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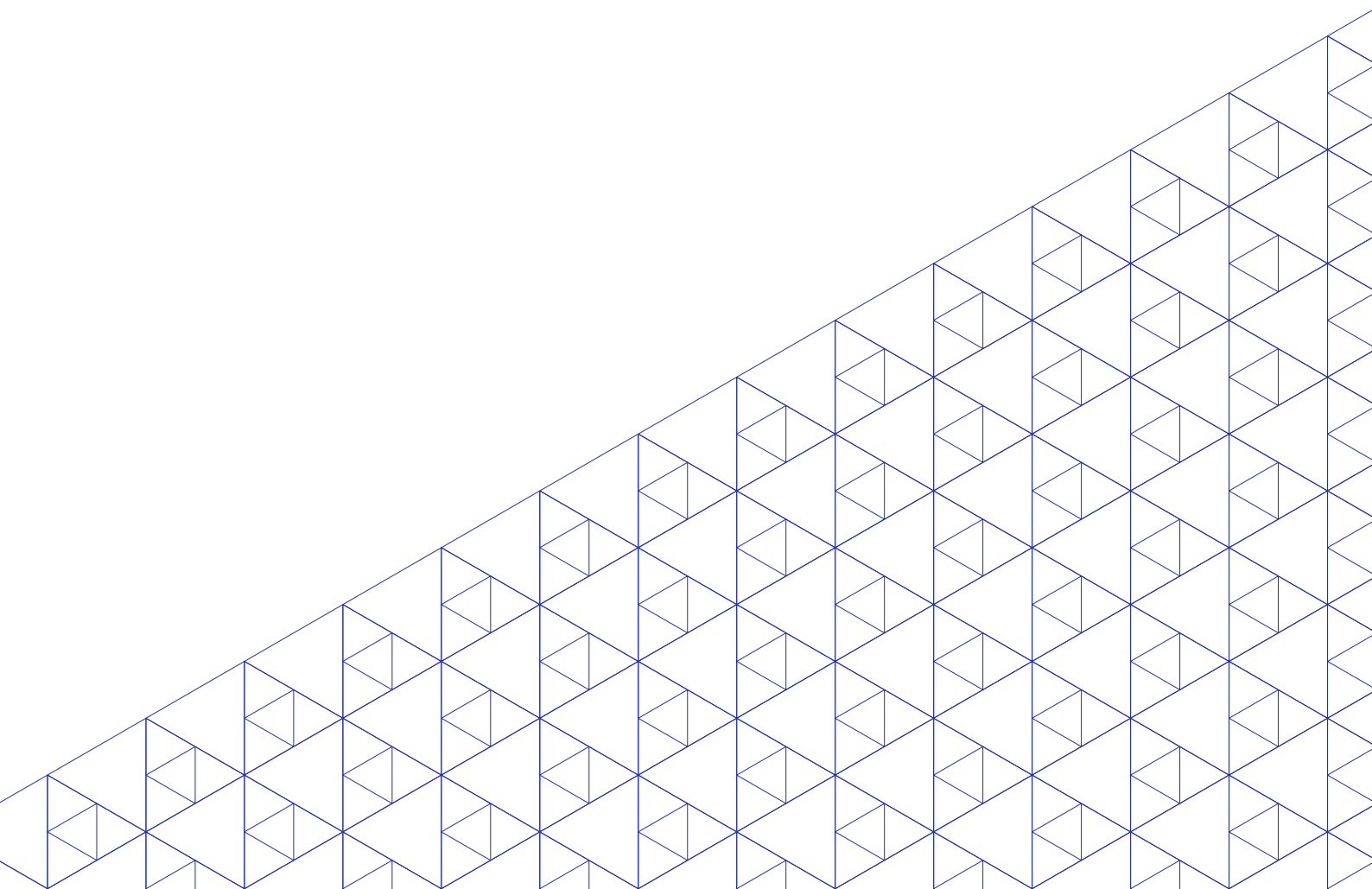
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► Occupational Safety and Health, Frontline Workers, and the COVID-19 Pandemic in the U.S.

Author / Emily A. Spieler





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Abstract

This Report on the U.S. occupational safety and health response to the pandemic was prepared as part of the ILO World Economic and Social Outlook (WESO) project that included a review of the protections provided to critical workers on the frontline of the pandemic in multiple countries. The Report provides an overview of U.S. occupational safety and health and related laws; traces the effects of the pandemic on workers in the U.S.; reviews the federal agencies' responses to the risk of COVID-19 within workplaces; explores the variability among state responses to the occupational health threat; provides a summary of COVID-related workplace litigation brought by individuals and unions to expand workplace protections; and briefly outlines the social and economic supports provided to workers in the U.S. before and then during the pandemic. The Report concludes with an analysis of the U.S. response to the coronavirus public health crisis within workplaces.

About the author

Professor Emily Spieler (Northeastern University School of Law, Boston, Massachusetts) is an expert on work law, with a particular focus on workplace safety. She has written extensively on issues relating to injured workers and work and was a member of the drafting committee of the recently issued ILO Report, *OSH and the COVID-19 pandemic: A legal analysis*. She has served on numerous committees, including as chair of the Scientific Advisory Committee to the Institute for Work and Health (Toronto); the Whistleblower Protection Advisory Committee (U.S. Department of Labor); and the Worker Advocacy Advisory Committee (U.S. Department of Energy).

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Acronyms

ACA	Affordable Care Act
ADA	Americans with Disabilities Act
ARPA	American Rescue Act
ATD	Aerosol transmitted diseases
BLS	Bureau of Labor Statistics
CDC	Centers for Disease Control and Prevention
CISA	Cybersecurity and Infrastructure Security Agency (within DHS)
C.F.R.	Code of Federal Regulations (designation for federal regulations)
CMS	Centers for Medicaid and Medicare Services
CWCI	California Workers' Compensation Institute
CARES Act	Coronavirus Aid, Relief, and Economic Security Act
DHS	Federal Department of Homeland Security
DLS	Massachusetts Department of Labor Standards
DOL	Federal Department of Labor
DPA	Defense Production Act
EEOC	Equal Employment Opportunity Commission
ETS	Emergency Temporary Standard
Fed.Reg.	Federal Register (place for publication of all federal notices and rules)
FFCRA	Families First Coronavirus Response Act
FMLA	Family and Medical Leave Act
FOUC	Federal Pandemic Unemployment Compensation
HHS	Federal Health and Human Services department
I2P2	Injury and Illness Program Prevention

Medicaid	Federally supported program providing health care access to people who meet income standards
Medicare	Federal program providing health care access to people over 65 and people who are permanently disabled
MSHA	Mine Safety and Health Administration
MSHAct or Mine Act	Mine Safety and Health Act
MSHRC	Mine Safety and Health Review Commission
NIOSH	National Institute for Occupational Safety and Health
OIG	Office of the Inspector General
OSH	Occupational safety and health
OSHA	Occupational Safety and Health Administration
OSHAct	Occupational Safety and Health Act
OSHRC	Occupational Safety and Health Review Commission
PEL	Permissible Exposure Limit
PEUC	Pandemic Emergency Unemployment Compensation
PPE	Personal Protective Equipment
PUA	Pandemic Unemployment Assistance
SOL	Solicitor of Labor (within DOL)
UI	Unemployment insurance
U.S.C.	United States Code (designation for federal statutes)

► Introduction¹

This report is divided into four Parts. Part I provides an overall description of the occupational safety and health (OSH) system in the U.S., describes the role of the federal regulatory system and that of the states, and gives a brief overview of more general worker social and economic protections. Part II is focused on what has happened during the pandemic in terms of OSH and essential frontline workers. It is divided into five parts: the first (A) describes the COVID pandemic in the U.S. generally; (B) describes the federal OSH approaches to the pandemic; (C) gives examples of the variability of state-based responses; (D) describes some of the COVID-related litigation brought by workers, family members, unions and advocacy groups; and (E) describes social welfare interventions related to the pandemic. Part III, drawing on Parts I and II, outlines challenges and shortcomings. Part IV is a very brief conclusion.

The U.S. is a federal system, with a highly dispersed public health structure and somewhat dispersed OSH regulatory structure. This report provides an overview of this system, but in a report of this length it is impossible to describe the variability in full detail.

Note that the U.S. has only ratified a total of fourteen ILO Conventions, of which ten are in force and only one is relevant to OSH [Safety and Health in Mines Convention, 1995 (No. 176)]. The U.S. has not ratified the core conventions relevant to OSH [Occupational Safety and Health Convention, 1981 (No. 155)² and Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)³]. The ILO Conventions are simply not significant in the U.S. domestic approach to OSH; this is discussed briefly in Part III in terms of U.S. shortcomings.

¹ This Report was originally provided to the ILO in April 2022. It has been revised to be current through December 31, 2022. In addition, all litigation references and references to public health orders have been revised to be current through 31 March 2023. Updating after the Report was originally submitted to the ILO in 2022 was supported by the McElhattan Foundation and by Northeastern University School of Law's support for research assistance. Findings from this Report have been incorporated into a broader analysis. See Sean Cooney, Olivia de Quintana Figueiredo Pasqualetto, Tzvetomira Radoslavova, Emily Spieler, Iván Williams Jiménez, "OSH and the COVID-19 pandemic: A legal analysis," ILO Working Paper No. 90 (March 2023), https://www.ilo.org/wcmsp5/groups/public/-dgreports/-inst/documents/publication/wcms_871987.pdf.

² C155 – Occupational Safety and Health Convention, 1981 (No. 155), ILO (Jun. 22, 1981), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C155.

³ C-187 – Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), ILO (Jun. 15, 2006), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C187.

► 1 Occupational Safety and Health (OSH) system in the U.S.⁴

The two most important federal statutes governing health and safety in the U.S. are the Occupational Safety and Health Act of 1970 (OSHAct).⁵ and the Mine Safety and Health Act (MSHAct or Mine Act), covering all mining and quarrying activities.⁶ In addition, there are other federal laws that govern health and safety in specific industries, including, among others, railroads,⁷ trucking,⁸ aviation,⁹ nuclear energy,¹⁰ and pesticide use in agriculture.¹¹

⁴ The ILO has listed sectors and occupations that were to be considered for the purpose of the national reports, of which this is one. "Key workers," in the ILO terminology, can be found among eight main occupational groups: food system workers, health workers, retail workers, security workers, manual workers, cleaning and sanitation workers, transport workers, and technicians and clerical workers. All can be under the jurisdiction of the OSHAct except mining-related activities which are covered by the Mine Safety and Health Act; extraction of crude petroleum and natural gas is under OSHA, not MSHA. Certain occupations, however, are excluded from OSHAct coverage because the workers are public sector workers employed by states, counties, and municipalities. As noted in coverage issues, *infra*, OSH coverage for these workers is not nationally mandated and depends on state and local law.

⁵ Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (2006).

⁶ 30 U.S.C. § 801. The following essential sectors and occupations (listed by the ILO) are under the jurisdiction of MSHA under the Mine Act: mining of coal and lignite; mining of metal ores; other mining and quarrying; Mining support service activities. Coverage under the MSHAct, 30 U.S.C. § 802, is defined as follows:

"(h) coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. (2) For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities; (i) "work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine."

⁷ Federal Railroad Safety Act (FRSA), 49 U.S.C. §§ 20109(a)-(j).

⁸ See Surface Transportation Assistance Act (STAA), 49 U.S.C. §§ 31105(a)-(j) (focusing specifically on retaliation).

⁹ Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121 (focusing on retaliation).

¹⁰ See Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §§ 5801-5891.

¹¹ See Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. § 1801; 40 C.F.R. § 170.1.

A. Occupational safety and health national policy

The OSHAct sets out the umbrella OSH policy in the U.S.¹² This includes both a commitment to assuring “so far as possible every working man and woman in the Nation safe and healthful working conditions,”¹³ as well as a suggestion that states should assume responsibility for the administration and enforcement of occupational health regulation in their jurisdictions.¹⁴ This lays down the basic commitment to a federal-state system that is described in more detail below.

Similarly, in the MSHAct, “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner.”¹⁵

The overall approach to regulation is to apply the hierarchy of controls to all workplace risks, ranging from the most protective (complete elimination of a hazard) to the least protective (personal protective equipment), with a preference for the most protective intervention that is feasible. The regulatory system is a command-and-control model and the explicit involvement of worker representatives is limited under these statutes. Both statutes make clear that it is the responsibility of employers to ensure healthy and safe working conditions.

B. The Occupational Safety and Health Act

The OSHAct created the Occupational Safety and Health Administration (OSHA) which has the responsibility for development of standards and enforcement; the National Institute for Occupational Safety Health (NIOSH), to perform research and make scientifically based recommendations to

¹² Occupational Safety and Health Act § 2, 29 U.S.C. § 651
(Congressional Findings and Purpose:

“(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources --

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.”).

¹³ Occupational Safety and Health Act § 2b, 29 U.S.C. § 651(b).

¹⁴ See Occupational Safety and Health Act § 18, 29 U.S.C. § 667.

¹⁵ 30 U.S.C. § 801(a).

OSHA (and MSHA); and the Occupational Safety and Health Review Commission (OSHRC), to hear appeals of enforcement activities.

OSHA covers only private sector employers. Federal public workers are covered by a presidential executive order that essentially extends the same protections to them as are given to the private sector workers.¹⁶ Workers in all essential occupations are covered,¹⁷ except that state, county and municipal public sector workers are *only* covered if a state chooses to extend OSH coverage to them. This is a critical gap in the extent of OSH protection for workers, including essential workers who are employed in this sector, and is discussed below in the section on coverage limitations.

Employers' duties under the OSHAct

To achieve the goals of the law, every covered employer has two primary duties:

a) Each employer-

1. shall furnish to each of his employees 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 to his employees;
2. shall comply with occupational safety and health standards promulgated under this chapter.¹⁸

Notably, this approach combines prescriptive and risk management approaches.

Under § 5(a)(1), employers have a “general duty” to keep workplaces safe, in the absence of any specific standard or requirement (generally referred to as the general duty clause or requirement). This provision has been used, for example, to cite employers for dangerous conditions that are not covered by specific regulations, including ergonomic risks,¹⁹ heat,²⁰ and workplace violence.²¹ If there is a specific standard governing a hazard, OSHA may not cite an employer for that hazard under the general duty clause. The general duty clause became particularly important during the pandemic, as OSHA does not have any standard governing airborne infectious diseases.

Under §5(a)(2), employers must comply with specific standards that are, generally, prescriptive in nature.

OSHA standards

OSHA standards consist of three types: interim standards (which were adopted initially after the Act was passed in 1970 without formal rule-making procedures based on industry consensus standards), permanent standards (adopted after an extensive process of public, scientific and often judicial review), and emergency temporary standards. The interim temporary standards simply establish permissible exposure limits; due to the difficulty in issuing new permanent

¹⁶ Exec. Order No. 12196, 3 C.F.R. 145 (1980) (covering all federal employees except the military. In general, this Executive Order applies the OSHAct provisions to federal workplaces and requires compliance with OSHA standards, with the following exceptions: the Secretary of the Department involved may develop alternative standards; prompt abatement is required; it sets out a process for the establishment of safety and health management-labor committees. Enforcement is done by the federal OSHA inspectorate).

¹⁷ In the U.S., both federal and state governments designated industries as essential. There was some variation in the lists of included industries by jurisdiction. For the purposes of this report, I use the list of essential workers developed by the ILO unless otherwise specified, as there was substantial overlap between the designations in the U.S. and the ILO list.

¹⁸ Occupational Safety and Health Act § 5, 29 U.S.C. § 654(a).

¹⁹ See, e.g., *Sec'y of Lab. v. Pepperidge Farm, Inc.*, 17 O.S.H. Cas. (BNA) (No. 89-265, 1997).

²⁰ See, e.g., *Duriron Co. v. Sec'y of Lab.*: U.S. Occupational Safety and Health Rev. Comm'n, 750 F.2d 28 (6th Cir. 1984).

²¹ See, e.g., *BHC Northwest Psychiatric Hosp. v. Sec'y of Lab.*, 951 F.3d 558 (D.C. Cir. 2020).

standards, the majority of these PELs have never been updated to reflect current scientific and technological knowledge or current industry consensus standards.²²

In order to issue a permanent standard, OSHA must demonstrate:²³

1. That the targeted hazard, if left unregulated, poses a significant risk of injury or death.
2. That the proposed change (reduction in exposure, workplace design change, or other proposed interventions) will result in a demonstrable reduction in this risk of harm.
3. That the regulation is based on the best available scientific information.
4. That the proposed regulation is both technically and economically feasible. Economic feasibility focuses on the viability of an industry, not individual employers.

Permanent standards are codified in the federal Code of Federal Regulations (C.F.R.) and are divided among requirements for general industry (29 C.F.R. Part 1910) and specialized requirements for specified industries: shipyards (Part 1915); marine terminals (Part 1916); longshore (Part 1917); federal service contractors (Part 1925); construction (Part 1926); and agriculture (1928). If there is not a specific sector standard, then all employers must comply with the requirements for general industry. In general, standards set out hazard-specific requirements. In addition, standards set out requirements that give employees access to employers' records (29 C.F.R. §1910.1020); require communication regarding hazards to workers and unions (29 C.F.R. §1910.1200); require recordkeeping and reporting of occupational injuries and illnesses (29 C.F.R. Part 1904) including the involvement of workers (29 C.F.R. §1904.35); and cover specific areas of protection, such as use of personal protective equipment (29 C.F.R. §1910.132), respiratory protection (29 C.F.R. §1910.134) and sanitation (29 C.F.R. §1910.141).

Permanent health standards have proven extremely difficult and cumbersome to promulgate, as a result of a lengthy internal review process and an extensive, legally mandated public review and comment period, combined with political resistance and judicial scrutiny. The only rule governing infectious diseases in existence at the outset of the pandemic was OSHA's bloodborne pathogen standard.²⁴ In 2010, OSHA had begun the lengthy rulemaking process regarding occupational exposure to airborne infectious agents in settings where health care is delivered; the agency was moving forward with a proposed rule when the issue was put on the long-term regulatory agenda (and onto the back burner) in 2017. Going into the pandemic, therefore, there were no federal OSHA rules specifically governing exposure to airborne infection disease.²⁵

Section 6(c) of the OSHA Act, 29 U.S.C. § 655(c), authorizes OSHA to promulgate emergency rules that are effective immediately upon publication, if "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" and if the standard "is necessary to protect employees from such danger." These are referred to as Emergency Temporary Standards (ETS). Under the statutory requirements, an ETS functions as a proposed rule and is supposed to be replaced with a permanent rule within six months. Two emergency standards were issued in 2021 in response to the pandemic, and these are described in Part II of this report.

²² The OSHA website sets out a comparison of the permissible exposure limits in the interim standards and the current recommendations. See Permissible Exposure Limits – Annotated Tables, Dep't of Lab., Occupational Safety & Health Admin., <https://www.osha.gov/annotated-pels/table-z-1> (last visited March 25, 2023).

²³ The leading cases setting out requirements for setting of health standards are *Industrial Union Department, AFL-CIO v. American Petroleum Institute (The Benzene Case)*, 448 U.S. 607 (1980) and *American Textile Manufacturers Institute (The Cotton Dust Case) v. Donovan*, 452 U.S. 490 (1981). Safety standards are governed by the same principles. See *UAW v. Occupational Safety and Health Admin.*, 37 F.3d 665 (D.C. Cir. 1994).

²⁴ 29 C.F.R. §1910.1030.

²⁵ States with approved state plans can have rules governing infectious disease transmission that are more protective than rules promulgated by federal OSHA. See California case study in Part II below.

There is no standard or specific requirement for the development of workplace-specific Occupational Safety and Health Management Systems²⁶ (sometimes referred to in the U.S. as Injury and Illness Prevention Programs or I2P2) under federal OSHA,²⁷ and there are no penalties for failure to develop these systems; employers cannot be cited under the general duty clause for failure to develop a prevention-based labor-management system to address hazards in the workplace. There is no federal requirement for the establishment of joint management-labor committees.²⁸

Enforcement under the OSH Act

Although the regulatory model is designed as a 'command-and-control' model, the OSH Act is based on a concept of pre-inspection compliance. That is, the expectation is that employers will comply as a preventive matter, not that the agencies will be able to inspect every employer with regularity. Unlike under the Mine Act, the OSH Act does not require that every employer be inspected.

In fact, OSHA is not staffed or funded to perform inspections of all employers; requiring employers to comply with the OSH Act before an inspection is, therefore, the only possible approach. The OSHA inspection force is tiny in comparison to the breadth of OSHA's jurisdiction. According to the official OSHA website, there are a total of approximately 1,850 inspectors in both the federal and state-approved programs; these inspectors are responsible for the health and safety of 130 million workers, employed at more than 8 million worksites around the nation.²⁹ These numbers are echoed in the annual study by the AFL-CIO, the international union federation: in FY2020 there were 774 federal and 1024 state inspectors to inspect 10.1 million workplaces, or one inspector for every 82,881 workers – and the number of OSHA inspectors was at its lowest number since the agency was established 50 years ago.³⁰

Federal OSHA is responsible for all enforcement activities in states that do not have approved state plans for the private sector, as well as for enforcement involving federal and postal service employees in every state. The agency is divided into regions, and each regional office employs compliance officers who are trained to investigate workplace hazards.

How inspections are prioritized

While pre-inspection compliance is the goal, OSHA has the power to levy civil penalties against employers for failing to comply either with standards or with the general duty clause. The OSH Act sets out the following priorities for inspections:³¹

1. Imminent danger investigations. These inspections are almost always conducted within 24 hours of notification to the OSHA area office. Imminent danger is defined by the Act as a danger "which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."³²

²⁶ For a discussion of the ILO approach, see Occupational Safety and Health Management Systems, ILO, <https://www.ilo.org/safework/areasofwork/occupational-safety-and-health-management-systems/lang-en/index.htm> (last visited Mar. 3, 2023).

²⁷ State with approved state plans can adopt I2P2 standards. See California case study in Part II(C), *infra*.

²⁸ In at least two states (Washington and Connecticut) there are provisions in the state workers' compensation laws that require joint labor-management committees to be established.

²⁹ Commonly Used Statistics, Dept of Lab., Occupational Safety & Health Admin., <https://www.osha.gov/data/commonstats#:~:text=Federal%20OSHA%20is%20a%20small,officer%20for%20every%2070%2C000%20workers> (last visited Feb. 7, 2023).

³⁰ AFL-CIO, Death on the Job: The Toll of Neglect 3 (30th ed. 2021), <https://aflcio.org/reports/death-job-toll-neglect-2021>.

³¹ 29 U.S.C. § 657 (governing investigations). For a full discussion of inspection and enforcement priorities, see Field Operations Manual, Directive No. CPL 02-00-164, Dep't of Lab., Occupational Safety & Health Admin. (Apr. 14, 2022), https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-164_1.pdf.

³² 29 U.S.C. § 662(a) (setting out this definition and governs the process by which injunctions can be sought in imminent danger situations).

2. Fatality and catastrophe investigations (three or more employees). These investigations are conducted to determine if noncompliance with standards or the general duty clause caused the injuries.
3. Investigation of complaints. Complaints regarding dangerous conditions that come from workers, unions, health care professionals and others will generally lead to an inspection unless: the person lodging the complaint does not establish reasonable grounds to believe that a violation threatening physical harm or an imminent danger exists; or a recent inspection or other objective evidence indicates that the hazard is not present or has been abated; or if the complaint is not within OSHA's jurisdiction.
4. In addition, OSHA has both National and Regional Emphasis Programs that target industries or hazards with particularly high rates of injuries. For example, targeted hazards have included combustible dust, hazardous machinery, hexavalent chromium, isocyanates, lead and crystalline silica; targeted industries have included nursing and residential care facilities, primary metal industries and shipbreaking; targeted processes have included process safety management in chemical facilities and petroleum refineries, and trenching and excavation.

The following chart sets out the total inspections done nationally by federal OSHA before the pandemic, broken down by category.³³

OSHA Inspection Statistics	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Total Inspections	36,163**	35,820	31,948	32,408	32,023	33,393
Total Programmed Inspections	19,222	16,527	12,731	14,377	13,956	14,900
Total Unprogrammed Inspections	16,941	19,293	19,217	18,031	18,067	18,493
~ Fatality/Catastrophe Inspections	850	912	890	837	941	919
~ Complaints Inspection	9,570	9,037	8,870	8,249	7,489	7,391
~ Referrals*	3,829	6,569	6,691	6,286	6,463	6,718
~ Other Unprogrammed Inspections	2,525	3,686	2,766	2,659	3,174	3,465

*As of FY 2015 referral inspections encompass all subtypes of referrals such as those received from compliance safety and health officers, safety and health agencies, other city/county/state/federal governments, media, and employer-reported.

** The October 2013 Government shutdown occurred during this time.

Note that the powers of the inspectorate are limited. After completion of an inspection, the inspector reports back to the regional office where a determination is made whether the employer should be cited, at what level, and what the penalty should be. If the employer challenges the citation, there is no legal requirement for abatement of the hazard pending review by OSHRC. In cases involving imminent danger, the inspector has no authority under the Act to shut down all or part of any operations. Instead, the inspector must report back to OSHA, and the agency must then seek an injunction from a federal judge to shut it down.³⁴

Proving violations

To prove a violation of a standard, OSHA must show:

1. A specific standard applies to the workplace situation;
2. The standard's requirements were not met;
3. Employees were exposed (or could be exposed) to the violative conditions; and
4. The employer either knew or could have known with exercise of reasonable diligence of the violative condition.³⁵

³³ Occupational Safety and Health Administration (OSHA) Enforcement, Dep't of Lab., Occupational Safety & Health Admin., <https://www.osha.gov/enforcement/2019-enforcement-summary> (last visited Jan. 22, 2023).

³⁴ See Occupational Safety and Health Act § 13(a), 29 U.S.C. § 662(a).

³⁵ See, e.g., *Thomas G. Gallagher, Inc. v. Occupational Safety & Health Rev. Comm'n*, 877 F.3d 1, 6 (1st Cir. 2017).

To prove a violation of the general duty clause, OSHA must show:

1. The employer failed to keep the workplace free of an identified hazard to which employees of that employer were exposed;
2. The hazard was recognized;
3. The hazard was causing or was likely to cause death or serious physical harm; and
4. There was a feasible and useful method to correct the hazard.³⁶

For a violation of the general duty clause to be proved, therefore, there must be a focus on a specific hazard likely to cause death or serious harm. Employers cannot be cited for failure to develop workplace health and safety program or failure to have safety and health labor-management committees. Notably, it is complex and difficult for OSHA to mount a “general duty” case, because evidence must be introduced in each individual case regarding the risks (based on scientific evidence) and the feasibility of abatement (based on expert evidence).

OSHA can use its enforcement powers on an enterprise-wide, rather than single location, basis, when there is a pattern across commonly owned and operated locations. This power has not been used frequently and is often challenged by employers. There have, however, been corporate-wide settlements of health and safety violations that have been negotiated with a number of companies in a range of industries and sectors, including critical sectors such as transportation, healthcare (nursing homes), food systems and manufacturing.³⁷

Civil and criminal penalties

OSHA violations are categorized as anything from “other-than-serious” to willful or repeated. Penalties are assessed based on the seriousness of the violation. Note that these are the maximum allowable fines and are adjusted annually; the following amounts are effective for 2023:³⁸

Type of Violation	Penalty
Serious Other-Than-Serious Posting Requirements	\$15,625 per violation
Failure to Abate	\$15,625 per day beyond the abatement date
Willful or Repeated	\$156,259 per violation

A serious violation occurs where there is substantial probability that death or serious physical harm could result and that the employer knew, or should have known, of the hazard. A willful violation occurs when the employer knowingly commits a violation involving a hazardous condition or operates with plain indifference to the law.

³⁶ See, e.g., *Nat'l Realty & Const. Co. v. Occupational Safety & Health Rev. Comm'n*, 489 F.2d 1257, 1265 (D.C. Cir. 1973).

³⁷ See Corporate-Wide Settlement Agreements, Dep't of Lab., Occupational Safety & Health Admin., <https://www.osha.gov/enforcement/cwsa> (last visited Feb. 7, 2022).

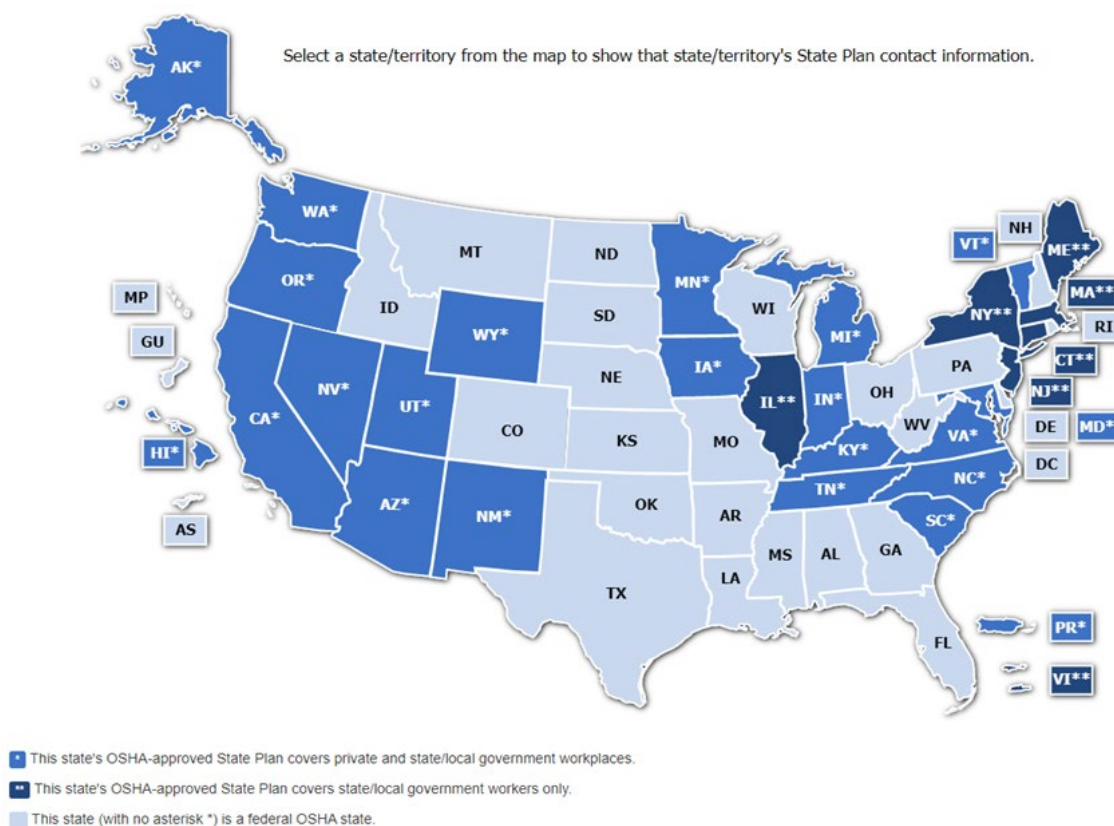
³⁸ See OSHA Penalties, Dep't of Lab., Occupational Safety & Health Admin., <https://www.osha.gov/penalties> (last visited Mar. 25, 2023) (describing the maximum penalty amounts, with the annual adjustment for inflation, that may be assessed after Jan. 15, 2023).

The Act also provides for limited low level criminal charges at the misdemeanor level when a violation is judged to be “willful” and results in the death of an employees.³⁹ Criminal prosecutions under this provision are rare. More serious criminal charges may result if there is also a violation of the environmental protection laws, or if a criminal charge is brought under state law.

Federal-state shared OSH responsibilities under the OSHAct

OSHAct Section 18⁴⁰ sets up shared responsibility between the federal government and the states for worker safety and health in all private sector employment covered by the OSHAct; it allows states to assume full responsibility for occupational safety and health within the state with the approval of OSHA.

This map of the U.S. shows the current status of states’ assumption of legal responsibility for OSH:⁴¹



States that have sought approval to take over OSHA enforcement pursuant to Section 18 (colored the medium blue on the map) are generally called “state plan states.” As can be seen on the map, about half of states have done this, and as a result these states receive federal support for

³⁹ Occupational Safety and Health Act § 17(e), 29 U.S.C. § 666(e). (“Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than \$20,000 or by imprisonment for not more than one year, or by both”).

⁴⁰ 29 U.S.C. §§ 667(a)-(h).

⁴¹ Map downloaded from State Plans, Dep’t of Lab., Occupational Safety & Health Admin, <https://www.osha.gov/stateplans> (last visited Mar. 6, 2023). Note that this map was updated to reflect the approval on August 17, 2022 of a State Plan for public sector workers in Massachusetts. See Massachusetts State Plan for State and Local Government Employers’ Initial Approval Determination, 87 Fed. Reg. 50766 (Aug. 18, 2022) (to be codified at 29 C.F.R. pt. 1956).

their OSH programs.⁴² These state plans create a state-based system of OSH for both private and state and local public sector workers within the borders of the state. State plans require federal approval and must be consistent with federal law (comparable standards, enforcement, and adjudicatory functions) and “at least as effective” – but specific aspects of standards and enforcement may vary.

Federal OSHA does not reach state and local public employers. States may, or may not, regulate health and safety in this sector. Six states without approved private sector state plans have approved state plans that specifically cover state and local public employees (colored dark blue on the map).⁴³ This means that in states without any approved state plan (colored light blue on the map), state and local public sector workers may have no OSH protection at all. See the discussion of coverage limitations, below.

In states without state plans, federal OSHA is directly responsible for enforcement of the standards, the general duty clause and the anti-retaliation provision in the OSHAct.

If OSHA does not have a standard that regulates a safety and health hazard, *any* state—with or without a state plan – may do so.⁴⁴ When there is an existing OSHA standard, however, the Supreme Court has interpreted Section 18 to mean that the OSHAct “precludes any state regulation of an occupational safety and health issue with respect to which a federal standard has been established, unless a state plan has been submitted and approved.”⁴⁵

In other words, states that do not have state plans (“federal OSHA states”) may not regulate the hazard for which a standard has been promulgated – at all. States with state plans may choose to adopt a more stringent standard for a regulated substance or hazard – for example, these states may adopt a standard governing confined spaces that is more stringent than the federal standard.

Hazards that OSHA regulates under the general duty clause, and for which no OSHA standard exists, may be regulated by any state. For example, any state may regulate ergonomic hazards or ban workplace smoking or address heat stress – or airborne infectious diseases – since federal OSHA currently has no standards for these hazards.

When OSHA chooses to issue a new regulation, state laws in federal OSHA states are wiped out by the preemptive effects of the statute, and the federal regulation may have a levelling effect. Even in federal OSHA states, however, “state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and non-workers alike,” are not preempted. Only laws “directed at workplace safety” will be preempted.⁴⁶

C. Mine Safety and Health Act

The Mine Safety and Health Act has a similar administrative and adjudicative structure to that of OSHA and OSHRC, but the substantive provisions of the law are stronger. In sharp contrast to the OSHAct, the Mine Act provides for a mandatory comprehensive inspection cycle: four times a year for underground mines, twice a year for surface facilities.⁴⁷ Inspectors have on-site authority to shut down an operation if it poses an imminent danger to the workers.⁴⁸ Workers who ac-

⁴² For a current listing of state plan states, see State Plans, *supra* note 41.

⁴³ Massachusetts was added as the sixth state on August 18, 2022. See *supra* note 41.

⁴⁴ Section 18(a) of the OSH Act provides that it does not “prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [OSHA] standard is in effect...” 29 U.S.C. § 667(a).

⁴⁵ *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 102 (1992).

⁴⁶ *Id.* at 107.

⁴⁷ Mine Act § 103(a), 30 U.S.C. § 813.

⁴⁸ Mine Act § 107(a), 30 U.S.C. § 817.

company the inspector on walkaround inspections must be paid for their time. Fines are higher than under the OSHAct.⁴⁹ Employers must abate hazards immediately, even if they appeal the citation or fine.⁵⁰ Protection for workers against retaliation is stronger, including an immediate right to reinstatement if they are discharged, as long as their claim is not viewed as “frivolous.”⁵¹ The MSHAct sets up a parallel system of enforcement, with a separate adjudicative agency, the Mine Safety and Health Review Commission (MSHRC). In addition, the federal-state partnership is designed quite differently under the MSHAct. In mining, states may set up parallel mine safety regulatory systems that do not displace any of the federal regulatory and enforcement processes.

In addition, the U.S. has ratified ILO Convention 176 on the Safety and Health in Mines.⁵² The U.S. federal law is fully consistent with the Convention.

D. Regulatory agendas for OSH agencies

Every federal agency is required to notify the public regarding its plans for developing or amending its regulations. The regulatory agenda posted in fall 2021 by OSHA included two pandemic-related rules, the COVID-19 Vaccination and Testing Emergency Temporary Standard Rulemaking and the Emergency Temporary Standard--COVID-19; both of these are discussed in Part II below. The OSHA agenda posted most recently (fall 2022)⁵³ indicated that the COVID-19 rule is now in the process of being finalized, and the agenda added a more general infectious disease standard for health care, which is now in the proposed rule stage.⁵⁴

E. Coverage limitations

Not all workers and workplaces are covered by the U.S. OSH laws

OSHA provides broad coverage of private sector industries, including construction, agriculture⁵⁵ and forestry. MSHA does the same for mining and mining related activities. The federal Executive Order extends the coverage of OSHA to federal public sector employees.⁵⁶

Limitations and exclusions relevant to essential workers:

1. Public sector workers at the state, county and municipal level are not covered by any federal OSH laws. OSH protection for these workers must be enacted by each state, and there is no requirement that this be done. This means that some essential workers – in all sectors, including health care, transportation, security and corrections – may have no OSH regulatory protection. The states in this category are Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Kansas, Louisiana, Mississippi, Missouri, Montana, New Hampshire, North Dakota, Nebraska, Ohio, Oklahoma, Rhode Island, Pennsylvania, South Dakota, Texas, West Virginia and Wisconsin. A few of these states (e.g. West Virginia and Wisconsin) do have state laws that set up OSH regimes for some of their public sector workers, but these are not encompassed within the federal scheme. As a result, for example, the West Virginia law for their public sector workers only covers employees of the state (not county and municipal workers)

⁴⁹ Mine Act § 103(f), 30 U.S.C. § 813.

⁵⁰ Mine Act § 104(a)-(b), 30 U.S.C. § 814.

⁵¹ Mine Act § 104(c)(2), 30 U.S.C. § 815.

⁵² C-176 – Safety and Health in Mines Convention, 1995 (No. 176), ILO (Jun. 22, 1995), https://www.ilo.org/dyn/normlex/en/f?p=NORM_LEXPUB:12100:0::NO::P12100_ILO_CODE:C176

⁵³ Agency Rule List – Fall 2022, Off. of Info. & Regul. Aff., https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=1200 (last visited Feb. 9, 2023).

⁵⁴ Id.

⁵⁵ OSHA does not regulate pesticide exposure in farmworkers. This is separately covered by the Environmental Protection Agency pursuant to the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 and 40 C.F.R. §§ 170.1-170.9.

⁵⁶ Exec. Order No. 12196, 3 C.F.R. 145 (1980).

and specifically excludes “the department of corrections, the department of health and the Legislature” – thereby excluding some of the highest risk essential workers.⁵⁷

2. The regulatory structure is rooted in the employer-employee relationship. Protections are offered to “employees” and not because of a workers’ presence in a workplace.⁵⁸ As a result, workers classified (or misclassified) as independent contractors, students and volunteers, irrespective of the sector or the occupation, are not protected under the U.S. OSH laws. This means, for example, that employers are not required to provide training, and they do not have the rights described below, including the right under the OSHAct to be protected from retaliation for raising safety concerns. This also creates confusion regarding OSH protections for workers employed by staffing or temp agencies. Faced with this dilemma, OSHA has issued guidance⁵⁹ regarding these triangulated relationships that specifically says that “staffing agencies and host employers are jointly responsible for maintaining a safe work environment for temporary workers - including, for example, ensuring that OSHA’s training, hazard communication, and recordkeeping requirements are fulfilled,” and continues:

“A key concept is that each employer should consider the hazards it is in a *position to prevent and correct*, and in a position to *comply* with OSHA standards. For example: staffing agencies might provide general safety and health training, and host employers provide specific training tailored to the particular workplace equipment/hazards.

1. The key is *communication* between the agency and the host to ensure that the necessary protections are provided.
 2. Staffing agencies have a duty to inquire into the conditions of their workers’ assigned workplaces. They must ensure that they are sending workers to a safe workplace.
 3. Ignorance of hazards is not an excuse.
 4. Staffing agencies need not become experts on specific workplace hazards, but they should determine what conditions exist at their client (host) agencies, what hazards may be encountered, and how best to ensure protection for the temporary workers.
 5. The staffing agency has the duty to inquire and *verify* that the host has fulfilled its responsibilities for a safe workplace.”⁶⁰
3. Firms can qualify for status that relieves them of regular inspections under the designated emphasis programs if they qualify under certain voluntary compliance programs.⁶¹
 4. Small farms (fewer than 10 employees) are entirely exempted from inspections. In theory, OSHA covers all farms. But under Congressional appropriations that carry the force of law, OSHA is not allowed to spend any appropriated funds for enforcement under the OSHAct on any farming operation which employs 10 or fewer employees and does not maintain a temporary labor camp.
 5. Other small employers with fewer than 10 employees are also exempted from some OSHA requirements, including recordkeeping,⁶² and are not included in OSHA’s regular program of inspections.

Not all hazards and conditions are covered by the U.S. OSH laws

Notably, in the context of the pandemic, there are no federal regulations or standards that address mental health, bullying, burnout, or any of the related conditions, and these have not

⁵⁷ W. Va. Code § 23-3A-2 (1987).

⁵⁸ See Occupational Safety and Health Act § 3, 29 U.S.C. § 652.

⁵⁹ Protecting Temporary Workers, Dep’t of Lab., Occupational Safety & Health Admin, <https://www.osha.gov/temporaryworkers/> (last visited Feb. 9, 2023).

⁶⁰ Id.

⁶¹ Voluntary Protection Programs, Dep’t of Lab., Occupational Safety & Health Admin, <https://www.osha.gov/vpp> (last visited Feb. 9, 2023).

⁶² 29 C.F.R. § 1904.1 (2020).

been a priority for federal OSHA. Regulations also fail to address some common physical hazards. As noted above, some of these hazards, including heat stressors and workplace violence, have been addressed through application of the general duty clause – and some are regulated under the more comprehensive state plans. Bullying has only been addressed in the context of whistleblower complaints as a component of retaliation, but not separately as an OSH hazard.

F. Workers' rights within the health and safety regime

Employment protection in general

It is impossible to engage in a study of OSH protections for workers in the U.S. without first acknowledging that the underlying legal regime for workers does not protect private sector, non-unionized workers from discipline and discharge at the whim of the employer: the “employment-at-will” doctrine remains the dominant rule in all U.S. states except Montana.⁶³ With a unionization rate in the private sector of only 6.1 percent, this means that almost all essential workers in the private sector live under this regime.⁶⁴ There are, of course, specific exceptions to this, but almost all of these exceptions require workers to prove that they fit within the specific exception and that the disciplinary action was taken because of their membership in the protected category. This has far-reaching consequences for OSH, as workers are very often reluctant to raise concerns about health and safety or to report injuries.⁶⁵

Workers' rights under OSH laws in general

Since the OSH laws in the U.S. are not built on a tripartite model, the explicit rights of workers are very limited. Under both the OSHAct and the Mine Act, workers can: participate in the public process of standard-setting; make complaints to the agency to request inspections; participate in the inspection process;⁶⁶ protest the abatement period set by a citation by OSHA; and participate in any appeal of a citation filed by an employer. In addition, employers must post a notice of rights and requirements;⁶⁷ provide information about hazards under the Hazard Communication Rule;⁶⁸ and give employees access to records.⁶⁹ Rights under the Mine Act are somewhat more extensive than under the OSHAct, including a right to be paid during inspections.

⁶³ Wrongful Discharge from Employment, Mont. Code Ann. § 39-2-901 (1987).

⁶⁴ According to the Bureau of Labor Statistics (BLS), in 2021, only 6.1 percent of private sector workers were in unions; the union membership rate of public-sector workers was considerably higher at 33.9 percent; the overall unionization rate, with private and public sector combined, was 10.3 percent. *Union Members – 2021*, Bureau of Lab. Stat. (Jan. 20, 2022, 10:00 AM), <https://www.bls.gov/news.release/pdf/union2.pdf>.

⁶⁵ Numerous studies and articles that summarize empirical data in the U.S. demonstrate this point. See, e.g., Charlotte S. Alexander, *Transmitting the Costs of Unsafe Work*, 54 Am. Bus. L. J. 463 (2017);

Lenore S. Azaroff, Charles Levenstein & David H. Wegman, *Occupational Injury and Illness Surveillance: Conceptual Filters Explain Underreporting*, 92 Am. J. Pub. Health 1421 (2002); Emily A. Spieler & John F. Burton, Jr., *The lack of Correspondence Between Work-Related Disability and Receipt of Workers' Compensation Benefits*, 55 Am. J. Indus. Med. 487 (2012); Emily A. Spieler & Gregory R. Wagner, *Counting Matters: Implications of Undercounting in the BLS Survey of Occupational Injuries and Illnesses*, 57 Am. J. Indus. Med. 1077 (2014); Kenneth D. Rosenman et al., *How Much Work-Related Injury and Illness is Missed by the Current National Surveillance System?*, 48 J. Occupational & Env't Med. 357 (2006); Leslie I. Boden & Al Ozonoff, *Capture-Recapture Estimates of Nonfatal Workplace Injuries and Illnesses*, 18 Annals Epidemiology 500 (2008); Timothy Morse et al., *Capture-Recapture Estimation of Unreported Work-Related Musculoskeletal Disorders in Connecticut*, 39 Am. J. Indus. Med. 636 (2001); Monica Galizzi et al., *Injured Workers' Underreporting in the Health Care Industry: An Analysis Using Quantitative, Qualitative, and Observational Data*, 49 Indus. Rel.: J. Econ. & Soc'y 22 (2009); Z. Joyce Fan et al., *Underreporting of Work-Related Injury or Illness to Workers' Compensation: Individual and Industry Factors*, 48 J. Occupational & Env't Med. 914 (2006); Xiuwen S. Dong et al., *Injury Underreporting Among Small Establishments in the Construction Industry*, 54 Am. J. Indus. Med. 339 (2011).

⁶⁶ Under the OSHAct, inspections can be conducted without worker participation, and employers are not required to pay workers who do participate. Under the Mine Act, participating workers must be paid for time spent.

⁶⁷ For general industry, this requirement can be found at 29 C.F.R. § 1903.2.

⁶⁸ 29 C.F.R. § 1910.1200 (2013).

⁶⁹ 29 C.F.R. § 1910.1020 (2011).

Anti-retaliation provisions in OSH laws

The OSHAct has a specific provision that is designed to protect workers from retaliation for raising concerns about safety or notifying the employer about an injury.⁷⁰ Under this provision, employers are prohibited from retaliating against workers who raise safety concerns, notify the employer about an injury, or participate in any part of OSHA enforcement activities. Overall, this is a relatively weak provision: complaints must be filed with OSHA within 30 days; the agency then will investigate and attempt to settle the claim; if it is not settled and is viewed as meritorious, the case is sent to the Solicitor of Labor (SOL) to review; and if SOL believes the case is worth pursuing, it must be filed in federal court.⁷¹ Very few cases reach this stage, and the decision by SOL as to whether to pursue a case is entirely discretionary and non-reviewable.

The regulations under the OSHAct anti-retaliation provision also provide some limited protection for workers who refuse to perform imminently dangerous work.⁷² The Mine Act makes explicit provision for refusal of dangerous work.⁷³

Protection against retaliation under federal safety laws other than the OSHAct (including the Federal Railway Safety Act, the Surface Transportation Assistance Act, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, known as AIR21, and others) is more robust than that provided under the OSHAct: the statutes of limitations are longer; the remedies are broader; the proof required to show the employer's intent is reduced (under some of these statutes, if an employee successfully shows that the protected activity was a contributing cause, the employer has to prove by clear and convincing evidence that the retaliatory action was not unlawfully motivated); and workers can bring the cases forward to either administrative hearings or judicial proceedings on their own.⁷⁴ The MSHAct also has stronger provisions than the OSHAct, including a provision for temporary reinstatement of a discharged worker while the claim is pending if it is viewed as "not frivolous" by the investigating agency.⁷⁵

Potential legal challenges to retaliation under state laws

State law can provide additional protection from retaliation involving health and safety. Coverage varies. It can be based in common law through judicially developed principles that allow workers without other job protection to sue employers for retaliatory discharge that violates a recognized public policy. States have recognized this principle in relation to retaliation for raising safety concerns. Some states also have specific anti-retaliation laws, sometimes referred to as whistleblower laws, to protect workers from retaliation: in some states, these are limited to state public sector workers; in other states, they cover all workers. Finally, OSHA state plan states must have provisions in the OSH statute regarding retaliation; in some states, these provisions are more protective of workers than the federal statutory requirement.

⁷⁰ 29 U.S.C. § 660(c); 29 C.F.R. §1977.

⁷¹ For an analysis of this OSHAct provision, see Emily A. Spieler, *Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act*, 32 ABA J. Lab. & Emp. L. 1 (2016).

⁷² 29 C.F.R. § 1977.12(b)(2)

("... occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.").

In *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 22 (1980), the Supreme Court upheld this regulation despite the fact that the OSHAct itself makes no reference to the right to refuse dangerous work.

⁷³ See Section 105(c) of the Mine Act, 30 U.S.C. § 815(c), and 29 C.F.R. Subpart-E - Complaints of Discharge, Discrimination or Interference.

⁷⁴ For a full analysis of the differences among these statutes, see Spieler, *supra*, note 71.

⁷⁵ Mine Act § 104(c)(2), 30 U.S.C. § 815.

Safety under the labor laws

Workers have the right to engage in activity for mutual aid and protection under the National Labor Relations Act.⁷⁶ This includes the right to refuse dangerous work, and to be free from retaliation for raising safety concerns, irrespective of whether the workers are members of labor unions or covered by collective bargaining agreements.⁷⁷

Collective bargaining agreements – contracts between unions and specific workplaces or broader enterprises – generally contain safety and health provisions, as well as strong protection against discipline and discharge. Once workers are unionized, their employer is obligated to negotiate regarding safety and health.⁷⁸ As noted above, however, unionization rates are now extraordinarily low in the U.S.

G. Workers' social and income protection prior to the pandemic

Health care

Most workers in the U.S. obtain health insurance through their employers or under provisions of the Affordable Care Act (ACA).⁷⁹ A smaller number are insured through federal programs such as Medicare (which provides health insurance to people over 65, including those who are still working) and Medicaid (which provides coverage for those who meet strict poverty guidelines, including workers in very low wage jobs). Although health insurance is universally *available*, there is, in fact, no truly universal system of health care access in the U.S. Although workers who do not obtain health insurance through employment (and do not qualify for Medicare or Medicaid) can purchase insurance through regulated markets, choice of plans is influenced by price, and lower cost plans provide less adequate coverage.

The ACA also expanded government-supported Medicaid to support health care for those who could not afford it on the market exchanges. Initially this provision was mandatory, requiring states to participate, but the Supreme Court ruled that Medicaid expansion established through the ACA is constitutional only if it was optional for states to participate.⁸⁰ Fourteen states⁸¹ initially refused the Medicaid expansion, thereby limiting the access of people with low income to health insurance; twelve of these states have continued to refuse the expansion, despite further federal support that was offered in the American Rescue Plan Act ⁸²(ARPA) that was passed to provide COVID-relief. ARPA also increased subsidies for purchase of health insurance, and these subsidies have been continued under the 2022 Inflation Reduction Act.⁸³

Nevertheless, low wage essential workers may be without any health care coverage. In 2020, 8.6 percent or 28 million people in the U.S. did not have health insurance at any point during the year.⁸⁴ A recent study found that 23 million people (nearly 1 in 10 adults) owe significant medical debt in the U.S.; Black Americans, and people living in the South or in Medicaid non-expansion

⁷⁶ National Labor Relations Act, 29 U.S.C. §§ 157, 158(a)(1).

⁷⁷ See *N.L.R.B. v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962); *Prill v. N.L.R.B.*, 835 F.2d 1481, 1485 (D.C. Cir. 1987).

⁷⁸ National Labor Relations Act, 29 USC § 158(d); *Oak Harbor Freight Lines, Inc. v. N.L.R.B.*, 855 F.3d 436, 438 (D.C. Cir. 2017).

⁷⁹ Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-48, 124 Stat. 119 (2010).

⁸⁰ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012).

⁸¹ Alabama, Florida, Georgia, Kansas, Mississippi, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Wisconsin, Wyoming.

⁸² American Rescue Plan Act of 2021, Pub. L. No. 117-2 (2021).

⁸³ Inflation Reduction Act of 2022, Pub. L. No. 117-169 (2022).

⁸⁴ See Katherine Keisler-Starkey & Lisa N. Bunch, U.S. Census Bureau, Health Insurance Coverage in the United States: 2020, Report No. P60-274 (2021), <https://www.census.gov/library/publications/2021/demo/p60-274.html>

states, were more likely to have significant medical debt⁸⁵; as many as 30% of workers in some industries, such as building cleaning services, lack insurance.⁸⁶

Minimum wage

The federal minimum wage has been \$7.25 per hour since 2009, with a lower rate set for ‘tipped employees’ in industries such as restaurants where workers traditionally rely on tips from customers to make up their full wages. States can adopt higher minimum wage levels; state minimum wages now range as high as \$16.50 per hour. But six states have no state-based minimum wage at all, which means that workers who are not covered by the federal laws are not protected by any minimum. Mississippi, described in greater detail below, is one of these states. An additional 16 states expressly connect the minimum wage in the state to the federal rate. Workers who earn wages at the low end of the wage scale often fall within the federal poverty guidelines – and may qualify for federal subsidized Medicaid, even if they work full-time.

Unemployment insurance (UI)

Unemployment insurance is provided to workers through a federal-state partnership, in which the federal government sets a floor and provides financial backing and states administer the programs. Benefit levels and eligibility rules are set by the states. Generally, to be eligible and maintain eligibility, workers must be out of work through no fault of their own and actively seeking employment. Benefits are capped in terms of weekly amount, and duration is usually limited 26 weeks.

Paid sick leave

There is no federally mandated requirement for paid sick leave. The federal Family and Medical Leave Act (FMLA),⁸⁷ covers employers with 50 or more employees, and requires that unpaid leave for up to 12 weeks be provided to qualifying workers with serious health conditions, thereby guaranteeing their right to return to their jobs. Thirty-seven state and local jurisdictions have adopted some version of paid sick leave laws within these jurisdictions; the provisions vary.⁸⁸

Workers’ compensation

Workers’ compensation programs are state-based (except for the federal program for federal employees, some disease-specific programs, and special programs for railroad workers and longshore workers). These programs generally provide temporary wage replacement, first dollar coverage for health care for the compensated injury or illness, and some longer-term benefits for partial or total disability. They require injured workers to prove that their injury or illness arose in the course of and within the scope of the employment. The coverage of occupational diseases is variable and generally spotty. In all but four states, compensation is privatized and

⁸⁵ Matthew Rae et al., The Burden of Medical Debt in the United States, Health Sys. Tracker (Mar. 10, 2022), <https://www.healthsystemtracker.org/brief/the-burden-of-medical-debt-in-the-united-states/>.

⁸⁶ Hye Jin Rho, Hayley Brown & Shawn Fremstad, Ctr. for Econ. & Pol’y Rsch., A Basic Demographic Profile of Workers in Frontline Industries (2020), <https://cepr.net/a-basic-demographic-profile-of-workers-in-frontline-industries/>.

⁸⁷ 29 U.S.C. § 2601 (1993).

⁸⁸ The list of states and local governments with these laws as of the end of 2022: thirteen states (Arizona, California, Colorado, Connecticut, Massachusetts, Maryland, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington), 20 cities and four counties (California: Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco, and Santa Monica; District of Columbia: Washington, D.C.; Illinois: Chicago and Cook County; Maryland: Montgomery County; Minnesota: Duluth, Minneapolis, and Saint Paul; New York: New York City and Westchester County; Pennsylvania: Allegheny County, Pittsburgh, and Philadelphia; Texas: Austin, Dallas, and San Antonio; Washington: Seattle and Tacoma). Currently, all three ordinances passed in Texas are on hold pending review by the courts. The National Council of State Legislatures tracks this information. See Paid Sick Leave, Nat’l Conf. of State Legislatures (Jul. 21, 2020), <https://www.ncsl.org/labor-and-employment/paid-sick-leave>.

employers purchase insurance coverage from private insurance carriers or self-insure for the risk. If claims are not paid voluntarily, most state systems involve considerable litigiousness and delays, resulting in settlements for “lump sums” that may not cover full entitlement to benefits.

Disability insurance

The Social Security system provides long term disability coverage (Social Security Disability Insurance) for qualifying workers who are permanently disabled and unable to work. This is paid until the worker reaches 65. Several states have laws providing for short term disability; there is no federal provision for this.

Protection against discrimination based on disability

Workers with disabilities that are caused by work may be protected from discrimination under the Americans with Disabilities Act (ADA)⁸⁹ and similar state laws, including a right to reasonable accommodation that will enable them to do the essential functions of a job. Note that this particular protection has become important in the wake of the pandemic and issues relevant to “long COVID.”

⁸⁹ 42 U.S.C. §§ 12101(a)-(b).

► 2 Responses to COVID & protecting frontline workers

A. Introduction: COVID in the U.S.

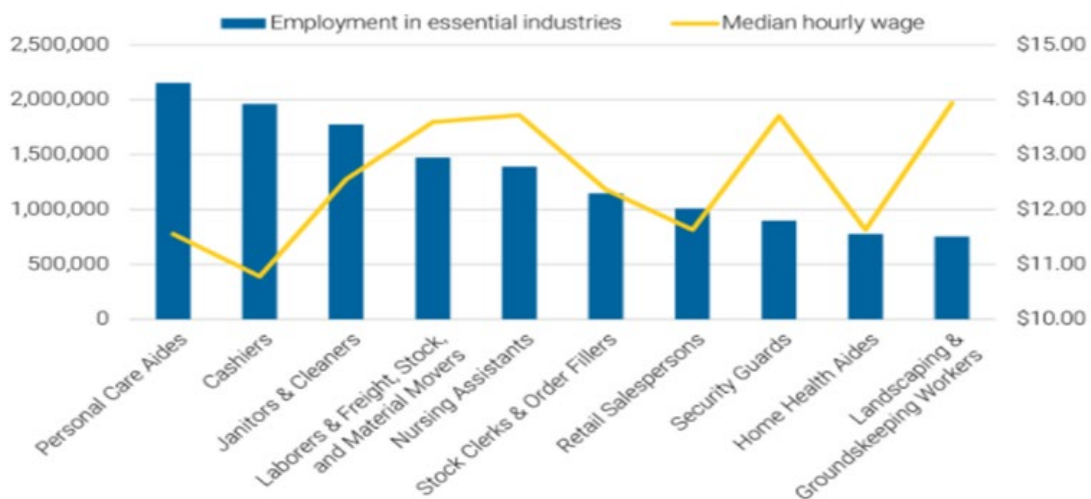
As state governments locked down economic activity in 2020, a subset of workers were deemed “essential,” and became a frontline for infection. Some of these workers were celebrated by the media and the public – particularly health care workers and first responders. Frontline essential workers also included workers in retail, transportation, meatpacking, prisons, police and fire and other emergency responders, warehouses and, of course, nursing homes, hospitals, and first responders. The pandemic raged through many of these workplaces.

These workers frequently worked in unprotected, crowded and poorly ventilated conditions, and then they returned home – sometimes traveling in crowded public transportation – often to crowded living conditions where they were unable to isolate or quarantine from other household members. Many of these frontline essential jobs are performed by immigrants and people of color.

Perhaps not surprisingly, COVID did not have equal impact across the U.S. population.

A large proportion of essential frontline workers work in very low wage jobs:⁹⁰

Figure 1. Ten largest essential occupations with a median wage less than \$15 per hour, 2018



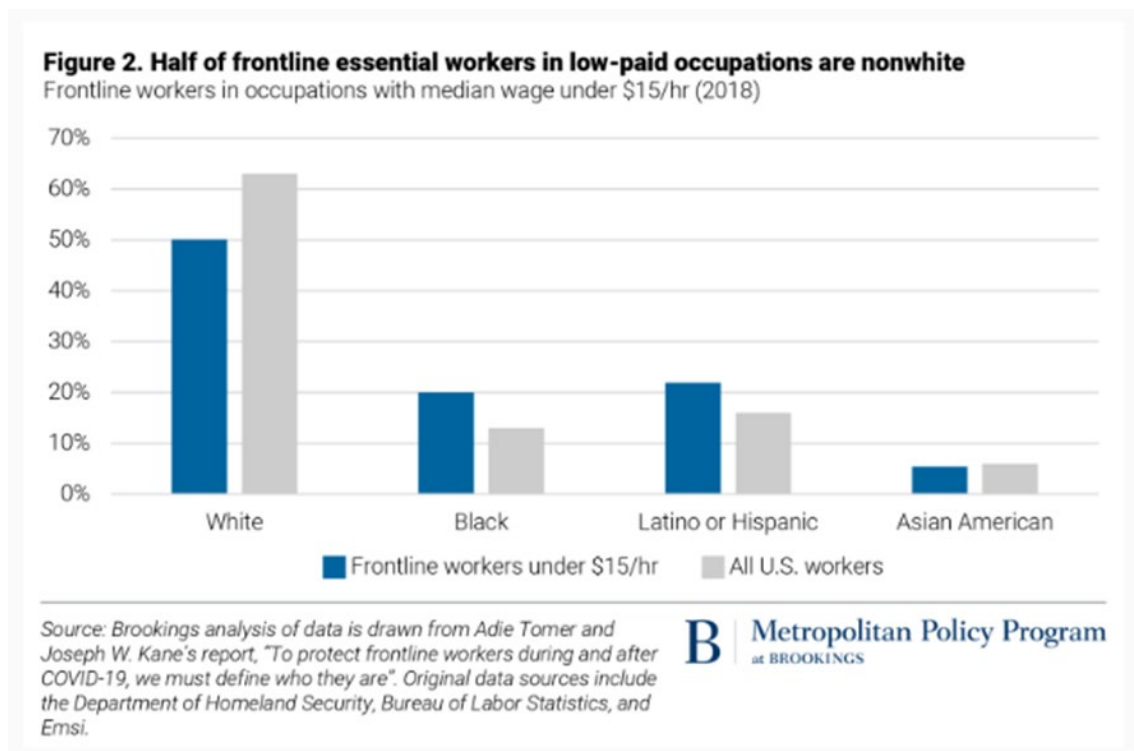
Source: Brookings analysis of data is drawn from Adie Tomer and Joseph W. Kane's report, "To protect frontline workers during and after COVID-19, we must define who they are". Original data sources include the Department of Homeland Security and the Bureau of Labor Statistics.

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And half of frontline essential workers in low-paid occupations were nonwhite:⁹¹

⁹⁰ Molly Kinder & Laura Stateler, Essential Workers Comprise About Half of All Workers in Low-Paid Occupations. They Deserve a \$15 Minimum Wage., Brookings Inst. (Feb. 5, 2021), <https://www.brookings.edu/blog/the-avenue/2021/02/05/essential-workers-deserve-minimum-wage-increase/>.

⁹¹ Id.

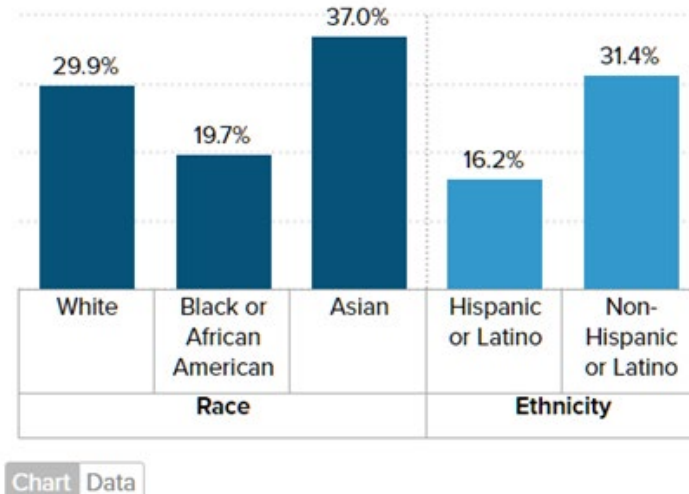


The ability to stay home also varied by race and ethnicity:⁹²

⁹² Elise Gould & Heidi Shierholz, Not Everybody Can Work From Home, Econ. Pol'y Inst. (Mar. 19, 2020), <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home/>.

Less than one in five black workers and roughly one in six Hispanic workers are able to work from home

Share of workers who can telework, by race and ethnicity, 2017-2018



Source: U.S. Bureau of Labor Statistics, *Job Flexibilities and Work Schedules — 2017–2018 Data from the American Time Use Survey*

Economic Policy Institute

This laid the basis for a perfect storm: high rates of disease among critical essential workers that disparately affected demographic groups by race and socioeconomic status. And many of these workers lacked adequate health insurance or paid sick leave.

Over the first two years of the pandemic, there were also changes in the distribution of jobs by essential sector. Most significantly from the vantage point of this report, while mining & logging and hospitality (-12.5% and -9% respectively) decreased, transportation and warehousing increased substantially(+10.1%).⁹³ The current state of the U.S. labor market is uncertain, with large numbers of people changing jobs both voluntarily and involuntarily and considerable debate and variation in the return to physical “brick and mortar” workplaces for workers who could work remotely during the height of the pandemic.

Meanwhile, the response to the pandemic as it hit American workplaces has been disjointed and disorganized. Sources of interventions⁹⁴ came from:

- The federal government in the form of orders regarding the general public health emergency, designations of essential industries by the Department of Homeland Security, public health guidelines issued by the Centers for Disease Control and Prevention (CDC) and adopted by OSHA; vaccine mandates issued by OSHA, the Centers for Medicaid and Medicare Services (CMS), and presidential executive orders covering firms that contract with the federal government and the armed services; an Emergency Temporary Standard issued by OSHA to cover healthcare facilities; and OSHA enforcement of requirements for PPE and mitigation.

⁹³ See Eric Berger & Andrew Witherspoon, *How Covid Shook the US: Eight Charts That Capture the Last Two Years*, Guardian (Mar. 13, 2022), https://www.theguardian.com/us-news/2022/mar/13/how-covid-shook-the-us-charts-graphs?CMP=Share_AndroidApp_Other (using BLS data).

⁹⁴ These are discussed in greater detail later in this report.

- Within states: Interventions included emergency orders issued for the general public, most of which focused on application of CDC guidelines applied to public-facing businesses that were designated as “essential” and therefore affected essential sectors and essential workers; specific regulations for OSH issued most commonly (but not exclusively) by states with approved state plans; and enforcement by state labor departments and local public health agencies of the emergency orders and specific COVID-related regulations.
- In addition, pandemic-related social protections were adopted by both the federal government and in some states.

The disorganization of public health and OSH measures contributed to alarming death tolls attributable to the pandemic in the U.S. As of April 2022, two years after the World Health Organization declared a global pandemic, close to one million people had died of COVID in the U.S.⁹⁵ Overall, about one quarter of deaths were among working age people between the ages of 18 and 64.⁹⁶ It seems reasonable to assume that workers who could not stay home would be overrepresented in this number.

A study of data from California suggests the same conclusion. In California, 73% of confirmed COVID-19 cases and 29% of confirmed COVID-19 deaths were in this age group; the highest relative and per capita excess mortality was found in essential industries (food/agriculture, transportation/logistics, manufacturing, and facilities industries). Latino workers experienced the highest relative excess mortality (37%) while Black workers had the highest per-capita excess mortality. The study identified 862 suspected work-related COVID-19 deaths in California between January 1, 2020 and January 13, 2022, noting that this is a remarkable number, considering that prior to the pandemic, fewer than 500 fatal occupational injuries typically occurred each year in California.⁹⁷

The toll of this pandemic on critical workers in the U.S. who were obliged to work outside their home is nothing short of shocking.

The materials below attempt to explain what happened in the U.S.

B. The federal response to the pandemic and essential workers

1. The initial response to COVID-19

On March 13, 2020, President Trump declared a national emergency. On March 19, 2020, pursuant to a presidential directive that had been issued prior to the pandemic,⁹⁸ the Cybersecurity and Infrastructure Security Agency (CISA) of the Department of Homeland Security (DHS) designated workers in sixteen sectors as “essential,” with orders that these industries continue to operate during the pandemic.⁹⁹ These sectors were “considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic

⁹⁵ According to the Centers for Disease Control and Prevention, as of November 2, 2022, a total of 1,068,667 COVID-19 deaths have been reported in the United States. Covid Data Tracker Weekly Review, CDC (Nov. 2, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html>.

⁹⁶ See Distribution of Total COVID-19 Deaths in the United States as of April 24, 2022, By Age Group, Statista (Apr. 24, 2022), <https://www.statista.com/statistics/1254488/us-share-of-total-covid-deaths-by-age-group/>. Demographic data regarding the pandemic in the US can be found on the CDC website. See COVID Data Tracker, CDC, <https://covid.cdc.gov/covid-data-tracker/#cases-deaths-trends-by-demographic> (last visited Mar. 6, 2023).

⁹⁷ Kristin J. Cummings et al., COVID-19 in the Workplace: The View from California, 19 *Annals of the American Thoracic Society* 1260 (2022), <https://doi.org/10.1513/AnnalsATS.202112-1334VP>.

⁹⁸ Press Release, The White House, Presidential Policy Directive - Critical Infrastructure Security and Resilience (Feb. 12, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil>.

⁹⁹ The 16 sectors were: Chemical; Commercial Facilities; Communications; Critical Manufacturing; Dams; Defense Industrial Base; Emergency Services; Energy; Financial Services; Food and Agriculture; Government Facilities; Healthcare and Public Health; Information Technology; Nuclear Reactors, Materials, and Waste; Transportation Systems; Water and Wastewater Systems. See Critical Infrastructure Sectors, Cybersecurity & Infrastructure Sec. Agency, <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19> (last visited Feb. 11, 2023).

security, national public health or safety, or any combination thereof.” At least initially, the focus of the directives from CISA/DHS was entirely “to help officials and organizations identify essential work functions in order to allow [workers] access to their workplaces during times of community restrictions.” Later, there was greater acknowledgement of the need to protect essential workers “to ensure that they can work safely,” as well the need to provide for “the allocation of scarce resources used to protect essential workers against COVID-19.”¹⁰⁰

The CDC, the primary national public health agency, issued guidelines for masking, social distancing, screening, hygiene, testing, quarantine and isolation, including interim guidance for infrastructure businesses.¹⁰¹ The CISA/DHS guidance followed the CDC guidelines on protection of workers,¹⁰² but enforcement, if there was any, generally fell to states and local public health agencies. The role of OSHA is described separately below. In view of the fact that neither the CDC nor WHO treated COVID-19 as a disease that spread by aerosol transmission, little attention was paid to ventilation, which in the hierarchy of controls should have been a primary focus.

As of March 19, 2020, all 50 states and the District of Columbia had declared emergencies related to the pandemic. Emergency orders listed essential functions and businesses, often following the lead of CISA/DHS, and these were ordered to continue to operate. When in-person operation was necessary, orders included requirements for mitigation measures (masking, social distancing, hygiene and sanitation, quarantine and isolation). The specific sectors varied somewhat from one state to another, but always included all healthcare and social service providers, emergency responders, retail groceries and pharmacies, transportation, food chain businesses, security and corrections. There is no easily accessible data base to tell us what happened at the local level, though there were reports of local public agencies shutting down businesses (including, for example, meatpacking plants) when significant disease clusters appeared in a workforce. Moreover, inadequate supplies of PPE early in the pandemic and problematic access to health care further challenged the OSH response for essential workers.

2. OSHA & the pandemic

OSHA standards & guidance during the pandemic ¹⁰³

OSHA standards that were in effect at the beginning of the pandemic that have some relationship to the pandemic exposures include:

1. Employers’ obligations for recording and reporting injuries and illnesses. ¹⁰⁴
2. General requirements regarding personal protective equipment, providing:

1910.132(a) Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.¹⁰⁵

¹⁰⁰ Id.

¹⁰¹ Interim Guidance for Business and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), February 2020, CDC (Feb. 26, 2020), <https://stacks.cdc.gov/view/cdc/85488>.

¹⁰² For the most recent version of the CISA/DHS directive, see Cybersecurity & Infrastructure Sec. Agency, Version 4.1, Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response (2021), https://www.cisa.gov/sites/default/files/publications/essential_critical_infrastructure_workforce-guidance_v4.1_508.pdf.

¹⁰³ For a discussion of OSHA’s response to the pandemic and related litigation, see Randy Rabinowitz, *The Sad, Sad Story of OSHA’s Failure to Protect Workers From COVID-19*, 32 New Sol. 86, 86–91 (2022).

¹⁰⁴ 29 C.F.R. § 1904.0 (2017).

¹⁰⁵ 29 C.F.R. § 1910.132 (1974).

3. Respiratory protection¹⁰⁶ providing:

1910.134(a)(1) In the control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors, the primary objective shall be to prevent atmospheric contamination. This shall be accomplished as far as feasible by accepted engineering control measures (for example, enclosure or confinement of the operation, general and local ventilation, and substitution of less toxic materials). When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used pursuant to this section.

1910.134(a)(2) A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program, which shall include the requirements outlined in paragraph (c) of this section. The program shall cover each employee required by this section to use a respirator.

4. Sanitation, requiring housekeeping and sanitation, provision of potable water, hand soap, toilets.¹⁰⁷

These standards could be enforced with regard to relevant hazards in any sector.

As noted above, there were no federal regulations at the start of the pandemic that would have protected workers specifically from the airborne spread of an infectious disease. OSHA did issue guidance, largely based on guidance issued by the CDC, suggesting “good practices,” but not mandating them.¹⁰⁸ In early March 2020, OSHA issued a booklet with suggestions for employers, telling them to “promote frequent and thorough hand-washing,” “encourage respiratory etiquette, including covering coughs and sneezes” and “provide customers and the public with tissues” – but specifically noting that these precautions were not legal requirements. Later guidance addressed the need for ventilation in workplaces.¹⁰⁹ Specific guidelines were also issued by industry, largely following the CDC guidance. At least in theory, employers who did not address significant exposures to COVID-19 could be cited under the general duty clause once the level of risk became apparent.

In its initial guidance, OSHA divided workplaces into four categories of risk:¹¹⁰

¹⁰⁶ 29 C.F.R. § 1910.134 (1974).

¹⁰⁷ 29 C.F.R. § 1910.141 (1974).

¹⁰⁸ See Control and Prevention, Interim General Guidance for All Workers and Employers, Dep’t of Lab., Occupational Safety & Health Admin., [COVID-19 - Control and Prevention | Occupational Safety and Health Administration \(osha.gov\)](#) (last visited Feb. 12, 2023) (“For all workers, regardless of specific exposure risks, it is always a good practice to:

-Wear cloth face coverings, at a minimum, at all times when around coworkers or the general public. If a respirator, such as an N95 respirator or better, is needed for conducting work activities, then that respirator should be used, and the worker should use their cloth face covering when they are not using the respirator (such as during breaks or while commuting).

-Frequently wash your hands with soap and water for at least 20 seconds. When soap and running water are not immediately available, use an alcohol-based hand sanitizer with at least 60% ethanol or 70% isopropanol as active ingredients and rub hands together until they are dry. Always wash hands that are visibly soiled.

-Avoid touching your eyes, nose, or mouth with unwashed hands.

-Practice good respiratory etiquette, including covering coughs and sneezes or coughing/sneezing into your elbow/upper sleeve.

-Avoid close contact (within 6 feet for a total of 15 minutes or more over a 24-hour period) with people who are visibly sick and practice physical distancing with coworkers and the public.

-Stay home if sick.

-Recognize personal risk factors. According to the U.S. Centers for Disease Control and Prevention (CDC), certain people, including older adults and those with underlying conditions such as heart or lung disease, chronic kidney disease requiring dialysis, liver disease, diabetes, immune deficiencies, or obesity, are at higher risk for developing more serious complications from COVID-19.”).

¹⁰⁹ Occupational Safety & Health Admin., OSHA 4103-03R 2021, COVID-19 Guidance on Ventilation in the Workplace (2021), <https://www.osha.gov/Publications/OSHA4103.pdf>.

¹¹⁰ Occupational Safety & Health Admin., OSHA 3990-03, Guidance on Preparing Workplaces for COVID-19 (2020), <https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf>.



The “very high” top category was limited to health care workers performing aerosol-generating procedures or collecting or handling specimens, as well as morgue workers performing autopsies. The second tier (“high”) included health care delivery and support staff who were exposed to patients, medical transport workers, and mortuary workers. *All* other workers were in the two lower exposure groups, including the sectors and workers where the conditions were dangerous (such as meatpacking) or where workers were regularly exposed to the public (such as grocery stores).

This categorization was important, because OSHA initially announced that it was not going to use its full enforcement authority in the lower exposure groups. Instead, complaints from workers in these groups were to be treated through a “non-formal phone/fax procedures” and a complaint would not be followed by an on-site inspection. Moreover, the guidance limited use of the general duty clause to jobs in the top two tiers. Under public pressure, OSHA expanded its enforcement efforts in May 2020 to include workplaces with high numbers of complaints or known COVID cases in industries, such as meatpacking, where large clusters of disease were being publicly reported.

In January 2021, immediately after his inauguration, President Biden issued an “[Executive Order on Protecting Worker Health and Safety](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/)” specifically calling attention to essential workers and workplace exposures: “Healthcare workers and other essential workers, many of whom are people of color and immigrants, have put their lives on the line during the coronavirus disease 2019 (COVID-19) pandemic. It is the policy of my Administration to protect the health and safety of workers from COVID-19....” and then calling upon OSHA to issue revised guidance for employers on workplace safety, consider an ETS on COVID-19, and review OSHA enforcement efforts “related to COVID-19 on violations that put the largest number of workers at serious risk or are contrary to anti-retaliation principles”; and calling upon MSHA to “consider whether any emergency temporary standards on COVID-19 applicable to coal and metal or non-metal mines are necessary, and if such standards are determined to be necessary and consistent with applicable law, issue them as soon as practicable.”¹¹¹

The Office of the Inspector General (OIG), the investigatory arm of the Department of Labor, issued four highly critical reviews of OSHA’s performance during the pandemic. The first audit expressed concerns regarding OSHA’s handling of whistleblower complaints, reiterating issues

¹¹¹ Joseph R. Biden Jr., Executive Order on Protecting Worker Health and Safety, The White House (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/>.

that OIG had expressed previously regarding the agency's failure to undertake timely investigations.¹¹² The second, issued in February 2021, focused generally on OSHA's performance during the pandemic and was a scathing assessment of OSHA's functioning during 2020.¹¹³ In this audit, the OIG set out to answer the question: "What plans and guidance has OSHA developed to address challenges created by COVID-19, and to what extent have these challenges affected OSHA's ability to protect the safety of workers and its workforce?" The audit reviewed the failure of OSHA to perform on-site inspections and the weakness of guidances that were not enforceable. Its recommendations to the agency included the development of onsite inspection strategies and the issuance of an ETS for infectious diseases. OSHA, which received the report after the change in federal Administration, agreed with the recommendations, and started to move ahead with an ETS. The third audit, issued in March 2022, focused on the need for OSHA to work more collaboratively with other federal agencies to achieve effective and efficient results.¹¹⁴ In October 2022, OIG again expressed concerns regarding OSHA's protection of workers during the pandemic.¹¹⁵

In June 2021, OSHA promulgated an Emergency Temporary Standard, "Occupational Exposure to COVID-19" that was limited to healthcare facilities.¹¹⁶ It required covered healthcare employers to develop and implement COVID-19 plans to identify and control COVID-19 hazards; addressed questions of PPE, cleaning and disinfection, health screening, training, recordkeeping and reporting and retaliation; and encouraged vaccination by requiring employers to provide reasonable time and paid leave for employee vaccinations and side effects. The provisions regarding ventilation required employers to ensure that existing ventilation systems be working in accordance with manufacturer's instructions, that the amount of outside air circulated through the system be maximized "to the extent appropriate," and specifically noted that new ventilation systems were not required. Further direction regarding ventilation referred employers to the CDC guidance, suggesting that employers should also "consider" other measures to improve ventilation in accordance with "CDC's Ventilation Guidance,"¹¹⁷ ("e.g., opening windows and doors.") This standard was in effect for the statutory period of six months and was then withdrawn in December 2021.¹¹⁸

A broader standard, to cover all workers, was being developed by OSHA at the same time as the health care ETS. The administration took comments from stakeholders for several weeks and then decided not to issue it, without explanation. This draft would have required all employers

¹¹² See Dep't of Lab., Off. of Inspector Gen. – Off. of Audit, No. 19-20-010-10-105, COVID-19: Osha Needs to Improve its Handling of Whistleblower Complaints During the Pandemic (Aug. 14, 2020), <https://www.oig.dol.gov/public/reports/oa/2020/19-20-010-10-105.pdf> (noting "the pandemic has significantly increased the number of whistleblower complaints OSHA has been receiving. OSHA was challenged to complete investigations in a timely manner before the pandemic, and the potential exists for even greater delays now," and concluding, "[a]mid this challenge, OSHA needs to improve its handling of whistleblower complaints.").

¹¹³ Dep't of Lab., Off. of Inspector General – Off. of Audit, No. 19-21-003-10-105, COVID-19: Increased Workforce Worksite Complaints and Reduced OSHA Inspections Leave U.S. Workers' Safety at Increased Risk (Feb. 25, 2021), <https://www.oig.dol.gov/public/reports/oa/2021/19-21-003-10-105.pdf>.

¹¹⁴ Dep't of Lab., Off. of Inspector Gen. – Off. of Audit, No. 19-22-003-10-105, COVID-19: To Protect Mission Critical Workers, OSHA Could Leverage Inspection Collaboration Opportunities Within External Federal Agencies (Mar. 31, 2022), <https://www.oig.dol.gov/public/reports/oa/2022/19-22-003-10-105.pdf> (recommending that OSHA devise a plan for outreach and training and development memorandum of understanding with other agencies).

¹¹⁵ Dep't of Lab., Off. of Inspector Gen. – Off. of Audit, No. 19-23-001-10-105, COVID-19: OSHA's Enforcement Activities Did Not Sufficiently Protect Workers from Pandemic Health Hazards (Oct. 31, 2022), <https://www.oig.dol.gov/public/reports/oa/2023/19-23-001-10-105.pdf> ("OSHA's enforcement activities did not sufficiently protect workers from COVID-19 health hazards because OSHA: (1) did not issue citations to enforce the standard for recording and reporting occupational injuries and illnesses in 15 percent of sampled fatality COVID-19 inspections, (2) lacks complete information on COVID-19 infection rates at worksites, and (3) closed inspections without ensuring it received and reviewed all items requested from employers to demonstrate alleged COVID-19 health hazards had been mitigated.").

¹¹⁶ 29 C.F.R. § 1910.502 (discussing general ETS for protecting workers in health care facilities from COVID-19); 29 C.F.R. § 1910.504 (describing the mini-respirator program).

¹¹⁷ Ventilation in Buildings, CDC (Jun. 2, 2021), www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html.

¹¹⁸ COVID-19 Healthcare ETS: Statement on the Status of the OSHA COVID-19 Healthcare ETS, Dep't of Lab., Occupational Safety & Health Admin. (Dec. 27, 2021), <https://www.osha.gov/coronavirus/ets>. Note that there was controversy regarding whether OSHA was required under the statute to withdraw the ETS. The statutory section is somewhat ambiguous, in one place stating that an ETS "shall be effective until superseded" by a permanent standard, and in another subsection requiring OSHA to issue a permanent standard "no later than six months after publication of the emergency standard." OSHA did not issue the permanent standard within the six-month period. See 29 U.S.C. § 655(c).

– not just health care facilities – to develop and implement COVID-19 plans to identify and control COVID-19 hazards in the workplace.¹¹⁹

OSHA is currently developing a new permanent standard to replace the health care ETS.¹²⁰ On January 5, 2022, National Nurses United and other unions filed a [mandamus petition](#), asking the federal court to order OSHA to issue a permanent health care standard within 30 days of the granting of the writ and to enforce the healthcare temporary standard until it is “properly superseded” by a permanent standard. On August 26, 2022, the D.C. Circuit Court of Appeals rejected this petition.¹²¹ Meanwhile, as of 25 March 2023, no permanent standard has yet been issued.

In early November 2021, OSHA issued its second ETS, mandating vaccinate-or-test programs for all employers with 100 employees or more,¹²² potentially reaching essential workers in all sectors. This ETS was never enforced, as it was immediately blocked by the courts. See the section below regarding vaccine mandates for further information.

This means that there are no pandemic-specific *federal* OSHA standards in effect as of 25 March 2023 for any essential sectors or critical workers. Instead, OSHA has continued to use the generic pre-pandemic standards, as well as the general duty clause, when workers are exposed to significant risk of disease in their workplaces. In addition, the agency has continued to update its guidance for employers.¹²³

OSHA COVID-related enforcement during the pandemic

During 2020 and most of 2021, the workplaces and workers that were the focus of OSHA enforcement were essential workers in critical sectors. On its website, OSHA provides data on COVID-related inspections.¹²⁴ Because there is an allowable lag time (up to six months) from the date of an inspection to the date a citation is issued, no citations are listed until July 2020. In 2020, OSHA issued about 300 COVID-related citations, the vast majority of which were in health care, nursing homes and social services; eight inspections were of workplaces with food service workers; two large meatpacking enterprises (JBS and Smithfield) were cited under the general duty clause; at least two inspections involved warehouse workers. The citations primarily relied upon the pre-existing standards, most commonly the requirements for respirator programs and for accurate recording and reporting of injuries and diseases; citations against the meatpacking enterprises relied on the general duty clause.

In 2021, another 443 COVID-related inspections were completed. Health care and related services continued to predominate. Inspections continued to be conducted in 2022. Other than healthcare, employers in the following sectors have been cited for COVID-related violations: manufacturing, construction, food and agribusiness, corrections, retail grocery, transportation and the postal service. During the time that the health care ETS was in effect, citations of health

¹¹⁹ Occupational Exposure to COVID-19; Emergency Temporary Standard, Dep’t of Lab., Occupational Safety & Health Admin. (Mar. 2021), <https://aboutlaw.com/Yj6>.

¹²⁰ Public hearings regarding the permanent standard were held April 27-May 2, 2022. See COVID-19 Healthcare Rulemaking, Dep’t of Lab., Occupational Safety & Health Admin., <https://www.osha.gov/coronavirus/healthcare/rulemaking> (last visited Feb. 14, 2023).

¹²¹ *In re National Nurses United*, 47 F.4th 746, 754 (D.C. Cir. 2022) (“While the rulemaking process is mandatory, promulgating a permanent standard is not. The Act states that the agency ‘shall promulgate a standard... no later than six months after publication of the emergency standard’ but also that any standard following an ETS be promulgated ‘in accordance with subsection (b).’ 29 U.S.C. § 655(c)(3). Contrary to the Unions’ assertions, the Act imposes no requirement to promulgate a permanent standard. Any permanent standard must be promulgated in accordance with the ordinary rulemaking process in the Act, which plainly provides that OSHA may conclude the process either by promulgating a permanent standard or by ‘mak[ing] a determination that a [standard] should not be issued.’ Id. § 655(b)(4). OSHA is permitted to choose either path, which means it does not have a clear duty to promulgate a permanent standard.”).

¹²² COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021).

¹²³ See Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace, Dep’t of Lab., Occupational Safety & Health Admin. (Jun. 10, 2021), <https://www.osha.gov/coronavirus/safework>.

¹²⁴ A full listing of COVID-related inspections can be found on the OSHA website: <https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations> (last visited Feb. 21, 2023).

care facilities for violation of the standard appear with considerable frequency. There is no record of OSHA shutting any facility down during the pandemic, including when serious clusters of cases appeared among workers in non-healthcare settings such as meatpacking. According to an OSHA official, OSHA in fiscal year 2021 conducted 1,860 COVID-19 related inspections that were prompted by complaints, up from the 1,695 inspections in fiscal year 2020, accounting for about 7.6% all of OSHA's 24,355 inspections in 2021.¹²⁵ As of September 30, 2022, federal OSHA reported that it had issued Covid-related citations against 976 workplaces since the pandemic began, with total proposed penalties of \$7,804,499.¹²⁶ Of these citations, only 29 involved violations of the General Duty Clause.¹²⁷

As of 25 March 2023, there have only been two cases involving citations for COVID-related violations that have been decided by Administrative Law Judges for the Occupational Safety and Health Review Commission; none have yet been considered by the Commission or the appellate courts. The first case upheld a general duty citation and fine of \$2926 against a small retail establishment in Mobile, Alabama, that had refused admittance to its store to customers wearing masks unless they removed them.¹²⁸ The second vacated a citation against a Tribal health organization that provides services to patients across Alaska. The health organization had failed to provide its employees with certified respirators, and three employees were hospitalized.. While the judge raised significant concerns about technical questions regarding the citation, the case turned at least in part on the conclusion that SARS-CoV-2 was a droplet, not an aerosolized, risk – and that respirators are not required for droplet dissemination.¹²⁹ This troubling conclusion reflects the positions taken by both CDC and OSHA (and WHO) that did not acknowledge the aerosol transmission of this kind of respiratory disease. Given that so few COVID-related citations have reached even this stage of litigation, it is too early to assess how these challenges will affect infectious disease enforcement activities in the future.

Given the lack of specific standards, and continuing concern regarding workplace COVID exposures, OSHA announced in March 2022 a “highly focused, short-term inspection initiative directed at hospitals and skilled nursing care facilities” to “encourage employers in these industry sectors to take the necessary steps to protect their workers against the hazards of COVID-19.”¹³⁰

Some specific essential sectors regulated by OSHA

- Health care sector

As noted above, most of the federal OSH standard-setting and enforcement has been focused on this sector. OSHA is continuing to work on a COVID-related standard for health care workers as well as a broader airborne infectious disease standard for this industry. For the period June–December 2021, health care facilities were required to comply with the healthcare ETS, and large numbers of inspections and citations were undertaken by OSHA under this standard. Pre-existing standards, including the standard governing respiratory protection, are also best suited to this sector. Further, most workers in this sector are subject to the CMS vaccine mandate, discussed

¹²⁵ Bruce Rolfson, Covid-19 Still an OSHA Priority Even as Masking Guidance Changes, Bloomberg L. (Mar. 9, 2022), <https://news.bloomberglaw.com/safety/covid-19-still-an-osh-priority-even-as-masking-guidance-changes>.

¹²⁶ Inspections with COVID-19 Related Violations, *supra* note 124.

¹²⁷ *Id.*

¹²⁸ Sec’y of Lab. v. Broken iPhone, LLC, 2022 CCH OSHD ¶ 33898 (OSHRC Docket No. 21-0289, 2022).

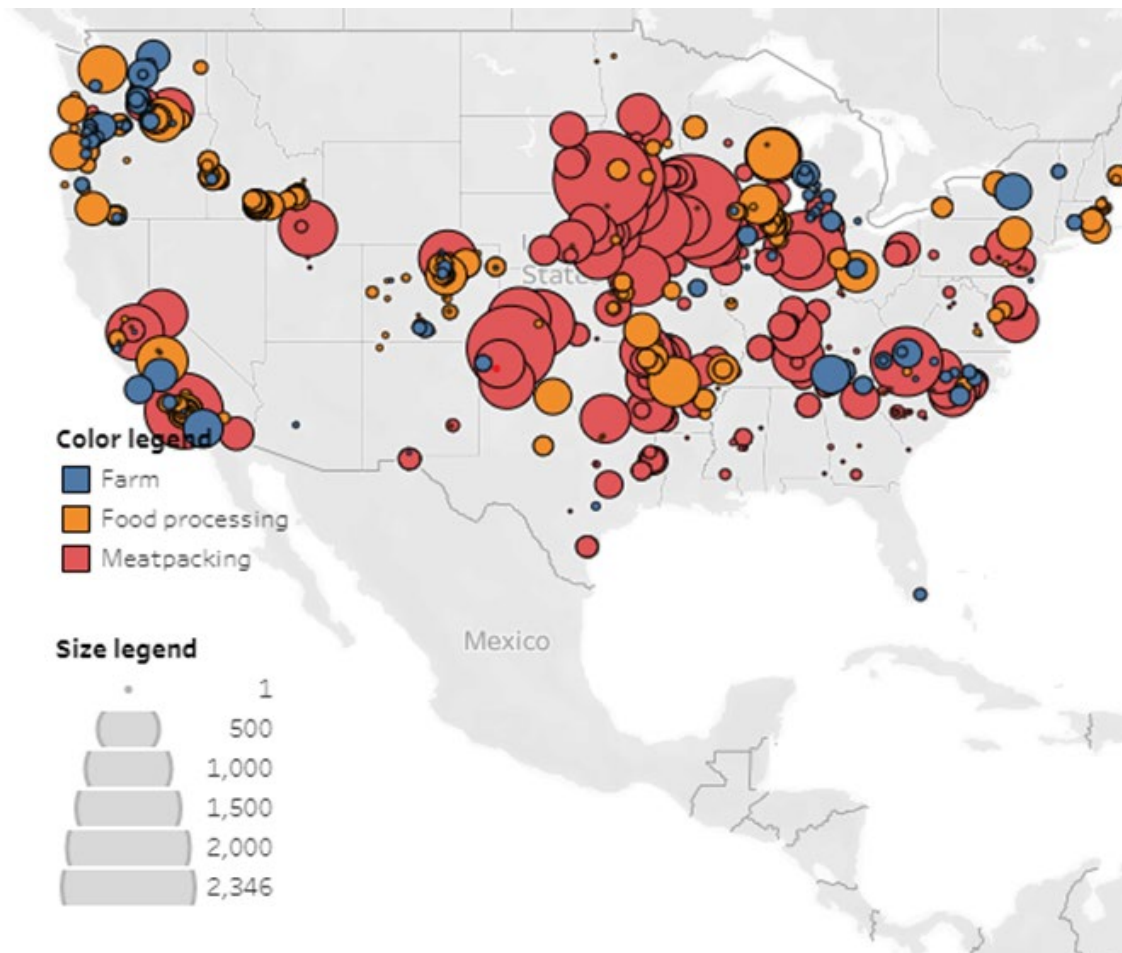
¹²⁹ Sec’y of Lab. v. Alaska Native Tribal Health Consortium, 2023 WL 2609545 (OSHRC Docket No. 21-0530, 2023).

¹³⁰ Memorandum re: COVID-19 Focused Inspection Initiative in Healthcare, Dep’t of Lab., Occupational Safety & Health Admin. (Mar. 2, 2022), <https://www.osha.gov/laws-regs/standardinterpretations/2022-03-02> (archived). This directive was revised and reissued July 7, 2021. See Occupational Safety Health Admin., Revised National Emphasis Program – Coronavirus Disease 2019 (COVID-19) (2021), https://www.osha.gov/sites/default/files/enforcement/directives/DIR_2021-03_CPL_03.pdf

below. Although this mandate was not OSH-focused, it nevertheless has provided extensive protection from COVID-19 to all workers in healthcare facilities.

- Food systems workers¹³¹

The pandemic hit the food system in the U.S. hard. Large clusters of cases were present in farms, food processing and meatpacking, as shown on this map compiled by the Food & Environment Reporting Network:¹³²



Meatpacking was hit particularly hard, and considerable public concern was focused on outbreaks in large meatpacking and processing plants. A review of the industry was conducted for the House Select Subcommittee on the Coronavirus Crisis:

Following multiple reports of widescale coronavirus outbreaks within and around meatpacking facilities, the Select Subcommittee initiated an investigation into coronavirus infections and deaths in meatpacking plants, and failures by meatpacking companies and the Department of Labor's Occupational Safety and Health Administration (OSHA) to safeguard workers against workplace coronavirus outbreaks in the first year of the pandemic.

¹³¹ For a discussion of the meat-packing industry and litigation surrounding it, see Alexia Brunet Marks, *Essential But Ignored: COVID-19 Litigation and the Meatpacking Industry*, 14 *Ne. U. L. Rev.* 47 (2022).

¹³² See Leah Douglas, *Mapping Covid-19 Outbreaks in the Food System*, Food & Env't Rep. Network (Apr. 22, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/> (data collected through Sept. 8, 2021).

This investigation has revealed that the impact of the coronavirus on meatpacking workers' health and safety was significantly worse than previously estimated.

Newly obtained documents from five of the largest meatpacking conglomerates, which represent over 80 percent of the market for beef and over 60 percent of the market for pork in the United States³—JBS USA Food Company (JBS), Tyson Foods, Inc. (Tyson), Smithfield Foods (Smithfield), Cargill Meat Solutions Corporation (Cargill), and National Beef Packing Company, LLC (National Beef)—reveal that coronavirus infections and deaths among their meatpacking workers were substantially higher than previously estimated. While publicly available data already indicated high volumes of coronavirus infections and deaths at these companies, data from JBS, Tyson, Smithfield, Cargill, and National Beef obtained by the Select Subcommittee now show that:

- Across these five companies' respective workforces, at least 59,000 meatpacking workers were infected with the coronavirus during the first year of the pandemic—almost triple the 22,700 infections previously estimated by the Food and Environment Reporting Network (FERN) for these five companies' respective workforces based on publicly available information.
- At least 269 meatpacking workers lost their lives to the coronavirus between approximately March 1, 2020 and February 1, 2021—over three times higher than what was previously estimated by FERN for these five companies' respective workforces.¹³³

In spring 2020, responding to closures of some plants as a result of large disease clusters, President Trump invoked the Defense Production Act to order meatpacking plants to remain open, classifying the plants as critical infrastructure as a way to combat the strain that the pandemic was placing on the food supply chain – and without regard for worker health and safety.¹³⁴ In August 2020, the CDC identified meatpacking plants as a source for “rapid transmission” of the coronavirus, and in August 2020, CDC issued a report showing that a single case of the coronavirus spread to 929 employees of a South Dakota meatpacking facility in just five weeks. At least two employees died. CDC explained that its findings “highlight the potential for rapid transmission of SARS-CoV-2 among employees in meat processing facilities.”¹³⁵

During 2020, OSHA did cite a number of meatpacking facilities, but the penalties were extremely low. A letter from Congressman Clyburn to OSHA¹³⁶ noted that OSHA had “issued only eight citations and less than \$80,000 in penalties for coronavirus-related violations at meatpacking companies” in 2020. The letter went on:

For example, on September 8, 2020, OSHA cited Smithfield Foods in Sioux Falls, South Dakota “for failing to protect employees from exposure to the coronavirus.” OSHA concluded that at least 1,294 Smithfield workers contracted the coronavirus, and four employees died. Yet the agency cited the company for just a single violation of the “general duty” of employers to “provide a workplace free from recognized hazards that can cause death or serious harm” and fined the company only \$13,494.

Although OSHA's citation identified four distinct actions Smithfield failed to take to protect its workers, the agency lumped them together as a single violation and declined to classify the conduct as “willful”—decisions that reduced a potential \$2.7 million penalty down to just a few thousand dollars. OSHA's paltry fine, amounting to less than \$11 per employee

¹³³ H. Rep. Majority Staff of Select Subcomm. on the Coronavirus Crisis, 117th Cong., Memorandum on Coronavirus Infections and Deaths Among Meatpacking Workers at Top Five Companies Were Nearly Three Times Higher than Previous Estimates 1-2 (Oct. 27, 2021), https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021.10.27%20Meatpacking%20Report.Final_.pdf.

¹³⁴ Exec. Order No. 13917, 85 Fed. Reg. 26313 (2020); see also Cong. Rsch. Serv., LSB 10456, Executive Order on the Food Supply Chain and the Defense Production Act: FAQs (2020).

¹³⁵ Jonathan Steinberg et al., Ctr. for Disease Control and Prevention, COVID-19 Outbreak Among Employees at a Meat Processing Facility—South Dakota, March–April 2020, at 1016 (2020), www.cdc.gov/mmwr/volumes/69/wr/mm6931a2.htm?s_cid=mm6931a2_w.

¹³⁶ Letter from James E. Clyburn, Chairman, Select Subcommittee on the Coronavirus Crisis, to James Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health (Feb. 1, 2021) https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021-02-01.Clyburn%20to%20OSHA%20re%20Meatpacking%20Investigation_.pdf.

infected with the virus and under \$3,400 per employee who died, is unlikely to spur better worker safety at a company as large as Smithfield, which paid its Chief Executive Officer \$14 million last year.

While federal OSHA has become somewhat more aggressive in its pursuit of violations, workers in this sector continued to be at high risk as new variants of the virus arrived and vaccination rates varied, despite the availability of vaccines. Few citations have been issued. Moreover, as is discussed below in the section of this Report regarding litigation, several of the meatpacking companies have used the Trump order regarding the Defense Production Act to try to avoid common law liability for deaths that occurred in their plants.¹³⁷

Note that in the absence of any OSHA standard addressing infectious disease, this industry can only be regulated by federal OSHA under the standards that pre-existed the pandemic, using the general duty clause. This has made enforcement difficult and cumbersome.

3. MSHA & Mining

Like OSHA, MSHA went into the pandemic in 2020 with existing standards relevant to worker protection: sanitation and hygiene¹³⁸; training requirements that include training regarding new hazards¹³⁹; workplace examinations requiring that a “competent person designated by the operator shall examine each working place at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health”¹⁴⁰; ventilation requirements¹⁴¹; hazard communication, relevant to use of chemicals¹⁴²; recording and reporting requirements for reporting work-related injuries and illnesses¹⁴³ and PPE.¹⁴⁴ Because employers are always required to review the worksite for all hazards, and because MSHA is required (and funded) to perform comprehensive on-site inspections at every working covered worksite – quarterly for underground mines, biannually for surface facilities – MSHA was better positioned than OSHA to address COVID-related hazards from the beginning of the pandemic.

In March 2020, CISA/DHS had designated mining as a critical infrastructure industry that states should keep open to help in the U.S. response to the pandemic.¹⁴⁵ Because the Mine Act requires regular on-site inspections, MSHA could not legally restrict these inspections. But there was considerable concern that inspectors, traveling from one site to another, would be the source of disease spread. Some mines suspended operations, due to concerns about COVID-19, reduction in demand for their product, or because miners were testing positive for the coronavirus. At the same time, according to MSHA, approximately 100 of its 750 inspectors (13 percent) self-identified as high risk at the beginning of the pandemic and were unavailable to perform inspections. Moreover, many miners are at high risk for COVID-19 due to age or pre-existing conditions, such as black lung disease, and they often live in rural communities where medical facilities are limited. No requirement for vaccination has been in place for any part of the mining industry, and vaccination rates in these communities remained low; the vaccine mandates discussed below would have reached miners only if their employers were operating under federal contracts or subcontracts.

¹³⁷ See *infra* Part II.D.6.

¹³⁸ See 30 C.F.R. §§ 56.20003(a), 57.20003(a), 56.20008(b), 71.402, 75.1712–3 (1969).

¹³⁹ 30 C.F.R. §§ 46.1–12, 48.11, 48.23, 48.31.

¹⁴⁰ 30 C.F.R. §§ 56.18002, 18002, 77.1713, 75.360, 75.361, 75.362, 75.364.

¹⁴¹ 30 C.F.R. § 75.325.

¹⁴² 30 C.F.R. §§ 47.1–47.92.

¹⁴³ 30 C.F.R. § 50.1 (2006).

¹⁴⁴ 30 C.F.R. §§ 56.15006, 72.701 (1969).

¹⁴⁵ Critical Infrastructure Sectors, Identifying Critical Infrastructure During COVID-19, Cybersecurity & Infrastructure Sec. Agency (Aug. 13, 2022), <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>.

MSHA therefore faced two parallel challenges: regular inspections are critical to maintaining safety standards in the industry; at the same time, new challenges created by the pandemic meant that workers and members of the inspectorate were at significant risk from SARS-CoV-2.

On March 26, 2020, MSHA posted COVID-19 guidelines on its website, essentially following the CDC guidelines recommending masking, social distance, hygiene and quarantine/isolation. In addition, the guidance said MSHA would continue to perform its essential functions, including mandatory inspections, serious accident investigations, and investigations of hazard

complaints (imminent danger or serious in nature); have inspectors maintain distance from miners while performing inspections, to the extent feasible; extend deadlines for certain required recertifications; encourage inspectors to participate on a voluntary basis in screenings or

questionnaires conducted by operators; identify MSHA inspectors or other employees exhibiting symptoms through self-identification or potential exposure and ask them to quarantine at home; and limit the number of inspectors sent to a mine for regular inspection proportional with the mine's operations, to the extent feasible if the mine operator alerted the agency to changes in production at a site.

Responding to the designation of mining as critical infrastructure, the Office of the Inspector General (OIG), the investigatory arm of the Department of Labor, conducted an audit of MSHA's response to the pandemic during the early days of the pandemic: "Given the risks to both miners and MSHA's workforce, we conducted an audit to answer the following question: What plans and guidance has MSHA developed to address challenges created by COVID-19, and to what extent have these challenges affected MSHA's ability to protect the safety of miners and its workforce?" The audit identified serious weaknesses in MSHA's initial response including suspended or reduced enforcement activities; unavailable inspectors; delayed inspections due to safety concerns by the mining industry; and shortages of PPE. In addition, the audit noted that CDC and MSHA COVID-19 guidance were unenforceable as written.¹⁴⁶

MSHA officials told the OIG auditors that they were addressing pandemic issues under existing rules, including maintaining sanitary facilities and proper ventilation, having appropriate PPE for specific occupations or mine areas, and conducting examinations by mine personnel to identify hazardous conditions, such as overcrowded areas and inadequately sanitized surfaces. In addition, the Mine Act allows MSHA to address imminent dangers and allows miners to file hazard complaints. According to the information provided by MSHA in May 2020 for this audit, MSHA had investigated 119 hazardous condition complaints for COVID-19 related issues, resulting in 115 negative findings and 4 positive findings of violations, and had issued 62 citations for COVID-19 related issues, such as unsanitary conditions.

The OIG report recommended that MSHA monitor any potential backlog of suspended and reduced enforcement activities; develop a plan to manage the backlog once full operations resumed; monitor COVID-19 outbreaks at mines; and use that information to reevaluate the

decision not to issue an emergency temporary standard related to the pandemic.

Data specific to COVID outbreaks in the mining industry are not available. MSHA did not issue an emergency temporary standard, despite authority to do so under Section 101(b) of the MSHA Act, 30 U.S.C. § 811. The United Mine Workers of America and the United Steelworkers filed a petition asking a federal court to order MSHA to issue an emergency standard in June, 2020.¹⁴⁷

¹⁴⁶ Dp't Of Lab., Off. of Inspector Gen. – Off. of Audit, No. 19-20-006-06-001, COVID-19: MSHA Faces Multiple Challenges in Responding to the Pandemic, (Jul. 24, 2020), <https://www.oig.dol.gov/public/reports/oa/2020/19-20-006-06-001.pdf>.

¹⁴⁷ See Press Release, UMWA, UMWA, USW Sue MSHA to Force Action to Protect Miners from COVID-19 (Jun. 16, 2020), <https://umwa.org/news-media/press/umwa-usw-sue-msha-to-force-action-to-protect-miners-from-covid-19/>.

In March 2021, under the Biden Administration, MSHA issued much more extensive Guidance on Mitigating and Preventing the Spread of COVID-19.¹⁴⁸ The Guidance emphasizes that operators are responsible for “recognizing and abating hazards likely to cause death or serious physical harm from the spread of SARS-CoV-2 (COVID-19) as part of their obligation to provide a safe and healthful mine.” It provides clear direction regarding actions to be taken, including the following: implementing a COVID-19 Prevention Program at each mine, noting that “the most effective COVID-19 prevention programs engage miners and their representative in the program’s development and implementation at every step”; provide protections for miners at higher risk of severe illness through supportive policies, noting the need to comply with the reasonable accommodation requirements of the Americans with Disabilities Act, 42 U.S.C. §12101 et seq; training miners “using accessible formats and in a language they understand”; provide for isolation and quarantine; perform enhanced cleaning and disinfection, noting the need to comply with existing standards for PPE and hazard communication regarding exposure to cleaning chemicals; record and report COVID-19 infections and deaths; implement protections from retaliation, specifically pointing out the need to protect miners who raise concerns about infection control related to COVID-19; “consider making a COVID-19 vaccine or vaccination series available at no cost to all eligible employees” and “treat vaccinated miners the same as those who are not vaccinated”; and provide PPE and respirators in compliance with existing MSHA requirements. The guidance states at the outset that “the recommendations are advisory in nature, informational in content, and are intended to assist operators in recognizing and abating hazards.” But the guidance provides a road map for mine operators who want to demonstrate that they are meeting their existing obligations under the statute and regulations.

Because citations are being issued under existing regulations, and MSHA is not providing public information regarding COVID-related enforcement activities, it is impossible to separate the citations specifically related to the special hazards posed by the pandemic from general enforcement activities. No administrative review decisions have been issued by MSHRC regarding COVID-related citations, although at least one case involved reinstatement of a miner for raising safety complaints regarding COVID.¹⁴⁹

In addition, in response to low vaccination rates, MSHA launched a Miner Vaccination Outreach Program, to encourage and facilitate coronavirus vaccinations for miners and their families by organizing voluntary, free vaccination clinics in mining communities.

4. Federal vaccine mandates

Five federal mandates for vaccines were issued that attempted to expand vaccination rates for populations covered by this Report. Below is a summary of the litigation regarding these mandates. As of March 2023, the only mandate still in effect nationwide is the one issued by CMS regarding workers in health care facilities that receive federal reimbursement for services (number 2 below). State, local and private employer mandates regarding vaccines were also issued and challenged in litigation, but are not discussed here.

1. On November 5, 2021, OSHA issued an Emergency Temporary Standard mandating that employers covered by the OSHAct with 100 or more employees develop, implement, and enforce a mandatory COVID-19 vaccination policy, or adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination; employers were not required to pay for workers’ tests if they refused vaccination for other than religious or health reasons. This vaccine-or-test

¹⁴⁸ Protecting Miners: MSHA Guidance on Mitigating and Preventing the Spread of COVID-19, Dep’t of Lab., Mine Safety & Health Admin., <https://www.msha.gov/protecting-miners> (last visited Feb. 17, 2023).

¹⁴⁹ Sec’y of Labor. U.S. Dep’t of Labor On Behalf of William R. Whitmore v. Yager Materials Corp., 2020 WL 4570704, MSHRC Docket No. KENT 2020-0116-DM (2020) (awarding temporary reinstatement to complainant because safety complaint regarding COVID was not frivolously brought).

mandate was immediately blocked by a federal Court of Appeals the day after it was issued, and the U.S. Supreme Court ruled that OSHA had gone beyond its statutory authority in issuing the rule, distinguishing between workplace health (which is within OSHA's purview) and general public health (which is not).¹⁵⁰ On January 25, 2022, OSHA formally withdrew the vaccine-or-test ETS in the wake of the judicial decision.¹⁵¹ Because a federal court stayed its implementation immediately after it was issued, it was never enforced. Notably, the court left open the possibility for a more targeted rule "[w]here the virus poses a special danger because of the particular features of an employee's job or workplace."¹⁵² No equivalent rule was issued for the mining industries, which are not covered by OSHA.

2. The Centers for Medicaid and Medicare Services (CMS) in the U.S. Department of Health and Human Services (HHS) issued a vaccine mandate that requires all healthcare facilities that bill their services to Medicare (which provides health insurance for people over 65 and qualified people with disabilities) and Medicaid (which provides health insurance coverage for people who meet strict income guidelines) to develop policies and procedures to ensure that all staff are fully vaccinated for COVID-19. The rule applies to all staff, including students and volunteers, unless they provide exclusively telehealth or otherwise work outside the facility. The justification for the rule was focused on the health of patients, for which CMS is responsible, but the effect of the rule is to reach the vast majority of people who work inside health care facilities, including both healthcare workers and ancillary staff such as cleaners and janitors, all of whom are essential workers in terms of the pandemic. On January 13, 2022, the same day as the ruling against the OSHA vaccine-or-test mandate, this rule was allowed to go into effect by the Supreme Court.¹⁵³
3. On September 9, 2021, using his authority under the Procurement Act,¹⁵⁴ President Biden issued an Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors.¹⁵⁵ The Order required federal agencies to ensure that the entities with which they contract comply with guidance issued by the Federal Workforce Task Force. This Guidance, dated September 24, 2021, set out the requirements for all federal contractors:
 - Federal contractors and subcontractors with a covered contract will be required to conform to the following workplace safety protocols: 1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation; 2. Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and 3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.¹⁵⁶
 - Federal contractors are in every sector of the economy and employ large numbers of workers in essential occupations.

¹⁵⁰ Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 666 (2022).

¹⁵¹ COVID-19 Vaccination and Testing ETS, Dep't of Lab., Occupational Safety & Health Admin. (Jan. 25, 2022), <https://www.osha.gov/coronavirus/ets2>.

¹⁵² That majority decision states: "That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID-19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID-19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID-19 that all face' OSHA's indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an "occupational safety or health standard." 29 U.S.C. § 655(b) (emphasis added)." Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665-66 (2022).

¹⁵³ See Biden v. Missouri, 142 S. Ct. 647 (2022).

¹⁵⁴ 41 U.S.C. § 3101(a)-(c).

¹⁵⁵ Joseph R. Biden Jr., Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors, The White House (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>.

¹⁵⁶ Safer Fed. Workforce Task Force, COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (2021), https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf.

- On December 9, 2021, a federal judge in Georgia issued a nationwide injunction against implementation of this vaccine requirement, which was immediately appealed.¹⁵⁷ The appellate court declined to uphold the nationwide injunction, but did affirm two aspects of the district court's order: it enjoined federal agencies from enforcing the mandate in the seven states involved in the litigation; and it barred the federal government from considering whether a bidder had complied with the mandate when awarding contracts, thereby protecting the right of bidders from the seven states to be considered in the awarding of contracts without regard to whether they had complied with the mandate.¹⁵⁸
- 4. Relying on the Civil Service Reform Act¹⁵⁹ and the President's authority to "prescribe regulations for the conduct of employees in the executive branch,"¹⁶⁰ President Biden issued Executive Order 14043 on September 9, 2021, requiring that all federal government employees be vaccinated against COVID-19 unless they required disability or religious accommodation. Numerous challenges were brought in federal courts. Several courts held that the proper venue for challenging this order is under the Civil Service Reform Act, and therefore the federal courts lacked jurisdiction to consider the challenges.¹⁶¹ The Fifth Circuit Court of Appeals, however, issued an en banc decision on 23 March 2023 holding, first, that the federal courts could review the mandate and, second, affirming the lower court's issuance of a nationwide preliminary injunction against the mandate.¹⁶² Notably, the lower court had relied on the decision in the OSHA vaccine-or-test mandate case,¹⁶³ concluding that "the Supreme Court has expressly held that a COVID-19 vaccine mandate is not an employment regulation. And that means the President was without statutory authority to issue the federal-worker mandate."¹⁶⁴
- 5. Order for servicemembers (on active and reserve duty): On August 21, 2021, the Secretary of Defense issued a memorandum, Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members. The memorandum mandated that servicemembers become "fully vaccinated against COVID-19," noting "mission-critical inoculation is almost as old as the U.S. military itself."¹⁶⁵ The mandate applied to all branches of the service, reached approximately 2 million people, including people who serve in the reserves and the National Guard. On March 25, 2022, the Supreme Court refused to uphold an injunction staying the implementation of this mandate that had been issued by a lower court.¹⁶⁶

After this ruling, challenges to this mandate were based on individual claims of religious freedom. On December 21, 2022, ruling in a case brought by several individual service members on religious freedom grounds, a federal court in Texas observed the following:

- The Army has a valid interest in vaccinating its soldiers, and it has made the COVID-19 vaccine mandatory. But its soldiers have a right to religious freedom, which in this case includes a sincere religious objection to the COVID-19 vaccine. Which side must yield? ... The Court begins with what is not in dispute. First, the Army concedes that the plaintiffs' sincerely held religious beliefs prevent them from receiving the COVID-19 vaccine. Second, the Army recognizes that its vaccine mandate substantially burdens those beliefs. Third, the Army agrees that it is subject to the Religious Freedom Restoration Act,

¹⁵⁷ *Georgia v. Biden*, No. 1:21-CV-163, 2022 WL 266186, at *2 (S.D. Ga. Jan. 21, 2022) (holding that the mandate is "unlawful, and unconstitutional" and "unenforceable," and that conditions for a preliminary injunction were met).

¹⁵⁸ *Georgia v. President of the U.S.*, 46 F.4th 1283, 1308 (11th Cir. 2022).

¹⁵⁹ 5 U.S.C. §§ 3301-3302.

¹⁶⁰ 5 U.S.C. § 7301.

¹⁶¹ See, e.g., *Church v. Biden*, No. 21-2815, 2022 WL 1491100, at *1 (D.C. Cir. 2022); *Rydie v. Biden*, No. 21-2359, 2022 WL 1153249, at *8 (4th Cir. Apr. 19, 2022).

¹⁶² *Feds for Medical Freedom v. Biden*, 2023 WL 2609247, at *1 (5th Cir. 2023).

¹⁶³ *Nat'l Fed'n of Indep. Bus.*, *supra* note 150.

¹⁶⁴ *Feds for Medical Freedom v. Biden*, 581 F.Supp.3d 826, 834 (S.D.Tex., 2022).

¹⁶⁵ Memorandum from the Sec'y of Def. to Senior Pentagon Leadership, Commanders of the Combatant Commands, Def. Agency, and DOD Field Activity Dir. (Aug. 24, 2021), <https://media.defense.gov/2021/Aug/25/2002838826/-1/-1/0/MEMORANDUM-FOR-MANDATORY-CORONAVIRUS-DISEASE-2019-VACCINATION-OF-DEPARTMENT-OF-DEFENSE-SERVICE-MEMBERS.PDF>.

¹⁶⁶ *Austin v. U.S. Navy Seals* 1-26, 142 S. Ct. 1301, 1302 (2022).

which prevents it from substantially burdening religious beliefs unless it can prove that the burden furthers a compelling interest through the least restrictive means possible. Fourth, 97% of active-duty soldiers are vaccinated against COVID-19, and thousands of soldiers have operated unvaccinated for the past year or so based on temporary, non-religious exemptions. Fifth, Army policy permits it to grant religious exemptions but later rescind them if circumstances change. And finally, despite these realities, nearly 2,000 Army soldiers have lost their jobs—and the opportunity to continue serving their country—for refusing to be vaccinated.¹⁶⁷

Holding that the government failed to demonstrate that enforcing the vaccine mandate furthered a compelling governmental interest, the court ordered that any disciplinary, punitive, or separation measures against the plaintiffs cease.¹⁶⁸

On Jan. 10, 2023, in compliance with the requirements of the National Defense Authorization Act for Fiscal Year 2023,¹⁶⁹ the Secretary of Defense rescinded the vaccine mandate for all branches of the armed services.¹⁷⁰

C. State responses to COVID-19 and essential workers

In the absence of national mandates (in contrast to guidelines), it was up to state jurisdictions to decide how to manage the pandemic, with regard both to broad public health issues and more focused workplace safety. All states issued initial public health emergency orders regarding the pandemic, designating essential businesses and requiring at least minimal public health measures that followed the CDC guidelines. Beyond this initial consistency, the actions of states fell across a wide spectrum of response, particularly with regard to protection of frontline workers.

The variability of state decisions to provide OSH protection to essential workers during the pandemic primarily reflected two intersecting variables: whether the state had an approved state OSHA plan; and whether the state's politics were dominated by conservative or more liberal factions. States with federally approved state OSHA plans had the legal power and the existing infrastructure and expertise to move beyond federal OSHA's requirements during an emergency. If the state also had a political structure willing to regulate essential workplaces, critical workers received considerably more protection than was true elsewhere in the U.S. Several of these states issued temporary standards addressing workplace exposure to COVID, including California, Virginia, Washington, Oregon and Michigan.¹⁷¹ The case of California, perhaps the most protective of workers among these states, is described in more detail below.

But state plan states governed by conservative majorities, despite having the power as well as the responsibility for both private and public sector OSH within the state, did not follow this pattern. Arizona, described below, is an example of this.

States without approved OSHA plans also had the power to regulate exposure to the coronavirus in workplaces: except for the healthcare ETS in place for the second half of 2021, there was no federal standard that would have preempted states' rights to intervene. Generally, however, these states lack the existing infrastructure to address OSH concerns adequately. Prior to the pandemic, there were few attempts to regulate workplace exposures, despite the residual power of states to regulate any hazard not specifically addressed by a federal OSHA standard.

¹⁶⁷ Schelske v. Austin, No. 6:22-CV-049-H, 2022 WL 17835506, at *1 (N.D. Tex. Dec. 21, 2022).

¹⁶⁸ Id. at *29.

¹⁶⁹ National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263 (2022).

¹⁷⁰ Press Release, Dep't of Def., DOD Rescinds COVID-19 Vaccine Mandate (Jan. 10, 2023), <https://www.defense.gov/News/Releases/Release/Article/3264323/dod-rescinds-covid-19-vaccination-mandate/#:~:text=Today%20in%20a%20memo%2C%20Secretary,National%20Guard%20and%20Reserve%20personnel>.

¹⁷¹ For a review of some states' regulations, see Lisa M. Brosseau et al., Health and Safety Regulations for COVID-19: A Policy Analysis, 67 Annals of Work Exposures and Health 21 (2022) (summarizing the rules in California, Michigan, Virginia, and Oregon).

In somewhat more liberal leaning states, such as Massachusetts, some efforts were made to provide OSH protection for essential workers at risk for COVID exposure. In more conservative states – including those with no OSH protection at all for state and local public sector workers – nothing was done to provide protections and, on occasion, orders were issued that were inconsistent with prevailing public health guidelines. An example of this is Mississippi, discussed below.

Moreover, the politics of a state may change, changing that state's view of how to handle the pandemic. A changing political landscape means that protections offered by one administration may be eliminated by another. For example, Virginia (a state plan state) was initially relatively aggressive in attempting to curb the spread of the coronavirus among essential workers; it was the first state to issue a temporary OSH standard governing COVID and followed it with a permanent standard that became effective on September 8, 2021.¹⁷² When the new Republican governor took office in 2022, he immediately announced plans to roll back some of these protections: in January 2022 – almost immediately after his inauguration – he issued an order rescinding Virginia's vaccine mandate for state employees,¹⁷³ and the workplace COVID regulation was replaced with non-mandatory guidance in February 2022.¹⁷⁴ Clearly, the vulnerability of these state systems to political pressures cannot be underestimated.

OSHA state plan states

Case study of California

California is a state-plan OSHA state with an effective and relatively well-resourced state agency (Cal/OSHA)¹⁷⁵ for both rule-generation and enforcement. It – together with a few other states, including Washington and Oregon – stands out as most protective of essential workers from the standpoint of OSH and COVID-19.

California entered the pandemic with several relevant standards that were more protective than those of federal OSHA. Since 1991, the Injury and Illness Program Prevention (I2P2) standard has required employers to develop workplace-specific health and safety plans.¹⁷⁶ The rule requires involvement of employees and must include processes for identification and correction of hazards as well as effective training.

The state also had a preexisting standard regarding aerosol transmitted diseases (ATD) which covers healthcare facilities (hospitals, skilled nursing and long-term care facilities, outpatient facilities, home health care, paramedic and emergency services and medical transport services) and other services and facilities where workers are at risk for transmission of disease (including some police services, correctional facilities and other facilities that house inmates or detainees, homeless shelters, drug treatment programs). The rule requires employers to establish an effective, written aerosol disease transmission exposure control plan, specific to the workplace, that includes designation of high-risk jobs and procedures, assignments requiring respiratory protection and provision of PPE, methods for source control, and reporting requirements. The plan must be reviewed annually.¹⁷⁷

¹⁷² Archive Page For The Outreach, Education And Training For Final Permanent Standard For Infectious Disease Prevention Of The SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220, Va. Dep't of Lab. (Jan. 27, 2021), <https://www.doli.virginia.gov/covid-19-outreach-education-and-training-archive/>.

¹⁷³ Off. of the Gov., Exec. Order No. 11, Providing Flexibility to Hospitals, Health Systems, Nursing Homes, Certified Nursing Facilities, and Other Health Care Providers to Combat COVID-19 (2022), <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-11-Providing-Flexibility-to-Hospitals,-Health-Systems,-Nursing-Homes,-etc.pdf>.

¹⁷⁴ Coronavirus (COVID-19) Resources: Frequently Asked Questions, Va. Dep't of Lab. (Mar. 23, 2022), <https://www.doli.virginia.gov/vosh-programs-coronavirus-covid-19-resources/>.

¹⁷⁵ Cal/OSHA, Cal. Dep't of Indus. Rel., <https://www.dir.ca.gov/dosh/> (last visited Feb. 19, 2023).

¹⁷⁶ Cal. Code Regs. tit. 8, § 3203 (West 2023). Further guidance is available to employers regarding the development of these programs. See Dep't of Indus. Rel. Div. of Occupational Safety and Health Publ'n Unit, Guide to Developing Your Workplace Injury & Illness Prevention Program (2020), https://www.dir.ca.gov/dosh/dosh_publications/iipp.pdf.

¹⁷⁷ Cal. Code Regs. tit. 8, § 5199 (2013).

In response to the pandemic and requests from worker advocacy groups, Cal/OSHA issued a new temporary standard in November 2020, specifically targeting COVID-19.¹⁷⁸ The emergency rule, which has been updated and remains in effect as of December 2022, extended protections to workplaces not covered by the pre-existing infectious disease standard. The only excluded workers are those who do not come into contact with other workers, including those working remotely. The temporary standard requires employers to develop COVID prevention programs. Unlike the federal rule, this standard gives specific attention to ventilation: for indoor locations, employers are required to evaluate “how to maximize ventilation with outdoor air; the highest level of filtration efficiency compatible with the existing ventilation system; and whether the use of portable or mounted High Efficiency Particulate Air (HEPA) filtration units, or other air cleaning systems, would reduce the risk of COVID-19 transmission.”¹⁷⁹

The combined effects of the I2P2, ADT, and temporary standards therefore extended significant workplace protections against COVID-19 to all essential frontline workers – including addressing risks in company-owned housing, of particular importance for the large migrant farmworker population in California. No groups of essential workers or critical sectors are excluded.

As the pandemic progressed to new phases, CalOSHA continued to be responsive. On December 15, 2022, the California Occupational Safety and Health Standards Board voted to adopt non-emergency COVID-19 prevention regulations that went into effect in 2023. These regulations include some of the same requirements found in the COVID-19 Prevention Emergency Temporary Standards (ETS), as well as new provisions aimed at making it easier for employers to provide consistent protections to workers and allow for flexibility if future changes are made to guidance from the California Department of Public Health.¹⁸⁰ Employers will no longer be required to maintain a standalone COVID-19 Prevention Plan; instead,

employers must now address COVID-19 as a workplace hazard under the state’s I2P2 program requirements. That is, California continues to acknowledge the need for on-going protection of workers from COVID-19 and from all aerosol transmitted diseases in the workplace.

Cal/OSHA has also been aggressive in developing training and educational materials to alert employers to their responsibilities and has developed numerous guidelines to assist employers with compliance.¹⁸¹ Information regarding COVID-related citations is also published on the agency’s website.¹⁸² As of November 2022, Cal/OSHA had issued 1,948 COVID-19 related violations; rules most frequently cited were, not surprisingly, the above three rules (I2P2, ATD, and COVID temporary standard) or the requirement for reporting of injuries and fatalities.¹⁸³ As with federal OSHA, however, penalties are low.

Employer reporting of workplace COVID-19 clusters was also mandated by state law beginning in 2021.

In addition, California’s governor issued an emergency order regarding compensation for COVID-19 related illness: an employee’s illness “shall be presumed to arise out of and in the course of the employment for purposes of awarding workers’ compensation benefits” if the worker was not working from home and had a confirmed case of the illness.¹⁸⁴ This was the broadest presumption for compensation in any U.S. state, covering all frontline workers, not limited to those in healthcare or other high risk occupations. The presumption was subsequently codified by an act

¹⁷⁸ Cal. Code Regs. tit. 8, § 3205 (2020).

¹⁷⁹ Cal. Code Regs. tit. 8, § 3205(c)(2)(e) (2020).

¹⁸⁰ Cal. Dep’t of Indus. Rel. Div. of Occupational Safety & Health, COVID-19 Prevention – Non-Emergency Regulation, What Employers Need to Know (2022), <https://www.dir.ca.gov/dosh/coronavirus/Non-Emergency-regs-summary.pdf>.

¹⁸¹ Cal/OSHA COVID-19 Guidance and Resources, Dep’t of Indus. Rel., <https://www.dir.ca.gov/dosh/coronavirus/> (last visited Feb. 19, 2023).

¹⁸² Citations for COVID-19 Related Violations, Cal. Dep’t of Indus. Rel. (Feb. 2023), <https://www.dir.ca.gov/DOSH/covid19citations.asp>.

¹⁸³ Cal. Code Regs. tit. 8, § 342 (2020).

¹⁸⁴ State of Cal., Exec. Order No. N-62-20 (2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20.pdf>.

of the state legislature.¹⁸⁵ This means that essential workers who have developed the disease after exposure at work do not have to provide, at the initiation of a claim for benefits, proof that they contracted the disease at work. Although this is a rebuttable presumption, they should be much more likely to receive workers' compensation benefits than in other states.

Comprehensive data regarding these claims is maintained by the California Workers' Compensation Institute (CWCi) and is posted on a publicly facing website. Despite the existence of the broad presumption, the data show that over 30 per cent of COVID claims have consistently been denied.¹⁸⁶ Further analysis has been done and reported in the *Annals of the American Thoracic Society* for the period through calendar year 2023: More than 80,000 COVID-19 workers' compensation (WC) claims were reported; at their peak in December 2020, monthly COVID-19 claims (n=43,705) exceeded non-COVID-19 WC claims (n=39,842) and approached the total number of WC claims in December 2019 (n=48,285). In addition, the impact of COVID-19 was felt across industrial sectors. The most common industries for COVID-19 claims through October 2021 were healthcare (29.9%), public safety/government (18.7%), retail (10.2%), manufacturing (7.1%), transportation (6.9%), food services (4.8%), and administrative and waste management (3.9%). Statewide, workplace outbreaks have occurred in every sector. During the first six months of the pandemic in Los Angeles County (the state's largest local health jurisdiction), the most frequent sectors for non-residential, non-healthcare workplace outbreaks were manufacturing, retail trade, and transportation and warehousing. Among the suspected work-related COVID-19 deaths, the study found that the greatest number occurred in healthcare settings other than hospitals, followed by public administration (which includes justice, public order, and safety activities), manufacturing, retail trade, hospitals, and transportation and warehousing.¹⁸⁷

In summary, in reviewing case studies of states, California has been a leader in OSH intervention, compensation, and in data collection and reporting.

Case study of Arizona

Like California, Arizona is a state-plan state and is therefore entirely responsible for OSH enforcement within the state. In sharp contrast to California, however, Arizona's approved state OSH system is designed, at best, to mirror the federal regulatory system. No OSH-specific rules or orders relevant to essential workers were issued during the pandemic. Protections, to the extent they were available, had to come under previously existing OSHA standards and general public health orders.

The governor issued a series of emergency orders, beginning in March 2020. The governor's stay-at-home advisory on March 13, 2020 required businesses designated as essential to implement social distancing and sanitation measures.¹⁸⁸ On March 25, 2021, the governor signed another order making all COVID-related safety requirements for businesses into non-enforceable "recommendations,"¹⁸⁹ although the state continued to have the responsibility to enforce existing OSH standards.

The governor had issued an executive order in 2015, which has been renewed annually,¹⁹⁰ noting that regulations "inhibit job growth and economic development," and requiring the governor's prior written approval for new rules; approval would only be granted under certain listed

¹⁸⁵ Cal. Lab. Code § 3212.86 (West 2023).

¹⁸⁶ COVID-19 & Non-COVID Interactive App, Cal. Workers' Comp. Inst. (2023), <https://www.cwci.org/CV19claims.html>.

¹⁸⁷ Kristin J. Cummings et al., COVID-19 in the Workplace: The View from California, 19 *Annals of the Am. Thoracic Soc'y* 1260, 1260 (2022), <https://doi.org/10.1513/AnnalsATS.202112-1334VP>.

¹⁸⁸ State of Ariz., Exec. Order No. 2020-18, Stay Home, Stay Healthy, Stay Connected (2020), https://azgovernor.gov/sites/default/files/EO_2020-18_stay_home_stay_healthy_stay_connected_1.0.pdf.

¹⁸⁹ State of Ariz., Exec. Order No. 2021-06, New Phase of COVID-19 Mitigation (2020), https://azgovernor.gov/sites/default/files/EO_2021-06.pdf.

¹⁹⁰ State of Ariz., Exec. Order No. 2021-02, Moratorium on Rulemaking to Promote Job Creation and Economic Development; Internal Review of Administrative Rules (2021), <https://azgovernor.gov/file/37102/download?token=ad95CBOK>.

circumstances. Although this order specifically allowed for rules to address “a significant threat to public health, peace or safety,” it does not appear that the state OSH agency submitted any rules relevant to the pandemic.

Arizona demonstrated its resistance to more protective measures in a variety of other ways.

The state failed to adopt either ETS issued by OSHA during the pandemic. In written notice to the Industrial Commission of Arizona on October 19, 2021, OSHA said it was “reconsidering” its approval of Arizona’s OSHA State Plan¹⁹¹ because of Arizona’s failure to fully adopt the health-care ETS or an “at least as effective as” alternative.¹⁹² The Governor maintained that the state was working on compliance, as he blasted OSHA, “The federal government’s threat to strip the ICA [Industrial Commission of Arizona] of its OSHA authority is nothing short of a political stunt and desperate power grab...”¹⁹³

At this point, there are no longer any federal requirements regarding COVID that can be imposed on state plan states like Arizona, since the health care ETS expired in December 2021 and the vaccinate-or-test mandate was eliminated by the Supreme Court in early January 2022. Removal of state-plan status is a cumbersome process – and, in fact, federal oversight of state plans is troublingly limited. In April 2022, OSHA formally announced that it would move ahead to revoke its approval of the Arizona State Plan.¹⁹⁴ It then rescinded that announcement in February 2023 based on assurances from Arizona that it would comply with federal requirements, “despite recent public reports of a downward trend in inspections in the plan’s enforcement program.”¹⁹⁵ It is impossible to assess the current effectiveness of the Arizona plan.

Arizona was also an epicenter of anti-vaccine agitation. The state was a plaintiff in the case, ultimately successful, that was brought to nullify the OSHA vaccine-or-test mandate. The governor issued an order in April 2021 essentially banning requirements for vaccines for workers and for entry into public places (but carving out an exception for hospitals).¹⁹⁶ On August 16, 2021, the governor issued an order which prohibits political subdivisions of the state from implementing vaccine mandates.¹⁹⁷

No information is available regarding OSH enforcement in essential sectors in Arizona during the pandemic.

On May 15, 2020, the Industrial Commission of Arizona issued an advisory policy statement regarding COVID-19 workers’ compensation claims indicating that claims could not be

¹⁹¹ Noam Scheiber, OSHA, Citing Covid Failures, Moves to Strip Three States of Workplace Safety Authority, N.Y. Times (Oct. 19, 2021), <https://www.nytimes.com/2021/10/19/business/economy/osha-covid-workplace-safety-states.html>.

¹⁹² Notice of the formal OSHA action can be found here: View Rule, Off. of Info. & Regul. Aff. (Fall 2021), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1218-AD43>.

¹⁹³ Ivan Pereira, Largest Nurses Union Applauds Possible OSHA Action Against 3 States Over PPE, ABC News (Oct. 20, 2021), <https://azgovernor.gov/governor/news/2021/10/governor-ducey-statement-osha-overreach> (quoting Governor Ducey’s statement on OSHA overreach).

¹⁹⁴ Arizona State Plan for Occupational Safety and Health; Proposed Reconsideration and Revocation, 87 Fed. Reg. 23783 (2022). In its summary of the Proposed Rule, OSHA noted, “If revocation is determined to be appropriate, the Arizona State Plan will revert to initial approval and Federal authority for discretionary concurrent enforcement would resume, allowing Federal OSHA to ensure that private sector employees in Arizona are receiving protections that are at least as effective as those afforded to employees covered by Federal OSHA.” Id. In February of 2023, OSHA withdrew its proposal to revoke, leaving the state plan in place. US Department of Labor Announces Plan to Withdraw Proposal to Reconsider, Revoke Arizona State OSHA Plan’s Final Approval, Dep’t of Lab., Occupational Safety & Health Admin. (Feb. 14, 2023), <https://www.osha.gov/news/newsreleases/national/02142023>.

¹⁹⁵ Press Release, “US Department of Labor announces plan to withdraw proposal to reconsider, revoke Arizona State OSHA Plan’s final approval” <https://www.osha.gov/news/newsreleases/national/02142023>.

¹⁹⁶ State of Ariz., Exec. Order No. 2021-09, Prohibiting Political Jurisdictions of the State from Requiring the Disclosure of an Individual’s COVID-19 Vaccine Status (2021), https://azgovernor.gov/sites/default/files/eo_2021-09.pdf.

¹⁹⁷ State of Ariz., Exec. Order No. 2021-18, Returning to Our Principles of Governance (2021), https://azgovernor.gov/sites/default/files/eo_2021-18.pdf; <https://azgovernor.gov/executive-orders>

categorically denied and had to be “investigated in good faith,” “well-grounded in fact” and “warranted by existing law.”¹⁹⁸ In a subsequent statement, the Commission wrote: “Recognizing the difficulties workers who are affected by COVID-19 face, the Commission asks the carrier and self-insured employer community to be especially diligent when investigating and reviewing claims filed by first responders, healthcare workers, and frontline employees who have developed COVID-19.”¹⁹⁹ No presumption was created for these claims, however, and the claimant bears the burden of proof to show that the disease is work-related. No data are provided by the state agency responsible for compensation claims regarding these issues.

Moreover, the state withdrew early from an enhanced unemployment compensation program on July 10, 2021 (the program was set to expire in September 2021). According to one news report, “Gov. Doug Ducey said the state would stop accepting the extra weekly payments from the federal government in an effort to push unemployed people to get back to work. ‘In Arizona, we’re going to use federal money to encourage people to work...instead of paying people not to work’, Ducey said in a statement in May, when he announced his Arizona Back to Work Program.”²⁰⁰

Arizona does participate in the Medicaid expansion program.

In sum, the politics of Arizona, despite the approved state OSHA plan, have meant that essential workers have received poor protections from OSH risks and have also been denied some enhanced social support benefits that were available.

Non-state plan OSHA states

Case study of Massachusetts

The Commonwealth of Massachusetts is not a designated state-plan state. Federal OSHA is therefore generally responsible for OSH enforcement in the state, and the existing governmental structures for OSH enforcement are, as a result, relatively weak. Despite a liberal reputation, the state has a limited history of worker OSH protection and had a Republican governor throughout the pandemic. It currently has a relatively new state OSH law governing all state, county and municipal public sector workers²⁰¹ and in mid-2022 received approval for state-plan status from federal OSHA for the public sector only.²⁰²

The governor was one of the first to issue a series of COVID-related emergency public health orders that ordered the closure of non-essential businesses while requiring a long list of essential “brick and mortar” businesses to stay open (while complying with CDC guidelines). These included healthcare, security, food and agriculture, the energy sector, transportation and logistics,

¹⁹⁸ Indus. Comm’n of Ariz., Substantive Policy Statement: COVID-19 Workers’ Compensation Claims (2020), <https://www.azica.gov/sites/default/files/SPS%20-COVID-19%20FINAL.pdf>.

¹⁹⁹ Adjusting COVID-19 Workers’ Compensation Claims, Indus. Comm’n of Ariz. (May 14, 2020), <https://www.azica.gov/sites/default/files/COVID%20SPS.pdf>.

²⁰⁰ Diannie Chavez, Pandemic Unemployment Relief Ends, Cutting Off 45,000 Jobless in State, Cronkite News (Sept. 6, 2021), <https://cronkitenews.azpbs.org/2021/09/06/pandemic-unemployment-relief-ends-cutting-off-45000-jobless-in-state/#:~:text=It%20was%20extended%20in%20March,the%20state%20on%20July%2010>.

²⁰¹ Mass. Gen. Laws ch. 149 § 6½ (2019).

²⁰² For the formal announcement regarding the application for state plan status, see View Rule, Off. Of Info. & Regul. Aff. (Fall 2021), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1218-AD41> (“Abstract: The Massachusetts Department of Labor is working toward submitting a developmental State Plan for occupational safety and health, applicable only to state and local government employment, for determination of initial approval under section 18 of the OSH Act. OSHA will be publishing a Notice of Proposed Rulemaking and soliciting written comment on whether or not initial State Plan approval should be granted and offering an opportunity to interested persons to request an informal public hearing on the question of initial State Plan approval.”). For announcement of approval, see U.S. Labor Department’s Initial Approval Gives Massachusetts’ State Plan Responsibility for Protecting Safety, Health of Public Workers, U.S. Dep’t of Lab., Occupational Safety & Health Admin. (Aug. 17, 2022), <https://www.osha.gov/news/newsreleases/trade/08172022#:~:text=The%20Massachusetts%20State%20and%20Local,18%2C%202022>.

communications and IT.²⁰³ Reopening followed a four-stage plan, and called for ending restrictions when vaccines became widely available.²⁰⁴ With the exception of remaining face-covering requirements for public and private transportation systems and facilities housing vulnerable populations, all industry restrictions were lifted as of May 2021, and capacity increased to 100% for all industries. All industries were encouraged to follow CDC guidance for cleaning and hygiene protocols. Many municipalities retained restrictions beyond this date, however, and there was no attempt by the governor to limit any public health actions taken by local governments.

The orders issued by the governor largely focused on the public, not on workplace health and safety or the needs of critical workers. Unions and advocacy organizations pressured for more workplace-specific protections. In the absence of any federal OSHA standard, the state was free to regulate COVID-19 as a workplace hazard in both the private and nonfederal public sector – although it remained within federal OSHA's enforcement territory. In theory, the Department of Labor Standards (DLS) was responsible for enforcement of workplace regulations. With a very small staff – in part the result of the fact that Massachusetts is not a state-plan state – DLS initially had a hard time responding to concerns. Complaints about both safety and retaliation mushroomed, and the state Attorney General's office, which is responsible for enforcement of wage and hour laws, stepped up to handle many of these complaints. As of August 31, 2020, they had handled 3692 COVID-related workplace health and safety matters before wrapping up their Health and Safety Task Force and turning the responsibility back to DLS.²⁰⁵

In the absence of any action by federal OSHA in the early days of the pandemic and an initially sluggish response from DLS, local public health agencies became the focus for addressing workplace COVID-19 workplace clusters. There are 351 municipalities in Massachusetts. Each municipality is responsible for protecting the public's health in its community. They are charged with addressing a wide range of public health issues, including disease case management and disease surveillance – and they are small and poorly funded.²⁰⁶ Nevertheless, local boards of health made efforts to respond to COVID outbreaks in workplaces. For example, in the town of New Bedford, which has a relatively large seafood processing industry, the local board of health posted a wide range of information²⁰⁷ and issued a series of emergency orders,²⁰⁸ including ordering these facilities to shutdown as a result of outbreaks of the virus.²⁰⁹

²⁰³ For a full list of COVID-related executive orders in Massachusetts, see COVID-19 Essential Services, Exhibit A of the Order of the Governor Assuring Continued Operation of Essential Services in the Commonwealth, Closing Certain Workplaces and Prohibiting Gatherings of More Than 10 People, Commonwealth of Mass. (Mar. 23, 2020), <https://www.mass.gov/doc/covid-19-essential-services/download>. Note that the public health orders in Massachusetts correlated with the ILO list of essential sectors.

²⁰⁴ As described on the state's website, Phase I ("Start") of the plan began on May 18, 2020, and allowed manufacturing facilities, construction sites, and places of worship to re-open. Hospitals and community health centers were able to begin to provide high priority preventative care, pediatric care and treatment for high-risk patients. Phase 2 ("Cautious") began in June 2020 and allowed additional lower risk businesses to reopen, including retail, childcare facilities, restaurants (with outdoor table service only), hotels and other lodgings, personal services without close physical contact, youth and adult amateur sports, and driving and flight schools. Health care providers also incrementally resumed in-person elective, non-urgent procedures and services, including routine office visits, dental visits and vision care subject to compliance with public health and safety standards. On July 6, 2020, the state moved to Phase III ("Vigilant") based on a sustained decline in key public health data, such as new cases and hospitalizations. A broad range of sectors were permitted to open, again subject to compliance with industry-specific rules concerning capacity and operations, including movie theaters and outdoor performance venues; museums, cultural and historical sites; fitness centers and health clubs; certain indoor recreational activities with low potential for contact; and professional sports teams (without spectators). Massachusetts moved into Phase IV ("New Normal") on March 22, 2021 with indoor and outdoor stadiums, arenas, and ballparks permitted to open at 12 percent capacity, and exhibition and convention halls also beginning to operate. See Reopening Massachusetts, Commonwealth of Mass., <https://www.mass.gov/info-details/reopening-massachusetts> (last visited Feb. 20, 2023).

²⁰⁵ Email from Jodi Sugarman-Brozan, Exec. Dir., MassCOSH, Member, DLS Advisory Comm., to Atty Gen. (Mar. 15, 2022) (providing data regarding complaints).

²⁰⁶ For information regarding local public health departments in Massachusetts, see Supporting Local Health Departments, Mass. Pub. Health Assoc., <https://mapublichealth.org/covid19local/> (last visited Feb. 20, 2023).

²⁰⁷ COVID-19 Updates, New Bedford Health Dep't, <https://www.newbedford-ma.gov/health-department/coronavirus/> (last visited Feb. 20, 2023).

²⁰⁸ See, e.g., Mayor Jon Mitchell & Dr. Patricia Andrade, Emergency Order for Reporting Covid-19 at Worksites (May 5, 2020), <https://s3.amazonaws.com/newbedford-ma/wp-content/uploads/20200506082240/Emergency-Order-Reporting-COVID-in-the-Workplace.pdf>.

²⁰⁹ Email from Thomas Smith, Co-Founder and Exec. Dir., Justice at Work, to author (Nov. 15, 2022).

Facing pressure regarding the need for further state protections, DLS issued a COVID-19 Workplace Safety regulation in mid-2020. The regulation covered “Any person providing paid or unpaid service to an enterprise at a brick-and-mortar premises including, but not limited to, any employee, contract worker, volunteer, temporary employee, or worker,” and incorporated by reference all orders issued by the governor that were sector-specific. Exempted from coverage under the rule were the courts, correction facilities, childcare facilities, and pre-college educational institutions (“K-12”). Substantively, the regulation provided for: an employer-generated “written control plan”; social distancing; hygiene protocols; cleaning and disinfecting; posting of notices; and immediate notification to the local board of health in the event a worker tested positive. Workplaces were required to self-certify compliance. The rule contained a specific prohibition against retaliation. Enforcement was assigned to DLS or local boards of health; in the event of an inspection, both employer and worker representatives were permitted to accompany the inspector.²¹⁰

DLS reported state-wide enforcement both before the rule was promulgated and continuing throughout the pandemic. Reports to the DLS Advisory Committee indicated that hundreds of cases were opened. Initially, cease and desist orders were issued against businesses that remained open despite the closure orders issued by the governor. Over the course of the pandemic, DLS undertook more than 2000 enforcement activities, targeting both businesses that were unlawfully opened during shutdown orders as well as violations of the COVID-19 workplace regulation; 173 written warnings were issued against essential businesses under the regulation.²¹¹

DLS rescinded the Workplace Safety rule after public hearing on July 21, 2021, over the angry objections of dozens of public health experts, unions and other worker advocacy organizations. No explanation was offered for this action. There are now no regulations currently enforced by DLS that are specific to the pandemic, in either the public or the private sector.

DLS is also responsible for enforcing the public sector Massachusetts health and safety law. Under the terms of the state law, all standards issued by OSHA were supposed to be enforced by DLS for the public sector. DLS disputed its obligation to follow the federal health care ETS, and it is not clear that there was any effort to enforce the ETS for health care facilities during 2021. As of March 2023, of course, there are no specific COVID-related federal standards in effect. The public sector state plan received OSHA approval in mid-2022, and the state now has a clear obligation to enforce federal standards. Of course, as of the close of 2022, there are no COVID-specific federal standards.

Given the role played by DLS and local boards of health, the role of federal OSHA was arguably less important in Massachusetts than in other federal OSHA states such as Mississippi, discussed below. Over the course of the pandemic, through March 11, 2022, OSHA had issued 25 COVID-related citations against Massachusetts employers, recommending a total of \$432,564 in penalties. All but six of these were in healthcare, including residential care facilities; the remaining were issued against an organization providing transitional training for people leaving correctional institutions, manufacturing and shipping, one small office (that had forbidden workers and customers to wear masks), the postal service, and one staffing agency for hospitality and food services. Arguably, all of these citations involved critical frontline workers and workplaces. As of December 21, 2022, an additional 39 inspections had been completed, with a total of an additional \$599,607 in penalties; again, all but two of these inspections involved health care or residential facilities, and the remaining two involved general duty citations against the US Postal Service.²¹² The increase in the number of inspections undoubtedly reflects the commitment of OSHA to expand enforcement under the COVID Special Emphasis Program.

²¹⁰ 454 Mass. Code Regs. 31 (2021).

²¹¹ Email from Jodi Sugarman-Brozan, Exec. Dir., MassCOSH, member, DLS Advisory Committee, to author (Mar. 15, 2022) (providing data from DLS regarding enforcement activities).

²¹² See Inspections with COVID-19 Related Violations, *supra* note 124.

With regard to workers' compensation, numerous bills were introduced in the state legislature to create a presumption of causation, but none were passed. No action was taken by the governor to institute any special rules for COVID-related diseases. The Massachusetts law on occupational disease compensation is relatively stringent. Nevertheless, according to data provided to the Advisory Committee to the Massachusetts Department of Industrial Accidents, a substantial number of these claims have been paid, primarily – though not exclusively – to workers in the healthcare sector.²¹³

With regard to other social supports: Massachusetts has relatively strong state-based protections for paid leave, unemployment compensation, and subsidized health insurance.

In sum, Massachusetts sits squarely in the middle among states – more attentive to essential workers than most states without state plans, but nevertheless reluctant to continue vigilant OSH enforcement as the pandemic has dragged on.

Case study of Mississippi

Mississippi is among the poorest states. Poverty in the state is exacerbated by the fact that Mississippi has not adopted any minimum wage to cover workers in the state who are not protected by federal law – and federal law only guarantees \$7.25 per hour for non-tip employees. It is also a state with a large Black population (38 percent)²¹⁴ when compared to the national average (13.6 percent).²¹⁵

Mississippi does not have a state OSH plan, and has no laws providing OSH coverage for public state and local employees. It thus stands at the other end of the spectrum from California in terms of protection for essential workers during the pandemic.

The governor issued orders creating a state of emergency at the onset of the pandemic, closing all but essential businesses, and adopting CDC guidelines. But this was rapidly followed by re-opening of non-essential businesses in May 2020 provided that they followed industry-specific guidance and made reasonable, good-faith efforts to comply with the CDC guidelines.

Requirements for masking were initially instituted for public health protection and rescinded in March 2021. On July 10, 2020, the governor issued an order covering specified counties that required businesses to screen all employees prior to beginning their shift and to provide hand sanitizer to employees, while requiring employees to wear appropriate personal protective equipment based on their duties and responsibilities. The state public health department also posted useful information regarding the pandemic.²¹⁶

But no OSH-specific actions to protect vulnerable critical workers were taken by the state during the entire course of the pandemic. Limitations on civil liability relating to the pandemic were enacted in July 2021, providing immunity from common law actions related to COVID-19 exposure to any person who attempts in good faith to follow applicable public health guidance.²¹⁷ The governor pushed back hard on any vaccine mandates, calling the attempt by OSHA to require vaccines in the private sector tyrannical and unconstitutional.²¹⁸ In June 2021, the state pulled out of expanded federal unemployment benefits which were not to expire until September.

²¹³ Email from Nancy Lessin, DIA Advisory Comm. Member, to author (Dec. 6, 2022).

²¹⁴ U.S. Census Bureau, Quick Facts, Mississippi, <https://www.census.gov/quickfacts/MS> (last visited Mar. 26, 2023).

²¹⁵ U.S. Census Bureau, Quick Facts, United States, <https://www.census.gov/quickfacts/fact/table/US/PST045221> (last visited Mar. 26, 2023).

²¹⁶ Coronavirus Disease 2019 (COVID-19), Miss. Dep't of Health (Feb. 15, 2023), https://msdh.ms.gov/msdhsite/_static/14,0,420.html.

²¹⁷ Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act, Miss. Code Ann. § 11-71-1 (2021).

²¹⁸ Tate Reeves (@tatereeves), Twitter (Sept. 9, 2021, 5:39 PM), <https://twitter.com/tatereeves/status/1436081918982897667?lang=en>.

At the same time, federal OSHA reports only thirteen total inspections relating to COVID in Mississippi between the onset of the pandemic and December 21, 2022, with total proposed penalties of only \$161,248. Ten of these involved health care institutions; one involved a failure to record injuries and illnesses at a manufacturing plant; two involved failures to report fatalities, presumably COVID-19 deaths.²¹⁹ Anecdotally, worker advocates in Mississippi report that fear of retaliation prevents workers from raising concerns to OSHA and other federal and state agencies.

Mississippi also lags other states in the provision of social welfare supports in general:

- Low-income Mississippi residents face significant challenges in accessing affordable health care. Despite a high rate of uninsured people, and the fact that one in five Mississippi residents live in poverty, Mississippi is one of the states that has not expanded the Medicaid program under the ACA, and the state does not provide health care coverage for nondisabled childless adults under age 65, regardless of income level.²²⁰
- As in Arizona, the governor announced that he was withdrawing the state early from pandemic-related federally sponsored unemployment programs after June 12, 2021.²²¹ The public justification for this was to encourage people to return to work: "It has become clear to me that we cannot have a full economic recovery until we get the thousands of available jobs in our state filled," the governor said.²²²
- No special provision was adopted to address workers' compensation claims relating to COVID-19. In Mississippi, an occupational disease is deemed compensable "when there is evidence that there is a direct causal connection between the work performed and the occupational disease," and the claimant must provide medical proof that the job caused or contributed to the development of the disease in a significant manner. No data are available regarding payment for COVID-related claims. The state is also an example of a jurisdiction where a range of compensation-limiting statutory enactments have limited access to benefits. These include reduction of compensation when a preexisting condition contributes to the disability and a prohibition on payment of benefits to any worker who tests positive for an illegal drug.

In sum, essential workers in Mississippi were left without any real OSH protection from COVID-19 during the pandemic.

D. COVID-related litigation brought by individuals, activists and unions

Private parties have brought a range of litigation in an attempt to improve the health and safety of workers who were exposed to the coronavirus at work. This litigation falls into a number of categories, enumerated below.

Note that this is not a fully exhaustive list of all COVID-related litigation in the U.S. Rather, this list focuses on efforts to improve workplace safety through creative use of the law. There has also been considerable (and creative) litigation challenging public health agency orders, which has been described elsewhere.²²³ In addition, many additional individual cases have been filed

²¹⁹ See Inspections with COVID-19 Related Violations, *supra* note 124.

²²⁰ Adam Striar et al., Medicaid Expansion in Mississippi — What's at Stake, The Commonwealth Fund (Feb. 3, 2022), <https://www.commonwealthfund.org/blog/2022/medicaid-expansion-mississippi-whats-stake#:~:text=Since%202014%2C%20states%20have%20had,90%20percent%20of%20the%20cost>.

²²¹ Resources for Workers and Businesses on COVID-19, Miss. Dep't of Emp. Sec. (Jun. 8, 2021), <https://mdes.ms.gov/unemployment-claims/covid19/>.

²²² Keisha Rowe, Mississippi to End Additional Federal Unemployment Benefits in June, Governor Says, Miss. Clarion Ledger (May 10, 2021), <https://www.clarionledger.com/story/news/local/2021/05/10/pandemic-unemployment-assistance-benefits-end-june-mississippi/5028758001/>.

²²³ See also Wendy Parmet & Faith Khalik, Judicial Review of Public Health Powers Since the Start of the COVID-19 Pandemic: Trends and Implications, 113 Am. J. Pub. H. 280 (March 2023) (providing an overview of litigation involving orders issued by public health agencies during the pandemic), available online <https://doi.org/10.2105/AJPH.2022.307181>.

involving claims of individual retaliation for asserting rights using a range of theories, including claims filed by workers who have challenged employers' vaccine mandates. Thousands of these claims have been filed, and this Report makes no attempt to provide an exhaustive and inclusive summary of them. As of March 2023, many cases are still pending, in both trial and appellate courts. The full story of COVID-related litigation cannot yet be told.

1. Efforts to force agencies to act

Individuals and unions have brought actions that sue OSHA and state agencies, asking for immediate issuance of rules or more aggressive enforcement.

For example, workers and advocates in a Maid-Rite Specialty Foods plant in Pennsylvania sought a Writ of Mandamus to compel OSHA to seek a court order directing Maid-Rite to take steps to abate imminent dangers to its employees related to the transmission of COVID-19. Notably, OSHA has rarely used its power regarding imminent danger closures, which under the OSHAct are only available if the agency applies to a federal court for an order. Here, the workers were attempting to compel OSHA to seek this order. The lower court concluded that, where there had been no request from an OSHA inspector that an imminent danger order be sought, the court lacked jurisdiction to proceed.²²⁴ On review, the Court of Appeals also refused to issue the order against OSHA. Although the appellate court agreed with the workers that the court might have the authority to order OSHA to take action, this authority would cease to exist at the point that OSHA completed its enforcement activities. Here, OSHA had concluded its standard enforcement proceedings against Maid-Rite and declined to issue a citation. The case was closed, and therefore, the court reasoned, it could not compel OSHA to act.²²⁵

Two related cases were also filed attempting to persuade courts to instruct OSHA to issue standards to limit exposure to coronavirus in the health care sector. In October 2020, nurses, teachers and others filed an application for a Writ of Mandamus, seeking an emergency temporary standard regarding transmission of infectious diseases to protect health care workers.²²⁶ The case was placed in abeyance after the new administration promised to move quickly to issue a rule.²²⁷ In January 2022, after the ETS was withdrawn at the end of six months, the same groups filed another application, asking the court to order OSHA to issue a permanent health care standard within 30 days of the granting of the writ and to enforce the healthcare temporary standard until it is "properly superseded" by a permanent standard. Eight months later, on August 26, 2022, the court dismissed the petition, holding that OSHA's decision not to continue to enforce the ETS did not violate a clear duty to act, nor did OSHA have a duty to either issue a permanent standard.²²⁸ As of March 2023, as noted above, OSHA was still planning to issue a standard governing exposure to the coronavirus in the health care industry, but had not yet done so.

2. Efforts to force employers to improve workplace safety

Workers, unions and allied advocates have sought workplace protections from transmission of the coronavirus, attempting to bypass the OSH administrative structure by relying on two state-based legal theories: public nuisance doctrine and the right to a safe workplace guaranteed either by statute or common law. In these cases, the workers sought only injunctive relief to force employers to adopt safety protocols, thus avoiding the bar on damages for workplace injuries that is well-established in most states under workers' compensation laws.

²²⁴ Does I, II, III v. Scalia, 530 F.Supp.3d 506, 508 (M.D. Pa. 2021).

²²⁵ Doe I v. Scalia, 58 F.4th 708 (3rd Cir. 2023).

²²⁶ Petition for Writ of Mandamus, In re Am. Fed'n of Tchrs. v. Occupational Safety & Health Admin., No. 20-73203, 11875280 (9th Cir. 2020) (Democracy Forward).

²²⁷ Joint Motion to Remove Case from Oral Argument Calendar and Place Case in Abeyance, Am. Fed'n of Tchrs. v. Occupational Safety & Health Admin., No. 20-73203 (9th Cir. 2021) (Democracy Forward).

²²⁸ In re Nat'l Nurses United, 47 F.4th 746, 757 (D.C. Cir. 2022).

The first case of this kind was filed on April 23, 2020 – early in the pandemic – against Smithfield Foods Inc., operating a meatpacking plant in Missouri.²²⁹ The worker and advocates alleged that, because the plant was not abiding by the CDC/OSHA/USDA guidance, it constituted a public nuisance²³⁰ and created an unreasonably unsafe workplace.²³¹ The court rejected the workers' request for injunctive relief, ruling that the issue came under Missouri's "primary jurisdiction doctrine,"²³² noting that the claims would succeed or fail based on whether the plant was complying with guidance issued by the federal agencies. Therefore, the court reasoned, "Due to its expertise and experience with workplace regulation, OSHA (in coordination with the USDA per the Executive Order) is better positioned to make this determination than the Court is."²³³

Following the dismissal of the Smithfield case in Missouri, similar cases were filed elsewhere. Results – and analysis of the plaintiffs' theories – have varied.

The reluctance of the Smithfield Foods court to enter into a discussion regarding workplace safety was echoed by another federal judge in a Texas case that was brought against Pilgrim Pride, also a meat processing company.²³⁴

Not only would the judges have had to fashion workplace safety protocols, but they would have had to figure out a way to enforce those protocols. Such a task requires expertise in workplace health and safety, as well as administrative flexibility. Because the plaintiffs in those cases were requesting injunctive relief, they needed an adjudicator who could tell the companies, for instance, how often employees needed to sterilize common surfaces. In those cases, the district judges found that OSHA was better suited to perform that function.²³⁵

Of course, plaintiffs also need to convince the court that they have standing to sue. A case in Nebraska against Noah's Ark Processing was dismissed when the court held that former employees from the beef processing plant could not assert any on-going rights to a safe workplace.²³⁶

The argument that heightened exposure to Covid-19 within workplaces constituted a public nuisance was specifically rejected in cases against FedEx²³⁷ and Walmart²³⁸ in California, and against an Amazon warehouse ("fulfillment center") in Staten Island, New York.²³⁹ In both New York and California, private citizens can only bring public nuisance claims if they can show "special injury" – that is, that they were subject to injury that is different in kind, not just degree, from the risk to

²²⁹ See *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 459 F.Supp.3d 1228, 1232 (W.D. Mo. 2020). There is no record of an appeal from this lower court decision.

²³⁰ Id. at 1244 ("Under Missouri law, 'a public nuisance is an offense against the public order and economy of the state and violates the public's right to life, health, and the use of property, while, 'at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons.'" (State ex rel. Schmitt v. Henson, ED 107970, 604 S.W.3d 793, 800 (Mo. Ct. App. April 14, 2020) (citations omitted).").

²³¹ Id. ("Under Missouri law, Plaintiffs must prove that Smithfield negligently breached its duty to provide a safe place to work and that such negligence was the direct and proximate cause of the Plaintiffs injuries.").

²³² Id. at 1240 ("Before reaching the merits of Plaintiffs' request for a preliminary injunction, the Court must determine whether it should dismiss or stay this case pursuant to the primary-jurisdiction doctrine. 'Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making . . . The doctrine allows a district court to refer a matter to the appropriate administrative agency for ruling in the first instance, even when the matter is initially cognizable by the district court.'" (quoting *Access Telecomms. v. Sw. Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998)).

²³³ Id. at 1240-41.

²³⁴ *Requena v. Pilgrim's Pride Corp.*, No. 9:20-CV-00147-ZJH, 2021 WL 2099312, at *1 (E.D. Tex. Apr. 1, 2021).

²³⁵ Id. at *5.

²³⁶ *Alma v. Noah's Ark Processors*, No. 4:20-CV-3141, 2021 WL 781287, at *1-3 (D. Neb. Dec. 9, 2021) ("According to the plaintiffs, Noah's Ark has not taken measures needed to protect its employees from COVID-19. . . . But the plaintiffs are not employees of Noah's Ark—instead, they're former employees, along with a local doctor. See filing 1 at 3-5. While the Court does not question their sincere concern for the well-being of Noah's Ark's employees, the Court finds that they lack standing to assert the claims they have alleged, and will dismiss their complaint. . . . The plaintiffs' alleged injuries are neither concrete nor particularized: the gist of their claim to standing is that there could be another COVID-19 outbreak at Noah's Ark, and that could cause widespread disease in the community in which they live, and that could endanger them and affect the community.").

²³⁷ *Sprewell v. Fed. Express Corp.*, No. 2:20-cv-11612-SVW-AGR, 2021, WL 4706703, at *2 (D.C. Cal. Sept. 30, 2021).

²³⁸ *Wicker v. Walmart, Inc.*, 533 F. Supp. 3d 944, 948-49 (D.C. Cal. 2021).

²³⁹ *Palmer v. Amazon.com*, 51 F.4th 491, 503 (2d Cir. 2022).

the public at large.²⁴⁰ In New York, the plaintiffs contended that their lack of autonomy to avoid exposure to the virus met this test,²⁴¹ but in dismissing this claim the court held that their injury from exposure to Covid was not “so markedly greater in degree than that faced by large numbers of the public” as to justify application of the public nuisance doctrine.²⁴²

The New York case against Amazon is nevertheless proceeding. The plaintiffs – both workers and their family members – also alleged a right to safe workplace under New York statutory law,²⁴³ which is a codification of the common law right to a safe workplace.²⁴⁴ The trial court had dismissed the entire action, invoking the primary jurisdiction doctrine (echoing the decision in the Missouri Smithfield case), but the Second Circuit Court of Appeals emphatically reversed,²⁴⁵ holding that, although the public nuisance doctrine requirements were not met, the issues in general were well within the expertise of the courts and did not require any special expertise that OSHA might offer:

The issues before us—whether Amazon created a public nuisance and whether Amazon has breached its duty owed to Plaintiffs under NYLL § 200 [statutory right to safe workplace] — turn on questions of state tort law that are within the conventional experience of judges. Although it is certainly within OSHA's competence to evaluate and create workplace health and safety standards, OSHA's expertise would not be a material aid here; the issues before us are of a legal, not factual, nature and do not require the kind of highly factual inquiry that would typically be aided by OSHA's expertise.²⁴⁶

The court, in issuing its decision, relied in part on OSHA's failure to act to regulate the hazard in question, noting that “OSHA has not promulgated the kind of cross-industry COVID-19 workplace safety standards that might be applicable here.”²⁴⁷

In similar cases brought against McDonald's and franchisees in Chicago and Oakland, the state court judges granted temporary restraining orders, refusing to dismiss the legal actions.²⁴⁸ Current workers were joined in these cases by workers' family members who had been infected by the employees. As in the other cases discussed above, plaintiffs sought injunctions against the employers to force adoption of safety protocols. These cases were ultimately settled, with specific requirements for safety protocols and creation of health and safety committees that included participation of non-managerial employees.²⁴⁹

The mixed success of these cases certainly suggests that the theories advanced by the workers are at least arguably sound – and the differences in outcome may be explained by differences

²⁴⁰ See Sprewell, 2021 WL 4706703, at *2 (“California law limits the private right of action for public nuisance to those who suffer a special injury as a result of the nuisance. ... When a public nuisance claim is based on risk of disease, the special injury requirement is not satisfied by a plaintiff who only alleges that his risk of contracting a disease, or the severity of his actual medical symptoms, is greater than that of the general public.”); Palmer, 51 F.4th at 512 (“The district court properly dismissed Plaintiffs’ public nuisance claim because Plaintiffs fail to allege special injury.”).

²⁴¹ Palmer, 51 F.4th at 512 (“Plaintiffs contend that, unlike members of the public at large, who can protect themselves from the virus by avoiding public places, they lack the autonomy to avoid the reach of Amazon's conduct since they cannot avoid JFK8 or their homes.”).
²⁴² Id. at 514.

²⁴³ N.Y. Lab. Law § 200(1) (2002) (“All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places.”).

²⁴⁴ Palmer, 51 F.4th at 507 (“As NYLL § 200 is a codification of the common law duty to provide workers with a safe work environment, e.g., Lombardi v. Stout, 80 N.Y.2d 290, 294, 590 N.Y.S.2d 55, 604 N.E.2d 117 (N.Y. 1992); Everitt v. Nozkowski, 285 A.D.2d 442, 443, 728 N.Y.S.2d 58 (2d Dep’t 2001), a federal court here can look to New York's common law to inform its determination as to whether Amazon breached the duty of care it owed to Plaintiffs. And where common law principles are at play, we have determined that the issues should be addressed in a judicial forum.”).

²⁴⁵ Id. at 491.

²⁴⁶ Id. at 499.

²⁴⁷ Id.

²⁴⁸ Plaintiff's Response to Defendants' Status Report and Memorandum in Support of Preliminary Injunction, *Hernandez v. McDonald's*, No. RG20064825, 2020 WL 6547545 (Cal. Super. Ct. 2020) (preliminary injunction granted); *Massey et al v. McDonald's Corp.*, Bus. Franchise Guide (CCH) ¶ 16,679, 2020 WL 4939293.

²⁴⁹ Summary of *Hernandez v. VES McDonald's Settlement*, <https://aboutblaw.com/Y7C> (last visited Feb. 22, 2023); Joint Stipulation and [Proposed] Order Dismissing the Litigation, *Massey v. McDonald's*, No. 2020 CH 04247 (Jul. 27, 2021), <https://aboutblaw.com/Y7B>.

among the jurisdictions as each state evolves its own common law, by factual differences among the cases, and by the differing views of the judges regarding workplace and community safety. Clearly, the trial judges in the McDonald's cases were less cautious about intervening on behalf of workers at risk – and the resulting outcome, with the adoption of safety protocols, reflected the success of combined legal and organizing strategies.

3. Challenge under international law regarding workers' safety concerns in the U.S.

Frustrated by the failure to protect U.S. workers in 2020, the AFL-CIO and the Service Employees International Union (SEIU) filed a Complaint to the ILO Committee on Freedom of Association Against the Government of the United States of America, arguing that the U.S. had violated international labor standards as a result of a “generalized failure by the United States government to address the Coronavirus pandemic in the United States,” and requesting the Committee to “organize a direct contacts mission to meet (virtually, under current conditions) with workers, trade unions, employers, and government officials in the United States to examine the effects of the Trump administration's response to the COVID-19 crisis in the workplace.”²⁵⁰

The Complaint claimed that the U.S. government had systematically violated ILO Conventions 87 and 98 on freedom of association, trade union organizing and collective bargaining, and also noted the failure of the government to engage in tripartite discussions to address the Covid-19 crisis, in violation of ILO Conventions 144 and 150, including the failure to reexamine unratified OSH conventions (No. 155 on occupational health; No. 161 on occupational health services; and No. 187 on promotional framework for occupational health). Citing research that shows that unionized workplaces (and therefore essential workers) were better protected from Covid-19 than nonunionized workers in the same industry, the Complaint argued that the failure of the U.S. to guarantee freedom of association and collective bargaining rights was directly connected to the lack of health and safety protection for workers during the pandemic. In particular, many workers are excluded by statute from coverage under the primary labor relations law, the National Labor Relations Act (including all farmworkers, domestic workers and independent contractors). Moreover, the National Labor Relations Board, the agency charged with enforcement, has taken a deregulatory approach, leaving workers who are technically covered by the law without adequate protection. The Complaint provided examples of the serious and well documented health and safety failures related to inability of workers to organize effectively in meatpacking, health-care, warehouse, fast food, construction and airport workplaces.

The “basic argument of this complaint is that 1) many features of U.S. labor law, in particular the exclusion of millions of workers from protection of the right to organize and bargain collectively, and 2) the Trump administration's response to the COVID-19 crisis, especially NLRB decisions undermining workers' organizing and bargaining rights, and executive orders and other actions that force workers to choose between their live and their jobs,

impede or nullify the ability of American workers to defend their health and their lives in the COVID-19 crisis in the workplace, all in violation of ILO Conventions 87 and 98.”²⁵¹

The Complaint was withdrawn after the change in federal administration in 2021.

²⁵⁰ Richard L. Trumka, Complaint to the ILO Committee on Freedom of Association Against the Government of the United States of America, AFL-CIO 51 (Oct. 7, 2020), <https://lawprofessors.typepad.com/files/complaint-7.pdf>. For coverage of the complaint, see Eli Rosenberg, U.S. Accused of Violating International Labor Laws, Forced-Labor Protections in New Complaint, Wash. Post (Oct. 7, 2020), <https://www.washingtonpost.com/business/2020/10/08/international-complaint-worker-protections/>.

²⁵¹ Trumka, *supra* note 250, at 50-51.

4. Stockholder derivative lawsuits

In another novel legal approach to the failure of corporations to ensure the safety of workers during the pandemic, at least three shareholder complaints have been filed against Tyson, charging Tyson with false and misleading statements. The lawsuits argue that Tyson failed to protect workers from COVID-19, causing the rate of infections to rise and closure of plants, leading to reduced production – and that this information was withheld from investors.²⁵² These lawsuits seek damages for investors by asserting that mandatory disclosure filings to the Securities and Exchange Commission must contain statements regarding worker safety that do not mislead investors.

The complaint in *Guo v. Tyson Foods*²⁵³ quoted extensively from Tyson's SEC filings:

We maintain a safety culture grounded on the premise of eliminating workplace incidents, risks and hazards. ... In response to the global novel coronavirus pandemic ("COVID-19" or "pandemic"), we have implemented and continue to implement safety measures in all our facilities. ... We formed an internal COVID-19 task force for the primary purposes of maintaining the health and safety of our team members, ensuring our ability to operate our processing facilities and maintaining the liquidity of our business. ... The health and safety of our team members is our top priority."

But the complaint noted that the New York City Comptroller had written to the SEC, calling for investigation, and describing Tyson's failures regarding Covid-19 worker protection:

Unfortunately, *the steps Tyson eventually took to protect employees were grudging and minimal, such as letting workers use bandanas or sleep masks, which function poorly as protective devices.... As COVID-19 was infecting its employees, Tyson reportedly misled its workforce in its largest pork plant by telling them that "everything is fine." Eventually over 1000 workers in that plant tested positive, leading to worker deaths, hospitalizations, and plant closure. Tyson's sick leave policy was similarly limited. As COVID-19 swept through its plants, in a nod to the CDC guidance that sick workers must stay home, Tyson paused its policy of penalizing workers who called in sick for a few months. However, it appears that Tyson then proceeded to undermine that policy. In April, employees were incentivized to continue working via a \$500 "thank you" bonus promised to workers who showed up for every scheduled shift over a three month period. Then in June, Tyson reinstated its policy penalizing workers who take sick leave to avoid contact with any exposed workers. ...Tyson's tardy and limited reaction took a serious human toll.*²⁵⁴

It was this investigation that led to the fall in the price of Tyson stock and resulted in this litigation.

5. Claims raising issues of bias in employers' implementation of COVID-related protections

As the pandemic continued, workers argued that they were being disadvantaged as a group because of their race. These cases build on the huge disparities between essential low wage workers – who were predominantly minorities – and the protection offered to white managers in the same workplaces.

For example, in November 2020 workers brought a lawsuit against an Amazon warehouse in Staten Island, New York, under Section 1981 which guarantees equal rights under the law,²⁵⁵ alleging that Amazon's discriminatory practices put minority workers at risk and that the company

²⁵² See Alan R. Bromberg et al., *Bromberg & Lowenfels on Securities Fraud*, § 26:10. COVID-19 Private Class Actions Under the Federal Securities Laws Involving Misleading Disclosure Re. a Company's Efforts to Protect its Employees from COVID-19, Westlaw (2d ed. 2022).

²⁵³ Complaint at 8, *Guo v. Tyson Foods, Inc.*, 2022 WL 5041798 (E.D.N.Y. Feb. 2, 2021) (No. 1:21-cv-0052).

²⁵⁴ See Bromberg, *supra* note 252.

²⁵⁵ 42 U.S.C. § 1981.

had engaged in retaliation when workers voiced their safety concerns.²⁵⁶ In dismissing the case, the judge wrote:

Protesting racial discrimination is a protected activity for purposes of these statutes, because the anti-discrimination statutes in question prohibit racial discrimination. But lodging general grievances about health or safety is not a protected activity for purposes of these discrimination laws....

Smalls describes raising COVID-19 grievances with company officials before he was fired. But he never alleges that he complained of race discrimination. More specifically, Smalls describes speaking with management seeking clarity about Amazon's quarantine policy and requesting to be placed in quarantine. ... He describes how when he approached management again, he "raised health and safety issues." ... And he describes how at the March 30 public demonstration, he "demanded that Amazon close down the building until it could be deeply cleaned and sanitized" and "noted that Amazon was endangering its workers and that the cleaning company with which it then contracted was short-staffed and giving short shrift to the cleaning process."...

Smalls conspicuously omits from his complaint any allegation that he told Amazon—or even stated publicly—that the company's COVID-19 policies were racially discriminatory, as opposed to simply unsafe. In arguing that Amazon was on notice that his COVID-19 protests were directed at racial discrimination, he relies on a sentence in the complaint stating that during the rally at the fulfillment center, "Smalls opposed practices which discriminated against minority workers and immigrants by subjecting them to inferior terms and conditions of employment due to their race/ethnicity," ... But that paragraph seems carefully crafted to allege only that, in Smalls' view, the practices Smalls denounced "discriminated"—without stating that Smalls criticized the practices on that ground. Smalls' evident belief that Amazon's practices were discriminatory is not enough to place the company on notice that he was protesting Amazon's COVID-19 protocols on that basis, rather than just as insufficiently protective.²⁵⁷

That is, the court was not persuaded to draw the necessary link between the OSH concerns and the racially discriminatory effects of Amazon's approach to the safety of its employees. The decision was summarily affirmed by the appellate court.²⁵⁸

In another case, a coalition of advocacy groups took a different tactic and filed an administrative complaint with the U.S. Department of Agriculture seeking to cut off financial assistance to meat companies Tyson Foods Inc. and JBS USA. The introduction to their complaint reads:

Respondents, meat processing corporations that have received over \$150 million dollars in federal contracts during 2020, are engaged in racial discrimination. Meat processing workers, the majority of whom are Black, Latino, and Asian bear an adverse disparate impact from exposure to COVID-19 caused by Respondents' Corporate Processing Policies that favor a processing capacity objective – the bottom line – over common-sense measures to protect workers' health and safety. In addition, when compared to Respondents' management, workers are overwhelmingly exposed to the virus while white managers are not exposed to the same risks as the Black, Latino, and Asian workers on the "front lines."²⁵⁹

On May 12, 2020, bus drivers, train operators, and other transit workers in Miami-Dade County, Florida, filed a charge with the EEOC on behalf of 28,000 transit workers, asserting:

Over fifty percent (50%) of the transit employees represented by are African-American. This charge is being filed to correct the Employer's discrimination on the basis of race through its

²⁵⁶ Smalls v. Amazon.com, No. 20-CV-5492, 2022 WL 356432, at *2 (E.D.N.Y. Nov 12, 2020).

²⁵⁷ *Id.* at *4.

²⁵⁸ *Id.* at *1.

²⁵⁹ Complaint under Title VI of the Civil Rights Act of 1964, Before the United States Department of Agriculture, Food Chain Workers Alliance v. Tyson Foods, Inc. (Jul. 8, 2020), <https://aboutblaw.com/RTO>.

disparate impact on this overwhelmingly African-American transit employee workgroup regarding the provision of personal protective equipment (“PPE”) related to the COVID-19 pandemic, including, but not limited to, masks, gloves, and cleaning and disinfectant methods/products. This discrimination has a severe negative and potentially lethal impact on the transit employee workforce.²⁶⁰

There was no further record of either of these complaints as of March 2023.

But it is important to note: these cases attempt to mesh OSH concerns with issues of discrimination based on race in novel ways. As in other areas, the pandemic has led to creative litigation that tests pre-existing rigid categories.

6. Tort claims against employers for negligence resulting in injury or death from Covid-19

Claims are pending around the U.S. that allege that employers were negligent or grossly negligent and that their failure to provide safe workplaces and protect workers from COVID-19 led to the deaths of workers or family members, or that employers engaged in fraudulent misrepresentation by reassuring workers of the safety in a workplace in order to entice them to continue working. As with litigation described earlier, many of these cases are still pending on various appeals, and the full story cannot yet be told.

These cases face considerable barriers: state workers’ compensation statutes generally provide the exclusive remedy for injuries and illnesses arising out of work; at least 30 states also passed specific liability limitation laws related to Covid²⁶¹; and, in addition, employers are raising a range of rather novel pandemic-related arguments. As a result, these cases involve complex matters of state-federal jurisdiction, as workers and their families file their claims in state courts under state common law, and employers remove the cases to federal court under various theories that would give the federal court jurisdiction and allow the federal court to dismiss the claim.²⁶² If the cases are sent back to state court, the claim essentially starts again, and the state court will apply that state’s law regarding liability in these situations.

At least twenty lawsuits against meatpacking and poultry processing companies – including Tyson Foods, JBS and Pilgrim’s Pride Corp. – were originally filed in state court and then removed to federal court. The companies have relied on arguments that they were acting pursuant various federal laws and pandemic-related orders and therefore should be immune to state common law actions. As of March 2023, no meatpacking company has prevailed on these arguments, and Tyson Foods’ Petitions for Certiorari to the U.S. Supreme Court have been denied.²⁶³

Here are a few examples of this litigation.

A family in Iowa sued Tyson Foods seeking damages because of the death of a worker. The company insisted in this case, as it has in others, that the Presidential Executive Order that invoked

²⁶⁰ Charge of Discrimination, Transit Workers Union of America, Local 291, v. Miami-Dade County Department of Transportation and Public Works, (May 12, 2020), <https://aboutblaw.com/QN1>.

²⁶¹ For a discussion of these laws, see Fiscal Report: COVID-19 Liability Legislation, National Conference of State Legislatures, <https://www.ncsl.org/fiscal/covid-19-liability-legislation>; for a listing of laws by states, see Practical Law Commercial Transactions, State Liability Shield Las for Business Charts: COVID-19 Immunity: Overview, Thomson Reuters (Oct. 5, 2022), [https://ca.practicallaw.thomsonreuters.com/w-027-5361?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://ca.practicallaw.thomsonreuters.com/w-027-5361?transitionType=Default&contextData=(sc.Default)&firstPage=true).

²⁶² For those reading this who are unfamiliar with the U.S. legal structure, federal courts have limited jurisdiction that is defined by the U.S. Constitution, federal statutes, and interpretation of these provisions. U.S. courts do not have general jurisdiction over common law claims, like claims of negligence, unless the parties are in different state jurisdictions and the case involves an adequate claim for damages. Thus, in these cases, the meatpacking companies are asserting their right to remove a case from the state court to the federal court based on specific arguments involving federal jurisdiction.

²⁶³ Bruce Rolfsen, Future of Tyson Covid Death Suits Hinges on Supreme Court Action, Bloomberg L. (Nov. 16, 2022), <https://news.bloomberglaw.com/safety/future-of-tyson-covid-death-suits-hinges-on-supreme-court-action>.

the Defense Production Act, threatening to require meatpacking plants to remain open,²⁶⁴ should shield the company from liability. The case, filed in 2020 in Iowa state court, wended its way through the courts, moving from state to federal trial court and then on to a federal appellate court, which upheld the decision of the trial court that Tyson was not entitled to protection under the Defense Production Act (and that therefore the case should be returned to state court for further consideration of state-based claims).²⁶⁵ The Supreme Court declined to hear Tyson Foods' appeals in February 2023,²⁶⁶ and the federal courts have now universally rejected the employer's argument.²⁶⁷

Tyson Foods has also fought vigorously against similar tort cases filed in Texas involving workers' deaths, arguing that the coordinated continued enforcement during the pandemic of the Poultry Products Inspection Act²⁶⁸ and the federal Meat Inspection Act,²⁶⁹ as well as the President's invocation of the Defense Production Act (DPA),²⁷⁰ should protect the company from tort liability. They have also pointed to the state's pandemic liability protection act²⁷¹ as another source of protection from these law suits. While the lower federal courts in Texas reached varying conclusions on these arguments,²⁷² Tyson's arguments have consistently been rejected by the appellate court.²⁷³

One critical question before the courts was whether the case could be removed from state court to federal court based on the "federal officer removal statute."²⁷⁴ Essentially, Tyson has argued that it was acting as a federal officer when it kept its plants open during the initial months of the pandemic. Noting that the USDA never did issue a Defense Production Act order to any meatpacking company, the Fifth Circuit Court of Appeals court concluded, "Tyson received, at most, strong encouragement from the federal government. But Tyson was never told that it must keep its facilities open. Try as it might, Tyson cannot transmogrify suggestion and concern into direction and control."²⁷⁵

This litigation is likely to take many twists and turns over the next few years. Interestingly, it does not appear that the companies have always raised the argument that the lawsuits brought on

²⁶⁴ Delegating Authority Under the Defense Production Act With Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19, Exec. Off. of the President (May 1, 2020), <https://www.federalregister.gov/documents/2020/05/01/2020-09536/delegating-authority-under-the-defense-production-act-with-respect-to-food-supply-chain-resources>.

²⁶⁵ *Buljic v. Tyson Foods, Inc.*, 22 F.4th 730, 734 (8th Cir. 2021), reh'g denied, No. 21-1012, 2022 WL 521355 (8th Cir. Feb. 22, 2022), appeal denied. See also *Fernandez v. Tyson Foods, Inc.*, 509 F.Supp.3d (N.D. Iowa 2020) (raising the same issues and consolidated with *Buljic* on appeal).

²⁶⁶ *Tyson Foods Inc. v. Buljic*, U.S., No. 22-70, cert. denied 2/21/23 and *Tyson Foods Inc. v. Glenn*, U.S., No. 22-455, cert. denied 2/21/23.

²⁶⁷ Bruce Rolfsen, Supreme Court Rejects Tyson Foods Covid Liability Claims Appeals, Bloomberg L. (Feb. 21, 2023), Supreme Court Rejects Tyson Foods Covid Liability Claims Appeals ([bloomberglaw.com](https://www.bloomberglaw.com)).

²⁶⁸ 21 U.S.C. § 451.

²⁶⁹ 21 U.S.C. § 601.

²⁷⁰ Delegating Authority Under the Defense Production Act With Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19, *supra* note 264.

²⁷¹ Tex. Civ. Prac. & Rem. Code Ann. § 148.003 (West 2021). For an application of the application of this statute, see *Johnson v. Tyson Foods, Inc.*, 2023 WL 2645553 (5th Cir. 2023) (holding, in a per curiam decision on March 27, 2023, that the plaintiffs had failed to meet the liability shield law's requirements regarding proof of causation and specificity of exposure).

²⁷² *Compare Fields v. Tyson Foods, Inc.*, 561 F. Supp. 3d 717 (E.D. Tex. Sept. 22, 2021) rev'd, 2022 WL 4990258 (5th Cir. Oct. 3, 2022) (reversing and remanding on appeal the District Court's holding that the Poultry Products Protection Act preempts state common law claims), and *Wazelle v. Tyson Foods, Inc.*, No. 2:20-CV-203-Z, 2021 WL 2637335 (N.D. Tex. Jun. 25, 2021) rev'd, 2022 WL 4990424, at *5 (5th Cir. Oct. 3, 2022) (applying federal officer removal jurisdiction, the District Court held that Tyson had met its burden to show it was acting "under the color of federal authority by maintaining operations during the pandemic to ensure the stability of the national food supply"), with *Glenn v. Tyson Foods, Inc.*, 554 F. Supp. 3d 858 (E.D. Tex. 2021), aff'd, 40 F.4th 230 (5th Cir. 2022) (upholding the District Court's conclusion that the Poultry Products Inspection Act did not preempt the plaintiffs' claims, and that the Defense Production Act and the President's food supply chain resources executive order and related federal directions did not provide the company with a colorable federal defense). See also *Requena v. Pilgrim's Pride Corp.*, 599 F. Supp. 3d 469, 483 (E.D. Tex. 2022) (granting summary judgement because the plaintiffs had not satisfied the elements of the state's Pandemic Liability Protection Act, Tex. Civ. Prac. & Rem. Code Ann. § 148.003 (West 2021)).

²⁷³ See e.g., *Glenn v. Tyson Foods, Inc.*, 40 F.4th 230 (5th Cir. 2022), petition for cert. docketed by Tyson Foods, Inc. on Nov. 15, 2022; *Wazelle v. Tyson Foods, Inc.*, No. 22-10061, 2022 WL 4990424, at *1 (5th Cir. Oct. 3, 2022); *Fields v. Brown*, No. 21-40818, 2022 WL 4990258 (5th Cir. Oct. 3, 2022).

²⁷⁴ 28 U.S.C. § 1442(a)(1).

²⁷⁵ *Glenn*, 40 F.4th at 232.

behalf of the workers are barred by state workers' compensation laws. These arguments are likely to be made in the state courts after the cases are remanded for review under state law.

Some examples of specific state law interpretation have, not surprisingly, already surfaced. Of course, the interpretation of these doctrines largely depends both on the state jurisdiction and the court issuing the decision. For example, in a case against JBS Foods, a Pennsylvania family filed a case in Pennsylvania state court, arguing that JBS had engaged in intentional fraudulent misrepresentation and therefore the Pennsylvania bar to tort litigation under the workers' compensation statute should not apply, citing a specific exception to workers' compensation exclusivity under Pennsylvania law. JBS sought to remove the case to federal court, and the federal court, finding that it had no jurisdiction over the claims, remanded the case to state court for further consideration of these issues.²⁷⁶ Another federal judge in Pennsylvania, however, in yet another meatpacking case (the plaintiff worked for Original Philly Cheesesteak Co. in Pennsylvania, a company owned by Tyson), dismissed the plaintiff's claims of fraudulent misrepresentation on the grounds that the Pennsylvania Worker's Compensation Act is the exclusive remedy for these types of claims; an appeal is pending.²⁷⁷

Other cases have been brought when a family member of a worker died as a result of exposure to the virus that was brought home from work. These cases turn on two issues: whether the employer owes a 'duty of care' to the non-employee;²⁷⁸ and whether the claims are foreclosed under workers' compensation law by the derivative injury doctrine which applies the exclusivity of workers' compensation to third party claims deemed collateral to or derivative of the employee's injury.²⁷⁹ States in the past, when considering these types of claims – most commonly involving exposure of family members to asbestos – have reached varying conclusions.²⁸⁰ In California, the question of this liability is now before the state supreme court.²⁸¹ In Wisconsin, after initially holding that an employer "owed a duty of care" to the spouse of a work, the court held, as a matter of public policy, that ConAgra Foods Packaged Foods, a large food packaging company, should not have liability for her death. The court noted both that imposing liability "would impose too great a burden on the defendant and would enter a field with no reasonable or principled stopping point,"²⁸² and that the state of Wisconsin had indicated the state public policy by enacting a COVID liability shield law.²⁸³ Similarly, in a negligence action involving the death of a Southwest Airlines flight attendant's husband, the court concluded that the plaintiffs had failed to show that the airline owed a duty, under the facts alleged, that would give rise to liability – but nevertheless dismissed the case without prejudice.²⁸⁴

²⁷⁶ Benjamin v. JBS S.A., 516 F. Supp. 3d 463, 475 (E.D. Pa. 2021) ("According to the Complaint, Defendants 'intentionally ignor[ed] the fact that workers at the Souderton Plant were infected with and/or were displaying symptoms consistent with COVID-19.' ... Defendants 'misrepresented to workers that there was no risk of infection and/or that the workers were unlikely to become infected and/or deliberately withheld their knowledge of workers at The Plant becoming infected with COVID-19.' ... 'Defendants fraudulently misrepresented the risk of infection to other workers at The Plant to induce those workers to continue their employment at The Plant.' ... 'Defendants intentionally misrepresented and deceived workers into believing that the JBS Souderton Plant was safe to ensure that workers continued to show up each day for their shifts and to ensure that the [] Defendants continued to profit.'").

²⁷⁷ See Barker v. Tyson Foods, Inc., No. 21-223, 2021 WL 5769538, at *2 (E.D. Pa. Dec. 6, 2021), appeal filed Jan. 6, 2022.

²⁷⁸ See, e.g., Est. of Madden v. Southwest Airlines, No. 1:21-cv-00672-SAG, 2021 WL 2580119, at *8 (D. Md. Jun. 23, 2021) ("Southwest owed no duty to Mr. Madden.").

²⁷⁹ See, e.g., See's Candies, Inc. v. County of Los Angeles, 288 Cal. Rptr. 3d 66, 75 (Cal. Ct. App. 2021) (concluding that the derivative injury doctrine did not apply, but noting that the decision does not resolve the question of the duty of care).

²⁸⁰ See Ruiz v. ConAgra Foods Packaged Foods, 606 F. Supp. 3d 881, 884-88 (E.D. Wis. 2022) (providing a recent summary of conclusions reached by states in these cases).

²⁸¹ See Kuciemba v. Victory Woodworks, Inc., 31 F.4th 1268, 1270 (9th Cir. 2022) (certifying the following questions for resolution by the Supreme Court of California: "1. If an employee contracts COVID-19 at his workplace and brings the virus home to his spouse, does California's derivative injury doctrine bar the spouse's claim against the employer? 2. Under California law, does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19?"). The California decision had not been issued as of Mar. 25, 2023.

²⁸² Ruiz, 606 F. Supp. 3d at 889.

²⁸³ Id. at 889 (noting that "the fact that the political branches of the State of Wisconsin have enacted a liability shield for exactly these kinds of claims cannot go unremarked.").

²⁸⁴ Est. of Madden, 2021 WL 2580119, at *8 (D. Md. Jun. 23, 2021) ("Southwest owed no duty to Mr. Madden").

Obviously, law on all of these issues varies among the states – and judges within states can reach different conclusions. Many of these cases remain in litigation. As in other areas, it is too early to tell the full story of this kind of Covid-related litigation. At least as of early 2023, however, COVID-19 has not caused substantial changes in the way states approach liability relating to occupationally-caused illnesses.

7. COVID-related safety and retaliation complaints

As of November 31, 2022, OSHA had received 19,634 complaints regarding COVID-related working conditions from workers, and state plans had received an additional 64,618; the health care industry predominated in these complaints, followed by retail and restaurant industry.²⁸⁵ Although specifics are not available from OSHA directly, a reporter for the Washington Post requested further information and reported that thousands of complaints were received as early as March and April 2020. Many of these came from health care workers, concerned about the lack of PPE, and from workers complaining of working in close proximity to others.²⁸⁶ The complaints early in the pandemic also reflected a breakdown in the availability of masks and respirators for healthcare workers.

Complaints about retaliation for raising concerns about safety related to the pandemic soared. In a usual year, OSHA receives approximately 2000 retaliation complaints under the OSHAct. As of November 30, 2022, 6,924 retaliation complaints had been filed with federal OSHA relating specifically to COVID (with almost all having been filed in the earlier years of the pandemic), and another 2,611 had been filed with state plans.²⁸⁷ OSHA does not report sector-specific information regarding these complaints. Media reports suggested that, again, the majority have come from the healthcare sector and emergency services, but that it is likely many have also come from workers in meatpacking, warehouses, construction and manufacturing.

COVID-related safety retaliation cases have also been brought to courts based on a variety of common law theories, particularly alleging that a termination of a worker violated public policy. Hundreds of cases involving discharges of workers are now reported, and the outcome of the case is entirely dependent on the interpretation of public policy under each state's common law.²⁸⁸

8. COVID-related individual claims of disability discrimination

Workers can raise several claims under the Americans with Disabilities Act that relate to OSH and the pandemic, including requests for reasonable accommodation to work remotely, requests to return to work with accommodation for symptoms of long COVID, and requests to refuse vaccines based on disability issues. The Equal Employment Opportunity Commission had received

²⁸⁵ Covid-19 Response Summary, Dep't of Lab., Occupational Safety & Health Admin. (Feb. 22, 2023), <https://www.osha.gov/enforcement/covid-19-data>.

²⁸⁶ Peter Whoriskey, Jeff Stein & Nate Jones, Thousands of OSHA Complaints Filed Against Companies for Virus Workplace Safety Concerns, Records Show, Wash. Post (Apr. 16, 2020), <https://www.washingtonpost.com/business/2020/04/16/osha-coronavirus-complaints/>.

²⁸⁷ COVID-19 Response Summary, Summary Data for Federal and State Programs - Whistleblower Data, Dep't of Lab., Occupational Safety & Health Admin. (Feb. 22, 2023), <https://www.whistleblowers.gov/covid-19-data>. Of the federal complaints, 1408 were "screened and referred to state plans"; 3615 were "screened and administratively closed"; 1632 were "docketed for investigation"; and, as of April 17, 2022, 1289 had been "investigated and completed." Id. Further information regarding the outcome of these claims is not available. Of the state claims, 1103 were "screened and administratively closed"; 1383 were docketed for investigation; 997 were docketed and completed. Id.

²⁸⁸ Compare Warner v. United Natural Foods, 513 F. Supp. 3d 477 (D. Pa. 2021) (holding that the employee who was terminated after he reported employer for alleged failure to follow COVID-19 safety protocols failed to identify clear pronouncement of public policy that would meet the standard under Pennsylvania law), with Cupi v. Carle Bromenn Med. Ctr., No. 1:21-cv-01286, 2022 WL 808209, at *2 (D. Ill. Mar. 16, 2022) (applying Illinois law and holding, "The operative question is therefore whether Plaintiff's termination for complying with Defendant's COVID-19 procedures frustrated the public policy favoring strong COVID-19 mitigation measures during the height of the pandemic, as mandated by OSHA. By terminating Plaintiff for being absent on October 2, Defendant implies Plaintiff should have come to work on that day. Requiring employees to work while presenting COVID-19 symptoms clearly frustrates and undermines that public policy. And even without that implication, Defendant terminated Plaintiff for adhering to its own COVID-19 mitigation procedures. That in and of itself offends public policy.").

over 6000 ADA complaints raising these and related issues by the end of 2023²⁸⁹ and issued extensive guidance on COVID and the ADA.²⁹⁰ The cases that have been filed vary widely and are largely unresolved at this point.

Related issues are arising under state common law and several federal statutes, including under the Family and Medical Leave Act²⁹¹ (which provides for 12 weeks of unpaid leave for serious health conditions), the Families First Coronavirus Response Act (FFCRA)²⁹² and the Emergency Family and Medical Leave Expansion Act (which provided emergency leave protections during the pandemic). Many of these cases involve terminations, often relating to an employee's absence from work due to illness or the need to quarantine. To date, many courts seem reluctant to extend disability or common law to protect workers in these situations.²⁹³ For claims under FFCRA, the workers' claims had to come within the very specific contours of the statute; claims that did not meet these specific requirements are being dismissed, despite the basic legitimacy of the leave and its relationship to the pandemic.²⁹⁴

All of these cases raise a concern for essential workers who were caught between public health or medical orders to stay home and orders from their employers to return to work. Given the basic employment law in the U.S., in which non-union private sector workers are subject to discharge without cause under the application of the "employment-at-will" doctrine, the cases raise very troubling issues regarding job security during the pandemic.

E. The social safety net and the pandemic

Compared to the general paucity of social support for people generally, as described above, the financial support provided to workers at the beginning of the pandemic was relatively substantial. It came in a number of forms from the federal government, briefly described below. In

²⁸⁹ From April 2020 through December 2021, the U.S. Equal Employment Opportunity Commission had received about 6,225 Covid-related charges of discrimination under federal civil rights laws. In addition, the commission received more than 2,700 vaccine-related charges, largely based on employers' failure to accommodate a request to avoid vaccines based on disability. Erin Mulvaney, Thousands of Covid-Related EEOC Charges Cite Disability Bias, Bloomberg L. (March 10, 2022), https://www.bloomberglaw.com/bloomberglawnews/exp/eyJjdH0JjoiRExOVyIsImklJoiMDAwMDAxN2YtNzRhNS1kZGZlWFZmYtNzZhZGY2ZGMwMDAxIiwic2lnJoidXpzTjVMQXVvYVudFFFQ2lvaGZzdVpWMjNRPSIsInRpbWUiOiIxNjQ2OTM0NTE3IiwidXVpZCI6Ikk3OXRMNzVEWW9QN0NCalhBYWNaeUE9PUxTN2VPS0dad2VVK1IRbk9qbmNyU1E9PSIsInYiOiIxIn0=2bwid=0000017f-74a5-ddfe-abff-76adf6dc0001&cti=LSCH&emc=bdlnw_cn%3A2&et=CHANNEL_NOTIFICATION&isAlert=false&item=read-text&qid=7259250®ion=digest&source=breaking-news&uc=1320024186&udvType=Alert&usertype=External.

²⁹⁰ See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, U.S. Equal Emp. Op'ty Comm'n (Jul. 12, 2022), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

²⁹¹ 29 U.S.C. § 2601.

²⁹² Families First Coronavirus Response Act of 2020, Pub. L. No. 116-127, 134 Stat. 178 (codified as amended in scattered sections, including 42 U.S.C.).

²⁹³ See, e.g., *Payne v. Woods Services*, 520 F. Supp. 3d 670, 678 (E.D. Pa. 2021) (granting the Defendant's motion to dismiss on employee's disability discrimination claim when the employee was terminated after refusing to return to work when under instructions to quarantine); *Brown v. Roanoke Rehabilitation & Healthcare Center*, 586 F. Supp. 3d 1171, 1177 (E.D. Ala. 2022) (denying the Defendant's motion to dismiss on employee's disability claim after the employee was terminated for failing to report to work while she was in the 13th day of her 14-day COVID-19 isolation and while she continued to suffer from COVID symptoms).

²⁹⁴ There are numerous cases on this point. In general, the cases reported to date resolve whether an employer's Motion to Dismiss will be granted. For examples of cases in which these motions were granted, see, e.g., *Nikki Ponti v. Shrewsbury Borough Sch. Dist. Bd. of Educ.*, No. 21-3415, 2021 WL 7904058 (D. N.J. Dec. 1, 2021) (holding that the worker who requested to work from home due to high risk and was terminated did not take leave for any of the reasons enumerated in the FMLA or EFMLEA); *Bowden v. Brinly-Hardy Co.*, No. 3:20-CV-0438-CHB, 2020 WL 9607025 (W.D. Ky. Dec. 15, 2020) (plaintiff was home with COVID and, at the direction of physician, was waiting for a negative test before returning to work, and was discharged after having used up the two weeks of paid leave under FFCRA; while the FMLA provides protected leave for qualifying need "related to a public health emergency," Section 2612(a)(1) (F) defines the narrow circumstance under which employees may qualify under this provision. The court wrote: "a qualifying need related to a public health emergency" may sound like it could encompass a COVID-19 diagnosis, but it does not. Section 2620 defines a 'qualifying need related to a public health emergency' to simply mean 'the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.' § 2620(a)(2)(A). The requisite 'public health emergency' must be related to COVID-19. § 2620(a)(2)(B). A COVID-19 diagnosis or medical order to isolate or quarantine is simply not included"); *Gomes v. Steere House*, 504 F. Supp. 3d 15, 18 (D. R.I. 2020). For examples of cases in which the initial Motion to Dismiss was not granted, see, e.g., *Johnson v. Gerresheimer Glass Inc.*, No. 21-cv-4079, 2022 WL 117768, at *4 (N.D. Ill. Jan. 12, 2022); *Gracia v. L. Off. of Alexander E. Borell*, 535 F. Supp. 3d 1268, 1275 (M.D. Fla. 2021).

addition to these federal supports, state responses varied: some states provided substantially greater support for workers through expanded unemployment and paid leave benefits; others, including Arizona and Mississippi, as described above, sometimes declined federal supports despite the crisis. These materials do not provide state-based information regarding these issues, beyond the descriptions in the state case studies above.

Three federal laws provided assistance to essential workers during the pandemic: the Families First Coronavirus Response Act (FFCRA)²⁹⁵ and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act),²⁹⁶ both enacted in March 2020, and the American Rescue Plan Act of 2021 (ARPA),²⁹⁷ enacted in March 2021. Most of the expanded benefits have, or will soon, expire. With the exception of a three year extension of some expanded health benefits,²⁹⁸ there is no indication that the protections in these laws will be re-enacted or extended.

None of these laws specifically targeted essential workers or critical sectors. But their impact on low wage workers and their families cannot be underestimated. Low wage workers in essential industries who earn the minimum wage may have incomes well below the poverty line. Many of these workers have had inadequate health insurance. Many had no access to paid sick leave. The provisions described below therefore were of great importance to these workers.

Health insurance

Under ARPA, subsidies for individuals purchasing health insurance were raised; the level of financial assistance for people with lower incomes was increased; and the upper income cap for eligibility (known as the subsidy cliff) was eliminated. As a result, it has been estimated that roughly 3.7 million more Americans – more than a third of whom were uninsured – became newly eligible for financial assistance to buy coverage and millions more became eligible for increased financial assistance; more than four out of ten uninsured people became eligible for a free or nearly free health plan; and a majority of previously uninsured people became eligible for financial assistance for the purchase of health insurance.²⁹⁹ These changes substantially affected the eligibility of low wage essential workers to access affordable health care. These changes were not been made permanent, however, and they were set to expire at the end of 2022. As noted above, some of the subsidies have, however, been extended through 2025 as part of the Inflation Reduction Act, legislation that was passed in 2022.³⁰⁰ Despite these improvements, there are still millions of people in the U.S. who are either uninsured or under-insured for health care, including many essential workers.

²⁹⁵ Families First Coronavirus Response Act of 2020, Pub. L. No. 116-127, 134 Stat. 178 (codified as amended in scattered sections, including 42 U.S.C.).

²⁹⁶ Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136 (codified as amended in scattered sections, including 20 U.S.C.), <https://www.govinfo.gov/app/details/PLAW-116publ136>.

²⁹⁷ American Rescue Plan Act of 2021, Pub. L. 117-2 (codified as amended in scattered sections, including 42 U.S.C.), <https://www.govinfo.gov/app/details/PLAW-117publ2>.

²⁹⁸ Health subsidy expansion was continued as part of the 2022 Inflation Reduction Act, Pub. L. No. 117-169, Subtitle C – Affordable Care Act Subsidies, Sec. 12001 (Aug. 16, 2022) (The act extends through 2025 certain adjustments and expansions of the premium tax credit, including to allow taxpayers with income above 400% of the federal poverty line to qualify for the credit.)

²⁹⁹ Matthew Rae et al., How the American Rescue Plan Act Affects Subsidies for Marketplace Shoppers and People Who Are Uninsured, Kaiser Fam. Found. (Mar. 25, 2021), <https://www.kff.org/health-reform/issue-brief/how-the-american-rescue-plan-act-affects-subsidies-for-marketplace-shoppers-and-people-who-are-uninsured/>.

³⁰⁰ 2022 Inflation Reduction Act § 12001 (extending through 2025 certain adjustments and expansions of the premium tax credit, including to allow taxpayers with income above 400% of the federal poverty line to qualify for the credit).

Unemployment insurance

The CARES Act substantially expanded the availability of unemployment insurance (UI) for workers unable to work due to the pandemic. Provisions included the following:

- Pandemic Unemployment Assistance (PUA) provided support for workers who were unable to work due to the pandemic but who would not have qualified under traditional UI eligibility rules. For example, eligible workers under the PUA/CARES Act included independent contractors, gig workers, farmers and individuals who did not have adequate work records to qualify under pre-existing rules. UI became available to people with COVID-related absences, including those who had been diagnosed, were living with or caring for someone who had been diagnosed, or were caring for a child who was unable to attend school. Participating states were required to relax the usual requirement that applicants be actively searching for work to qualify for these benefits in order to accommodate pandemic-related illness, quarantine, and movement restrictions.
- Under the Federal Pandemic Unemployment Compensation (FPUC), eligible people who collected unemployment insurance benefits, including regular unemployment compensation, received an extra \$600 in federal benefits each week through July 31, 2020.
- Pandemic Emergency Unemployment Compensation (PEUC) extended the number of weeks an unemployed worker could collect benefits. After several extensions, PEUC extended unemployment insurance by up to 53 weeks. The PEUC program ended on Sept. 6, 2021.

Under ARPA, the FPUC was extended but reduced to \$300 from \$600 per week for the period January 3, 2021 through September 5, 2021. Those making less than \$150,000 a year and receiving unemployment benefits were also eligible for a \$10,200 tax break under this legislation.

All states but South Dakota initially applied to participate in the expanded UI benefit programs. Several states decided to terminate participation early. All pandemic-related federal unemployment benefits expired on September 6, 2021. It does not appear that they will be renewed.

Paid sick leave

FFCRA included two provisions, the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act, which applied to public employers and private employers with fewer than 500 employees. These temporary provisions provided for:

- Two weeks of paid sick leave at full pay rate if the individual was unable to work because of quarantine or isolation requirements, or because of the need to care for someone else in quarantine, or the need to care for a child whose school was closed due to the pandemic.
- Up to ten weeks of paid leave at two-thirds the employee's regular rate of pay when a worker was unable to work due to the need to care for a child whose school or childcare provider was closed due to the pandemic.

The explanation for excluding large employers with 500 employees was apparently the assumption that these employers would provide paid leave to their employees without regulatory intervention.

FFCRA also provided a refundable tax credit for the mandated paid sick leave and family leave for private-sector employers with under 500 employees. Researchers have now estimated that these payments prevented about one COVID-19 case per day for every 1300 workers covered.³⁰¹

These provisions expired at the end of 2020.

³⁰¹ Stefan Pichler et al., COVID-19 Emergency Sick Leave Has Helped Flatten The Curve in the United States, 39 Health Aff. 2197, 2197 (2020).

Workers' compensation

As noted in the state case studies above, state-based workers' compensation systems have varied in their response to the pandemic. To the extent data are available, it appears that COVID-related claims have been paid, at least for many health care workers, in most states.

Direct payments to individuals and families

Three rounds of direct payments to individuals were authorized. In 2020, the CARES Act provided the first "Economic Impact Payment" of \$1,200 (\$2,400 for a couple) plus \$500 for each child for individuals earning less than \$75,000 or couples earning \$150,000. In December 2020 the COVID-related Tax Relief Act of 2020 authorized a second direct payment of \$600 (\$1,200 for a couple) plus \$600 for each child. ARPA provided a third round of direct payments of \$1,400 for eligible individuals or \$2,800 for married couples, plus \$1,400 for each qualifying dependent, including adult dependents. In addition, ARPA substantially expanded the Child Tax Credit, increasing the amount and providing a mechanism for monthly payment from July through December of 2021 for families earning up to \$150,000. This meant that qualifying families received \$250 per month for each child 6-17 years old and \$300 per month for each child under 6. The Child Tax Credit, with its monthly payments to families, had a demonstrable – albeit brief – effect in reducing poverty.³⁰²

All of these direct payments provided substantial assistance to low wage essential workers. All of them have expired.

Hazard pay

Hazard pay was proposed in Congress for essential workers, but never enacted. No federal governmental program mandated increased pay based on hazardous work during the pandemic. A few state and local governments did enact hazard pay for targeted industries. For example, a Seattle city ordinance mandated that all grocery stores with over 500 workers provide their workers with hazard pay of \$4 an hour.³⁰³ Private firms did sometimes voluntarily offer hazard pay for some portion of the pandemic. Health and safety activists generally prefer aggressive safety measures to increases in pay for workers exposed to risk.

³⁰² See, e.g., Zachary Parolin et al., Sixth Child Tax Credit Payment Kept 3.7 Million Children Out of Poverty in December, 6 *Poverty & Soc. Pol'y* Brief, Jan. 18, 2022, at 1, 2.

³⁰³ Councilmember Mosqueda, Hazard Pay for Grocery Employees, CB 119990, <https://seattle.legistar.com/View.ashx?M=F&ID=9085980&GUID=82958EEA-7E5D-450E-BFF8-4B24D9B61339> (last visited Mar. 7, 2023). The ordinance withstood a challenge brought by grocery stores covered by the ordinance [*Nw. Grocery Ass'n v. City of Seattle*, 526 F. Supp. 3d 884, 897 (W.D. Wash. 2021)] but was repealed effective Sept. 2, 2022. Seattle Office of Labor Standards Announces the Suspension of Hazard Pay Under the Grocery Employee Hazard Pay Ordinance, City of Seattle, Wash. (Sept. 2, 2022 8:34 AM), <https://content.govdelivery.com/accounts/WASEATTLE/bulletins/32af26c>.

► 3 OSH shortcomings and challenges faced by U.S. essential workers, highlighted by the pandemic experience

As we entered the fourth year of the pandemic, OSHA has continued to promise to issue a permanent standard governing exposure to Covid-19 in the healthcare industry. For now, however, all essential workers remain at risk without adequate OSH protections in most places in the country. On February 10, 2023, President Biden announced that the federal emergency would be terminated on May 11, 2023.³⁰⁴

Below is a brief synopsis of key OSH shortcomings and challenges that affect essential frontline workers and which have been highlighted by the pandemic:

1. Federal OSH protection for essential at-risk workers is not adequate. Even when the federal administration is committed to worker protection, OSHA is prevented from moving quickly due to cumbersome standard-setting procedures and the complexity of enforcing the general duty clause. This is further exacerbated by the reluctance of the judiciary to uphold standards that are promulgated, as evidenced most recently by the Supreme Court's rejection of the OSHA vaccine-or-test mandate.
2. The lack of any requirement for the development of workplace-specific Occupational Safety and Health Management Systems outside of the mining industries means that firms are under no obligation to continuously monitor hazards in workplaces. Obligations under the OSHA general duty clause are not an adequate substitute. When a new hazard, such as COVID-19, is recognized, there is therefore no clear obligation of employers to act immediately to reduce levels of risk.
3. The OSH laws in the U.S. focus on the employer-employee relationship. This means that essential workers on worksites may lack both OSH and anti-retaliation protections. Without a general duty of care that requires firms to protect all workers on a worksite, U.S. OSH laws do not adequately protect all essential workers.
4. The inadequacy of existing federal regulation has meant that protection for essential workers during the pandemic has devolved to states and localities. The pandemic has revealed the variability of states' willingness and capability to address serious OSH risks. It also highlights the troubling effects of changeable state politics on the ability to protect essential workers. Moreover, state-based public health is simply not adequate to address an infectious disease pandemic: borders of states and localities are completely porous, meaning that public health measures taken only at the local level are inevitably inadequate during an infectious disease pandemic.
5. The overall weakness of local public health agencies has meant that they are not in a position to develop and sustain OSH expertise that would enable them to move quickly and effectively to protect essential workers or intervene in workplaces. The underfunding of local public health has been an issue raised for years by the broader public health community in the U.S.; the particular effects on essential workers during the pandemic has illustrated the weaknesses of the current system.

³⁰⁴ Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID- 19) Pandemic (Feb. 20, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/10/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic-3/>.

6. There is a complete lack of any OSH protection for state and local public sector workers in Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Kansas, Louisiana, Mississippi, Missouri, Montana, New Hampshire, North Dakota, Nebraska, Ohio, Oklahoma, Rhode Island, Pennsylvania, South Dakota and Texas, and limited protection in some other states. Essential public sector workers in these states work in industries including healthcare, transportation, security and corrections. Under the current regulatory regime, these workers can only be given OSH protection through state law. But, in general, these workers are in states with inadequate protection for workers generally. It is unlikely that universal protection will be forthcoming unless there is a federal mandate that requires state action.
7. The lack of adequate job protections for essential workers, starting with the basic employment laws and underscored by the inadequate anti-retaliation provisions of OSHA, suggests that essential workers are – and perceive themselves to be – at risk if they raise health and safety concerns. This lack of job protection, combined with the low level of unionization, means that there are few clear avenues for workers to influence OSH decision-making at the workplace or firm level. Despite the statutory rights to participate in workplace inspections and in standard-setting, these rights are difficult for non-union workers to exercise. Worker voice is simply not strong enough to address serious OSH issues such as those raised by the pandemic.
8. Little attention was paid in the U.S. to the specific needs of particular groups of essential workers, and the results have been catastrophic in some communities. This includes the failure to address the inevitable disparate impact of the pandemic on low income and poor communities which are largely comprised of immigrants and people of color. The pandemic brought out the extraordinary need – and failures – to address broad issues of inequality in the U.S. Lack of adequate housing, public transportation and childcare, as well as income disparities, were all highlighted during the pandemic. Essential workers were caught at the center of broad societal failures.
9. The particular inadequacies of the existing structure of social protections, particularly the weakness of the health care system (both access to insurance and access to care) and lack of federal paid sick leave, were also highlighted by the pandemic. The temporary interventions in these areas are expiring. There is no indication that federal legislation will be passed and implemented that will improve the situation. Again, social protections are left to the states. The willingness among states to address these issues varies tremendously, and essential workers in poor conservative states are paying the price.
10. The lack of coordination during the pandemic between public health agencies (such as the CDC) and OSH agencies at both the state and federal level has resulted in a lack of adequate protection for essential workers. For example, public health agencies at the federal level and in many states failed to maintain adequate data regarding the association of disease spread and workplace exposures. Without this occupationally based data, it is more difficult for OSH regulatory agencies to develop regulatory and enforcement strategies.
11. There has been inconsistent communication of OSH and public health strategies to the general public and to essential workers. The controversies regarding vaccines and vaccine mandates has further blurred the public health messaging. There is a need for adequate, effective, consistent and continuous communication of public health strategies based on changing scientific information to both workers and employers, as well as the general population.

► Conclusion

The failure of the U.S. to ratify ILO OSH conventions is emblematic of the weak state of OSH regulation and enforcement in the U.S. Specific recommendations can flow from the shortcomings and challenges enumerated above. But the current political situation in the U.S. makes it doubtful that Congress will pass federal legislation that would eliminate some of the weaknesses of the existing OSHA Act and strengthen worker voice. This means that disparities among states will continue for the time being, and worker advocates have turned to state legislatures for more adequate protection for essential workers. This approach raises at least four inherent and troubling issues: the disparities among states for protecting essential workers will persist; states are not individually in a good position to address issues of supply chain adequacy, such as for PPE, that is critical for these workers; states are limited by federalism and preemptive effects of some federal laws to do all that is necessary to protect essential workers; and, from the vantage point of public health generally, states have no ability to contain the spread of an infectious disease, given the porosity of their borders.

Effective national leadership in both the key public health agencies and the OSH agencies is therefore essential. Current political and agency OSH leadership appears to be committed to expanding protections for essential workers, but the delay in issuing a permanent standard to protect healthcare workers from airborne disease illustrates the cumbersome and bureaucratic nature of the regulatory process. The ability to overcome these obstacles is critical to create a state of preparedness for the next pandemic that will affect essential workers.

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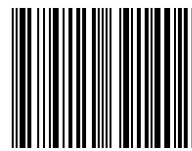
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