

Saint Louis University School of Law
Scholarship Commons

All Faculty Scholarship

2020

Structural Discrimination In COVID-19 Workplace Protections

Ruqaiijah Yearby

Saint Louis University School of Law

Seema Mohapatra

Indiana University Robert H. McKinney School of Law

Follow this and additional works at: <https://scholarship.law.slu.edu/faculty>



Part of the [Agricultural and Resource Economics Commons](#), [Civil Rights and Discrimination Commons](#), [Health Economics Commons](#), [Health Law and Policy Commons](#), [Labor and Employment Law Commons](#), and the [Virus Diseases Commons](#)

Recommended Citation

Yearby, Ruqaiijah and Mohapatra, Seema, Structural Discrimination In COVID-19 Workplace Protections (May 29, 2020). Health Affairs Blog (2020). Also available at <http://dx.doi.org/10.2139/ssrn.3614092>

This Working Paper is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarship Commons. For more information, please contact erika.cohn@slu.edu, ingah.daviscrawford@slu.edu.



SAINT LOUIS UNIVERSITY SCHOOL OF LAW
Legal Studies Research Paper Series

No. 2020-09

Structural Discrimination In COVID-19 Workplace Protections

Ruqaiijah Yearby
Saint Louis University - School of Law

Health Affairs Blog (2020)

Publication date: 5/29/2020

(<https://www.healthaffairs.org/doi/10.1377/hblog20200522.280105/full/>)

Title: Structural Discrimination In COVID-19 Workplace Protections

Authors: Ruqaiijah Yearby, and Seema Mohapatra
ruqaiijah.yearby@slu.edu, mohap@iu.edu

Excerpt: To achieve true health justice for all, including essential workers, interventions to address the root causes of inequity, including all community conditions among them environmental and educational factors, are necessary.

Workers, who are being asked to risk their health by working outside their homes during the COVID-19 pandemic, need adequate hazard compensation, safe workplace conditions, and personal protective equipment (PPE). Sadly, this is not happening for many essential workers, such as those working in home health care and in the meat processing industry. These workers are not only being unnecessarily exposed to the virus, but they are also not receiving paid sick leave, unemployment benefits, and affordable health care and childcare. The lack of these protections is due to structural discrimination and has disproportionately disadvantaged women of color and low-wage workers. This leaves them and their families more vulnerable to COVID-19 infection and death. In this context, structural discrimination refers to the ways in which laws are used to advantage those in power, while disadvantaging powerless workers. In the COVID-19 pandemic, the lack of legal protections for many workers is a reflection of structural discrimination.

[Home Health Care Workers: Poor And Unprotected By The Law](#)

Ninety percent of home health care workers are women, and two-thirds of them are women of color. Even though they are primarily paid by Medicaid, the wages of home health care workers are so low that one in five (20 percent) home health care workers are living below the federal poverty level, compared to 7 percent of all US workers. Additionally, more than half of home health care workers have to rely on some form of public assistance such as food stamps. Although they are providing an essential health care related service, almost 20 percent of home health care workers lack health insurance, and another 39 percent rely on Medicaid, Medicare, or some other form of public coverage for health insurance.

[Lack Of Workplace Protections](#)

Home health care workers remain in poverty, lack workplace protections, and often go without health insurance. The Fair Labor Standards Act (FLSA) of

1938, which established the 40-hour work week, federal minimum wage, and overtime requirements, did not apply to domestic workers, including home health care workers until 2015. Eighty-two years later, many home health care workers are still not covered by the FLSA because they are classified as independent contractors. Thus, they do not receive minimum wage, overtime pay, and often work more than 40 hours a week. Additionally, as independent contractors, they do not receive health insurance or paid sick leave.

Home health care workers have been deemed essential workers during the COVID-19 pandemic because they provide home-based care to elderly and disabled patients. Yet, they are still not protected by the [Coronavirus Aid, Relief, and Economic Security Act \(CARES Act\)](#) because home health care companies argued that there would be a worker shortage. Many home health care workers were laid off due to the pandemic. Those home health care workers who are still employed have reported not being provided masks and PPE, unlike essential health care workers providing care in institutional settings. For example, one worker said “she had been making protective masks out of paper towels” and “hand sanitizer out of supplies she bought herself.”

Some home health care workers are being asked to work in resource-strained hospitals and nursing homes to fill in for sick and absent employees. As the home health care companies that manage these workers increase their business and profit, these home health care workers are left making little money, without health insurance, unemployment benefits, or protective gear. The failure to cover home health care workers under the CARES Act has benefitted home health care companies who are making money off the workers, while disadvantaging the workers who remain in poverty and without health insurance, unemployment benefits, or protective gear.

[Meat-Processing Workers: Vulnerable, At Risk Of Infection, And Lacking Workplace Protections](#)

Meat-processing workers have also been left vulnerable to COVID-19 infections and deaths for the benefit of meat-processing companies. More than half of workers in the US who work in meat processing are people of color. [Fifty-one-and-a-half percent](#) of those who are considered frontline meatpacking workers are immigrants, compared with 17.0 percent of all workers in the US. In contrast, 19.1 percent of frontline meatpacking workers are white, compared to 63.5 percent of all workers. In the past, meat-processing plants have been the subject of immigration sweeps by the federal government due to the large percentage of immigrant workers. With this backdrop of vulnerability, it is particularly egregious that these workers are being left without any COVID-19 protection due to federal action.

On April 28, 2020, President Donald Trump issued an executive order under the powers of the Defense Production Act of 1950 to ensure that meat-processing facilities stay open to ostensibly provide a continued supply of meat in the US. On May 1, 2020, the Centers for Disease Control and Prevention (CDC) issued a report showing that meat-processing workers were particularly susceptible to COVID-19 infection at plants because workers were not able to work six feet apart; employees were incentivized to work while ill; Plexiglass barriers were not used for all worker functions; and the recommended heightened cleaning and disinfection was not followed.

Smithfield Foods offered a \$500 bonus to those who did not miss work in April, which caused some workers with COVID-19 symptoms to continue to come to work. Considering that the bonus is almost the equivalent of one week of pay, it is not surprising that workers with COVID-19 symptoms would continue to work. In South Dakota, more than half of the state's cases of COVID-19 (644) are linked to one meat-processing plant. In Iowa, not only are 90 percent of all COVID-19 cases in Black Hawk County tied to the meat-processing plant, but Black Hawk County also has the most COVID-19 cases in Iowa.

Several lawsuits against meat-processing plants are being brought by workers. One example in Missouri involves a suit by workers in which 120 out of 770 (17 percent) workers at one plant have tested positive for COVID-19. These workers filed a lawsuit against the company alleging that workers are not required to stand six feet apart, there is not adequate testing for COVID-19, workers are denied bathroom breaks, and sick workers are encouraged to continue to work to receive bonuses. The attorney general of Missouri, who filed a lawsuit against China for misleading the public about COVID-19, is notably not a party to the meat-processing lawsuit regarding worker safety and protection from COVID-19. Thus, the executive order keeping open meat-processing plants benefits the companies, allowing them to make money without having to ensure a safe working environment, while disadvantaging workers by making them more susceptible to COVID-19 infection and death.

What Can Be Done

The disparate working conditions of home health care and meat-processing workers are two examples that demonstrate how laws are hurting workers. This example of structural discrimination will continue to contribute to their greater infection and death from COVID-19, unless laws and policies are changed. Applying the familiar analogy comparing health to a stream, the health harms these low-wage essential workers face are downstream effects of upstream factors, such as lax and unfair laws and policies. Workplace conditions are one of the most important social determinants of health, as is law. There are numerous ways law can provide support to address the needs of essential workers.

Provide Hazard Pay For Essential Workers

Low-wage essential workers need to be provided adequate hazard pay if they are going to be deemed essential workers by the federal government. Legal requirements can help ensure this support. The CARES Act was a first step but additional legislation is needed to protect essential workers, especially low-wage essential workers. Politicians on both sides of the aisle, such as Mitt Romney (R-UT) and Elizabeth Warren (D-MA), have supported additional hazard pay for essential workers. The House of Representatives recently passed the [Health and Economic Recovery Omnibus Emergency Solutions Act](#) (HEROES Act), which includes provisions creating a \$200 billion fund for essential workers to receive hazard pay. The HEROES Act includes hazard pay for low-wage essential workers, such as home health care workers and meat-processing workers. If enacted into law, such provisions would help ensure essential workers are better compensated. However, more comprehensive hazard pay is needed, as the HEROES Act only covers employees, not independent contractors, of essential businesses.

Provide Workplace Protections

Instead of providing immunity to employers, the federal government through the Occupational Safety and Health Administration (OSHA) should mandate emergency safety measures for employers to protect workers against COVID-19 infection. For example, meat-processing plants should be required to comply with the joint safety guidance issued by OSHA and the CDC. Workers sacrificing their well-being need employers to be responsible for providing safe and sanitary workplaces. There should be frequent and comprehensive inspections of workplaces such as meatpacking plants, both from state and federal representatives. The HEROES Act requires OSHA to issue a standard to require employers to develop and implement infection control plans to protect workers, based on CDC and other expert guidance. The Heroes Act also includes funding for increased worker protection and enforcement activities and would be a step in the right direction, if enacted.

Provide Paid Sick Leave And Disallow Any Bonuses Based On Lack Of Absenteeism

Essential workers need paid sick leave so they do not go to work while showing symptoms of COVID-19 to earn much needed income. Additionally, federal, state, and local governments must ensure that workers are not penalized for staying home while sick and ban so-called responsibility bonuses, which just encourage sick workers to go to work and potentially expose others. If the

federal government deems certain workers as essential during this pandemic, those workers need to know that they have paid sick leave if they fall ill due to the coronavirus. Some states have [expanded](#) requirements for sick leave, due to the pandemic. Cities, such as [Oakland](#), California, are requiring that employers provide paid sick leave to essential workers during the pandemic. However, comprehensive paid sick leave should be required and supported at a federal level. More could be done to ensure that independent contractors and those who work for employers of any size would also receive paid sick leave. If the HEROES Act becomes law, it would require health care workers, first responders, workers at businesses with fewer than 50 employees, and workers at businesses with 500 or more to all provide coronavirus-related sick leave. Although this still leaves out independent contractors, this would help protect more low-wage workers than current law does.

Provide Free Health Care For Essential Workers And Their Families For COVID-19 Care

Although the CARES Act required private insurance companies, Medicare, and Medicaid to provide free diagnostic testing for the virus that causes COVID-19 and visits related to such testing without cost sharing, deductible payments, or prior authorization, this did not go far enough. Testing has been scarce in many parts of the country, and many sites were requiring a physician's order to get a test. Many essential workers do not have employer-sponsored health care coverage, work in states that did not expand Medicaid under the Affordable Care Act (ACA), and cannot afford health care coverage. Additionally, many undocumented immigrants, who are essential workers, lack access to Medicaid or ACA exchanges and thus are uninsured. The CARES Act permitted states to create an option to cover COVID-19-related testing for those who are uninsured individuals with a federal match, but it did not require this support. If workers are being asked to provide essential services, the federal government needs to ensure that employers provide free and frequent COVID-19 testing. Furthermore, the federal government must provide funding for employers to cover all health care costs related to any suspected or confirmed COVID-19 infection for the worker and their family members, regardless of immigration status. This type of protection would help ensure workers seek care and protect their families.

Provide Child Care Support For Essential Workers

If workers are being asked to work outside their home due to the essential nature of their job, but many schools and daycares are closed due to infection risk, workers with children are put in an untenable situation. Essential workers must be able to take care of their children. There is a need for sustained federal and state support for child care for all but especially essential workers during this crisis. The CARES Act provides block grant funding for

child care subsidies, but it does [not require](#) states to provide such support for helping with child care for essential workers. The proposed [HEROES Act](#) includes additional child care support but again does not require states to use it to support the child care needs of essential workers. Additionally, the CARES Act includes provisions providing 12 weeks of paid sick leave for those employee who need to care for children whose school is closed or whose child care provider is unavailable. However, this exempts many employers and leaves those who are independent contractors without financial help.

Looking Forward

Here, we suggest targeted legal and policy measures that should be immediately addressed to protect vulnerable workers' needs during this pandemic. These are vital to protect essential workers and also to stop the spread of COVID-19. The health and well-being of our most vulnerable workers are tied to the well-being of all. We note, however, that this is not a comprehensive list. To achieve true [health justice](#) for all, including essential workers, interventions to address the [root causes](#) of [inequity](#), including all community conditions among them environmental and educational factors, are necessary.

BIOS:

Ruqaiijah Yearby, JD, MPH, is a full professor and member of the Center for Health Law Studies at Saint Louis University School of Law. She is also co-founder and executive director of Saint Louis University's Institute for Healing Justice and Equity. She evaluates the effectiveness of processes implemented by city and county governments across the country to achieve racial equity as co-principal investigator of the Robert Wood Johnson Foundation grant entitled, "Are Cities and Counties Ready to Use Racial Equity Tools to Influence Policy?". She earned her BS in honors biology from the University of Michigan, MPH from Johns Hopkins School of Public Health, and her JD from Georgetown University Law Center. Using empirical data, her research explores the ways in which gaps in the language and enforcement of labor and employment laws results in health disparities for women and racial and ethnic minorities, particularly during the COVID-19 pandemic. Her work has been cited in the *Oxford Handbook of Public Health Ethics* (2019); Dolgin and Shephard, *Bioethics and the Law* (fourth edition, 2019); Mark Hall, et al., *Health Care Law and Ethics* (ninth edition, 2018); *Implicit Racial Bias across the Law* (Cambridge University Press 2012); and the *Oxford Handbook of Bioethics* (2007).

Seema Mohapatra, JD, MPH, is a tenured associate professor of law and dean's fellow at Indiana University Robert H. McKinney of Law. Her research has focused on equity issues, centering on race and gender, in bioethics, public

health law, and biotechnology and the law. She is an expert in the areas of health care law, public health law, bioethics, torts, and international family law. Her work has been published in several journals, including the *Wake Forest Law Review*, *Colorado Law Review*, *Brooklyn Law Review*, and the *Harvard Journal of Law and Policy*. She has authored articles and book chapters on topics such as insurance coverage of infertility and assisted reproduction, genetics and health privacy, international surrogacy laws, and equity in health care coverage. Professor Mohapatra regularly presents her research nationally and internationally at legal and medical conferences and symposia. She earned her BA in natural sciences, with a minor in women's studies from the Johns Hopkins University, MPH in chronic disease epidemiology from Yale University School of Public Health, and her JD from Northwestern University School of Law.