natasha Singer, *Employers Rush to Adopt Virus Screening. The Tools May Not Help Much*, N.Y. TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/11/technology/coronavirus-worker-testing-privacy.html>.

<sup>174</sup> See David J. Reis et al., *Employee Privacy with Respect to COVID-19*, ARNOLD & PORTER (Apr. 2, 2020), <https://www.arnoldporter.com/en/perspectives/publications/2020/04/employee-privacy-with-respect-to-covid>.

<sup>175</sup> *Id.*; *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC (Sept. 8, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>176</sup> *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC (Sept. 8, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>177</sup> H.V. MacArthur, *Company Survival Guide to Care for Staff During the Coronavirus Pandemic*, FORBES (Apr. 1, 2020, 5:42 AM), <https://www.forbes.com/sites/hvmacarthur/2020/04/01/company-survival-guide-to-care-for-staff-during-the-covid-19-pandemic/?sh=35570c5b327a>; *Guidance for Employers and Employees on Workers' Rights and Safety*, ILL. DEP'T PUB. HEALTH, <https://dph.illinois.gov/covid19/community-guidance/workplace-health-and-safety-guidance/employee-employer-rights-and-safety>; *Novel Coronavirus (COVID-19) - Business & Organizations*, IOWA DEP'T PUB. HEALTH, <https://idph.iowa.gov/Emerging-Health-Issues/Novel-Coronavirus/Business-and-Organizations>; *Businesses*, MO DEP'T HEALTH & SENIOR SERVS., <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/businesses.php>.

<sup>178</sup> Ian Carleton Schaefer & Brock J. Seraphin, *Rule 5: Yes, My Employer Can Do That: Balancing Employers' Rights and Responsibilities with Employee Privacy – Return to Work in the Time of COVID-19*, NAT'L L. REV. (Sept. 10, 2020), <https://www.natlawreview.com/article/rule-5-yes-my-employer-can-do-balancing-employers-rights-and-responsibilities>; Mike Juang, *Here's What Employers Can and Can't Do When They Take Your Temperature in Return to Work*, CNBC (May 29, 2020, 12:45 PM), <https://www.cnbc.com/2020/05/29/what-employers-can-legally-ask-about>.

Employers must first determine how to protect employee privacy when an employee tests positive. The law is unclear on whether employers can require employees to report a positive test, but employers are strongly encouraging their employees to report positive tests, even when they work from home.<sup>179</sup>

With this in mind, does an at-will employee terminated for failing to report a positive test have a successful claim for wrongful discharge based on the theory that requiring employees to report positive tests was a violation of privacy? The answer may depend upon whether the state has a right to privacy guarantee in its constitution. Currently a handful of western states contain such a privacy guarantee while the rest do not.

Despite the absence of case law on this question, an employee would likely be unsuccessful in pursuing a wrongful discharge claim based on those facts alone. Even in states with an expansive public policy exception, and a right to privacy in the state's constitution, like Alaska, the employee needs a compelling narrative to have a successful wrongful discharge claim based on a privacy violation. Because the employer's decision to terminate the employee was likely motivated by a pressing public safety concern, a court would likely find the employee's privacy interest outweighed. This situation is comparable to the *Luedtke* case, where the employer had a valid safety reason for requiring employee drug tests. However, an employee with a powerful narrative may have a stronger case. For example, if the employee worked from home, was asymptomatic, and had no contact with fellow employees, the public safety concerns justifying the employer's decision seem smaller in comparison to the privacy intrusion on the employee. But without a strong fact pattern, the employee's claim will likely be unsuccessful.

Once an employee has reported a positive test, an employer is not generally required to report this information to local, state, or federal health authorities, but best practice is to do so.<sup>180</sup> The issue of whether, how, and to whom an employer must report positive tests due to workplace exposures varies by location.<sup>181</sup> This is another area of confusion due to the absence of an OSHA standard. Best practice also encourages an employer to disclose the positive test to employees who

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[coronavirus-in-return-to-work.html](#).

<sup>179</sup> See H.V. MacArthur, *Company Survival Guide to Care for Staff During the Coronavirus Pandemic*, FORBES (Apr. 1, 2020, 5:42 AM), <https://www.forbes.com/sites/hvmacarthur/2020/04/01/company-survival-guide-to-care-for-staff-during-the-covid-19-pandemic/?sh=35570c5b327a>; *Contract Tracing in Non-Healthcare Workplaces*, CDC (Oct. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/contact-tracing-nonhealthcare-workplaces.html>.

<sup>180</sup> See Ian Carleton Schaefer & Brock J. Seraphin, *Rule 5: Yes, My Employer Can Do That: Balancing Employers' Rights and Responsibilities with Employee Privacy – Return to Work in the Time of COVID-19*, NAT'L L. REV. (Sept. 10, 2020), <https://www.natlawreview.com/article/rule-5-yes-my-employer-can-do-balancing-employers-rights-and-responsibilities>; *Contract Tracing in Non-Healthcare Workplaces*, CDC (Oct. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/contact-tracing-nonhealthcare-workplaces.html>; *When and to Whom Does an Employer Have a Duty to Report a COVID-19 Case?*, VENABLE LLP (Apr. 8, 2020), <https://www.venable.com/insights/publications/2020/04/when-and-to-whom-does-an-employer-have-a-duty-to#:~:text=There%20is%20currently%20no%20federal,other%20federal%20or%20state%20agencies.https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>.

<sup>181</sup> *FAQs for Workplaces & Businesses*, CDC (Dec. 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>; *When and to Whom Does an Employer Have a Duty to Report a COVID-19 Case?*, VENABLE LLP (Apr. 8, 2020), <https://www.venable.com/insights/publications/2020/04/when-and-to-whom-does-an-employer-have-a-duty-to#:~:text=There%20is%20currently%20no%20federal,other%20federal%20or%20state%20agencies.https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>.

may have been in contact with the positive employee.<sup>182</sup> While employers may disclose the identity of the positive employee to the authorities, disclosing the positive employee's identity to their fellow employees is a different matter. EEOC guidance indicates that employers cannot disclose a positive employee's identity without the employee's written authorization.<sup>183</sup> Accordingly, best practice is to disclose the potential coronavirus contact to other employees and keep the positive employee's identifying information confidential.<sup>184</sup> When disclosing a positive test to other employees, best practice would encourage an employer to inform other employees as soon as possible,<sup>185</sup> but this is not always done. For example, REI failed to disclose a positive test in one of its stores to the other employees for at least a week and urged the positive employee to stay quiet about their result.<sup>186</sup> While REI changed their disclosure policy after employees signed a petition, many believe the company's failure to disclose was a calculated risk to keep their store open.<sup>187</sup>

Employers must also determine what they can require of their employees before they return to the workplace. Because merely questioning employees imposes minimal costs on the employer and can assist in detecting the virus, best practice is to question employees about any symptoms and whether they have been in contact with anyone with the virus.<sup>188</sup> EEOC guidance indicates that such questioning does not violate the ADA, but employers cannot ask whether anyone in the employee's family has had the virus, as questioning employees about family medical information violates GINA.<sup>189</sup>

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<sup>182</sup> Ian Carleton Schaefer & Brock J. Seraphin, *Rule 5: Yes, My Employer Can Do That: Balancing Employers' Rights and Responsibilities with Employee Privacy – Return to Work in the Time of COVID-19*, NAT'L L. REV. (Sept. 10, 2020), <https://www.natlawreview.com/article/rule-5-yes-my-employer-can-do-balancing-employers-rights-and-responsibilities>.

<sup>183</sup> *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC (Sept. 8, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>184</sup> Ian Carleton Schaefer & Brock J. Seraphin, *Rule 5: Yes, My Employer Can Do That: Balancing Employers' Rights and Responsibilities with Employee Privacy – Return to Work in the Time of COVID-19*, NAT'L L. REV. (Sept. 10, 2020), <https://www.natlawreview.com/article/rule-5-yes-my-employer-can-do-balancing-employers-rights-and-responsibilities>; SIMPSON THATCHER, STRATEGIES FOR COMPLYING WITH PRIVACY LAWS WHILE COLLECTING EMPLOYEE INFORMATION REGARDING THE CORONAVIRUS 1–2, 4 (2020).

<sup>185</sup> *Contract Tracing in Non-Healthcare Workplaces*, CDC (Oct. 22, 2020), <https://www.cdc.gov/coronavirus/2019-nCoV/community/contact-tracing-nonhealthcare-workplaces.html>.

<sup>186</sup> *REI's Response to Virus Cases Angers Employees*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/07/20/business/reis-response-to-virus-cases-angers-employees.html>; Sapna Maheshwari, *REI Faces Staff Backlash Over Response to Covid-19 Cases*, N.Y. TIMES (July 19, 2020), <https://www.nytimes.com/2020/07/19/business/coronavirus-rei-staff.html>.

<sup>187</sup> *REI's Response to Virus Cases Angers Employees*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/07/20/business/reis-response-to-virus-cases-angers-employees.html>; Sapna Maheshwari, *REI Faces Staff Backlash Over Response to Covid-19 Cases*, N.Y. TIMES (July 19, 2020), <https://www.nytimes.com/2020/07/19/business/coronavirus-rei-staff.html>.

<sup>188</sup> Mike Juang, *Here's What Employers Can and Can't Do When They Take Your Temperature in Return to Work*, CNBC (May 29, 2020, 12:45 PM), <https://www.cnbc.com/2020/05/29/what-employers-can-legally-ask-about-coronavirus-in-return-to-work.html>.

<sup>189</sup> *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC (Sept. 8, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

In regard to physical testing, best practices vary. While EEOC guidance indicates which tests do not violate the ADA,<sup>190</sup> employers are conducting cost-benefit analyses to determine what tests they should implement.<sup>191</sup> Because checking employees' temperatures is less intrusive, cost effective, and can assist in detecting the virus, it is considered best practice.<sup>192</sup> However, checking employees' temperatures is not the most effective way to detect the virus because many individuals are asymptomatic.

A more effective way to detect the coronavirus would be to test employees for the virus itself. Whether testing is considered best practice seems to depend on the circumstances. EEOC guidance indicates that employers may test employees for the virus according to CDC testing guidelines.<sup>193</sup> However, because of the expense associated with testing, employers are unlikely to regularly test their employees unless the failure to test could be costly. One industry that frequently tests its employees is the NFL.<sup>194</sup> Because the players and staff regularly come in close contact with each other, creating a high risk of spreading the virus, the NFL has been testing its players and staff multiple times a week for several months.<sup>195</sup> While this testing is expensive, the consequences of not testing could result in greater losses, as the entire season could be canceled. On the other hand, large retail chains like Target are not testing the employees working within their stores.<sup>196</sup> Instead, they ask employees to monitor their own symptoms and offer paid leave if an employee may be positive. Although there is a risk that employees in these stores could spread the virus to customers and other employees, these employers likely have not implemented widespread testing because the costs to them associated with the risk of spreading coronavirus in the workplace do not outweigh the costs of testing employees.

Finally, testing employees for coronavirus antibodies may be another way to assess the

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<sup>190</sup> *Id.*

<sup>191</sup> See TARGET, SAFE RETAIL: CONSIDERATIONS FOR RETAIL OPERATIONS POST COVID-19 5 (2020) [https://corporate.target.com/\\_media/TargetCorp/about/pdf/Target\\_SAFE\\_Retail\\_Considerations-for-Retail-Operations-Post-COVID-19.pdf](https://corporate.target.com/_media/TargetCorp/about/pdf/Target_SAFE_Retail_Considerations-for-Retail-Operations-Post-COVID-19.pdf); Andrew Beaton, *Coronavirus is Pushing the NFL Toward a Financial Cliff*, WALL ST. J. (July 24, 2020), <https://www.wsj.com/articles/coronavirus-is-pushing-the-nfl-toward-a-financial-cliff-11595592000>.

<sup>192</sup> See Mike Juang, *Here's What Employers Can and Can't Do When They Take Your Temperature in Return to Work*, CNBC (May 29, 2020, 12:45 PM), <https://www.cnbc.com/2020/05/29/what-employers-can-legally-ask-about-coronavirus-in-return-to-work.html>.

<sup>193</sup> *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC (Sept. 8, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>194</sup> *NFL Issues New Procedures for Teams Following COVID Outbreak*, AP NEWS (Oct. 1, 2020), <https://apnews.com/article/virus-outbreak-nfl-pandemics-tennessee-titans-football-908b41ea3c3b8432803373bec94f3279>; Kevin Seifert, *NFL Says It Will Now Test Players, Coaches, Other Personnel For COVID-19 on Game Days*, ESPN (Oct. 12, 2020), [https://www.espn.com/nfl/story/\\_/id/30103569/nfl-says-now-test-players-coaches-other-personnel-covid-19-game-days](https://www.espn.com/nfl/story/_/id/30103569/nfl-says-now-test-players-coaches-other-personnel-covid-19-game-days).

<sup>195</sup> *NFL Issues New Procedures for Teams Following COVID Outbreak*, AP NEWS (Oct. 1, 2020), <https://apnews.com/article/virus-outbreak-nfl-pandemics-tennessee-titans-football-908b41ea3c3b8432803373bec94f3279>; Kevin Seifert, *NFL Says It Will Now Test Players, Coaches, Other Personnel For COVID-19 on Game Days*, ESPN (Oct. 12, 2020), [https://www.espn.com/nfl/story/\\_/id/30103569/nfl-says-now-test-players-coaches-other-personnel-covid-19-game-days](https://www.espn.com/nfl/story/_/id/30103569/nfl-says-now-test-players-coaches-other-personnel-covid-19-game-days).

<sup>196</sup> TARGET, SAFE RETAIL: CONSIDERATIONS FOR RETAIL OPERATIONS POST COVID-19 5 (2020) [https://corporate.target.com/\\_media/TargetCorp/about/pdf/Target\\_SAFE\\_Retail\\_Considerations-for-Retail-Operations-Post-COVID-19.pdf](https://corporate.target.com/_media/TargetCorp/about/pdf/Target_SAFE_Retail_Considerations-for-Retail-Operations-Post-COVID-19.pdf).

threat of coronavirus in the workplace, but it is not best practice. The CDC announced that antibody tests should not be used to make decisions, so EEOC guidelines state that employers cannot require employees to complete an antibody test before working in-person.<sup>197</sup> Employers, therefore, do not use antibody tests.

Overall, employers are in a difficult position right now. They must facilitate a safe environment to continue operating; however, in order to facilitate such an environment, employers will invade employees' privacy without clear protection from the law. Employees seem to understand this balance, and most have not yet taken issue with the privacy intrusions, but lawsuits will likely emerge.

As the REI example showed, employees may begin to seek redress from their employer if the employer failed to disclose positive tests and the employee or someone close to them contracted the virus as a result.<sup>198</sup> Showing causation for these claims might be difficult, but employees in this situation may still attempt to attribute fault to their employer, especially if they have large medical bills. In response, employers may argue, as REI did when it was questioned about its failure to disclose, that they were attempting to protect employee privacy by delaying the disclosure of such information.<sup>199</sup> On the opposite end of the spectrum, employees will likely sue their employer for violating their privacy by disclosing too much of their information after they reported a positive test. Undoubtedly some employers will disclose the names of positive employees without permission from the employee, creating potential violations of the employee's privacy and the ADA.

Finally, there is already litigation over employers' testing procedures, and the number of claims will only grow. Whether it be the amount of testing, the type of testing, or the mechanism of testing, employees are likely to claim that an employer's required testing procedures invaded employee privacy. Amazon has already had a suit filed against it for the body scan technology it uses to test employees for coronavirus symptoms and in that suit, the employees are claiming the technology is an unnecessary invasion of their privacy.<sup>200</sup> The number of lawsuits like this will increase over the coming months, especially as the pandemic begins to fade and the privacy invasions seem less justified to the employees.<sup>201</sup>

Ultimately if these suits occur, their outcomes are uncertain because this area of law is often without clear precedent and companies have been basing their decisions on mere guidance and best

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<sup>197</sup> *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC (Sept. 8, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>198</sup> *REI's Response to Virus Cases Angers Employees*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/07/20/business/reis-response-to-virus-cases-angers-employees.html>; Sapna Maheshwari, *REI Faces Staff Backlash Over Response to Covid-19 Cases*, N.Y. TIMES (July 19, 2020), <https://www.nytimes.com/2020/07/19/business/coronavirus-rei-staff.html>.

<sup>199</sup> *REI's Response to Virus Cases Angers Employees*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/07/20/business/reis-response-to-virus-cases-angers-employees.html>; Sapna Maheshwari, *REI Faces Staff Backlash Over Response to Covid-19 Cases*, N.Y. TIMES (July 19, 2020), <https://www.nytimes.com/2020/07/19/business/coronavirus-rei-staff.html>.

<sup>200</sup> Lauraann Wood, *Amazon COVID-19 Scans Ignore Workers' Rights, Ill. Suit Says*, LAW 360 (Oct. 8, 2020, 5:05 PM), <https://www.law360.com/articles/1318190/amazon-covid-19-scans-ignore-workers-rights-ill-suit-says>.

<sup>201</sup> *See* Vin Gurrieri, *EEOC Coronavirus Guidance No Silver Bullet for ADA Risks*, LAW 360 (Apr. 3, 2020, 10:16 PM), <https://www.law360.com/articles/1260314/eeoc-coronavirus-guidance-no-silver-bullet-for-ada-risks>.

practices.<sup>202</sup> Judges will likely have to balance the relevant public policy considerations and determine which is more important—employee privacy or public safety. Because the pandemic is a threat to human life, the more important public policy should generally be safety. While employee privacy rights are incredibly important during ordinary life, the current period is not ordinary and such rights pale in comparison to the potential loss of life associated with the coronavirus. Employers generally should not incur liability for taking reasonable actions to prevent further infection. Of course, this balance is fact dependent. There may be situations where the privacy violation is legitimate and the public safety concern is minimal, like the hypothetical involving an asymptomatic employee working from home who was fired for failing to report a positive test. In these situations, the weightier public policy might be employee privacy.

Knowing that judges should generally value public safety over employee privacy right now, the real question is whether employee privacy will forever be altered. After the pandemic has subsided, employees will likely regain their pre-pandemic level of privacy in regard to their health information. Right now, employers are allowed to ask health related questions and perform medical tests because they need to conduct business and ensure the coronavirus does not spread in their workplace, creating a legitimate business necessity.<sup>203</sup> Employers do not ordinarily have a legitimate business necessity to obtain this information and after the pandemic is over, employers will likely violate the ADA if they continue to do so.<sup>204</sup> Therefore, employers, fearing litigation, will likely cease these practices on their own. Additionally, employers will likely abandon most of their current testing procedures because performing such tests will no longer be cost effective. This is not to say that all standards of employee privacy will revert to normal, as there are many privacy aspects to the pandemic that may be forever altered, like the privacy intrusions associated with working from home; however, the current intrusions into employee health will likely cease after the pandemic has subsided. That said, in the meantime, we can only hope that employers will continue to protect employee wellness while minimizing their intrusion on employee privacy.

### C. Whistleblowing under COVID

The legal system has always had problems creating the right incentives to encourage, support and protect whistleblowers. As in many areas, the pandemic has exacerbated these problems as well. Many of the whistleblowing circumstances have occurred in the area of OSHA, as described above. The pandemic has inundated state and federal OSHA offices with complaints. Because there continues to be confusion about the standards of protection against COVID in workplaces, as well as great variations between states and among firms, it is difficult for employees who believe something is wrong to know whether it violates a legal standard or not. Whistleblowers always face the personal cost-benefit analysis between “doing the right thing” and potentially losing a job during an economic crisis.<sup>205</sup> The Biden Administration will hopefully

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<sup>202</sup> See Mike Juang, *Here's What Employers Can and Can't Do When They Take Your Temperature in Return to Work*, CNBC (May 29, 2020, 12:45 PM), <https://www.cnbc.com/2020/05/29/what-employers-can-legally-ask-about-coronavirus-in-return-to-work.html>.

<sup>203</sup> *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC (Sept. 8, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>204</sup> See Mike Juang, *Here's What Employers Can and Can't Do When They Take Your Temperature in Return to Work*, CNBC (May 29, 2020, 12:45 PM), <https://www.cnbc.com/2020/05/29/what-employers-can-legally-ask-about-coronavirus-in-return-to-work.html>.

<sup>205</sup> See, e.g., Bruce Rolfsen, *Workers Face Delays as Virus Whistleblower Cases Inundate OSHA*, BLOOMBERG L. (Aug. 18, 2020, 12:51 PM), <https://www.bloomberglaw.com/product/blaw/document/XF27K5KC000000>; Chris Marr,

handle COVID in ways that will avoid the whistleblower problems caused by the Trump Administration. The Biden Administration has already promulgated some OSHA guidelines and mask mandates. It will likely introduce worker-friendly COVID relief legislation, and boost whistleblower protections.<sup>206</sup> With Democrats in control of both the U.S. House and Senate, two federal COVID whistleblower protection bills may pass. Additionally, not only will COVID likely normalize online whistleblowing (with increasing numbers of employees working from home), but will also likely chill future health/safety whistleblowing—if employees are retaliated against for whistleblowing about a global pandemic, why would they blow the whistle about something that’s debatably “trivial” in comparison? As expected, whistleblower claims regarding COVID-19 are skyrocketing. For instance, from February to May 2020, OSHA received 30% more whistleblower complaints than it did during the same timeframe in 2019.<sup>207</sup> The Fisher Phillips law firm created a COVID litigation tracker, showing approximately 239 whistleblower or retaliation lawsuits as of November 19.<sup>208</sup> The vaccines (and whether vaccines will be mandatory) will cause another swarm of whistleblower complaints and lawsuits.<sup>209</sup> In June 2020, the National Employment Law Project found that “[o]ne in eight workers has perceived possible retaliatory actions by employers” after they “raised health and safety concerns during the pandemic.”<sup>210</sup> The National Employment Law Project’s report disclosed retaliations ranging from hostility, discharges, threats of discharge, and misinforming employees about their rights. Even more incriminating, systemic racism plays a role in COVID-19 whistleblowing: Black employees experienced retaliation at a rate of more than twice that of white workers. The ACLU of Iowa reported immigrants, Black, and Latinx Iowans are disproportionately affected by COVID; they hold the most outbreak-susceptible jobs.<sup>211</sup> Employees understandably expressed fear that they would be fired if they raised any COVID-19 concerns with their employer. Most cannot afford to lose their job, particularly in the middle of an economic crisis. Some employers have gone as far as implementing gag orders on its

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*Workplace Whistleblower Protections Inch Forward Amid Pandemic*, BLOOMBERG L. (Aug. 27, 2020, 11:31 AM), <https://www.bloomberglaw.com/product/blaw/document/X5GM25SO000000>.

<sup>206</sup> See, e.g., Fatima Hussein & Bruce Rolfsen, *Emergency Rule, More Enforcement Forecast for OSHA Under Biden*, BLOOMBERG L. (Nov. 7, 2020, 1:07 PM), <https://www.bloomberglaw.com/product/blaw/document/X4L2AJ3K000000>; John Lauinger, *What Biden’s Win Means for Labor-Focused Federal Agencies*, BLOOMBERG L. (Nov. 9, 2020, 7:16 AM), <https://www.bloomberglaw.com/product/blaw/document/X8J1SIBK000000>; Eli Rosenberg, *How Biden Could Revamp Worker Health Protections in the Midst of the Deadly Pandemic*, WASH. POST (Nov. 13, 2020, 3:08 PM), <https://www.washingtonpost.com/business/2020/11/13/biden-osha-workplace-protections/>.

<sup>207</sup> DEPT. OF LAB., OFF. INSPECTOR GEN.—OFF. AUDIT, NO. 19-20-010-10-105, REPORT TO THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION: COVID-19: OSHA NEEDS TO IMPROVE ITS HANDLING OF WHISTLEBLOWER COMPLAINTS DURING THE PANDEMIC 3 (Aug. 14, 2020), <https://aboutblaw.com/SEJ>; see also *COVID-19 Response Summary*, OSHA (last updated Nov. 18, 2020, 10:30 AM), [https://www.whistleblowers.gov/covid-19-data#complaints\\_filed](https://www.whistleblowers.gov/covid-19-data#complaints_filed).

<sup>208</sup> *COVID-19 Employment Litigation Tracker*, FISHER PHILLIPS, <https://www.fisherphillips.com/covid-19-litigation>.

<sup>209</sup> Cf. Bruce Rolfsen, *Covid-19 Employer Vaccination Programs Could be Sought by OSHA*, BLOOMBERG L. (Sept. 18, 2020, 4:30 AM), <https://www.bloomberglaw.com/product/blaw/document/X1EKQRO000000>.

<sup>210</sup> NAT’L EMPL. L. PROJECT, SILENCED ABOUT COVID-19 IN THE WORKPLACE 1 (June 2020), <https://s27147.pcdn.co/wp-content/uploads/Silenced-About-COVID-19-Workplace-Fear-Retaliation-June-2020.pdf>.

<sup>211</sup> Complaint from Rita Bettis Austen, Legal Dir., ACLU of Iowa, et al., to Kim Stille, Reg’l Adm’r, Occupational Safety and Health Admin., at 2 (Nov. 13, 2020), [https://www.aclu-ia.org/sites/default/files/2020-11-12\\_final\\_caspa.pdf](https://www.aclu-ia.org/sites/default/files/2020-11-12_final_caspa.pdf).

employees.<sup>212</sup> COVID whistleblowing by healthcare employees has been front-and-center. The New York Times reported that one nurse was fired and banned from the hospital's premises; one doctor was reassigned for raising concerns about equipment and testing shortages; and another nurse was suspended for raising concerns on her private Facebook page.<sup>213</sup> Other industries are retaliating against employees, too: dating app companies, restaurants, meat packing plants, the government.<sup>214</sup> The Government Accountability Project argues that employer retaliation prevents the truth about COVID, and "[t]he act of keeping the truth from the public during a pandemic is gross negligence."<sup>215</sup> OSHA is typically thought of as the chief defender of workers' health and safety rights. However, under the Trump Administration, OSHA did not issue any mandatory COVID-19 regulations,<sup>216</sup> and the Trump Administration also showed hostility towards processing OSHA's overwhelming number of complaints. Unsurprisingly, then the Office of Inspector General found that OSHA has fumbled its whistleblower response as well. Since the beginning of the pandemic, OSHA investigators have taken approximately 279 days to close a case, which the Office of Inspector general warns "could leave workers to suffer emotionally and financially. . . . [And] may also lead to the erosion of key evidence and witnesses."<sup>217</sup> Experts believe Biden's OSHA will operate much like Obama's, with heavy enforcement of penalties and anti-retaliation rules (specifically 29 C.F.R. § 1904.35(b)(1)(iv)<sup>218</sup>), an emergency temporary standard, and more inspectors. In Congress, Representative Jackie Speier introduced the Covid-19 Whistleblower Protection Act, and Senator Elizabeth Warren introduced the Coronavirus Oversight & Recovery

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<sup>212</sup> Josh Eidelson, *Shut Up and Work: Covid Gag Rules Leave Everyone in the Dark*, BLOOMBERG L. (Aug. 27, 2020, 3:00 AM), <https://www.bloomberglaw.com/product/blaw/document/X6M74VDS000000>.

<sup>213</sup> Noam Scheiber & Brian M. Rosenthal, *Nurses and Doctors Speaking Out on Safety Now Risk Their Job*, N.Y. TIMES (Apr. 27, 2020), <https://www.nytimes.com/2020/04/09/business/coronavirus-health-workers-speak-out.html>; see also *Nurse Questions Medical Care at Immigration Jail in Georgia*, AP NEWS (Sept. 14, 2020), <https://apnews.com/article/georgia-virus-outbreak-hysterectomy-archive-immigration-30d71f010ec2696c5ca8b69e62b97c09>.

<sup>214</sup> See, e.g., Maria Perez, *Workers, Advocates Say Strauss Fired Meatpacking Workers After COVID-19 Safety Complaints*, MILWAUKEE J. SENTINEL (Aug. 9, 2020, 8:00 AM), <https://www.jsonline.com/story/news/2020/08/09/strauss-accused-firing-workers-after-covid-19-safety-complaints/3327237001/>; Daniel Wiessner, *McDonald's Worker Says He Lost His Job for Suing Over COVID-19 Protections*, REUTERS LEGAL (Nov. 12, 2020), [https://today.westlaw.com/Document/I85dddab0252c11eb96408cad4ba40ea4/View/FullText.html?transitionType=SearchItem&contextData=\(sc.Default\);Hailey Konnath, Ex-Grindr VP Says She Was Fired for Questioning PPP Loan, LAW360 \(Sept. 24, 2020, 10:34 PM\), https://www-law360-com.proxy.lib.uiowa.edu/articles/1313645/ex-grindr-vp-says-she-was-fired-for-questioning-ppp-loan](https://today.westlaw.com/Document/I85dddab0252c11eb96408cad4ba40ea4/View/FullText.html?transitionType=SearchItem&contextData=(sc.Default);Hailey Konnath, Ex-Grindr VP Says She Was Fired for Questioning PPP Loan, LAW360 (Sept. 24, 2020, 10:34 PM), https://www-law360-com.proxy.lib.uiowa.edu/articles/1313645/ex-grindr-vp-says-she-was-fired-for-questioning-ppp-loan).

<sup>215</sup> Samantha Feinstein, *COVID-19: The Largest Attack on Whistleblowers in the World*, GOV'T ACCOUNTABILITY PROJECT (Apr. 8, 2020), <https://whistleblower.org/blog/covid-19-the-largest-attack-on-whistleblowers-in-the-world/>.

<sup>216</sup> DEPT. OF LAB., OSHA, NO. 3990-03 2020, GUIDANCE ON PREPARING WORKPLACES FOR COVID-19, at 4 (2020), <https://www.osha.gov/Publications/OSHA3990.pdf>; see also Eyal Press, *Trump's Labor Secretary Is a Wrecking Ball Aimed at Workers*, NEW YORKER (Oct. 26, 2020), <https://www.newyorker.com/magazine/2020/10/26/trumps-labor-secretary-is-a-wrecking-ball-aimed-at-workers>.

<sup>217</sup> DEPT. OF LAB., OFF. INSPECTOR GEN., at 2; see also NAT'L EMPL. L. PROJECT, OSHA MUST PROTECT COVID WHISTLEBLOWERS WHO FILE RETALIATION COMPLAINTS (Oct. 2020), <https://s27147.pcdn.co/wp-content/uploads/OSHA-Must-Protect-COVID-Whistleblowers-Who-File-Retaliation-Complaints-v2.pdf>.

<sup>218</sup> *Regulations (Standards—29 CFR)*, U.S. DEPT. OF LAB., OSHA, <https://www.osha.gov/laws-regs/regulations/standardnumber/1904>.

Ethics Act of 2020.<sup>219</sup> Unfortunately, no action has been taken on these bills since they were both introduced in June. They have a greater chance of passing now that Democrats control both houses. Few Midwest states' legislative and executive branches have introduced any form of COVID whistleblower protections. In the spring, Michigan governor Gretchen Whitmer and Minnesota governor Tim Walz released executive orders exclusively for whistleblower and anti-retaliation protections.<sup>220</sup> Colorado, Virginia, Oregon, Pennsylvania, Chicago, and Philadelphia have either passed or introduced notable COVID whistleblower legislation, ordinances, or temporary standards.<sup>221</sup> Iowa has also failed whistleblowers as one can see from the failure to provide remedies in the Waterloo Tyson plant case described above. Not only did OSHA fail to investigate or cite violations, it has failed to pursue remedies in cases of retaliation under OSHA whistleblower protection provisions.

The Fisher Phillips law firm expects the Biden Administration to “seek more aggressive enforcement from [the OSHA] state counterparts.”<sup>222</sup> Regardless of COVID-specific legislation, it is difficult to say whether or not a discharged whistleblower would be protected under a state's statutes or public policy exception. Whistleblower protections are jerry-rigged; they vary from state to state. A Tyson employee in Nebraska may be less protected than a Tyson employee in Iowa. To deal with this state-to-state disparity, it would be desirable to create blanket protections for whistleblowers, especially COVID whistleblowers. Dana Gold, attorney for the Government Accountability Project, is in favor of a blanket protection; she has indicated that she thinks whistleblowers should be a protected status under the Civil Rights Act.<sup>223</sup> Nonetheless, given that President Biden is implementing some form of a mask mandate, it would be desirable to include any anti-retaliation provisions for those who report violations. Presidential Executive orders may provide a basis for the whistleblower to be protected from discharge under a public policy exception. Iowa courts are split on this issue—the Iowa Court of Appeals held federal law counts as a source of state public policy,<sup>224</sup> but the Iowa Supreme Court has dodged the issue.<sup>225</sup>

## D. Whistleblogging

COVID's effect on telecommuting, working from home, and social media will intensify whistleblower issues. Will employees be protected if they blow the whistle over Twitter, Reddit, or

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<sup>219</sup> Covid-19 Whistleblower Protection Act, H.R. 7227, 116th Cong. (2020); Coronavirus Oversight & Recovery Ethics Act of 2020, S. 3855, 116th Cong. (2020).

<sup>220</sup> Mich. Gov. Gretchen Whitmer, Exec. Order No. 2020-36 (Apr. 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-524136--,00.htm](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-524136--,00.htm); Minn. Gov. Tim Walz, Emergency Exec. Order No. 20-54 (May 2020), <https://www.leg.mn.gov/archive/execorders/20-54.pdf>.

<sup>221</sup> See 2020 Colo. Sess. Laws 1351; PHILA. PA., CODE § 9-5000 (2020); CHI., ILL., MUN. CODE § 1-24 (2020); OR. ADMIN. R. 437-001-0744 (2020); H.R. 2694, 2020 Gen. Assemb., Reg. Sess. (Pa. 2020); § 16VAC25-220, Emergency Temporary Standard Infectious Disease Prevention: SARS-CoV-2 Virus that Causes COVID-19 (Va. Dept. of Lab. & Indus., effective July 27, 2020).

<sup>222</sup> *Expect These 8 Changes to OSHA Under the Biden Administration*, FISHER PHILLIPS (Nov. 9, 2020), <https://www.fisherphillips.com/resources-alerts-expect-these-8-changes-to-osha-under>.

<sup>223</sup> See Dana L. Gold, *Introduction: Speaking Up for Justice, Suffering Injustice: Whistleblower Protection and the Need for Reform*, 11 SEATTLE J. FOR SOC. JUST. 555, 559–60 (2013).

<sup>224</sup> See *Smuck v. Nat'l Mgmt. Corp.*, 540 N.W.2d 669, 672 (Iowa Ct. App. 1995).

<sup>225</sup> See *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 285 n.4 (Iowa 2000).

Facebook? St. Louis University law professor Miriam Cherry coined the term “whistleblogging” to describe virtual whistleblowing.<sup>226</sup> Cherry points out that working from home can present similar ethical or safety dilemmas one would experience in-person: fraud and sexual harassment, for instance. Zoom’s video and un-muting functions may inadvertently expose problematic workplace behavior as in the case of Jeffrey Toobin. Essential workers have aired grievances online; nurses and doctors have reported staff and equipment shortages on Twitter and Facebook, and as mentioned above, one nurse was fired for posting on Facebook. Former Wuhan doctor Li Wenliang blew the whistle first in a chat group and subsequently published his story on his blog before his death.<sup>227</sup> A research article in the *Journal of Business Ethics* analyzed the theory of the “whistleblowing triangle” and found that after internally reporting, many whistleblowers opt for media exposure if the employer responded inadequately.<sup>228</sup> That may be why some COVID whistleblowers report online, or perhaps whistleblowers report online, instead of internally, because they know their employer will respond inadequately. The research article dubs them “skeptical whistleblowers.”<sup>229</sup> While states differ on whether a whistleblower is protected for reporting to the media or other external sources, Cherry argues for uniform law reform that (1) expands the definition of media to include blogs/social media, and (2) protects external whistleblowing.<sup>230</sup> Additionally, virtual whistleblowers could be protected by privacy laws (if the employee’s social media account is private), off-duty statutes, or the First Amendment (if a government employee).<sup>231</sup> Online whistleblowing in the wake of COVID may pressure states to introduce or expand external whistleblowing protections.

COVID-19 has “increase[d] cooperation globally in acting as a critical watchdog on government censorship of whistleblowers.”<sup>232</sup> Whistleblowers are often negatively labeled as tattletales or snitches, but the circumstances of the pandemic may shift public opinion in a positive direction. There may be some hope that stories like the Tyson plant incident—and the pandemic itself—will lead to enhanced protections, easier reporting mechanisms, increased enforcements, and potential incentives for whistleblowers.

## The Nature of the Message in Whistleblowing

Coronavirus whistleblowers are exposing two main types of wrongful acts related to COVID-

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<sup>226</sup> Miriam A. Cherry, *Virtual Whistleblowing*, 54 S. TEX. L. REV. 9, 14 (2012).

<sup>227</sup> *Li Wenliang: Coronavirus Kills Chinese Whistleblower Doctor*, BBC (Feb. 7, 2020), <https://www.bbc.com/news/world-asia-china-51403795>.

<sup>228</sup> Nadia Smaili & Paulina Arroyo, *Categorization of Whistleblowers Using the Whistleblowing Triangle*, 157 J. BUS. ETHICS 95, 95 (2019).

<sup>229</sup> *Id.* at 110.

<sup>230</sup> Cherry, at 33.

<sup>231</sup> Robert Sprague, *Fired for Blogging: Are There Legal Protections for Employees Who Blog?*, 9 U. PA. J. LAB. & EMP. L. 355, 376–85 (2007).

<sup>232</sup> Vigjilence Abazi, *Truth Distancing? Whistleblowing as Remedy to Censorship During COVID-19*, 11 EUR. J. RISK REGUL. 375, 376 (2020).

19: violations of health and safety and labor law,<sup>233</sup> as well as fraudulent financial acts.<sup>234</sup> Although, COVID-19 whistleblowers have been bringing lawsuits for retaliation, this country has only started to introduce specific federal legislation to protect COVID-19 whistleblowers.<sup>235</sup> Though, that legislation is primarily focused on protecting the economy rather than on protecting employees' and the public's health and safety.

*Whistleblowing about matters of health and safety*

No specific federal laws protecting *all* employees who raise COVID-19 safety concerns have yet been introduced in response to COVID-19. Federal laws have been introduced to protect certain COVID-19 whistleblowers—COVID-19 Whistleblowers Protection Act (“CWPA”) and the Coronavirus Oversight and Recovery Ethics Act (“CORE Act”).<sup>236</sup> However, neither act's primary purpose is to protect health and safety: the CWPA only covers employees who report employers that receive CARES Act funding and the CORE Act only covers employees that report misuse of governmental relief funds related to COVID-19.

A primary type of COVID-19 related whistleblowing is employees reporting unsafe working conditions in their place of work.<sup>237</sup> Examples include inadequate PPE, employers not implementing policies and practices that adhere to social distancing guidelines, inadequate ventilation systems, and inadequate cleaning and disinfection. Whistleblowing of such violations is incredibly important in uncovering employer practices that not only can put the health and safety of employees at risk, but also perpetuate the pandemic thereby putting the whole nation at risk. When employees do not feel adequately protected from employer retaliation, they do not come forward to alert others to unsafe working conditions.

Federal law protecting *all* employees, who reveal unsafe working conditions related to COVID-19, from retaliation is currently insufficient in protecting employees from retaliation. The primary federal law that can be used to protect *all* employees that speak out on unsafe working conditions is the Occupational Safety and Health Act (“OSH Act”)—which is neither new nor tailored to the pandemic. Section 11(c) of the Act prohibits employers from discharging or discriminating employees who exercise their right to raise health and safety complaints, including

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<sup>233</sup> see Samantha Feinstein, COVID-19: The Largest Attack on Whistleblowers in the World, GOVERNMENT ACCOUNTABILITY PROJECT (Apr. 8, 2020), <https://whistleblower.org/blog/covid-19-the-largest-attack-on-whistleblowers-in-the-world>.

<sup>234</sup> See COVID-19 Fraud, CONSTANTINE CANNON, <https://constantinecannon.com/practice/whistleblower/whistleblower-types/covid-19-fraud>.

<sup>235</sup> See Chris Marr, Workplace Whistleblower Protections Inch Forward Amid Pandemic, BLOOMBERG LAW (Aug. 27, 2020, 11:31 AM), <https://news.bloomberglaw.com/daily-labor-report/workplace-whistleblower-protections-inch-forward-amid-pandemic>.

<sup>236</sup> See Raskin

<sup>237</sup> Mathew LaGarde, COVID-19 Whistleblower Protections: Few Options for Workers Reporting Unsafe Working Conditions, THE NATIONAL LAW REVIEW (July 24, 2020), <https://www.natlawreview.com/article/covid-19-whistleblower-protections-few-options-workers-reporting-unsafe-working>.

refusing to work based on unsafe working conditions.<sup>238</sup> However, the Act does not give the employee a private right of action to sue the employer.<sup>239</sup> Rather, the Act allows employees to file a complaint with the OSHA agency. This reduces the employee to relying completely on the agency action. The Act does not assist the employee with resources to file a complaint nor does it grant an employee the right to appeal OSHA's decision. Furthermore, the Act has a short 30-day statute of limitations and extremely stringent requirements as to what constitutes a protected refusal to work.

Employers can retaliate against whistleblowing employees without significant penalty. For example, Amazon fired one its warehouse employees, Christopher Smalls,<sup>240</sup> for reporting to management that there was a visibly ill employee on the warehouse floor. He urged Amazon to shut down the warehouse for two weeks because it was impossible to know who the employee had been in contact with. Amazon refused and its only response was to urge Smalls to self-quarantine, rather than taking any precautions to keep other employees safe. After Smalls led a protest outside the warehouse, he was fired. The case went no further. However, Cal/OSHA closed over 29 complaints related to Amazon's working conditions, only one of which resulted in an inspection.<sup>241</sup> The complaints included Amazon trucks not being sanitized, employees failing to socially distance in meetings, work areas not being sanitized after infected workers were discovered, infected employees showing up to work without PPE, inability to social distance within fulfillment centers, and lack of enforcement of the mask policy. Furthermore, Cal/OSHA imposed on Amazon the smallest penalties that it had imposed on any employer related to COVID-19 related violations.

OSHA does not have procedures in place to adequately address COVID-19 complaints filed under the OSH Act. The National Employment Law Project ("NELP") reported that only 2% of COVID whistleblower complaints filed with OSHA from the start of the pandemic through August 2020 were investigated and resolved. OSHA dismissed or closed over 54% of the complaints without any investigation.

Some states and municipalities have attempted to fill the gap. Colorado passed a law barring an employer from retaliating against a worker for reporting violations of governmental health rules or unsafe working conditions related to "a public health emergency."<sup>242</sup> Colorado's law

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<sup>238</sup> See *id.* (citing 29 U.S.C. § 660(c)).

<sup>239</sup> See LaGarde, Mathew LaGarde, COVID-19 Whistleblower Protections: Few Options for Workers Reporting Unsafe Working Conditions, *THE NATIONAL LAW REVIEW* (July 24, 2020), <https://www.natlawreview.com/article/covid-19-whistleblower-protections-few-options-workers-reporting-unsafe-working>.

<sup>240</sup> See Carolyn Wheeler, Lessons from Amazon's Termination of a Warehouse Worker who Protested about Unsafe Conditions, *KATZ, MARSHALL, & BANKS, LLP* (April 13, 2020), <https://kmblegal.com/employment-law-blog/lessons-amazon%E2%80%99s-termination-warehouse-worker-who-protested-about-unsafe>.

<sup>241</sup> See Orlando Mayorquin, Amazon Workers Stage Vigil at Jeff Bezos' Beverly Hills Mansion, *CAL MATTERS* (October 14, 2020), <https://calmatters.org/california-divide/2020/10/amazon-warehouse-workers-bezos-mansion-prime-day>.

<sup>242</sup> See Col. Rev. Stat. §§ 8-14.4-102.

allows an employee to bring a private right of action in district court.<sup>243</sup> Similarly, the city of Philadelphia passed the Essential Workers Protection Act protecting employees who report unsafe working conditions related to COVID-19.<sup>244</sup> The act allows employees to bring a private right of action in court after first filing a complaint with the City's Department of Labor. The Philadelphia act also protects employees who refuse to work based on unsafe working conditions, unless the employer provides the employee with a suitable alternative work assignment or the city's or state's department of health has inspected the working conditions and deemed them safe. Chicago, Michigan, and New Jersey have also taken measures that protect employees who raise COVID-19 safety concerns.<sup>245</sup> Several other cities and states, such as Washington D.C. and Maryland do not provide employees with a private right of action.<sup>246</sup> Additionally, Virginia does provide employees with a private right of action and a 60-day limitations period filing a complaint.<sup>247</sup>

#### *Whistleblowing about matters of Financial Fraud*

The CWPA is pending legislation intended to protect employee whistleblowers whose employers are recipients of funds under the CARES Act.<sup>248</sup> The CWPA is intended to protect taxpayers' dollars, via the CARES Act and other COVID-19 federal relief, from being misused. Under the CWPA employees are protected from making "disclosures related to relief funds that stand as evidence of gross mismanagement or waste, danger to public health or safety, abuse of authority, or violation of law, rule or regulation." The CWPA dictates that employees must file the complaint with the Secretary of Labor within 3 years after learning about the alleged misconduct. If the employee does not receive administrative relief in a timely fashion from the Department of Labor, the CWPA affords the employee a jury trial in federal court.

Another type of whistleblowing that employees are engaging in is exposing employer fraud or misuse of governmental relief funds related to COVID-19.<sup>249</sup>

#### After the CWPA was created, the Coronavirus Oversight and Recovery Ethics Act

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<sup>243</sup> See Col. Rev. Stat. §§ 8-14.4-104.

<sup>244</sup> See Neveraz (citing Phila. Code § 9-5000 et seq.). Angela Quiles Nevarez, Philadelphia Enacts COVID-19 Whistleblower Legislation, JACKSONLEWIS (July 1, 2020), <https://www.jacksonlewis.com/publication/philadelphia-enacts-covid-19-whistleblower-legislation#:~:text=The%20Essential%20Workers%20Protection%20Act,%C2%A79%2D5000%20et%20seq.>

<sup>245</sup> See Marr.

<sup>246</sup> See Mathew LaGarde, COVID-19 Whistleblower Protections: Few Options for Workers Reporting Unsafe Working Conditions, THE NATIONAL LAW REVIEW (July 24, 2020), <https://www.natlawreview.com/article/covid-19-whistleblower-protections-few-options-workers-reporting-unsafe-working>. (citing D.C. Code § 32-1117; Md. Code, Labor & Empl. § 5-604).

<sup>247</sup> See LaGarde (citing Va. Code § 40.1-51.2:2).

<sup>248</sup> See Raskin. Press Release, Jamie Raskin, Congressman, House of Representatives, Speier, Raskin, Harris Introduce Legislation Ensuring Protection for Those Who Expose Waste, Fraud, Abuse in Federal Covid-19 Relief Effort (June 15, 2020), <https://raskin.house.gov/media/press-releases/speier-raskin-harris-introduce-legislation-ensuring-protection-those-who-expose>.

<sup>249</sup> See COVID-19 Fraud.

(“CORE”) was introduced and includes some of the same whistleblower protections included in the CWPA. The CORE Act, like the CWPA, is still a bill and thus not yet enacted legislation. The CORE Act was created to fill the gaps of the CARES Act, which left room for corrupt acts. Among other wider-ranging protections, the CORE Act includes provisions that protect whistleblowers, and those provisions were modeled after the 2009 Recovery Act. The CORE Act protects employee whistleblowers who report misuse and fraud of COVID-19 relief funds. The CORE Act’s whistleblower provisions allow whistleblowers to submit complaints directly to Special Inspector General for Pandemic Relief (“SIGPR”) or the Pandemic Relief Accountability Committee (“PRAC”)—both established in the CARES Act—or the Congressional Oversight Commission. Covered employees under the CORE Act include government employees, government contractors, and private sector workers who witness waste, fraud, or abuse of CARES Act funds or are victims of such misconduct. The CORE Act sets a three-year statute of limitations on whistleblower claims.<sup>250</sup> COVID-19 has uncovered the inadequacies in current whistleblower laws—such as the OSH Act—especially as it relates to public health and safety.

## V. Specific Occupations

### A. Essential Workers: The Unsung Heroes of the Pandemic

Essential Workers (EWs) are considered heroes in many communities. Not all heroes wear capes. But, in 2020, they do wear masks. During the COVID-19 pandemic, EWs continue to work to keep society functioning sometimes at their own expense. COVID has impacted employment law for EWs in two ways: 1) definitions of EWs are changing to meet the new demands of an at-home workforce; 2) EWs are exempt from quarantine orders and as a result, face extreme health risks, little protection, and little pay. The change of administration and potential for vaccines will also alter the future course of law.

### Definitions of ‘Essential Workers’ are Expanding.

To ‘flatten the curve’ and protect the public, the federal government has suggested, and at least 42 states have ordered, that all in-person, ‘non-essential’ business shut down.<sup>251</sup> Like most of the Trump Administration’s response to COVID, defining EWs in the U.S. is a highly decentralized task.<sup>252</sup> CISA, the federal agency responsible for classifying EWs, suggests the definition should include those who provide: 1) public health and safety, 2) essential products, and 3) other critical infrastructure and support.<sup>253</sup> However, this is merely advisory. Currently, 20 states follow CISA’s

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<sup>250</sup> Aaron Nicodemus, Dems Propose Coronavirus Whistleblower Protection Bill, COMPLIANCE WEEK (June 16, 2020, 11:07 AM) <https://www.complianceweek.com/regulatory-policy/dems-propose-coronavirus-whistleblower-protection-bill/29069.article>.

<sup>251</sup> U.S. DEP.T OF LABOR, *Unemployment Insurance Relief During COVID-19 Outbreak*, DOL.GOV, <https://www.dol.gov/coronavirus/unemployment-insurance#:~:text=Each%20state%20sets%20its%20own.Meet%20work%20and%20wage%20requirements.>

<sup>252</sup> Fatima Hussein & Bruce Rolfsen, *Emergency Rule, More Enforcement Forecast for OSHA Under Biden*, BLOOMBERG L., OCCUP.’L AND SAFETY HEALTH REP. (Nov. 7, 2020, 1:07 PM, CST), [https://www.bloomberglaw.com/document/X4L2AJ3K000000?bna\\_news\\_filter=safety&jcsearch=BNA%2520000001754159d9cda3f763dbd3850001#cite](https://www.bloomberglaw.com/document/X4L2AJ3K000000?bna_news_filter=safety&jcsearch=BNA%2520000001754159d9cda3f763dbd3850001#cite).

<sup>253</sup> See CYBERSECURITY AND INFRASTRUCTURE SECURITY AGENCY (CISA), *Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response*, VERS. NO. 4.0 (Aug.18, 2020),

guidance, 22 states have created their own standard (often using CISA as a starting point), and the rest have no standard. However, most states have put interim guidelines into place during COVID. Iowa's DOL, for example, now uses CISA's guidelines.<sup>254</sup>

When determining who is an EW, frontline workers—those in public safety, healthcare, emergency services, law enforcement, sanitization, utilities, etc.—are the typical, 'low-hanging fruit' under the first and third categories.<sup>255</sup> However, the latter two categories have expanded, in most states, to include unlikely workforces—often on the margins of pay and respect. These workers include, inter alia, delivery drivers, grocery store clerks, and 'gig workers' like rideshare operators or task service providers.<sup>256</sup>

### **Essential Workers are Exempt from Quarantines.**

While the federal government issued guidance to stay home, 41 states have ordered closure of all non-essential business establishments, and (with exceptions) the public to stay home. However, EWs are exempted from these laws; they must continue to work to support those at home. These EWs often face the brunt of the pandemic, yet lack protection, remain underpaid, and have little to no benefits.<sup>257</sup>

#### **a. Essential Workers and Their Households are at Substantial Risk.**

With increased risk of exposure, EWs—and their loved ones—are in danger. Not only are they at risk by probability, but also severity. To date, almost 400,000 Americans have died from COVID-19. No official sources account for how many deaths are directly from EWs, but it is likely a high percentage. According to a *Jama Internal Medicine* study, as of November 9, 2020, "between 57 million and 74 million adults with increased risk of severe COVID-19 were either [EWs] unable to work at home or they lived in households with such workers."<sup>258</sup>

Despite these imminent threats, many EWs are working without personal protective equipment (PPE). While the federal government has yet to provide such protections, some states, localities, and businesses are increasingly providing PPEs like plastic shields, hand sanitizer, masks, and gloves. Nevertheless, access to PPEs is not uniform across the United States. For example, a recent study found that one in five grocery store workers was infected with COVID-19,

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[https://www.cisa.gov/sites/default/files/publications/Version\\_4.0\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_FINAL%20AUG%2018v3.pdf](https://www.cisa.gov/sites/default/files/publications/Version_4.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_FINAL%20AUG%2018v3.pdf).

<sup>254</sup> IDPH GUIDANCE, CDC CRITICAL WORKER GUIDANCE, INTERIM GUIDANCE FOR IMPLEMENTING SAFETY PRACTICES FOR CRITICAL INFRASTRUCTURE WORKERS WHO MAY HAVE HAD EXPOSURE TO A PERSON WITH SUSPECTED OR CONFIRMED COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html>.

<sup>255</sup> Molly Kinder, et al., *The COVID-19 Hazard Continues, But the Hazard Pay Does Not: Why America's Essential Workers Need a Raise*, BROOKINGS (Oct. 29, 2020), <https://www.brookings.edu/research/the-covid-19-hazard-continues-but-the-hazard-pay-does-not-why-americas-frontline-workers-need-a-raise/>.

<sup>256</sup> Andrew Parkhurst, *Hazard Pay During COVID-19: New Laws Who May Be Entitled and What To Do Next*, JDSUPRA.COM (August 25, 2020), <https://www.jdsupra.com/legalnews/hazard-pay-during-covid-19-new-laws-for-24495/>.

<sup>257</sup> *Id.*

<sup>258</sup> Steven Reinberg, *Nearly 74 Million Essential Workers at High Risk for COVID in U.S.*, U.S. NEWS & WORLD REPORT (Nov. 9, 2020, 11:18 AM), <https://www.usnews.com/news/health-news/articles/2020-11-09/nearly-74-million-essential-workers-at-high-risk-for-covid-in-us>.

and many were asymptomatic.<sup>259</sup> In another example, another study found that almost half of the staff at American nursing homes has been infected with COVID-19.<sup>260</sup>

### **OSHA, at Both Federal and State Levels, is Failing EWs.**

Under the Trump Administration, OSHA did little to ensure states are protecting the health and safety of EWs. Under the Trump administration, there was no emergency temporary OSHA standard for COVID. Instead DOL Secretary Eugene Scalia relied on OSHA’s “general duty clause,” which cites employers for hazards that could have been “feasibly mitigated” when no specific rule covering a hazard exists.

Subsequently, over 9,800 workers have filed COVID-related complaints, and OSHA has already closed over 9,296 of those investigations. One OSHA administrator has said that “workplace exposures have become the fulcrum of the epidemic.” One study found that just a single OSHA news release about violations resulted in compliance to more than 200 inspections on airborne diseases. Thus, a temporary emergency standard would likely have some positive results, even without the bite of enforcement.

Meanwhile, some state OSHAs—such as Virginia, Michigan, Oregon, and New Jersey—stepped up and provided further protections for EWs, establishing both their own COVID-specific standards and enforcement. On the other hand, weak federal enforcement has enabled some states to neglect workers. Iowa, in particular, has failed to enforce OSHA standards, despite its high concentration of meat packing and processing plants—facilities that are, essentially, breeding grounds for the virus’s spread.

When meatpacking employees were declared essential workers, their legal status changed considerably. Meatpacking employees do physically intense, high-speed work, while forced to work closely together. Naturally, these employees breathe hard as they work. Face masks make this even more difficult. In addition, most of these employees cannot take sick leave. Nationwide, as of late June, infections tied to meatpacking facilities had climbed to nearly 28,000 cases and 100 deaths across 250 plants, according to the Food and Environment Reporting Network, which is mapping COVID-19 outbreaks in the food system.<sup>261</sup>

Tyson Foods was again a primary example of the danger and the lack of Iowa’s OSHA enforcement. Although various workers died there on April 13, April 23, and May 25, Iowa OSHA issued no citations. The plant’s workers filed 148 complaints with Iowa OSHA, only 36 were formal, and only 5 complaints even resulted in actual inspections, and still no citations. On November 13, 2020, various advocacy groups such as the ACLU and Iowa AFL-CIO, filed complaints to federal OSHA requesting investigation into Iowa OSHA, and Democratic Iowa Legislators have also called upon the federal OSHA to investigate Iowa OSHA’s failure for worker safety inspections.<sup>262</sup>

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<sup>259</sup> Chris Melore, *Study: 1 in 5 Grocery Store Workers Have Tested Positive for COVID-19, Most Asymptomatic*, STUDYFINDS.ORG (Nov. 5, 2020), <https://www.studyfinds.org/grocery-store-workers-coronavirus-asymptomatic/>.

<sup>260</sup> Emily Paulin, *Exclusive: Nearly Half of U.S. Nursing Homes Have Staff Infected With COVID-19*, AARP (Oct. 14, 2020), <https://www.aarp.org/caregiving/health/info-2020/nursing-home-covid-ppe-staff-shortages.html>.

<sup>261</sup> Kim Krisberg, *Essential Workers Facing Higher Risks During COVID-19 Outbreak: Meat Packers, Retail Workers Sickened*, 50 THE NATION’S HEALTH (6) 1–16 (Aug. 2020), <https://www.thenationshealth.org/content/50/6/1.1>.

<sup>262</sup> Fatima Hussein, *Iowa OSHA Accused of Failing to Protect Workers During Pandemic*, BLOOMBERG DAILY LAB. REP. (Nov. 13, 2020, 2:49 PM, CST),

## **Essential Workers Remain Underpaid, and often Lack Support, If Infected.**

COVID has created a vastly larger demand for these new ‘essential’ jobs. The CDC estimates there are roughly 87 million EWs in the U.S. With the increased demand on delivery services, companies like Instacart, Amazon, DoorDash, etc., are all looking to hire hundreds of thousands of more people to their workforce. Instacart, alone, plans to add 200,000 shoppers. Amazon plans to add 100,000 more workers in its warehouses, and individual grocery chains are adding thousands of jobs to meet surges in demand. This is a boost for job creation, but EWs face the dichotomy of having a paycheck or taking their gamble with the virus.<sup>263</sup>

### **Unemployment Insurance?**

In the CARES Act, Congress included an unemployment insurance package for states to meet the surge of UI demand from COVID job loss. This also included Pandemic Unemployment Assistance (PUA) for states to expand unemployment insurance to people who would be ineligible in regular circumstances, like part-time employees, gig workers, or independent contractors. However, if a state deems an essential/critical industry, those EWs may only collect unemployment compensation if they involuntarily quit or their job is unavailable. And with the increased demand for EWs, there are lots of available jobs. Even if there is an outbreak at the EW’s workplace, they may be ineligible for refusing to work out of reasonable fear of contracting the virus unless they can demonstrate that conditions were unsafe, and that employee attempts to engage management in improving conditions failed. In these circumstances, federal and state resources direct EWs to report unsafe work environments to OSHA. As we have already seen in states like Iowa, this is a dead end for many EWs.<sup>264</sup>

#### **i. Hazard Pay?**

Before the pandemic, hazard pay served as an incentive for workers to take on dangerous, risky, or physically strenuous work. Now, many states or companies are extending hazard pay to jobs where the risk/danger is not even tied to the job itself. Some COVID-essential jobs are transitioning to include hazard pay but are few and far between. Looking to the federal government, Democrats in Congress have pushed for EW hazard pay throughout COVID. The latest bill, the HEROES Act, aimed to establish a \$200 billion “Heroes Fund,” which was designed to raise pay by \$13 per hour for EWs for workers earning less than \$200,000, and a maximum of \$5,000 for workers earning more than that.<sup>265</sup> However, Senate negotiations have stripped hazard pay from the bill. In lieu of hazard pay, the bill does include grants for employers to provide PPEs to employees. To date, the federal government still has not provided EWs hazard pay, some states are leveraging federal relief for innovative hazard pay programs, and many employers are stopping or reducing hazard pay altogether.

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[https://www.bloomberglaw.com/document/XBPPI5C000000?bna\\_news\\_filter=daily-labor-report&jcsearch=BNA%252000000175c280d1a3a17ddecc400a0001#jcite](https://www.bloomberglaw.com/document/XBPPI5C000000?bna_news_filter=daily-labor-report&jcsearch=BNA%252000000175c280d1a3a17ddecc400a0001#jcite).

<sup>263</sup> Dave Lee, *Amazon to Pay Employee Bonus Amid Threat of Black Friday Strikes*, FIN. TIMES (Nov. 27, 2020, 11:16 AM), <https://arstechnica.com/tech-policy/2020/11/amazon-to-pay-employee-bonus-amid-threat-of-black-friday-strikes/>.

<sup>264</sup> U.S. DEP.T OF LABOR, *Unemployment Insurance Relief During COVID-19 Outbreak*, DOL.GOV, <https://www.dol.gov/coronavirus/unemployment-insurance#:~:text=Each%20state%20sets%20its%20own,Meet%20work%20and%20wage%20requirements>.

<sup>265</sup> CQ’S HOUSE ACTION REPORTS, *Revised Democratic Virus Response Package*, FACT SHEET NO. 116–33 (Sep. 30, 2020), <https://plus.lexis.com/api/permalink/1fb7220b-026f-4d13-a2f4-f74916c4e618/?context=1530671>.

## ii. Workers' Compensation?

For infected EWs that lack sick leave, lack unemployment insurance eligibility, lack hazard pay or even medical benefits, one alternative may be workers' compensation. Typically, workers' compensation has not included airborne illnesses like COVID-19. Luckily, governors and lawmakers in at least fourteen states have assisted employees by placing the burden of proof on employers and insurance companies to show an employee's infection did not occur at work. However, in most states, this has applied only to healthcare or emergency workers.

### b. Voices for Essential Workers are Growing Louder.

Unlike small businesses, large corporations are making unprecedented profits during the pandemic. Amazon is now a trillion-dollar corporation. Jeff Bezos has made history as the first person to surpass \$200 billion in worth, while EWs are making pennies. Amazon is a representative example of employers that incrementally chip away at EWs' pay, deny them benefits, and only hire them part time, or as independent contractors, to avoid requirements under laws like the FLSA. EWs do, however, have increased bargaining power. Companies are desperate for EWs' services, especially during the holidays. A glimmer of hope—on November 27, 2020, a coalition of human-rights organizations ignited the “Make Amazon Pay” (MAP) movement. MAP leveraged Cyber Monday against Amazon, with world-wide strikes and protests at Amazon facilities. In response, Amazon agreed to pay its frontline workers a Christmas bonus totaling \$100 million. Other companies will likely face similar pressure.<sup>266</sup>

## 2. Predictions for Essential Workers Along the Horizon

While the situation for EWs has been bleak, the future seems promising. First, the CDC has recently expressed commitment to make EWs a top priority in the early rounds for vaccines, even before severe-risk individuals.<sup>267</sup> Also, Biden's administration will undoubtedly take a stronger, centralized COVID response. Biden plans to set emergency COVID standards, premium pay for EWs, and he will name a new member of the OSHA commission, giving Democrats a majority on the panel.<sup>268</sup>

Looking to the more distant future, issues EWs face during COVID have reinvigorated arguments in support of policies like raising the minimum wage and universal healthcare. If these policies are successful, they will help close the loopholes that allowed millions of EWs to work with unlivable wages and no protections.

### B. Teachers as Essential Workers?

As of the date of this publication, the state of Iowa has mandated that all school districts

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<sup>266</sup> Paula Froelich, *Human Rights Groups Protest Amazon Over Worker Pay Ahead of Cyber Monday*, N.Y. POST (Nov. 27, 2020), <https://nypost.com/2020/11/27/black-friday-2020-human-rights-groups-protest-amazon/>.

<sup>267</sup> Hellen Branswell, ‘Essential Workers’ Likely to Get Earlier Access to COVID-19 Vaccine, STATNEWS (Nov. 23, 2020), <https://www.statnews.com/2020/11/23/essential-workers-likely-to-get-earlier-access-to-covid-19-vaccine/>.

<sup>268</sup> Oscar Gonzalez, *President-elect Biden's 2021 Stimulus Plan: Would You Get a Second Check or Not?*, C|NET, PERS. FIN. (Nov. 26, 2020, 2:15 PM, PT), <https://www.cnet.com/personal-finance/president-elect-bidens-2021-stimulus-plan-would-you-get-a-second-check-or-not/>.

offer in-person education.

Teachers have been forced to adapt to a complicated new system of teaching, involving a higher dependence on technology and an increased risk of contracting COVID as they perform in-person teaching. As a result, one can expect lawsuits based on teacher deaths, illnesses, failed promises of precautions taken by school districts, and damage to teachers' mental health. There is also the possibility of a mass exodus of teachers from the profession, which, when faced with an already worrying teacher shortage, could have long-term damaging effects on American education. With the rise of virtual instruction, education in America may never be the same again.

Many parents were worried about sending their children back to school. In response to this, over the summer the CDC released advice for parents on how to handle various back to school plans safely for their families, including information on in-person, virtual, and hybrid forms of instruction. Therefore, as the summer of 2020 progressed and the school year loomed on the horizon, many were watching how school districts would handle the start of the new school year. The CDC's guidelines for school administrators included information on the importance of maintaining social distancing and ideas on how to reduce risk of exposure within the school.<sup>269</sup>

School districts have offered teachers various options. Firstly, teachers have the option to take leave under the Family and Medical Leave Act. This Act allows for employees who work at organizations with 50 or more employees and government employees to take up to 12 weeks of unpaid leave. Additionally, if teachers qualify, they can ask for reasonable accommodation or leave under the Americans with Disabilities Act.<sup>270</sup> This Act applies to people who believe, due to prior medical conditions, that they are especially vulnerable for infection or death resulting from Covid-19. One such accommodation would allow teachers to work completely remotely if they are at a high risk.<sup>271</sup>

However, one additional option for taking time off is under the Families First Coronavirus Response Act. This Act requires employers to give their employees paid time off in relation to Covid-19 concerns. The Act provides either full or partial pay for specified amounts of leave for employees who are either sick with Covid-19 themselves, or if they must take care of a family member who is sick. It also provides for partial pay during leave if a parent is required to stay home due to lack of childcare.<sup>272</sup>

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<sup>269</sup> CDC, Back to School Planning: Checklists to Guide Parents, Guardians, and Caregivers, (Aug. 20, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/parent-checklist.html>; and CDC, Strategies for Protecting K-12 School Staff from COVID-19, (Oct. 21, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-staff.html>.

<sup>270</sup> Steven Jensen, Teachers May Use Federal Disability, Medical-Leave Laws to Fight Return to Classroom, CT NEWS JUNKIE (July 23, 2020, 4:00 AM) [https://www.ctnewsjunkie.com/archives/entry/20200722\\_teachers\\_may\\_use\\_federal\\_disability\\_medical-leave\\_laws\\_to\\_fight/](https://www.ctnewsjunkie.com/archives/entry/20200722_teachers_may_use_federal_disability_medical-leave_laws_to_fight/)

<sup>271</sup> Madeline Will, Teachers With COVID-19 Health Risks: Who Gets to Stay Home?, EDUCATION WEEK (Aug. 18, 2020) <https://www.edweek.org/ew/articles/2020/08/18/teachers-with-covid-19-health-risks-who-gets.html>

<sup>272</sup> MARYLAND STATE EDUCATION ASSOCIATION, FAQ: Taking Sick and Personal Leave During Coronavirus-Related School Closures <https://marylandeducators.org/faq/taking-sick-and-personal-leave-during->

Cleanliness of the school buildings presented another concern. Many teachers were unsure as to whether they were required to oversee their classroom's cleanliness. Some school districts met the burden by providing extra funding for custodial staff.<sup>273</sup>

The National Education Association released an FAQ list addressing educators' concerns about returning to in-person instruction.<sup>274</sup>

Some of the measures school districts have instituted include hybrid systems of attendance for students to limit the number of students in school at a time, increased cleaning protocols, mandating mask-wearing, and installation of high-quality air filtration systems in the school buildings. However, there has been disappointment when promised protections did not materialize in time. For example, there have been disputes between teachers and school administrators over the school district's failure to install air filtration systems in all school buildings before the start of school.<sup>275</sup>

Reliance on technology has put a strain on teachers and students this year. Teachers have struggled emotionally with the change in how schooling is formatted, noting how strange it feels to teach in empty classrooms, how difficult it is to form connections with students virtually, and how this pandemic has demonstrated the inequities among students' families.<sup>276</sup> Some school districts have seen spikes in positive tests among teachers. By November, over 2,300 teachers within the Arkansas public school system tested positive for the virus. Of that number, eight teachers died, either from Covid-19 directly or Covid-related causes.<sup>277</sup> One high school in Bloomfield Hills, Michigan decided to go all-virtual due to a high number of substitute teachers being quarantined.<sup>278</sup>

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[coronavirus-related-school-closures/](#); Mark Lieberman, Getting Paid During the Coronavirus Crisis: How a New Law Affects School Employees, EDUCATION WEEK (Mar. 20, 2020) <https://www.edweek.org/ew/articles/2020/03/20/getting-paid-during-the-coronavirus-crisis-how.html>

<sup>273</sup> Marco Buscaglia, Imperfect Attendance: Will Teachers Take Leave if Coronavirus Cases Continue to Climb?, CHICAGO TRIBUNE (July 7, 2020, 12:00 PM) <https://www.chicagotribune.com/coronavirus/sns-will-teachers-take-leave-if-coronavirus-climb-continues-20200707-2rbn4smdanfjnzbyb5ctqv5zim-story.html>

<sup>274</sup> NATIONAL EDUCATION ASSOCIATION, Q&A: Educator Rights and Benefits (Mar. 22, 2020) <https://www.nea.org/advocating-for-change/new-from-nea/qa-educator-rights-and-benefits>; See also U.S. DEPT OF LABOR, Families First Coronavirus Response Act: Employee Paid Leave Rights <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

<sup>275</sup> Walter Makaula, Rocklin Teachers, District Disagree Over COVID-19 Safety Measures, KCRA 3 (Sep. 17, 2020, 12:01 AM) <https://www.kcra.com/article/rocklin-teachers-district-disagree-over-covid-19-safety-measures/34050089>.

<sup>276</sup> Katie Reilly, This Is What It's Like to Be a Teacher During the Coronavirus Pandemic, TIME (Aug. 26, 2020, 7:00 AM) <https://time.com/5883384/teachers-coronavirus/>

<sup>277</sup> Region 8 Newsdesk, COVID-19 Takes Tolls on NE Arkansas School Teachers, Staff, KAIT8 (Nov. 2, 2020, 11:55 AM) <https://www.kait8.com/2020/11/02/covid-takes-toll-ne-arkansas-school-teachers-staff/>; Kelly McLaughlin, At Least 5 Teachers Have Died From COVID-19 Since the School Year Began. Here Are Their Stories., INSIDER (Sep. 15, 2020, 12:48 PM) <https://www.insider.com/teachers-who-died-covid-19-school-year-2020-9>

<sup>278</sup> Derick Hutchinson, Bloomfield Hills High School to Go Fully Remote Due to Number of Teachers in Quarantine: Building Open Tuesday Only as Precinct for Election, CLICKONDETROIT (Nov. 2, 2020, 3:58 PM)

While virtual classes may help prevent the pandemic's spread, they present their own concerns. Additionally, for teachers that must teach in a simultaneous hybrid format (meaning they simultaneously teach in-person students and students connecting via technology) the rates of burnout are incredibly high. Teachers been overworked teaching classes in this hybrid fashion, and worry that students are not getting equal access to their time and attention.<sup>279</sup>

Generally, teachers are terrified of becoming sick or dying, and surveys have shown that many teachers are considering leaving the profession due to the stress and fear from Covid-19.<sup>280</sup> This has the potentiality of being one of the biggest lasting effects from the Covid-19 pandemic on the education field. There is currently already a teacher shortage throughout the United States, so more teachers leaving due to Covid-19 will likely make the situation worse.<sup>281</sup> Fewer teachers after this pandemic mean larger class sizes, and already under-funded schools will likely reach student-teacher ratios that would make it impossible for teachers to give students the bare minimum level of attention that they need.

There have been a variety of lawsuits filed, some seeking opening and some seeking closing of schools. The City of San Francisco recently sued its own school district seeking to open the schools. Teachers' unions have sued on behalf of teachers. In August the state teachers' union and the Iowa City public schools sued Iowa Governor Reynolds challenging the governor's authority to mandate in-school instruction. Other lawsuits have been filed by parents against school districts to force them to re-open fully for in-person instruction of their children. This has highlighted working parents' reliance on the public-school system as childcare. Parent groups have voiced concerns that students will essentially be forced to drop out of school due to an inability to attend an all-virtual form of instruction. One possible lasting change would be a general shift to more virtual instruction of students

## **VI. Employer-Mandated COVID-19 Vaccination Policies**

Once Covid vaccines are readily available, can employers mandate their employees be vaccinated as a condition of continued employment?

One pre-pandemic example provides some insight into the use of vaccine mandates. Employer-mandated flu and pertussis vaccines occur with some regularity in various health care

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<https://www.clickondetroit.com/health/2020/11/02/bloomfield-hills-high-school-to-go-fully-remote-due-to-rising-covid-19-cases-in-oakland-county/>

<sup>279</sup> Safia Samee Ali, Educators Teaching Online and In Person At the Same Time Feel Burned Out, NBC NEWS (Oct. 18, 2020, 3:30 AM) <https://www.nbcnews.com/news/us-news/educators-teaching-online-person-same-time-feel-burned-out-n1243296>

<sup>280</sup> HEATHLINE, "I'm Scared to Death": How Teachers Feel About COVID-19 School Safety <https://www.healthline.com/health-news/im-scared-to-death-how-teachers-feel-about-covid-19-school-safety>

<sup>281</sup> Karen Ann Cullotta, More Than a Third of Illinois Teachers Surveyed Said They've Considered Leaving the Profession Amid COVID-19 Stress: "I Don't Know How Much Longer I Can Keep It Together", CHICAGO TRIBUNE (Nov. 11, 2020, 3:09 PM) <https://www.chicagotribune.com/coronavirus/ct-covid-illinois-teachers-consider-leaving-profession-20201111-4ytit5koznhe315jz5khoafhou-story.html>

institutions around the U.S.<sup>282</sup> These policies are implemented to protect vulnerable groups, including the elderly, those with compromised immune systems, and newborns. There is not much legal resistance to the implementation of such plans in the health care field. Indeed, the OSHA noted the legality of such plans in reference to the H1N1 outbreak in 2009.<sup>283</sup>

Collective bargaining agreements may be an obstacle to employer seeking to implement such a policy. One nurses' union successfully challenged a mandate on the grounds that it had not been properly bargained for under the terms of their agreement.<sup>284</sup>

Those seeking to challenge employer-mandated vaccinations may find language in the Americans with Disabilities Act (ADA) for exemptions on the basis of disability. Under the ADA, an employer may not “discriminate against a qualified individual on the basis of disability.”<sup>285</sup> Methods of discrimination include “not making reasonable accommodations” to an employee with a qualifying disability. But what would be the “qualifying disability” standing in the way of a vaccination? The employee first has to demonstrate a qualifying disability and then demonstrate that such a disability prevents them from taking the vaccine.<sup>286</sup>

Some employees may seek to challenge employer-mandated vaccines on religious grounds. Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate against employees on the basis of religion or sincerely held religious beliefs, “unless an employer demonstrates that he is unable to reasonably accommodate...without undue hardship.”<sup>287</sup>

To determine what qualifies as a sincerely held religious belief, the Third Circuit set out a three-part test in *Fallon v. Mercy County Medical Center*. The belief must address fundamental questions having to do with imponderable matters, must be a comprehensive belief system, and must be recognized by external indications.<sup>288</sup> There, a hospital worker failed to demonstrate a sufficiently strong religious belief to qualify for an exemption from a mandatory vaccination policy because the employee's anti-vaccination beliefs, though sincerely held, were not part of a broader framework of religious teaching. Under the Trump administration, the EEOC issued recommendations, though not explicit, indicating that they may consider anti-vaccination beliefs to

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<sup>282</sup> Teri D. Baxter, Employer-Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks, 2017 Utah L. Rev. 885, 885-938 (2017)

<sup>283</sup> Jordan Barab, OSHA's Position on Mandatory Flu Shots for Employees, United States Department of Labor (Nov. 29, 2020, 7:00 AM), <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>

<sup>284</sup> Va. Mason Hosp. v. Wash. State Nurses Ass'n, 511 F.3d 908, 915 (2007)

<sup>285</sup> Americans with Disabilities Act, 42 U.S.C. § 12112 (2008)

<sup>286</sup> Teri D. Baxter, Employer-Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks, 2017 Utah L. Rev. 885, 885-938 (2017)

<sup>287</sup> Civil Rights Act of 1964 §§ 701, 703, 42 U.S.C. § 2000e (1991)

<sup>288</sup> Fallon v. Mercy Catholic Med. Ctr., 877 F.3d 487, 490-493 (2017)

be protected under Title VII.<sup>289</sup> To cope with such exemption requests, one scholar recommends starting to think about possible accommodations and what would amount to undue hardship before implementing such a plan.<sup>290</sup>

On the other hand, OSHA may provide a duty to mandate vaccination. An official communication from OSHA regarding the H1N1 virus states that there is an expectation on healthcare providers to perform risk assessments on possible vaccination programs. It states that such a program may be mandated by an employer but is not required by OSHA. However, as Baxter writes, there has been no court holding as of yet finding a duty on employers to have employees vaccinated. Additionally, there is an outlet for employees under Section 11(c) of the Act for “an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death.” Together, it seems as though OSHA may provide some ground to base a vaccination mandate on but would still be subject to possible exceptions.

In addition to federal law, states have various statutes and regulations pertaining to vaccination, largely in the area of religious and disability related exemptions. Further, there may be some tort liability for employers to their customers and employees if they contract the virus, though such claims do not have the weight of precedent behind them. Also, employees may have ripe workers’ compensation claims for either (a) negative reactions to an employer-mandated vaccine, or (b) contracting COVID from a sick coworker or customer, whether there is a vaccination program or not. State law would largely determine the validity of such claims. Employers looking to employ such mandates would be advised to look into state law regarding compulsory vaccination schemes and any exemptions under such laws.

Though there are various exceptions and exemptions provided for in both state and federal law, employer-mandated vaccine programs appear to be generally legal. Assuming the eventual production and distribution of an effective vaccine for COVID-19, employers would be able to mandate their employees take the vaccine as a condition of continued employment. Such employees would then be able to raise various reasons for an exception, such as a disability, a sincerely held religious belief, or a sincere belief that they would have a detrimental reaction to the vaccine. Such claims could be bolstered by the fact that any vaccine coming out in within two years of the outset of the COVID pandemic would be developed faster than most vaccines.<sup>291</sup> This could give rise to concerns among employees about the efficacy and safety of the vaccine, leading to more dissent against a vaccine regime than if the vaccine were established and proven effective

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<sup>289</sup> Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, U.S. Equal Employment Opportunity Commission (Nov. 29, 2020, 6:45 AM), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.

<sup>290</sup> Andrea Kirshbaum, Employers Should Plan for Vaccine Religious Exemptions, Law360 (Nov. 29, 2020, 7:20 AM), <https://www.law360.com/articles/1312230/employers-should-plan-for-vaccine-religious-exemptions>

<sup>291</sup> COVID-19 (Coronavirus) Vaccine: Get the Facts, Mayo Clinic (Nov. 29, 2020, 7:05 AM), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-vaccine/art-20484859>

over a normal timeline.<sup>292</sup> If such a vaccine did unfortunately create some adverse reactions in its recipients, this could create liability issues for employers who had mandates in place. While mandating vaccination may be attractive for some employers, it may not be the best option.

The most likely course of action for many employers would be to strongly encourage their employees to get vaccinated when it becomes available, but not make it a mandate. This is the path suggested by the EEOC in their official Pandemic Preparedness guidance documentation and the one some businesses in high-risk industries such as meat processing will take.<sup>293</sup> The appeal of a mandate is greatly diminished by the administrative complexities and potential for legal challenges that come along with enforcing such a program.

Legal challenges on the other side may include negligence claims against businesses for failing to properly deal with the virus by those who contract the virus from the business. The potential for competing claims makes the decision even more difficult for employers.

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This White paper is not and should not be taken as legal advice. We share it to provide the legal community with insight into the directions the law seems to be changing in reacting to the national and international pandemic.

With contributions by Kevin Sharp, Talera Jensen, Elizabeth P. Lovell, Drew Driesen, Flossie Neale, Kevin Kim, Chandler Mores, Hayley Sherman, Nicholas Day, Anthony Fitzpatrick, Kevin Illg, Scott DuPlessis, Peter Murray, David Salmon, Isabella Neuberg, Jacklyn Vasquez, Tanner Krob, and Michaela Crawford. This White Paper should not be construed as legal advice. The contents are intended for general information purposes only. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the University of Iowa Law School.

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<sup>292</sup> Robert Nichols & Rebecca Baker, Cos. Should Brace for Workers' Vaccine Safety Concerns, Law360, (Nov. 29, 2020, 7:30 AM) <https://www.law360.com/articles/1310033>

<sup>293</sup> Andrea Hsu, As COVID-19 Vaccine Nears, Employers Consider Making It Mandatory, National Public Radio (Nov. 29, 2020, 6:50 AM), <https://www.npr.org/2020/11/25/937240137/as-covid-19-vaccine-nears-employers-consider-making-it-mandatory>.