

2020

Center for Progressive Reform Report: Protecting Workers In A Pandemic--What The Federal Government Should Be Doing

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Center for Progressive Reform Report: Protecting Workers In A
Pandemic--What The Federal Government Should Be Doing

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Protecting Workers in a Pandemic



What the Federal Government Should Be Doing

By Thomas O. McGarity,
Michael C. Duff, and Sidney Shapiro

June 2020

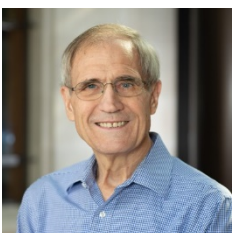
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Founded in 2002, the nonprofit Center for Progressive Reform connects a nationwide network of scholars with policymakers and allied public interest advocates. CPR pursues a vision of legal and regulatory policies that put health, safety, and environmental protection before private interests and corporate profit. With rigorous analysis, strategic engagement in public interest campaigns, and a commitment to social welfare, CPR supports thoughtful government action, ready public access to the courts, enhanced public participation, and freer access to information.

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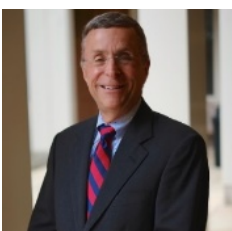
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Table of Contents

Executive Summary	1
Introduction	4
Workers at Risk from COVID-19	6
Health Care	6
Meat Packing.....	7
Public Transit.....	9
Retail Stores	10
Warehouses	12
Mining	12
OSHA’s Abysmal Performance.....	13
Unenforceable Guidance	13
Recommendation.....	14
Pathogen Protection Emergency Temporary Standard	14
Recommendations.....	16
The General Duty Clause	17
Recommendation.....	19
Enforcement.....	19
Recommendations.....	22
State OSHA Protections	22
Recommendations.....	24
OSHA’s Failures	24
Other Agencies Have Failed Workers, Too.....	25
Department of Agriculture.....	26
Recommendations.....	27
The Federal Aviation Administration	27
Recommendation.....	28
Mine Safety and Health Administration	28
Recommendations.....	28
Financial Support for Workers Is Inadequate	29
Workers’ Compensation	29
Recommendation.....	31
The COVID-19 Paid Leave Rule	31

Recommendation.....	32
Self-Help by Workers.....	32
Worker Protests	32
Worker Lawsuits	34
Workers Silenced	36
The Limitations of Legal Protections for Self-Help	37
National Labor Relations Board	37
Recommendations	37
Whistleblower Protections	38
Recommendations	39
Union Protections.....	39
Recommendation.....	41
White House Interference	41
Plant Closures.....	42
Liability Shield.....	43
Recommendations	44
Conclusion: Reconceiving the Workplace with Health and Safety in Mind....	45
Endnotes	46

Protecting Workers in a Pandemic

What the Federal Government Should Be Doing

Executive Summary

The "re-opening" of the American economy while the coronavirus that causes COVID-19 is still circulating puts workers at heightened risk of contracting the deadly virus. In some blue-collar industries, the risk is particularly acute because of the inherent nature of the work itself and of the workplaces in which it is conducted. Moreover, for a variety of reasons, that risk falls disproportionately on people of color and low-income workers – people whose economic circumstances and less reliable access to health care renders them all the more vulnerable. These workers are being treated as expendable, forced by the threat of losing their jobs to accept risks no member of Congress or White House staffer would accept for themselves or their families.

During the period when much of the nation was on lockdown – roughly the middle of March to the end of April 2020 – the evidence that workplace transmission of COVID-19 is a very serious threat became all too clear. Workers in a variety of "essential industries" – health care, meatpacking, transportation, warehousing, and more – suffered from localized outbreaks.

Public health officials warn that, in order to avoid a repetition of these outbreaks on a far larger scale, we must take appropriate precautions. In the workplace, that typically includes limiting interactions and expanding distancing among workers, rigorous and frequent sanitization and cleaning, engineering controls such as plexiglass barriers and adequate ventilation systems, medical-grade protective clothing, and masks for workers. Even so, such measures are likely to slow but not stop transmission – effectively bending the curve of transmission so as to buy time for a vaccine or improved treatment of COVID-19.

Implementing such measures requires a nationwide commitment built on determined leadership, robust standard-setting and enforcement, and education and research about what works and what does not. Unfortunately, the federal government has largely failed to provide such leadership and has instead used the pandemic as a rationale to roll back enforcement of existing workplace safety measures. Instead of seizing the opportunity, with both carrot and stick, to ensure that the nation's workers are not subjected to significant risks on the job, the Occupational Safety and Health Administration (OSHA) and other protector agencies have shrunk into the background. Meanwhile, conservative leaders and the White House are pushing to insulate businesses from litigation brought by workers and

customers who are harmed by the failure to institute appropriate safety measures – thus incentivizing unscrupulous businesses to ignore the risks in the pursuit of profit.

While the federal government has shown little interest in taking a lead role in protecting workers from the coronavirus, such leadership is not beyond its reach. In the pages that follow, we describe the risks to workers, with a particular focus on "essential" industries. We review the existing workplace safety authorities at the disposal of OSHA, several other agencies of the federal government, and state labor agencies. We also discuss the various, limited rights workers have to protect themselves or to demand that their employers provide protection, the role of unions and workers' compensation. Finally, we discuss the likely impact of the proposed liability shield for businesses.

Throughout the paper, we offer a series of recommendations, some specific to preventing the spread of the virus, and some that apply the lessons of the virus to enduring workplace safety issues. These recommendations include:

- The Occupational Safety and Health Administration (OSHA) should promulgate an emergency temporary standard on pathogen protection for workplaces where employees are at high risk of exposure to COVID-19.
- OSHA should promulgate a permanent standard for pathogens in workplaces where such pathogens pose a significant risk to workers.
- OSHA should aggressively enforce the general duty clause of the Occupational Safety and Health Act by issuing citations to any company that fails to comply with generally recognized pathogen protection practices, drawing on OSHA and CDC guidelines as well as other indicia of proper safety practices relevant to pathogens as evidence of recognized safety practices.
- The United States Department of Agriculture should require that meat and poultry packing plants reduce line speeds to a level at which employees can maintain a safe distance between one another and have time to maintain personal hygiene.
- The Federal Aviation Administration should promulgate interim final regulations protecting aircraft crew members from the risk of contracting COVID-19 drawing on OSHA and CDC guidance as well as other indicia of proper safety practices relevant to pathogens and make those regulations immediately applicable to aircraft in operation.

- The Mine Safety and Health Administration should promulgate standards requiring mine operators to protect miners from the risk of contracting COVID-19.
- The National Labor Relations Board and the courts should give employees who collectively leave workplaces where they face a significant risk of contracting COVID-19 the benefit of the doubt in exercising their rights under the National Labor Relations Act to refuse dangerous work.
- State legislatures and workers' compensation agencies should create a presumption that at a minimum any "essential" worker who suffers from COVID-19 contracted the infection at the workplace and is therefore presumptively entitled to workers' compensation.
- Congress should enact legislation making paid sick leave a universal requirement for all employees, providing strong whistleblower protections for workers reporting dangerous conditions to authorities, and giving workers a private right of action in federal court to enforce OSHA standards and the general duty clause.

Protecting Workers in a Pandemic

What the Federal Government Should Be Doing

Introduction

Annie Grant had worked on a packing line at the Tyson Foods poultry processing plant in Camilla, Georgia for 15 years when one morning in late March 2020 she felt feverish. Two of her 13 children urged her to stay home rather than work on the chilled line with a fever, but she told them that the company insisted she continue to work. "They told me I had to come back to work," she texted later. The company was short on help, she explained, and supplies of stored chicken were running low as Americans, mindful that they were headed into a period of sheltering in place, began to stock up. It was not just Tyson's pressing the point. Vice President Pence had told food supply workers that the nation needed them "to continue, as a part of what we call critical infrastructure, to show up and do your job." On the incentives side, Tyson was offering a \$500 bonus to employees if they worked for three months without missing a day. So, Annie Grant showed up for work and continued to labor shoulder-to-shoulder with hundreds of other workers slicing thousands of chicken carcasses a day. Soon, however, she became too ill to work, and had to return home. Later, she checked herself into a hospital, spent a week on a ventilator, before dying of COVID-19 in early April. Two of her co-workers died of the same disease within the next few days. One of Annie's sons told a reporter that if the plant management "had taken proper precautions, they would have prevented people from getting it."¹

For millions of workers like Annie Grant, the magnitude of the risk that they would become sickened with deadly COVID-19 while much of the nation was on lockdown depended on the precautions their employers took to protect them. They did not have the option of sheltering in place and telecommuting, either because they were essential workers or feared they would lose their jobs if they did not show up for work. Because most workers go home to families or roommates, workplace practices that put workers at risk of contracting a communicable disease like COVID-19 put families, communities, and the entire public at risk.²

As the coronavirus swept across the continent and people who could shelter in place did so, Americans were reminded that many of the workers who are "essential" to the production of the goods and services upon which we all depend are some of the most poorly paid and least protected members of society.³ And they are disproportionately people of color.⁴

We have also learned that our health directly depends upon their good health. If the nurse, the store clerk, the bus driver, or the delivery person is sick, the people who come into contact with them are at risk. This means that we all have a direct interest in how the federal government regulates workplaces to ensure that workers stay safe and healthy. We now recognize that these workers who go to their jobs every day despite the risks to themselves and their families are the heroes of the coronavirus crisis.⁵

For its part, Tyson Foods, Annie Grant's employer, later said it would implement social distancing measures, install dividers between stations, slow production lines, and take employees' temperatures before allowing them into the plant.⁶ Many other employers also took steps to protect workers by providing personal protective equipment or installing plastic barriers between workers and between workers and customers.⁷ Often this was necessary to get closed facilities up and running again after COVID-19 infections had caused them to shut down.⁸ For employees like Annie Grant, however, these new efforts to protect workers came too late. Moreover, less conscientious employers have been slow to implement the necessary protections, and some have done nothing at all. As a result, workers have complained that their employers are not doing enough to protect them from contracting the disease in the workplace.⁹

Federal law is supposed to protect workers who encounter health and safety risks on the job. During the current COVID-19 crisis, however, those protections remain largely unavailable because the Trump administration has been more concerned with keeping the economy humming and the stock market rising than protecting the nation's essential workers. As a result, the federal government has failed abysmally in its responsibilities to keep safe the very workers who have been assisting victims of the disease or providing the vital functions that are necessary to keep the lights on, the streets safe, and food on store shelves. In particular, the Occupational Safety and Health Administration (OSHA) has failed to play the proactive role that Congress envisioned for it by gathering information on pathogens and workplaces where workers encounter such pathogens, using that information to promulgate emergency standards and permanent standards to ensure safe workplaces, ensuring that workers receive adequate training in safe workplace practices relating to pathogens, and enforcing the duty that employers have to provide workplaces free of recognized hazards.

This report tells the stories of workers like Annie Grant who found themselves in jobs that presented a high risk of contracting COVID-19 and their attempts to seek help from federal agencies that were supposed to protect them. It also describes attempts by workers to explore self-help by exercising their rights under federal law to report dangerous conditions in the workplace, to walk away from dangerous jobs and to enforce contracts between unions and employers. These accounts make it clear that the Trump administration has done a painfully poor job of protecting workers

from the risk of contracting COVID-19 and that it has done very little in the way of supporting workers who attempt to invoke their rights under federal and state laws to protect themselves. The report offers recommendations for administrative and legislative actions to make workplaces safer now and in the future.

Workers at Risk from COVID-19

As the following descriptions indicate, millions of workers across the United States, have been at work while the rest of the country has sheltered in place. These include employers working in agriculture,¹⁰ airline assembly plants,¹¹ call centers,¹² delivery services,¹³ health care, electronic chip manufacturing,¹⁴ food packaging plants,¹⁵ home services,¹⁶ meatpacking, public transit, retail stores, and warehouses. In all of these industries, we see a failure by many employers to offer a robust response to the virus that resulted in workplaces becoming a prime source of the virus for employees, their families, and their communities. Even when employers sought to protect employees, they had difficulty accessing masks and other supplies needed to protect the workers. To explain and illustrate how workers have been at risk, we take a closer look at health care, meatpacking, public transit, retail stores, warehouses, and mining.

Health Care

Nurses, physicians' assistants and other health care providers in hospitals, doctor offices, clinics, assisted living facilities, nursing homes and home health, sometimes called the "care work force," are at greatest risk from the pandemic. As of mid-May, the Centers for Disease Control had received 43,738 reports of COVID-19 infections among health care workers and 191 deaths.¹⁷ A disproportionate number of these health care workers were women, accounting for 73 percent of COVID-19-infected health care workers as of mid-April.¹⁸



In the hardest hit places early in the pandemic, nurses and nursing assistants had to reuse protective masks or fashion their own masks out of whatever material was available. Nurses at one Los Angeles hospital complained that the most protective N95 respirators were unavailable to most nurses even though they were assisting with patients who might be carrying the coronavirus. In hard-hit New York City, nurses were limited to one N95 mask per day, rather than following their normal practice of discarding a mask after each use. A nurse at a Windham, Connecticut, hospital was told to return the N95 mask she had picked up and instead use a basic surgical mask; she later tested positive for COVID-19. In some hospitals, health care workers not treating COVID-19 patients were told not to wear masks because it would frighten patients.¹⁹

After stay-at-home orders were in place, many of these essential care givers also bore the primary responsibility of caring for their own children and dependents. They legitimately worried about bringing COVID-19 from their workplaces to their homes. But managers at some hospitals threatened to fire nurses who spoke out about the unsafe conditions. By mid-April, thousands of nurses had tested positive for COVID-19, and more than 40 had died of COVID-19 infections.²⁰

Meat Packing

The chicken processing plant in Georgia where Annie Grant contracted COVID-19 was not the only slaughterhouse to close due to a COVID-19 outbreak. Because the owners had ignored their responsibility to keep workers as safe as possible, the plants were prime breeding grounds for the coronavirus. Yet, rather than taking responsibility, companies, with the backing of conservative politicians, blamed the workers for becoming ill, saying that it was their “home and social habits” that caused their illness.²¹ As a result of the failure to take precautions, many of the largest of the nation’s 800 federally inspected meatpacking plants closed during the month of April due to the pandemic, despite having been deemed essential. The communities in which plants were operating became hotbeds of COVID-19.²²



It was virtually impossible for workers to maintain a safe distance at meat processing facilities. The employees who worked shoulder-to-shoulder on the fast moving packing lines sliced, deboned, and “gut-snatched” carcasses at such a rapid clip that they did not have time to cover their mouths when they sneezed or wipe their noses afterward. Typically, workers on the lines were allowed two 15-minute breaks a day and a one-half hour lunch break. Other than that, they got no breaks to wash or sanitize their hands because the line had to keep moving. At one hog processing facility, workers processed around 1,100 pigs per hour on a fast-moving assembly line. Workers responsible for picking up dropped chicken parts at a large poultry processing facility had to go where the parts fell, even if they landed within six feet of another employee. Desperate to keep the lines running, several plants offered employees additional pay and bonuses for staying on the job.²³

By early May, 167 meat and poultry plants had suffered COVID-19 outbreaks with 9,400 workers testing positive for the disease and 45 deaths.²⁴ But the actual numbers were probably higher because many companies have been reluctant to allow testing for fear of becoming the center of public attention, and little testing was undertaken in the communities surrounding the packing plants. Moreover, the towns in which they operated became hot

spots of COVID-19 infections in rural America. In Texas, the counties with the highest rate of COVID-19 cases were not the ones containing the state's large cities; they were the rural counties in the panhandle and East Texas that hosted meatpacking plants.²⁵

By the end of April, at least 22 meatpacking plants throughout the country had been shut down to deal with the effects of the pandemic, though a few had reopened. Sometimes the shutdowns were ordered by state or local health officials, but sometimes they were voluntary, no doubt because the companies feared they would be held liable for damages in lawsuits brought by workers or neighboring communities that suffered COVID-19 outbreaks.²⁶

The closures were devastating to the many immigrants who worked in the plants, but who were often not eligible for unemployment insurance. The closures also gave rise to fears of meat supply shortages at the same time that they deprived many farmers and ranchers of the primary buyers of their cattle, pigs, and poultry.²⁷

The increased risk of infection to employees also increased the risk of infection to the inspectors from the United States Department of Agriculture (USDA), who, under federal law, must be on the premises at all times that meat is being processed to ensure the safety of the meat. As of late April 2020, 137 USDA inspectors had tested positive for COVID-19, and two had died from the infections. At that point, the Department decided that inspectors should wear masks, but found itself unable to round up enough of them. It told inspectors that it would reimburse them for up to \$50 to purchase masks of their own.²⁸

On April 26, as state governors attempted to address the risk to workers, their families, and their communities, Tyson Foods responded. Notwithstanding the deaths of Annie Grant and her fellow Tysons workers, the company published a full-page advertisement in the *Washington Post* and the *New York Times* warning that "the food supply chain is breaking" because meatpacking plants were having to shut down to deal with the pandemic. The ad claimed that millions of pounds of meat would disappear from grocery shelves and farmers and ranchers would have to "depopulate," a sanitized term for euthanize, thousands of cows and pigs and millions of chickens if the federal government did not help the meat production industry find "a way to allow our team members to work in safety without fear, panic or worry."²⁹

The ad apparently caught the President's eye. Trump administration officials discussed the potential meat shortage privately with meat company executives, and White House General Counsel Pat Cipollone worked with the companies to craft an executive order.³⁰ On April 28, President Trump announced he would invoke the Defense Production Act to address the

meat industry's "liability problems," which had become a "legal road block" to opening the plants. The president had been quite hesitant to invoke the Defense Production Act to increase supplies of face masks and reagents for testing, but he was eager to use that power to protect the meat production industry and the farmers and ranchers that supplied it.³¹

The Secretary of Agriculture sent a letter to packing plants directing those "contemplating reductions in operations or recently closed since Friday May 1, and without a clear timetable for near term resumption of operations, [to] submit written documentation of their operations and health and safety protocol developed based on the CDC/OSHA guidance to USDA." The letter told the plants that they should "resume operations as soon as they are able after implementing the CDC/OSHA guidance for the protection of workers."³²

The problem with the Secretary's letter and subsequent statements and letters is that they all operated on the erroneous assumption that "compliance" with the CDC/OSHA guidelines provides meaningful protection to workers. Because the guidelines are meant to be voluntary, they employ easily circumvented terms like "should," "where appropriate," and "if possible." Whatever "health and safety protocols" companies develop in response to the executive order would be just as voluntary as the guidance.

As we will establish later in the report, the President's assertion of authority to override closedown and other orders by the governors is dubious, and it has led to new outbreaks of the virus because the plants remain a major source of the spread of COVID-19. As of May 15, almost one-half of COVID-19 hotspots were linked to meat processing plants leading to the virus spiking in many small towns.³³

Public Transit

Jason Hargrove was one of the first people in Detroit to issue a public warning that COVID-19 presented a serious risk to the public. On March 21, he posted a video from the public transit bus he was driving showing him mopping his face with a tissue after a passenger had coughed on him. To his million-plus viewers, he explained: "That s--- was uncalled for. I feel violated." Jason's job was not high paying, but it was deemed essential by Detroit's mayor because almost 25 percent of the city's residents depended exclusively on public transportation to get to work, stores, and entertainment. Nevertheless, the city provided no personal protective equipment or disinfectants to its bus drivers. Just prior to the Hargrove incident, several



bus drivers in his district had refused to take their buses out until the city took steps to protect them from the risks posed by their customers.³⁴

The city responded by sending out health care workers to instruct drivers on the necessity of keeping passengers six feet apart. The drivers concluded that such an instruction could only have come from someone who had never been on a city bus. The mayor followed with promises to disinfect buses at the end of each route, force passengers to use the rear door, and waive fares so that passengers did not have to come in close proximity with drivers to pay their fares. That only made things worse because the buses then became “homeless shelter[s] on wheels.” One driver asked, “How many people have to die and get sick and hospitalized before they realize that it’s the buses that are transporting the virus all over the city?”

Soon after the incident that he filmed, Jason Hargrove got sick. He died of complications caused by COVID-19 on April 1. That day, seven bus drivers tested positive for the virus and more than 100 were quarantined awaiting the results of testing. Not long after Hargrove passed away, the mayor put bus drivers in the same testing and medical monitoring program that the city had created for first responders, and he ordered all buses outfitted with surgical mask dispensers for any passengers that were not already wearing masks. The masks did not last very long, however, and they were not replaced.³⁵

Workers who provide public transportation services are particularly at risk for contracting airborne diseases. Bus and subway drivers, pilots and flight attendants, and taxi drivers are among those groups that deserve protection. As the pandemic grew in intensity in urban areas served by mass transit in late March and early April, those workers were not being protected. According to a *New York Times* report on New York City’s Metropolitan Transit Authority’s response to the COVID-19 pandemic, the authority “was late to distribute disinfectant to clean shared workspaces, struggled to keep track of sick workers and failed to inform their colleagues about possible exposure to the virus.” MTA did not provide masks to its employees until April 3 when the Centers for Disease Control (CDC) changed its position on masks. Drivers who fashioned their own masks were reprimanded by supervisors. Some drivers brought homemade disinfecting solutions onto their buses to clean the areas where they were located. By mid-April, 41 New York transit workers had died from COVID-19 infections and 6,000 had tested positive or were self-quarantining. And by the end of April, more than 100 local transit workers had died of COVID-19 nationwide.³⁶

Retail Stores

The grocery stores, hardware stores, pharmacies and other retail stores that remained open because they provided essential services exposed their employees to the risk of contracting COVID-19 as they performed their daily functions of restocking shelves, working checkout counters, and dealing

with abandoned and potentially contaminated shopping carts. During the peak of the crisis, demand for groceries doubled as people avoided restaurants and ate more meals at home. Retail employees in essential jobs did not have the option of working from home, but they received little training in dealing with pandemics. More than two-thirds of workers at grocery store checkout stands and fast food counters were women.³⁷ The proportion of retail store workers over 55 has increased steadily since the 2008 recession to nearly a quarter of the workforce. They know that they are at high risk, but they need the money to pay their bills.³⁸



Although there was an obvious risk that workers would transmit the disease to one another, the gravest threat stemmed from careless customers. Cashiers could become infected by touching the products that customers picked out, touching the money, and receiving droplets containing the coronavirus when a customer coughed or sneezed. In a survey conducted by their union, 85 percent of grocery workers said that customers were not practicing social distancing.³⁹

Retail giant Walmart initially did little to protect store employees as customers poured into stores to stock up on food and other essentials in March. The surge made it impossible for employees to maintain a safe distance, and the company at first provided no hand sanitizer or personal protective equipment. One employee complained that “[a]ll I have is a stupid blue vest.”⁴⁰

It was not until the pandemic was widespread in mid-April that many retail stores began offering employees (now deemed essential) masks and gloves and began temperature screening. They also began to limit the number of customers that could enter the store, provide wider aisles, install Plexiglas barriers at registers, employ touchless payment technologies, use chemical foggers and robot sanitizers, and reduce store hours to allow for restocking. It was, however, sometimes difficult for retail stores to obtain protective masks for employees because first claim to the most effective masks went to health care workers and the rest went to the highest bidder. The grocery workers union urged states to categorize grocery workers as first responders so that they could obtain a higher priority. Several states obliged, but most did not. After receiving petitions from thousands of employees, several of the large grocery chains temporarily offered hazard pay and bonuses to employees who regularly showed up for work. But all of this came too late for the dozens of grocery store workers who had died of COVID-19 infections by mid-April.⁴¹

Warehouses

Warehouse workers for companies like Amazon, UPS, Federal Express, and XPO are exposed to the coronavirus on the packages and through

interactions with fellow workers. When the pandemic first broke out, warehouse

employees worked shoulder to shoulder on conveyer belts, and they gathered for security pat-downs with little concern for social distancing. Workers for several companies were told that their employers

needed them to come to work to deal with

unprecedented demand, even if they felt sick

and were coughing. In some facilities hand soap and paper towels were in short supply. Although many of the companies have increased their efforts to sanitize working surfaces, they have done little to change working arrangements.⁴²



Mining

After working in the Kentucky coal mines for 30 years, Cy Robinette was one of the hundreds of coal miners who contracted black lung disease, an affliction that renders the victim far more susceptible to respiratory infections than the general population. In April 2020, Robinette was laid off due to the COVID-19 pandemic. He knows that when the mines reopen, he will be at high risk of dying if he suffers a COVID-19 infection, but he says he needs the paycheck to feed his family. He will have to take that risk.⁴³

Like Robinette, many if not most coal miners are at extreme risk if they contract COVID-19, but it is nearly impossible to maintain proper social distancing in the narrow confines of a coal mine. Miners descend into the mine together in mantrips, they work together in confined spaces, they operate the same equipment, and they use common shower facilities at the end of their shifts. Like Robinette, many miners are

older, and suffer from occupational lung diseases like black lung and silicosis, putting them at higher risk of a COVID-19 infection.⁴⁴



The risk is so high, in fact, that the inspectors from the Mine Safety and Health Administration (MSHA), who are charged with ensuring that the mines are safe, are concerned that

they will necessarily come into close contact with miners during their inspections, and they do not have an opportunity to decontaminate as they travel between mines. This puts both the inspectors and the miners at risk. MSHA inspectors requested better personal protective equipment, fewer

mandatory inspections, and more opportunities to conduct inspections over the phone or internet, but to no avail.⁴⁵

OSHA's Abysmal Performance

The Occupational Safety and Health Administration (OSHA) is responsible for protecting American workers in the private sector from safety and health risks, including COVID-19. OSHA protections do not extend to those workers covered by another federal agency (e.g., miners are covered by MSHA), independent contractors, and some farmworkers on family farms. The Obama Administration OSHA worked on a pathogen protection standard to protect health care workers in response to the H1N1 pandemic of 2009-2010, but the Trump administration put the project on hold indefinitely and has never gotten back to it.⁴⁶ The thousands of complaints that OSHA received at the outset of the COVID-19 pandemic about the failures of employers to protect workers against COVID-19 risk are powerful evidence that OSHA needed to do something to protect workers who were in no position to protect themselves.⁴⁷

The plain reality is that OSHA failed to act rapidly to address the mounting carnage in the workplace.⁴⁸ It has failed this responsibility entirely, even though it has a number of possible actions available to it, actions that would make a meaningful difference, and that are still worth taking even this late in the pandemic's course.

Unenforceable Guidance

OSHA's only significant action in response to COVID-19 has been to issue general guidance for preparing workplaces for COVID-19 on March 9. Among other things, the guidance recommended that employers develop infectious disease preparedness and response plans, implement basic infection prevention measures like hand-washing, proper respiratory etiquette, encouraging sick workers to stay at home, and providing workers and the public with tissues and trash receptacles. It also recommended that employers develop procedures for identifying and isolating employees who might be suffering from COVID-19. And it made suggestions for engineering, administrative, and work practice controls. To communicate the guidance to workers, OSHA prepared a poster providing tips on how to prevent the spread of infections.⁴⁹

OSHA offered specific guidance for several kinds of workplaces... Compliance was entirely voluntary, and the document itself was laced with qualifiers like "should," "where appropriate," and "if possible."

In addition to the general guidance, OSHA offered specific guidance for several kinds of workplaces that was also entirely voluntary. For example, OSHA and CDC collaborated on a lengthy guidance document with suggestions for making meat and poultry-packing facilities safer for workers. Compliance with the guidance was entirely voluntary, and the document itself was laced with qualifiers like “should,” “where appropriate,” and “if possible.” The guidance suggested engineering controls, including configuring workspaces to keep employees six feet apart or installing physical barriers between employees, providing convenient handwashing or hand-sanitizing stations, adding clock-in stations to reduce crowding, and spacing tables in break rooms and cafeterias. It also suggested administrative controls such as staggering break times, staggering worker arrival and departure times, providing visual cues to remind employees to

At the end of the day, guidance is unenforceable. If employers do not want to follow the guidance, they do not have to. This purely voluntary approach “strips workers of their legal right to see and receive a worksite inspection by OSHA,” and it sends a message to employers that they are not required to take strong preventative actions to protect workers from COVID-19.

maintain safe distancing, providing tissues, and educating workers to avoid touching their faces. Cloth masks, OSHA said, were advisable for workspaces where safe distancing was impractical, but employers should consider using N95 respirators. The guidelines recommended cleaning and disinfecting tools as often as workers changed workstations. Finally, the guidelines provided suggestions for how best to screen workers, deal with sick workers, and undertake contact tracing when a worker comes down with an infection.⁵⁰

At the end of the day, however, guidance is unenforceable. If employers do not want to follow the guidance, they do not have to. This purely voluntary approach “strips workers of their legal right to see and receive a worksite inspection by OSHA,”⁵¹ and it sends a

message to employers that they are not required to take strong preventative actions to protect workers from COVID-19. As workers continue to die of work-related COVID-19 infections in hospitals, meatpacking plants, warehouses, mass transit vehicles and other facilities, it is becoming painfully apparent that OSHA’s guidance documents are not working.⁵²

Recommendation

(1) Voluntary guidance documents are no substitute for enforceable standards. OSHA should use its considerable expertise and that of the National Institute of Occupational Safety and Health to promulgate enforceable standards to protect workers from the coronavirus and other pathogens as suggested below.

Pathogen Protection Emergency Temporary Standard

The Occupational Safety and Health Act of 1970 authorizes OSHA to write safety and health standards requiring conditions and practices “reasonably necessary or appropriate” to provide safe and healthful employment.⁵³ In

cases where employees are exposed to a “grave danger” from toxic or harmful substances or agents or a “new hazard,” the law says OSHA “shall” issue an emergency temporary standard to take immediate effect upon publication.” Within six months after publication, OSHA must promulgate a permanent standard with the emergency temporary standard (ETS) serving as the proposed regulation.⁵⁴

Early in the outbreak, House Education and Labor Committee Chairman Bobby Scott sent a letter to Labor Secretary Eugene Scalia urging him to prioritize the promulgation of a pathogen standard for all affected workers. Scalia replied that OSHA could “best meet the needs of America’s workers by being able to rapidly respond in a flexible environment,” but this turned out to be an empty claim.⁵⁵ Later in the debates over the Families First Act and the CARES Act, Democrats unsuccessfully attempted to include a requirement that OSHA promulgate an ETS requiring personal protective equipment, social distancing and other protections for health care workers. The provision’s proponents were, however, unable to overcome intense lobbying by the American Hospital Association.⁵⁶

On March 6, the AFL-CIO and affiliated unions filed a petition with the Department of Labor demanding that OSHA issue an ETS addressing the risks that COVID-19 posed to workers and thereafter promulgate a permanent standard. The unions wanted the standard to be applicable to any workers who might interact with other workers or members of the public as part of the performance of their duties.⁵⁷ It should be designed to prevent infections in the workplace through feasible techniques, such as keeping workers six feet apart, providing effective masks, and providing hand sanitizers throughout the workplace.⁵⁸ On April 23, 2020, Labor Secretary Eugene Scalia responded that an emergency temporary standard was unnecessary because OSHA had ample power to protect workers from COVID-19 through the Occupational Safety and Health Act’s “general duty” clause.⁵⁹ As we shall see, OSHA has not exercised its power, even though it has certainly encountered situations in which it could have. The AFL-CIO then sued OSHA in the D.C. Circuit Court of Appeals asking that court to issue a writ of mandamus ordering the agency to promulgate an ETS within 30 days.⁶⁰ Unfortunately for workers who face the risk of contracting COVID-19 on a daily basis, the court declined to interfere with OSHA’s discretion not to issue an ETS, given OSHA’s power under the general duty clause to address individual workplaces.⁶¹ As discussed below, that is small comfort for workers, given OSHA’s reluctance to rely on that clause to protect workers from COVID-19.

Labor Secretary Eugene Scalia responded that an emergency temporary standard was unnecessary because OSHA had ample power to protect workers from COVID-19 through the Occupational Safety and Health Act’s “general duty” clause. OSHA has not exercised its power, even though it has certainly encountered situations in which it could have.

In the distant past, when OSHA was fully staffed and energetic, it did not hesitate to promulgate ETSs. During the 1970s, for example, it promulgated ETSs for asbestos and vinyl chloride.⁶² If ever there were an emergency calling for an ETS, this is it. COVID-19 has killed more workers in a shorter period of time than any health emergency that OSHA has encountered in its 50-year history.⁶³ There is no excuse for OSHA to fail to promulgate protective standards for workplaces posing COVID-19 risks to workers. OSHA has a template for an ETS in the Obama administration's draft pathogen protection standard and California OSHA's Aerosol Transmission Disease (ATD) standard. And the AFL-CIO petition suggested basic elements that should be included in the ETS.

The project would be strongly resisted by the affected industries. Since the template has already been prepared by the Obama administration OSHA, however, it might not prove that difficult to pull together a standard. For meat and poultry-packing plants, the agency could make the guidance prepared by CDC and OSHA at the end of April 2020 mandatory with a few modifications like changing "should" to "shall" and "if possible" to "unless technologically infeasible."

The American Hospital Association has argued that it would be impossible for hospitals to comply with any standard that required N95 masks because of the difficulty of obtaining them during the pandemic.⁶⁴ That was certainly a serious issue early in the pandemic, and may still be valid in certain hospitals, but supplies of N95 masks should be less rare in the future. In any event, the standard could provide a variance for situations in which supplies are literally unavailable.

Recommendations

(1) The Occupational Safety and Health Administration (OSHA) should promulgate an emergency temporary standard (ETS) for workplaces where employees are at significant risk of exposure to COVID-19. The ETS should require companies to write exposure control plans containing a hierarchy of approaches, including engineering controls such as ventilation or negative pressure isolation, work practice controls, and personal protective equipment. The standard should include testing workers for COVID-19, a mandatory medical surveillance program, and provisions for allowing workers who test positive for COVID-19 to remain at home with pay. Finally, the ETS should provide for proper disposal of contaminated items, hazard communication and training for workers, and proper recordkeeping.

(2) Building on the emergency temporary standard, OSHA should promulgate a permanent standard protecting workers from pathogens in workplaces where such pathogens pose a significant risk to workers.

The General Duty Clause

On April 14, workers at a McDonalds franchise in Chicago filed a complaint with OSHA alleging that conditions in their eating establishments presented “serious and imminent workplace hazards” after an employee tested positive for COVID-19.⁶⁵ Since OSHA had not promulgated a pathogen protection standard for restaurants, the appropriate legal vehicle for addressing this workplace risk was the “general duty” clause – the provision cited by Labor Secretary Scalia when he waved off a proposal to develop an emergency temporary standard. The provision requires employers to provide employees with “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”⁶⁶ For example, the Centers for Disease Control and Prevention (CDC) has provided specific guidelines on hand washing, social distancing, mask wearing and other techniques to protect employees from pathogens that OSHA could easily adopt as techniques for avoiding the known hazard of coronavirus infection. An OSHA official explained that it did not have authority to enforce guidelines, but that begged the question of whether it could use the guidelines as a measure of compliance with the general duty clause. By mid-March, the coronavirus was a recognized hazard, and it was clearly likely “to cause death or serious physical harm” to many if not most workers who were exposed to it.⁶⁷

An example: Workers at a poultry-processing plant in Georgia complained of standing shoulder-to-shoulder on the rapidly moving assembly line without protective barriers or masks. After three employees died of COVID-19, the plant had not changed its practices. It is hard to imagine a better case for finding a violation of the general duty clause, yet OSHA watched from the sidelines. OSHA did not attempt to protect workers from COVID-19 by concluding that failure to follow the CDC guidelines or other available industry standards violated the general duty clause. To the contrary, when OSHA issued its guidance documents, discussed above, it made clear that it will not use their provisions as the measure of compliance with the general duty clause.⁶⁸

After President Trump issued his executive order under the Defense Production Act directing the Secretary of Agriculture to insist that meat production plants remain open, Solicitor of Labor Kate O’Scannlain and acting OSHA head Loren Sweatt issued a statement saying that OSHA did “not anticipate citing employers that adhere to the CDC/OSHA Meat Processing Guidance, and that it would “take into account good faith attempts” to follow the guidance in deciding whether to cite violators. Since the guidance was filled with terms like “should” and “if possible,” it would take an utter scofflaw not to adhere to its suggestions. The statement further warned state and local agencies that the president’s invocation of the Defense Production Act meant that those agencies could not direct a meat or poultry processing facility to close, remain closed, or operate other than

in accordance with the CDC/OSHA guidance. In other words, the executive order purported to preempt state and local worker protection laws that were inconsistent with the guidance. Finally, the statement said that the federal government would “consider a request” by an employer that complied with the guidance to intervene on behalf of that employer in litigation brought by workers or other plaintiffs, and it would consider intervening on behalf of an employee against an employer that “has not taken steps in good faith to follow” the guidance.⁶⁹

Given the Trump administration’s reluctance to promulgate regulations and invoke the general duty clause to protect meat and poultry plant workers, forcing meat and poultry-production plants to remain open is a particularly bad idea. By the time President Trump issued the executive order, 20 workers had died of COVID-19 and 6,500 workers had been hospitalized, tested positive for COVID-19, or were quarantined and awaiting results. Richard Trumka, the president of the AFL-CIO, complained that “[u]sing executive power to force people back on the job without proper protections is wrong and dangerous.”⁷⁰

As President Trump pressed ahead with reopening the economy and state governors started lifting restrictions on returning to work, many employers worried about their liability under the general duty clause if their facilities became hot spots. The National Association of Managers and the U.S. Chamber of Commerce demanded that OSHA and CDC publish guidance that “clearly defines proper hygiene and sanitization processes and practices that employers must follow” to avoid liability under

the general duty clause.⁷¹ In effect, these industry representatives are demanding that OSHA issue unenforceable guidelines that provide a safe harbor from state regulation and tort liability for companies that comply with them, but prevent OSHA from citing violations of those guidelines as violations of the general duty clause. This one-way street might be a good deal for employers, but it would be a bad deal for workers.



To be sure, the CDC guidelines are no panacea. During the Trump Administration, the guidelines were often less specific and more hortatory than in the past. The frequent use of “where appropriate” and “if possible” in the OSHA/CDC guidelines for meatpacking plants is a good example. Moreover, CDC was not beyond reducing the stringency of its guidelines to meet industry objections. Early in the pandemic, the CDC guidelines advised workers who had been exposed to someone testing positive for COVID-19 to self-quarantine for 14 days, but it changed the guidelines on April 9 to allow “essential workers” to continue working, even if they had been exposed, so long as they did not display symptoms of the disease, wore face masks and

monitored their temperatures. This, despite Dr. Anthony Fauci's warning that 25 to 50 percent of people carrying the virus may be asymptomatic.⁷²

To invoke the general duty clause, OSHA must prove in a given instance that a "recognized hazard" is present in the workplace and that "feasible" technologies or work practices are available to abate that hazard.⁷³ The fact is that the serious risks that the coronavirus poses to workers are by now generally recognized hazards that are likely to cause death or serious physical harm, and many technologies and work practices are easily available to protect workers from infections. Even if CDC and OSHA guidelines are not directly enforceable, those guidelines and many other indicia of proper safety practices relevant to pathogens are part of the universe of information that OSHA inspectors can draw on in determining whether an employer has violated its duty to provide a safe place of employment. Social distancing is feasible in most workspaces and in company cafeterias and break rooms. Where it is not feasible, employers can erect Plexiglas barriers between workers to provide some degree of protection. There is now a scientific consensus that wearing a mask when one is likely to come within six feet of another person is proper procedure during the current pandemic; providing masks to employees who will find themselves in that situation is the least that an employer can do to protect its employees. And employers should have a general duty to limit gatherings of employees to those of a modest size during the COVID-19 pandemic.⁷⁴

Recommendation

(1) OSHA should aggressively enforce the general duty clause of the Occupational Safety and Health Act by issuing citations to any company that fails to comply with generally recognized pathogen protection practices, drawing on OSHA and CDC guidelines as well as other indicia of proper safety practices relevant to pathogens as evidence of recognized safety practices. OSHA should consider such guidelines and practices to be appropriate, unless an employer demonstrates that they are inappropriate in a particular workplace, and OSHA should consider qualifiers in guidelines like "if possible" to provide an excuse only in cases of demonstrated technological infeasibility.

Enforcement

During the first three months of the COVID-19 crisis, workers filed thousands of complaints with OSHA alleging that their employers had failed to protect them from workplace risks posed by the coronavirus. OSHA standards and the general duty clause are enforced by OSHA inspectors and by state agencies in states that come up with plans that are equivalent to the federal program.⁷⁵ We will have more to say about the state-plan states below.

As of April 28, 2020, OSHA had received 2,884 complaints related to COVID-19, and states administering OSHA-approved programs had received 7,408 complaints. The complaints came from workers in a wide variety of

workplaces, ranging from hospitals to call centers to funeral homes. Dozens of complaints came from U.S. Postal Service workers. Workers expressed concerns about the absence of a number of protections, including masks, gloves and barriers to keep workers at an appropriate social distance from one another and from customers. On behalf of nurses who were afraid to go public, the nation's largest nurses' union filed more than 125 complaints with OSHA alerting it to dangerous working conditions. In the midst of the pandemic, OSHA responded that it had "the tools it needs to hold employers accountable if they expose workers to coronavirus by disregarding appropriate safety practices." But it was not at all clear that it was using those tools. In fact, an OSHA official told an attorney representing the family of a deceased Walmart employee that it had no jurisdiction to inspect the store, explaining that "OSHA does not have any jurisdiction on enforcing anything related to COVID-19 at this time."⁷⁶

An OSHA official told an attorney representing the family of a deceased Walmart employee that it had no jurisdiction to inspect the store, explaining that "OSHA does not have any jurisdiction on enforcing anything related to COVID-19 at this time."

OSHA's existing Personal Protective Equipment (PPE) standards contain specifications for PPE in situations in which PPE is called for by a separate OSHA standard or the general duty clause. The standard applies to gloves, eye and face protection, and respiratory masks. Given the desperate need for N95 respiratory masks for health care workers during the early stages of the COVID-19 pandemic, OSHA on April 3, 2020, issued a guidance providing that employers would not be cited for a violation of the PPE standard if they required workers to reuse N95 masks so long as they made a "good faith" effort to locate masks and they adhered to CDC guidance in using them. Not satisfied with this protection from prosecution, the Chamber of Commerce asked Congress to amend the OSH Act to allow manufacturers to use industrial masks and other protective equipment that did not meet OSHA's standards if the items were not available because of shortages caused by the COVID-19 pandemic. Congress thus far has failed to include the provision in any of the stimulus bills. The emergency situation may have called for extended use of the respirators for a brief period of time, but the guidance remains in effect indefinitely.⁷⁷

On April 14, OSHA issued enforcement guidance saying that the agency would give priority in allocating its inspection resources to hospitals and other health care facilities. For other workplaces where essential workers might encounter COVID-19, like grocery stores and public transit, the agency would consider employee complaints to be "informal complaints," in response to which it would contact employers and request a rundown on the measures that the employer was taking to protect workers. An inadequate response would result in an inspection. OSHA inspectors were to "assess whether the employer is making a good faith effort to provide and ensure workers use the most appropriate respirator protection available,"

and they should not issue a citation to employers who were making such “good faith” efforts. OSHA explained that it was exercising “enforcement discretion to help employers comply with OSHA requirements during the challenging times the pandemic has created and to help ensure that [personal protective equipment] is available in workplaces . . . where it is needed most.”⁷⁸ OSHA issued another guidance document on April 16 that assured employers that its inspectors would take into “strong consideration in determining whether to cite a violation” the fact that the employer acted in “good faith” to comply with OSHA standards related to training, audit, assessment, inspection, or testing requirements.⁷⁹

During the pandemic, the agency increased inspections at hospitals and other health care facilities. Between March 15 and April 23, it initiated 70 inspections of such facilities on its own and 15 in response to complaints or other reports. Within 48 hours of receiving a complaint from a nurses’ union concerning a lack of personal protective equipment, OSHA conducted an inspection of the facility. During the same period, OSHA also conducted 15 inspections of meat processing facilities and several inspections of nursing homes. But retail stores received no inspections for COVID-19. Many of the inspections that did take place, however, were simply telephone conversations in which the inspector asked an employer representative questions about the precautions the employer was taking. Telephone inspections protected OSHA inspectors from possible infections, but they also depended on employers telling the truth.⁸⁰

The April 14 guidance means that essential workplaces other than hospitals and health care facilities are not likely to be inspected even though workers face a serious risk of infection. Some employers offered some protections, but others offered no protection and even prohibited employees from using their own personal protective equipment.⁸¹ The agency does need to prioritize its very limited resources (which are due to political abuse unrelated to the coronavirus) during a crisis, and it needs to prioritize the safety of its own inspectors. Even with that in mind, however, the decisions the agency has made are disastrous for workers on the front lines and completely contrary to its mission to protect America’s workers.

A major limitation on OSHA’s enforcement capacity and a primary reason for its need to assign a low priority to workers in workplaces other than hospitals is the pitiful number of inspectors that still remain at OSHA after the Trump administration decimated the agency.

A major limitation on OSHA’s enforcement capacity and a primary reason for its need to assign a low priority to workers in workplaces other than hospitals is the pitiful number of inspectors that still remain at OSHA after the Trump administration decimated the agency. The 862 federal inspectors that were working for OSHA at the time of the outbreak was the lowest number in OSHA’s history. As of April 22, OSHA had issued no citations for

violations to employers for failing to protect workers from hazards related to COVID-19.⁸²

The “good faith” safe harbor in the April 16 guidance will make it harder for inspectors to issue citations for some kinds of violations. It may, in fact, raise the bar so high as to require OSHA inspectors to demonstrate a “willful” violation, for which the statute provides higher penalties. Many at-risk employees have effectively given up on OSHA and resorted to self-help. As one union representative asked, “Why waste your time?”⁸³

With OSHA missing in action, it highlights a critical weakness of the original OSH Act—the law does not provide workers with a means of holding employers accountable for violations independently of the agency. Workers, in other words, must rely on OSHA to enforce the statute; if OSHA fails to inspect or issue a citation, workers have no recourse. As OSHA loosens its enforcement efforts amid the pandemic, workers need to have a way to protect themselves by enforcing violations when OSHA fails to do so.

Recommendations

- (1) OSHA should immediately rescind its April 14 and April 16 enforcement memoranda exercising unwarranted enforcement discretion and issue a new memorandum that gives enforcement priority to all facilities that pose a high risk of contracting COVID-19 and clarifies that OSHA expects employers to comply with OSHA standards and the general duty clause to the greatest extent that is technologically feasible.*
- (2) OSHA should respond immediately to all complaints it receives concerning worker exposure to pathogens as quickly as possible and require employers to respond to all letters the agency sends regarding informal complaints.*
- (3) Rather than allowing weak guidelines to become a safe harbor for employers, OSHA should devote its scarce resources to writing enforceable regulations for workplaces where employees are likely to encounter pathogens. OSHA should ask Congress for sufficient additional enforcement resources to make an OSHA citation a credible threat to employers who needlessly subject their employees to the risk of contracting COVID-19.*
- (4) Congress should enact legislation giving workers a private right of action in federal court to enforce OSHA standards and the general duty clause.*

State OSHA Protections

If the federal government continues to shirk its duty to protect workers during the pandemic, the states will have to step up to the plate. Currently, 28 states have OSHA-approved state plans.⁸⁴ These states have the power to promulgate occupational safety and health standards so long as they are not inconsistent with standards that OSHA has promulgated.⁸⁵ If OSHA adopts a standard, the state plan states may provide greater protections than the

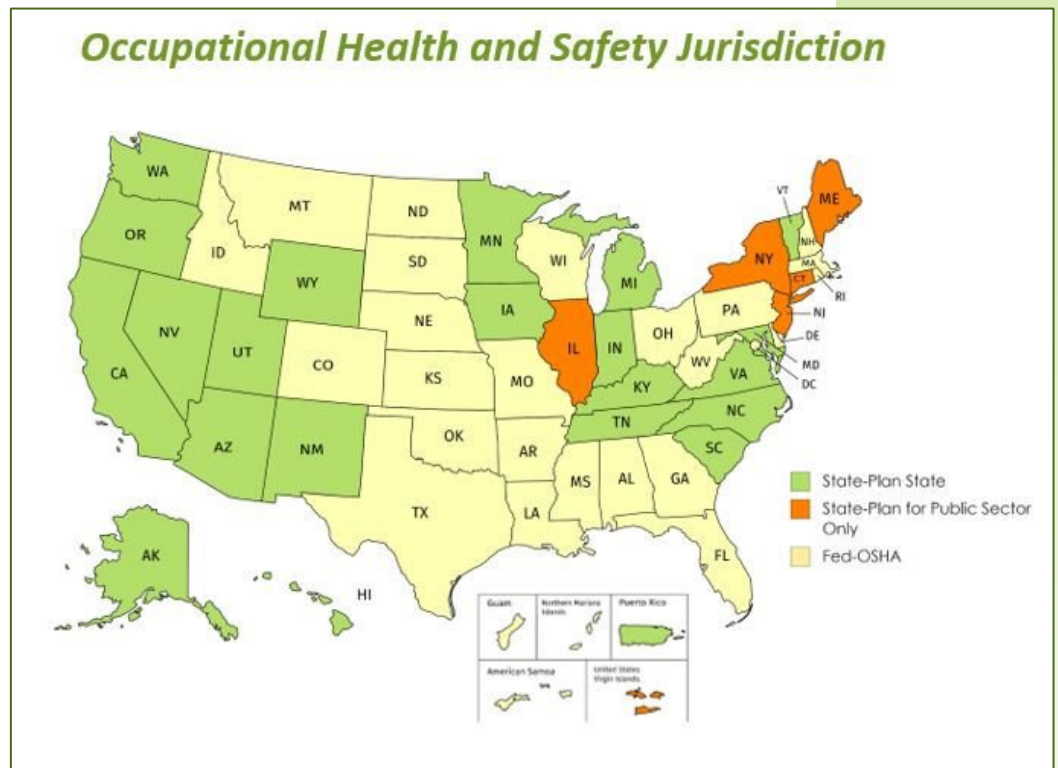
federal minimum. In the case of COVID-19, since OSHA has not promulgated any standards to protect workers from exposure, all states are free to promulgate their own. And some states have done just that.

California has promulgated an Aerosol Transmission Disease (ATD) standard that is binding and enforceable. Developed with employer and union support, the California ATD standard was issued in 2009 as a response to the pandemic flu. The standard protects health care and other high-risk workers from exposure to biological and other diseases, including coronavirus. The standard requires employers with employees exposed to ATDs to develop written safety plans, provide personal protective equipment as needed to reduce risks, and to provide safety training.⁸⁶

In early April, Gov. Phil Murphy of New Jersey

ordered all retail establishments that remained open to limit maximum occupancy to one-half of actual capacity and to place barriers between workers and customers. On April 12, New York Gov. Andrew Cuomo signed an executive order requiring employers of essential workers to provide masks when they interacted with the public. And the New York legislature passed legislation requiring employers to provide paid sick leave to employees for COVID-19-related illnesses.⁸⁷

Like federal OSHA, however, other states issued unenforceable guidelines. In mid-April, Minnesota OSHA issued guidelines for meat processing plants that, among other things, recommended slowing line speeds so that workers could keep a distance of six feet from one another and erecting solid barriers between workers when social distancing was impossible. Not satisfied with guidelines, United Farmworkers and Familias Unidas por la Justicia filed a lawsuit seeking injunctive relief against the Washington Department of Health and Department of Labor and Industries requiring the departments to promulgate mandatory standards.⁸⁸



State OSHAs, like federal OSHA, have received thousands of complaints of employer failures to protect workers against the risk of contracting COVID-19.⁸⁹ Some state OSHAs have vigorously responded to these complaints. For example, Oregon's OSHA actively followed up on 2,800 complaints across a wide variety of industries, and it went beyond that to conduct spot checks to ensure that employers who had agreed to make changes to protect workers from COVID-19 actually did so. Other state OSHAs have been just as derelict as federal OSHA. For example, when a worker in a North Carolina poultry plant complained that her employer failed to require social distancing in the cafeteria and locker rooms and refused to allow her to wear a mask on a crowded production line, the North Carolina Department of Labor refused to issue a citation because it had not promulgated a pathogen protection standard. The department agreed that the employer had a general duty to provide a workplace free of recognized hazards, but it refused to issue a citation for violations of the general duty clause. Because the worker was responsible for her two-year-old son at home, she quit the job rather than expose him to the disease.⁹⁰

In Wisconsin, the state OSHA advised employees to raise their concerns with their employers and, failing that, file a complaint with the local police. The first option was more likely to get the employee fired than to result in greater protection, and the second option was wholly impractical, since police officers have no training or experience in occupational safety and health.⁹¹

Recommendations

(1) State occupational safety and health agencies should follow California's lead and promulgate enforceable standards to protect employees from pathogens in the workplace.

(2) State occupational safety and health agencies should enforce state general duty clauses by issuing citations to any company that fails to comply with generally recognized pathogen protection practices, drawing on OSHA and CDC guidance as well as other indicia of proper safety practices in a pandemic as evidence of recognized safety practices.

(3) OSHA should provide leadership and resources to states that operate their own occupational safety and health programs in lieu of federal OSHA.

OSHA's Failures

It should be clear from the above description that OSHA under Donald Trump and Eugene Scalia has not acted proactively to protect workers from the coronavirus. Instead of immediately promulgating an emergency temporary standard, it dithered with unenforceable guidance documents laced with loopholes like "as appropriate" and "if possible." Rather than ordering all hands on deck and asking Congress for more enforcement

resources in its stimulus bills, OSHA signaled that it will not be citing workplaces where workers have been infected with and even died of COVID-19 so long as employers acted in “good faith.” And the agency has not issued a single citation under the general duty clause or any of its applicable regulations related to protection from COVID-19 infection. According to the AFL-CIO, which represents many of the workers impacted by OSHA's lackadaisical approach, “The government’s response has been delinquent, delayed, disorganized, chaotic and totally inadequate.”⁹² In the meantime, tens of thousands of workers have become infected, and hundreds if not thousands have died.

The states have responded to OSHA inaction with varying actions and directives that leave some workers better protected than others. But a patchwork of state regulations and enforcement policies is no substitute for a national program to provide workers with real protection against this terrible disease. Until both federal OSHA and state OSHAs are willing and able to devote the resources necessary to ensure that all workers are protected from infection, it will be risky to allow nonessential workers to return to stores, offices, and schools.⁹³

OSHA is the agency to which Congress assigned the responsibility to protect those workers. As former OSHA head David Michaels observed, however, OSHA “is almost completely missing from the federal response to the COVID-19 pandemic.”⁹⁴ OSHA has been missing in action because occupational safety and health has been a very low priority for the Trump administration.

Throughout the entire Trump administration, OSHA has lacked an appointed leader, and half of its senior executive positions remain empty. The number of OSHA inspectors in the field is at its lowest level since the Reagan administration. The Trump administration’s guidelines for “Opening Up America Again” list protection of the health and safety of workers in critical industries as a core *state* function.⁹⁵ Apparently, the administration believes that OSHA is no longer responsible for implementing its statutory mission of providing safe employment and workplaces for American workers.

States have responded to OSHA inaction with varying actions and directives that leave some workers better protected than others. But a patchwork of state regulations and enforcement policies is no substitute for a national program to provide workers with real protection against this terrible disease.

Other Agencies Have Failed Workers, Too

Congress has enacted a number of other laws to protect workers. Like OSHA, the agencies responsible for implementing these protections have fallen far short of their responsibilities. This includes the Department of Agriculture (USDA), the Federal Aviation Administration (FAA), and the Mine Safety and Health Administration (MSHA).

Department of Agriculture

The Federal Meat Inspection Act (FMIA) prohibits anyone from selling, transporting, offering for sale or transportation, or receiving for transportation in commerce, any adulterated or misbranded meat or meat food product. USDA and its Food Safety and Inspection Service (FSIS) are responsible for ensuring that meat products are safe, wholesome, and correctly marked, labeled, and packaged. Agency inspectors must be present at meat and poultry slaughtering and processing plants to conduct “continuous carcass-by-carcass inspection during slaughter” and daily inspection during processing. The inspectors must ensure that meat is not “adulterated” or “misbranded.” Meat cannot be sold unless it is marked “Inspected and passed” by an FSIS inspector.⁹⁶

As discussed earlier, many workers in meat and poultry plants line up next to one another along conveyor lines to perform different operations. The best way to ensure that employees are kept at a safe distance from one another and have more time to tend to personal hygiene is to slow the conveyor belts so that fewer workers are needed to cut and debone the meat. Employees at several meatpacking plants therefore begged their companies to reduce line speeds to allow them to achieve proper social distancing and to tend to personal hygiene while they were slicing meat.⁹⁷

The companies did the opposite. As some meat processing plants shut down to address COVID-19 outbreaks, the meat companies persuaded USDA to allow pork producers and many chicken producers to increase line speeds. They raised the threat of empty shelves in grocery stores once frozen stockpiles ran out, but the companies also knew that reducing the speed of production would result in reduced profits. This speedup put employees at risk of contracting COVID-19 as they scrambled to keep up, and it increased the risk that they would injure themselves, as well.⁹⁸

USDA historically took the position that it had the authority to consider the safety of workers on the production lines in determining line speeds, but the Trump administration denied that it had that authority. In a dramatic reversal, USDA claimed that it could only take into account the ability of its inspectors to assure the safety of meat for consumers in determining line speeds.⁹⁹

A federal district court in Minnesota held that USDA’s reversal was arbitrary and capricious. The court noted that the Humane Methods of Slaughter Act of 1978 was intended to create “safer and better working conditions for persons engaged in the slaughtering industry” and that “worker conditions in slaughterhouses are arguably related to food safety.” The court observed that “[i]f the conditions for the employees are not safe and sanitary, the safety of the food products they prepare is also at risk.”¹⁰⁰

Recommendations

(1) The United States Department of Agriculture (USDA) should require that meat and poultry packing plants reduce line speeds to a level at which employees can maintain a safe distance between one another and have time to maintain personal hygiene.

(2) If USDA refuses to reduce line speeds to protect workers, OSHA should promulgate an emergency temporary standard establishing line speeds slow enough to allow workers to maintain a safe distance between one another and have time to maintain personal hygiene. OSHA should follow with a permanent line speed standard.

The Federal Aviation Administration

Airline pilots and flight attendants are exposed to the public on a regular basis in confined spaces where social distancing is often impossible. Although the pandemic drastically reduced airline travel, airline employees are still exposed to each other and to those who do decide to travel. By early April, 600 crew members had tested positive for COVID-19. While the industry did not track COVID-19 deaths, the *Los Angeles Times* reported that at least 15 airline employees died between April 5 and April 13.¹⁰¹

The Federal Aviation Administration (FAA) in the Department of Transportation has broad authority to prescribe regulations and minimum standards for practices, methods, and procedures that it deems necessary for safety in air commerce. This includes the authority to promulgate regulations governing the occupational safety of the crew of aircraft while they are in operation.¹⁰²

On March 31, 2020, the head of the Airline Pilots Association wrote to FFA Administrator Stephen Dickson, urging him to promulgate regulations requiring airlines to follow CDC guidelines or similar requirements on airplanes to protect pilots and flight attendants from COVID-19 infections. Two weeks later, Dickson responded that, although FAA was responsible for ensuring safety on commercial flights, “we are not a public health agency.”¹⁰³



This statement was inconsistent with FAA’s historical position that it had authority to protect the safety of flight crews, except to the extent that it ceded that authority to OSHA, and it was inconsistent with a memorandum of understanding (MOU) that FAA and OSHA had entered into in August 2014. In the MOU, FAA ceded its authority to regulate occupational safety

and health on commercial airlines to OSHA with respect to OSHA's standards on hazard communication, bloodborne pathogens, and occupational noise exposure. But the MOU also said that "FAA will continue to exercise its statutory authority over all other working conditions of aircraft cabin crewmembers while they are on aircraft in operation, and to fully occupy and exhaust the field of flight deck crew occupational safety and health while they are on aircraft in operation."¹⁰⁴ Until that memorandum of understanding is repealed, FAA has the responsibility to protect crewmembers on aircraft in operation from the risk of contracting COVID-19.

Recommendation

(1) FAA should promulgate interim final regulations protecting aircraft crew members from the risk of contracting COVID-19 drawing on OSHA and CDC guidance as well as other indicia of proper safety practices relevant to pathogens and make those regulations immediately applicable to aircraft in operation.

Mine Safety and Health Administration

The Mine Safety and Health Act prescribes specific mine safety and health standards to protect miners from accidents and diseases, and it empowers the Mine Safety and Health Administration (MSHA) to increase their scope and stringency as it identifies new hazards and safety



technologies. MSHA inspectors are required to conduct unannounced inspections of every underground mine at least four times annually. MSHA has done nothing to protect miners or its inspectors from COVID-19 beyond offering suggestions on its website for social distancing, cleaning equipment, washing hands, and taking sick leave.¹⁰⁵ It has apparently not even required mine operators to report incidences of COVID-19 among their workers.

Recommendations

(1) MSHA should require mine operators to report all cases of COVID-19 in their workers and erect a presumption that any case of COVID-19 in a worker was work-related, unless the employer can provide objective evidence that the case was not work-related.

(2) MSHA should promulgate standards requiring mine operators to protect miners from the risk of contracting COVID-19. The standards should limit contact among workers, require engineering and administrative controls, require respirators and other personal protective equipment, require enhanced sanitation, and require paid sick leave to workers who become infected with COVID-19.

(3) MSHA should provide its inspectors with personal protective equipment and sanitizers to protect them from contracting COVID-19 on the job, and it should provide paid leave to inspectors who do become infected.

Financial Support for Workers Is Inadequate

There is federal and state support for workers who have been furloughed or fired as a result of the closure of the businesses, plants, and other places where they work. While these sources of support are crucial to helping unemployed people and their families with their financial needs, they are an incomplete response to the financial challenges that workers face. Workers may not qualify for workers' compensation unless the states act to clarify that they are eligible. And actions by the Department of Labor have narrowed the eligibility for financial help from the recently enacted CARES Act.

Workers' Compensation

State workers' compensation systems provide statutory indemnity (wage loss) and medical benefits to employees for injuries and diseases arising out of and in the course of employment. Some state workers' compensation statutes also require that the injury or disease be sustained "by accident." Workers' compensation benefits consist of some percentage of an employee's pre-injury or pre-disease average wage (66 2/3% is a common figure, and the benefits are not subject to tax). In addition, workers' compensation pays covered employees for all "reasonable and necessary" medical expenses. This compensation is barely adequate, and it is no substitute for preventing worker exposure to COVID-19 in the first place. Nevertheless, in the absence of other benefits, workers' compensation coverage can be crucial to struggling employees.

Almost all states have covered occupational disease under their workers' compensation statutes or through standalone occupational disease laws. A common strategy for increasing coverage under these statutes has been to create presumptions that workers in certain occupations are presumed to have contracted statutorily specified diseases. The presumptions are normally rebuttable, and when an employee is subject to the presumption, the burden shifts to the employer (or insurance carrier) to prove that the employee's disease did *not* "arise out of employment." The problem with COVID-19 is that it is not easily classifiable as an occupational disease.

A common state strategy for increasing coverage under these statutes has been to create presumptions that workers in certain occupations are presumed to have contracted statutorily specified diseases. The presumptions are normally rebuttable, and when an employee is subject to the presumption, the burden shifts to the employer (or insurance carrier) to prove that the employee's disease did not "arise out of employment."

Partly because of this classification problem, a number of states¹⁰⁶ have already enacted tailored workers' compensation COVID-19 presumptions, most of which are rebuttable, and at least one state has enacted a conclusive presumption of COVID-19 coverage.¹⁰⁷ In COVID-19 contexts, workers' compensation benefits are provided to employees in statutorily-covered job classifications, most often firefighters, police officers and other first responders, and health care workers as defined by statute. If an employee is working in the designated classification and is reliably diagnosed with COVID-19, the employee is presumed to have contracted the disease at work.

The governors of six states have also issued executive orders requiring their workers' compensation agencies to accept COVID-19-related illness incurred by health care workers and first responders as compensable. But this coverage did not extend to retail workers, transportation workers, janitors, and other frontline workers who are also at a high risk of contracting COVID-19.¹⁰⁸

The COVID-19 presumptions established by administrative rule may be vulnerable, however. For example, the Illinois Workers' Compensation Commission issued an emergency rule creating a presumption that workers in a number of industries, including health care, grocery, pharmacy, hotel, and funeral service, infected with the coronavirus, had contracted the disease in the workplace. When the rule was challenged by the Illinois Manufacturers Association and the Illinois Retail Merchants Association in a local county court, the court issued a temporary restraining order against implementation of the rule. Lacking the resources for a lengthy court fight, the commission unanimously repealed the presumption.¹⁰⁹ Subsequently, on May 22, 2020, the Illinois legislature passed out of special session a very broad statutory COVID-19 presumption.¹¹⁰

Despite the potential vulnerability of non-statutory approaches to creating COVID-19 presumptions, on May 6, 2020, California Governor Gavin Newsom issued a presumption by executive order.¹¹¹ It is limited to 60 days and, unlike earlier executive orders in other states, covers all employees with verified diagnoses of COVID-19, retroactive to March 19, 2020.¹¹² In other workers' compensation developments, New Jersey enacted a presumption, by legislation, on May 14, 2019.¹¹³

The issue of whether the presumptions should be rebuttable or irrebuttable has been politically contentious for some advocates, though perhaps unnecessarily. Even allowing for its greater resources, an employer could be as hard-pressed to prove that COVID-19 infection did not happen at work as an employee is to prove that it did. Another contentious question concerns who should be covered by the presumption. There seems to be a plurality position among states creating presumptions that first responders should

be covered. Minnesota includes health care workers. It is, however, difficult to support a presumption that does not apply to all “essential” workers.

Opponents of workers’ compensation coverage argue that the costs of coverage will be exorbitant, but one analyst has concluded that “the presumption standard for essential employees as a matter of fairness, puts a preliminary estimate of the cost at roughly \$10 billion. And while that sounds like a big number, [consider that] annual premiums for the industry [are] about \$63 billion.”¹¹⁴

Recommendation

(1) State legislatures and workers’ compensation agencies should create a presumption that at a minimum, any “essential” worker who suffers from COVID-19 contracted the infection at work and is therefore entitled to workers’ compensation.

The COVID-19 Paid Leave Rule

Early in the progression of the COVID-19 pandemic, Congress recognized that many employees were reluctant to stay home from work when they felt sick because they needed the work to pay their bills and purchase food. The Families First Coronavirus Response Act of 2020 required employers of less than 500 workers to provide up to two weeks of paid sick leave at full pay up to a cap of \$511 to employees testing positive for COVID-19, two weeks of paid sick leave at two-thirds salary to care for a person subject to quarantine, and 10 weeks of paid family and medical leave for various reasons related to COVID-19, such as caring for children whose schools closed, with a cap of \$200 per day. The statute allows the Department of Labor (DOL) to exempt companies that employ fewer than 50 workers. Employers can get federal tax credits for their outlays. The law took effect on April 1, 2020, and it expires at the end of 2020.¹¹⁵

The assumption underlying the limitation of the paid sick leave requirement to employers of under 500 employees is that larger firms already offer paid sick leave to their employees. Although many companies with more than 500 employees provide paid sick leave, many do not.

On April 6, DOL adopted a temporary rule that narrows eligibility for this benefit in several important ways. It exempts employers who do not have work for the sick employee to do. For example, the employer may not have work for an employee because it had to close a facility because of a stay-at-home order. Worse, an employee who was laid off or furloughed before claiming sick leave would not be eligible. That employee’s remedy is apparently state unemployment insurance, if anything. The temporary rule also allows DOL to exempt employers with fewer than 50 employees on a case-by-case basis if the employer believes that compliance would “jeopardize the viability of the business as a going concern.”¹¹⁶

The assumption underlying the limitation of the paid sick leave requirement to employers of under 500 employees is that larger firms already offer paid sick leave to their employees. Although many companies with more than 500 employees provide paid sick leave, many do not. That leaves around 60 million employees uncovered. In addition, the DOL regulations allow employers to determine for themselves whether their businesses would be jeopardized for purposes of taking the exemption for fewer than 50 employees, so long as they retain paperwork justifying the decision for possible (but unlikely) review in the future. That leaves 96 percent of the firms subject to an exemption if business turns bad, which impacts an additional 34 million workers.¹¹⁷

Recommendation

(1) Congress should make paid sick leave a universal requirement for all employees and provide additional paid sick and family leave in the event of a public health emergency.

Self-Help by Workers

The lack of effective regulatory protections and financial safeguards has left thousands of workers to fend for themselves by staging protests or filing lawsuits. Some protests were successful in getting employers to do a better job of safeguarding their workers, but by and large, non-unionized workers lack many effective tools to engage in self-help beyond participating in concerted work stoppages protected under the National Labor Relations Act (discussed below). Such actions may, importantly, provide temporary escape from especially dangerous working conditions, but they cannot by themselves force employers to make durable improvements in workplace safety.

Worker Protests

As we have seen, workers in many “essential” industries discovered that their employers were unwilling or unable to provide the sanitizer, wipes, masks, and other personal protective equipment that they believed were necessary to keep them and their families safe.¹¹⁸ And they received no hazard or “premium” pay for the new and unexpected risks they encountered.¹¹⁹ Workers pointed out the unfairness that they had to face grave risks to their health while company executives telecommuted from their pricey homes.¹²⁰ By the end of March, they had had enough, and they began to engage in wildcat strikes and walkouts.¹²¹ Here are just a few examples:

- When they learned that some of their fellow employees had tested positive for COVID-19, workers at several meatpacking plants staged unprecedented walkouts to protest the absence of personal protective equipment and to demand paid sick leave, new gloves

after every break, and greater distancing between workers on packing lines.¹²²

- Workers at Boeing’s enormous airplane assembly plant in Everett, Washington, complained to the media as 25 of their co-workers tested positive for COVID-19 and the company failed to provide sufficient sanitary wipes and adequate personal protective gear.¹²³ Their frustration erupted into a work-stoppage protest on the assembly floor after an employee tested positive but employees who worked near him were not allowed to self-quarantine.¹²⁴
- After some employees at a California McDonalds restaurant tested positive for COVID-19, workers staged a protest by driving around the parking lot honking their horns to demand paid quarantine leave, hazard pay, and more personal protective equipment.¹²⁵
- Whole Foods employees staged a “sick out” to emphasize their demand that the company extend sick leave and health insurance to part-time employees.¹²⁶ Similar protests erupted at Walmart and Amazon facilities.¹²⁷
- On March 30, thousands of Instacart workers across the country stopped responding to delivery orders.¹²⁸



As hospitals became overwhelmed with patients suffering from COVID-19, doctors and nurses were not free to engage in walkouts or work stoppages out of concern for their patients, but they did speak out publicly about the lack of personal protective equipment and unsafe work conditions. Nurses at two New York City hospitals participated in demonstrations to protest the lack of safety equipment. Many hospitals reacted by issuing gag orders instructing hospital staff not to speak to the media about workplace conditions. And dozens of the nurses who did speak out were punished.¹²⁹

The direct actions brought about some changes in working conditions in some companies.¹³⁰

- Boeing closed the Everett, Washington plant. It continued to pay its workers while it undertook a deep sanitization, brought in more portable handwashing stations, and implemented temperature screening for employees who requested it. When the plant re-opened on April 14, the company started a contact screening program to

allow self-isolation of employees who came into contact with an infected worker.¹³¹

- Several of the largest meatpacking companies closed their plants for sanitation. Most of the companies that remained open began to provide non-medical masks to employees and to install barriers between workstations along packing lines. After a walkout at one of its chicken plants, Perdue Farms improved sanitation at the plant, increased hourly pay for workers, waived the waiting period for collecting disability benefits, and gave employees free chicken.¹³²
- Amazon provided face masks to warehouse workers and checked temperatures of workers before they began shifts. It also raised wages, temporarily implemented paid leave for self-quarantined workers, and tripled its janitorial staff. Warehouse employees who had no contact with persons who had tested positive for COVID-19 had the option of taking unpaid leave to care for children or to avoid contact with other workers, but they were expected to be back on the job by May 1. And the company built a laboratory to enable it to test employees for COVID-19. Amazon CEO Jeff Bezos announced that his goal was to test the entire Amazon and Whole Foods staffs on a regular basis for the duration of the crisis.¹³³
- McDonalds agreed to provide masks at its restaurants in hot zones. Most retail chains took extra precautions like additional sanitizing and facilitating social distancing. Walmart, Target and Trader Joes began to limit the number of shoppers in a store at any one time. McDonalds, Walmart, and Home Depot implemented temperature checks in some stores.¹³⁴

Worker Lawsuits

In addition to protests and other demonstrations, many workers sought redress in court. In most states, workers' compensation is the exclusive remedy for workers who are injured or become ill at work, but workers can sue their employers for creating a "public nuisance." A public nuisance occurs when the defendant commits an "unreasonable ... [and] significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience."¹³⁵ On April 21, the New York State Nurses Association sued the New York State Department of Health and the Montefiore Medical Center in a New York state court. Alleging that the hospitals had become a public nuisance, the union asked for injunctive relief to make them safe for nurses. Supporting affidavits reported that nurses had to care for COVID-19 positive patients with only flimsy surgical masks for protection and that they were told to re-use N95 masks and store them in paper bags. At least 150 Montefiore nurses had become infected with COVID-19, and eight of the Nurses Association's members had died. The

plaintiffs sought a court order requiring Montefiore to supply a sufficient number of respirators, face shields, gowns, and other personal protective equipment; provide negative-pressure rooms or filter the air; and comply with previously negotiated staffing ratios.¹³⁶

On behalf of its members, Local 291 of the Transport Workers Union of America sued Alice Bravo, the director of the Miami-Dade County Department of Transportation and Public Works, seeking injunctive relief to remedy many alleged failings, including failure to provide enough N95 masks to drivers (drivers were provided one mask that they were supposed to reuse), failure to provide sufficient cleaning supplies and hand sanitizer (some drivers were given a single wipe to last the entire shift), failure to erect physical barriers between drivers and passengers, and failure to enforce social distancing requirements for passengers.¹³⁷

In the one case in which a court has written an opinion, workers at the Smithfield Foods plant in Milan, Missouri, and members of the surrounding community claimed that the company had violated the state's common law right to a safe workplace and that the plant constituted a public nuisance. The plaintiffs alleged that Smithfield provided insufficient personal protective equipment (one mask per week for some, but not all employees); forced employees to work shoulder-to-shoulder and scheduled breaks in a way that forced them to be in crowded hallways and restrooms; refused to provide employees sufficient time to wash their hands; discouraged workers from taking sick leave; and failed to test workers and conduct contact tracing. The plaintiffs did not seek damages. Instead, they asked the court to order Smithfield to provide adequate personal protective equipment, implement social distancing (even if that required slowing down production lines), provide handwashing facilities and breaks, provide tissues for employees, implement a protocol to clean surfaces, provide paid leave for workers who displayed COVID-19 symptoms, and develop a plan for testing and contact tracing workers.¹³⁸



Arguing that a court was not the proper venue for determining protections for workers, Smithfield urged the judge to dismiss the case and leave worker protection to an OSHA that under the Trump administration has been utterly ineffective in safeguarding workers.

The court agreed. It dismissed the case without prejudice, invoking the doctrine of "primary jurisdiction," under which a court declines to decide a dispute until a federal agency with the authority to address the subject matter has had an opportunity to take action. The plaintiffs will be able to refile the case if they do not obtain adequate relief from OSHA.¹³⁹ In short,

the court held that it was deferring to OSHA to protect the workers and, by extension, the community.

The court also denied the plaintiffs' request for a preliminary injunction. Since Smithfield had undertaken nearly all of the measures that the plaintiffs had requested by the time the court heard the case, it was not persuaded that a public nuisance existed. Given the "significant measures" that Smithfield was taking to protect employees and the fact that no employee at the plant had contracted COVID-19, the court saw no need for injunctive relief.¹⁴⁰

These lawsuits will encounter serious obstacles, including some that the plaintiffs did not encounter in the *Smithfield* case. Plaintiffs will have difficulty in proving that any particular plaintiff's COVID-19 infection was caused by an exposure in the workplace, difficulty in proving that the employer was negligent or reckless in failing to provide protection against the risk of infection, and difficulty in overcoming bars on direct actions by employees against employers imposed by state workers' compensation laws.¹⁴¹

The nearly universal absence of health insurance meant that fieldworkers could not afford to seek medical attention, even if they were willing to risk deportation. Since a large majority of fieldworkers are undocumented immigrants and migrants on visas, they labored on in silence, afraid to insist that their employers provide training in avoiding COVID-19 infections and suitable handwashing and sanitation facilities.

Workers Silenced

Due to fear of retaliation, many workers were reluctant to talk with the press about the failures of their employers and government agencies.

Agricultural workers were deemed "essential" in most states because someone had to pick the fruits, vegetables, and other produce that makes its way to grocery stores throughout the country. The fact that many employers did not provide sick leave provided an incentive to come to work when ill, thereby risking further spread of infections. The nearly universal absence of health insurance meant that fieldworkers could not afford to seek medical attention, even if they were willing to risk deportation. Since a large majority of fieldworkers are undocumented immigrants and migrants on visas, they labored on in silence, afraid to insist that their employers provide training in avoiding COVID-19 infections and suitable handwashing and sanitation facilities.

Similarly, hospital gag orders silenced an unknown number of doctors and nurses who would otherwise have complained publicly about the hospitals' failure to provide adequate protective gear and safe working conditions.¹⁴²

The Limitations of Legal Protections for Self-Help

As indicated, workers who engage in self-help often experience retaliation, and even firing, by their employers. The legal protections for workers who engage in self-help have been underenforced and are weak at best. Under the National Labor Relations Act (NLRA), the remedy for a discharge in retaliation for protected, concerted activity is reinstatement and backpay that is subject to mitigation for interim earnings. Moreover, there is a coordinated campaign by employers to block lawsuits by employees and others who become ill from the virus as a result of a company's failure to take reasonable precautions to protect workers (and customers) from infection.

National Labor Relations Board

Employees at a Chicago McDonald's franchise walked off the job after learning that a fellow employee had tested positive for COVID-19 and the company did not take any steps to protect them from contracting the disease beyond cleaning the restaurant.¹⁴³ The workers had a legally protected right to take this action under two sections of the NLRA that confer rights upon employees to refuse dangerous work.

Section 7 of the NLRA protects the rights of employees to engage in protests, including work stoppages, over what the employees believe to be unsafe or unhealthy working conditions.¹⁴⁴ Section 502 of the NLRA,¹⁴⁵ as amended by the Labor Management Relations Act (LMRA), states that cessation of labor by an employee or employees, in good faith, because of abnormally dangerous conditions for work at their place of employment is not deemed a strike. It is noteworthy that employees, not unions, possess these rights, although the statutory context of Section 502 assumes union representation. Employees have six months to file a charge with the National Labor Relations Board (NLRB).

NLRA remedies are, as mentioned above, limited to reinstatement and mitigated backpay. Although in theory administrative violations may quickly be found, litigation can be protracted if the employer refuses to resolve the case at the administrative level. Appeal from the internal administrative processes of the NLRB is to the Federal Circuit Courts of Appeal. It is possible that employees have been fired for collectively walking away from jobs to avoid the risk of contracting COVID-19.

Recommendations

(1) The National Labor Relations Board should make employees aware of their right to refuse to remain in a work environment in which they are subject to a significant risk of contracting COVID-19.

(2) *The National Labor Relations Board and the courts should be sensitive to the high risk of hospitalization and death that is associated with exposure to the coronavirus and the large uncertainties surrounding its transmissibility in different environments. They should give employees who collectively leave workplaces where they face a significant risk of contracting COVID-19 the benefit of the doubt in applying their rights under sections 7 and 502 of the National Labor Relations Act to refuse dangerous work.*

(3) *Congress should authorize employees to sue their employers for harm to them caused by labor law violations.*¹⁴⁶

Whistleblower Protections

News reports of COVID-19 outbreaks in essential workplaces are filled with accounts of courageous whistleblowers who risk their jobs to report dangerous conditions. Most employees, however, fear retaliation if they blow the whistle on unsafe conditions, and they are by no means convinced that OSHA's whistleblower protections will make things right.¹⁴⁷

Workers are correct to fear retaliation. Many health care employees who raised concerns about the lack of personal protective equipment like N95 masks were fired or otherwise punished for speaking out publicly about the problem. Every major hospital system in New York sent messages to employees instructing them not to talk to the media. Instead, employees were supposed to "share positive and uplifting messages that support your colleagues and our organization."¹⁴⁸

By mid-April, Amazon had fired four employees and disciplined several others for complaining publicly about unsafe work conditions concerning COVID-19 in violation of company external communications policy prohibiting commenting on Amazon's business without executive approval. On March 30, it fired Christian Smalls, the leader of a public protest against Amazon's safety practices at its Staten Island fulfillment center. The protest, which was aimed at drawing public attention to the risks that workers were encountering in Amazon workspaces, took place during a lunch break.



The company maintained that Smalls should have been self-quarantining because he had come into contact with a co-worker who had tested positive for COVID-19. But a leaked email showed that Amazon's General Counsel characterized Smalls as "not smart or articulate" and suggested that the company attempt to make him "the face of the entire union/organizing movement."¹⁴⁹ One of the fired employees had merely tweeted that the absence of sanitary working conditions at Amazon plants put workers and the public at risk. A second employee merely retweeted the first employee's tweet.¹⁵⁰ Both were also active critics of Amazon's climate change policies.

Their fears were well-founded: Workers in 74 of Amazon's warehouses and delivery facilities had already tested positive for COVID-19 when they made their complaints public.¹⁵¹

Workers are also correct in believing that OSHA would not come to their aid if they engage in whistleblowing. The Occupational Safety and Health Act protects whistleblowers against retaliation by employers for reporting unsafe or unhealthful working conditions. Retaliation includes termination, blacklisting, demotion, denial of overtime or promotion, or reduction in pay or hours.¹⁵² Between March 1 and mid-April, OSHA received more than 300 whistleblower complaints related to COVID-19. And on April 8, 2020, OSHA issued a reminder to employers that they were prohibited from retaliating against employees who reported unhealthful working conditions during the COVID-19 crisis.¹⁵³ But there is no evidence that OSHA has ramped up the program or fast-tracked whistleblower investigations during the coronavirus crisis.

Although they look powerful on paper, the OSH Act's whistleblower protections are **notoriously weak and outdated** and offer little recourse for workers.¹⁵⁴ Workers have a mere 30 days to file a complaint; investigations take nearly a year; the agency cannot preliminarily reinstate employees; and there is no option for workers to pursue a case independently. During the Obama administration, OSHA established a Whistleblower Protection Advisory Committee to advise it on how it could improve whistleblower protections administratively, but the Trump administration disbanded the committee in 2018. Surprisingly, none of the stimulus bills that Congress has passed to provide relief to ailing businesses and workers contained whistleblower protection provisions.¹⁵⁵

Recommendations

(1) Congress should include strong whistleblower protections in a future COVID-19 stimulus package.

*(2) OSHA should bolster its Whistleblower Protection Program immediately by adopting **recommendations** that do not require legislative action and by completing investigations of alleged employer retaliation against employees who take action to protect themselves and their co-workers from COVID-19 within 90 days.*

Union Protections

Employees who belong to unions are potentially in a stronger position to force their employers to take necessary precautions to protect workers. Unions have provided labor protections for their members in three important ways:

1. They have been a voice for workers in identifying where laws and regulations are needed and have been influential in getting these laws enacted;
2. They have provided information to members about workers' rights and available programs; and
3. They have encouraged their members to exercise workplace rights and participate in programs by reducing fear of employer retribution, helping members navigate necessary procedures, and facilitating the handling of workers' rights disputes.¹⁵⁶

In mid-April 2020, for example, the Council of Prison Locals, a division of the American Federation of Government Employees, filed a grievance with the Justice Department on behalf of the 122 institutions in the Federal Bureau of Prisons alleging that the bureau had violated its collective bargaining agreement with the union by moving inmates from low-risk areas to high-risk ones, waiting too long to prevent visitors from entering facilities, ordering staff exposed to COVID-19 to return to work before 14 days had passed since the exposure, and failing to provide proper masks and other personal protective equipment to prison guards. The grievance is currently pending.¹⁵⁷

Empirical studies have demonstrated widespread inclusion of safety provisions in collective bargaining agreements, and workplace health and safety is a mandatory subject of bargaining, meaning that once employees have selected a union to represent them, employers are required to bargain over employee health and safety.¹⁵⁸

Union actions have produced significant improvements in worker protections from the coronavirus without work stoppages or public protests. For example:

- The United Food and Commercial Workers Union reached an agreement with Kroger Co. under which the company paid workers \$2 an hour in hazard pay, offered paid leave to workers exhibiting COVID-19 symptoms, installed Plexiglas partitions between cashiers and customers, and reduced store hours to allow employees to safely clean and restock shelves.
- The Transport Workers Union persuaded many major cities to provide masks to its members and to increase the number of trains on heavily used routes to reduce crowding.
- After the local Teamsters Union in Chicago filed a grievance against the Jewel-Osco pharmacy chain demanding that the company take steps to protect workers from potentially infected customers, the

company installed plastic barriers at pharmacy windows and increased bonus pay.¹⁵⁹

As is true with any dispute resolution mechanism, it can take time to pursue a grievance through the contractual dispute resolution process. Getting through the arbitral process is normally faster for employees than pursuing full-fledged court actions. But this efficiency can be misleading if employers simply refuse to comply with arbitration awards. Eventually, a court enforcement action may prove necessary to compel compliance. Also, in situations where unions are not especially assertive in enforcing collective bargaining health and safety protections, individual employees lack power to compel unions to pursue safety.¹⁶⁰

The demand for competent employees in industries deemed essential and the dwindling supply of workers willing to put their lives on the line in workplaces where they might contract COVID-19 gave workers in low-wage positions like bus drivers and Amazon fulfillment center employees unusual leverage to bargain for safer workplaces. In addition, media reports of heroic efforts by low-wage essential workers cast them in a favorable light with the public.¹⁶¹

For union organizers, the pandemic presents a welcome opportunity to persuade workers to join a union, after which they can demand safer working conditions, higher wages, and better sick leave policies. At the same time, frustrated nonunion workers concerned for their safety are reaching out to unions for assistance. One veteran union organizer predicts “an organizing boom” in the wake of the pandemic. After receiving many requests for assistance from Chicago-area workers, Jorge Mujica, an organizer at Arise Chicago, a nonprofit worker rights center, suggested that the pandemic crisis was “going to be a big, big moment for organizing and for workers taking action.”¹⁶²



Recommendation

(1) Workers in nonunion jobs that expose them to the coronavirus should continue to reach out to unions for assistance, and unions should both look for organizational opportunities in workplaces where nonunion workers are at risk of contracting COVID-19 and advise nonunion workers of their right to engage in concerted activity under the National Labor Relations Act.

White House Interference

As noted above, President Trump invoked the Defense Production Act to keep meat and poultry packing plants open. Some companies interpreted

the executive order to preempt lawsuits against them for failing to take reasonable precautions to protect workers, their families, and their communities. The president's authority to block the efforts of governors to control the outbreak and to prevent lawsuits against packing plants is questionable. Moreover, even if it is legal, it disrespects federalism and puts workers at even greater risk.

Plant Closures

The Defense Production Act gives the president broad authority "to allocate materials, services, and facilities in such a manner, upon such conditions, and to such an extent as he shall deem necessary or appropriate" to promote the national defense.¹⁶³ Arguably, this gave President Trump the authority to order meat producers to reopen or stay open during the COVID-19 emergency, though there may be a legitimate question whether ensuring grocery stores have adequate supplies of all of the cuts that customers prefer is really necessary or appropriate to promote the national defense. A more persuasive case might have been made for granting the armed services priority access to meat products.

The Defense Production Act does not empower the president to order the workers at the plants to show up for work, and White House officials made it clear that the president had no plans to attempt to force workers to stay on the job.¹⁶⁴ The president may have the option of sending in the National Guard or the Army to fill in for absent workers, but that would require extensive training, and it would put our troops at risk. In reality, the vast majority of workers will clock in at plants that remain open, and at the closed plants when they reopen, because they need their jobs to survive. The president's action will have the practical effect of forcing employees back to work.

The executive order that the president signed delegated to the Secretary of Agriculture the president's power under the Defense Production Act to "take all appropriate action . . . to ensure that meat and poultry processors continue operations consistent with" the CDC/OSHA interim guidance "providing for the safe operation of such facilities." The order also directed Agriculture Secretary Sonny Perdue "to determine the proper nationwide priorities and allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat and poultry." Curiously, the executive order was silent on the issue of liability protection, but it made it clear that state and local governments no longer had the power to order a meatpacking plant to close down or modify its production methods.¹⁶⁵

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The net result is that the Trump administration is threatening to invoke the Defense Production Act against meat companies if they close their plants to address coronavirus risks or if they do not reopen closed plants as quickly as they can comply with CDC/OSHA guidelines. Since the guidelines are completely voluntary and do not require “compliance,” that should be an easy thing to do. As the companies seek to avoid the Trump administration’s wrath and rush to reopen plants, and companies continue to operate plants despite the threat of further COVID-19 outbreaks, states will probably be barred from shutting down the plants, and workers will be at the mercy of an OSHA that has consistently shirked its duty to protect them from the coronavirus.

Liability Shield

When the president issued the meat and poultry plant executive order, he explained it was intended to address the meat industry’s “liability problems,” which had become a “legal road block” to opening the plants.¹⁶⁶ The president’s comments have encouraged companies to view the executive order as a shield from liability from lawsuits concerning the companies’ failure to protect their workers and the general public from coronavirus infections.

The day after President Trump issued the executive order, for example, Smithfield Foods filed a motion in the Missouri public nuisance action (discussed above) asking the court to dismiss the case on the ground that it was inconsistent with the executive order and the statement issued by the Solicitor of Labor and the acting head of OSHA. Smithfield took the position that any order of the court abating the nuisance would constitute regulation inconsistent with the executive order, thereby “undermining the critical infrastructure during the national emergency.” As noted earlier, the court did not rely on the Defense Production Act in dismissing the complaint. It deferred to OSHA under the doctrine of primary jurisdiction.¹⁶⁷

The Defense Production Act contains a broad waiver of liability for actions undertaken pursuant to a presidential order under the law. The statute provides that “[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act, notwithstanding that any such, rule, regulation or order shall thereafter be declared by judicial or other competent authority to be invalid,”¹⁶⁸ but the meager case law regarding this provision suggests it does not prevent workers from suing their employer.

Only a handful of courts have addressed the scope of this liability waiver. The only judicial opinion to address its applicability to common law tort claims is Judge Weinstein’s ruling in *In re “Agent Orange” Product Liability Litigation*, a case that involved multiple claims by Vietnam veterans against

the manufacturers of the herbicide Agent Orange, which was used as a defoliant during the Vietnam War. The court concluded that the Defense Production Act did not preclude the veterans' claims because it barred only lawsuits by companies that had contracted with a supplier of goods against the supplier after the government ordered the supplier to send the goods elsewhere.¹⁶⁹ In other words, the waiver of liability applied to contract cases and not to common law tort claims.

The court agreed that it was "possible to hypothesize tort cases where a causal connection could be found, e.g., where the [government order] forced the contractor to begin production before it was fully ready to or at a quicker pace than it would have done otherwise, resulting in injury to an employee" that might be covered by the waiver, but that was not the case with Agent Orange.¹⁷⁰ The hypothetical situation that Weinstein envisioned looks a lot like the claims that employees who return to work after President Trump's executive order and contract COVID-19 might bring. The court's speculation, however, is dicta and not binding precedent.

The U.S. Supreme Court, in *Hercules, Inc. v. United States*, rejected a claim by an Agent Orange producer that the Defense Production Act required the federal government to indemnify it for monies that it spent satisfying claims of Vietnam veterans. The Court held that the Act provided "immunity, not indemnity."¹⁷¹ It did not elaborate on the nature of the immunity that the statute provided. In a footnote, the Court observed that the Clinton Justice Department urged the Court to hold that the Act only barred "liability to customers whose orders are delayed or displaced on account of the priority accorded Government orders." The Court did not need to decide the scope of the liability waiver "because it clearly functions only as an immunity, and provides no hint of a further agreement to indemnify."¹⁷²

Recommendations

(1) Companies whose plants have suffered serious COVID-19 outbreaks should close those plants and should not reopen them until independent professional industrial hygienists, in consultation with representatives of affected plant employees, have certified that they comply with generally recognized pathogen protection practices, drawing on OSHA and CDC guidance as well as other indicia of proper safety practices relevant to pathogens in the workplace as evidence of recognized safety practices.

(2) The president should not invoke the Defense Production Act to order companies that have closed plants or are contemplating closing plants because of COVID-19 outbreaks to reopen or remain open, nor should the president prevent state or local officials from ordering plants to close when conditions in those plants pose an imminent hazard to workers.

(3) Courts should not interpret the liability waiver provision of the Defense Production Act to apply to common law tort claims.

Conclusion: Reconceiving the Workplace with Health and Safety in Mind

There will be no return to the pre-existing “normal” at the end of this crisis. And that can be a desirable thing. We can use the lessons that we are learning from the pandemic to define a new normal that includes safer workplaces across the economic spectrum.

In many industries, workers now have more leverage than in the past to demand more safety and higher wages.¹⁷³ We have seen how pressure from grocery, meatpacking, and retail store workers brought about some much-needed safety-oriented changes in some workplaces. Workers have demanded and received better physical protections, the right to wear masks, paid sick leave, and hazard pay. We are in fact seeing the stirrings of a new class consciousness on the part of these workers, the likes of which this country has not seen since the Great Depression.¹⁷⁴

The COVID-19 pandemic presents “a once-in-a-lifetime opportunity . . . to focus on restructuring our economy in a way that rebalances power toward workers.”¹⁷⁵ This report has suggested changes that can be easily implemented by officials who are motivated to provide greater health and safety protections to workers. Most of these changes can be put into place quickly without additional legislation by a president who is committed to protecting workers. Others can be implemented by the states. We recognize Donald Trump has not demonstrated the slightest commitment to the safety of employees and that some states are equally uninterested in worker safety, but we are also confident that American workers will not be satisfied with governments that spectacularly fail to protect workers in a full-blown pandemic. And we fear that as many governors reopen the economy before adequate testing and contact tracing are in place, the COVID-19 pandemic will be with us for quite some time.

In any event, the federal government should do much more to protect workers from future pathogens in the workplace. The recommendations in this report should serve as a starting point for the next presidential administration, the next Congress, and states that care about protecting American workers.

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¹⁴⁰ *Rural Community Workers Alliance v. Smithfield Foods, Inc.*, Civ. No. 5:20-CV-06063-DGK, Slip Opinion, May 5, 2020.

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¹⁴³ Joyce Hanson, Employers Seek Liability Shield from COVID-19 Worker Suits, *Law 360*, April 17, 2020.

¹⁴⁴ *N.L.R.B. v. Washington Aluminum Company*, 370 U.S. 9 [82 S.Ct. 1099, 8 L.Ed.2d 298] (1962); *N.L.R.B. v. Tamara Foods, Inc.*, 692 F.2d 1171, 1176 (1982). Section 7 of the NLRA states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .".

¹⁴⁵ The full text of the provision states:

Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act [LMRA].

¹⁴⁶ See Protecting the Right to Organize Act of 2019, H.R. 2374, 116th Congress (2019).

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¹⁴⁹ Sebastian Herrera, Reprisal Cited in Amazon Firings, *WSH*, April 15, 2020, at B4 (quote); Ginia Bellafonte, Amazon Workers Are Feeling Vulnerable, *NYT*, April 5, 2020, at A29.

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