

## NOTES

### OSHA'S FAILURE TO PROTECT AMERICA'S ESSENTIAL WORKERS: THE NEED FOR MANDATORY RULES IN THE COVID-19 PANDEMIC

Hannah Kail

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2022.867  
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program and is cosponsored by the University of Pittsburgh Press.

# NOTES

## OSHA'S FAILURE TO PROTECT AMERICA'S ESSENTIAL WORKERS: THE NEED FOR MANDATORY RULES IN THE COVID-19 PANDEMIC<sup>1</sup>

Hannah Kail\*

### INTRODUCTION

Employees at a Swift beef plant in Greeley, Colorado, worked tirelessly through the COVID-19 pandemic, helping sustain the country's food supply during the crisis.<sup>2</sup> However, their employers at JBS Foods failed to keep their work environment safe which led to tragic consequences.<sup>3</sup> In Spring 2020, the virus spread

---

<sup>1</sup> This Article was written with the data and information available in the Spring of 2021. On June 21, 2021, OSHA adopted a Healthcare Emergency Temporary Standard ("Healthcare ETS") to protect essential workers in healthcare settings from COVID-19. Statement on the Status of the OSHA COVID-19 Healthcare ETS, OSHA, U.S. Dep't of Lab., COVID-19 Healthcare ETS (Dec. 27, 2021), <https://www.osha.gov/coronavirus/ets> [<https://perma.cc/JU5L-G7FW>]. However, OSHA's protections were not extended to all essential workers. *Id.* This Article remains highly relevant in that the delay of OSHA's promulgation of an ETS severely impacted essential workers during the height of the COVID-19 pandemic. Additionally, OSHA was unable to finalize the Healthcare ETS within the required six months and reopened the docket to allow for submission of post-hearing comments and briefs—the deadline for which was on May 23, 2022. 29 C.F.R. § 1910 (2022).

\* J.D., 2022, University of Pittsburgh School of Law; B.A. Washington & Jefferson College, 2019.

<sup>2</sup> Ed. Bd., *Under Trump, OSHA's Covid-19 Response Is Failing Workers*, N.Y. TIMES (Sept. 14, 2020), <https://www.nytimes.com/2020/09/14/opinion/trump-covid-osh-workers.html>.

<sup>3</sup> *Id.*

quickly through the plant and killed eight individuals.<sup>4</sup> Two whistleblowers from the plant filed affidavits alleging that JBS pressured the employees to go to work when they were sick.<sup>5</sup> After an investigation, the Occupational Safety and Health Administration (“OSHA”) found that JBS failed to ensure that the working environment was safe for these workers.<sup>6</sup> OSHA also cited the company for failing to make proper disclosures about illness after an earlier spring inspection in May 2020.<sup>7</sup> For the unsafe conditions that led to the deaths of the JBS employees, the agency imposed a fine of \$15,615.<sup>8</sup> This negligible sum to a fifty-two billion dollar company<sup>9</sup> sends a message to executives that they are relatively free to continue operations as usual.

In September of that year, OSHA also fined Smithfield Foods, another multibillion-dollar company, a mere \$13,494.<sup>10</sup> The company’s failure to protect workers resulted in a plant shutdown after the widespread infection of more than a thousand workers took the lives of four workers.<sup>11</sup> In some cases, the infected workers even spread the virus to their household members.<sup>12</sup> The industry’s awareness of its carelessness is apparent—before the issuance of the citation,

---

<sup>4</sup> *Id.*

<sup>5</sup> Cuyler Meade, *Whistleblowers: JBS’ COVID-19 Screening Protocols Encouraged Employees to Work While Sick, Discouraged Accurate Screening*, GREELEY TRIB. (Oct. 6, 2020), <https://www.greeleytribune.com/2020/10/06/whistleblowers-jbs-covid-19-screening-process-encouraged-employees-to-work-while-sick-discouraged-accurate-screening/> [<https://perma.cc/A6RV-2NFY?view-mode=client-side&type=image>]. These two whistleblowers were hired by the plant to screen employees for COVID-19. *Id.* Among the allegations in the affidavit, they claim that the screening equipment malfunctioned, employees were charged for COVID-19 tests, and that the plant would ignore employees’ possible virus symptoms. *Id.*

<sup>6</sup> Press Release, OSHA, U.S. Dep’t of Lab., U.S. Department of Labor Cites JBS Foods Inc. for Failing to Protect Employees from Exposure to the Coronavirus (Sept. 11, 2020), <https://www.dol.gov/newsroom/releases/osha/osha20200911-1> [<https://perma.cc/8A3N-LGK3>] [hereinafter JBS Foods Release].

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Ed. Bd., note 2.

<sup>10</sup> Press Release, OSHA, U.S. Dep’t of Lab., U.S. Department of Labor Cites Smithfield Packaged Meats Corp. For Failing to Protect Employees from Coronavirus (Sept. 10, 2020), <https://www.osha.gov/news/newsreleases/region8/09102020> [<https://perma.cc/82X5-4PD3>].

<sup>11</sup> *Id.*

<sup>12</sup> Johnathon Steinberg et al., *COVID-19 Outbreak Among Employees at a Meat Processing Facility—South Dakota, March–April 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1015, 1015 (2020).

Smithfield Foods attempted to sue OSHA to prevent them from examining their records.<sup>13</sup> Additionally, the Centers for Disease Control and Prevention (“CDC”) had previously noted the densely packed employees in the plant and inadequate testing procedures.<sup>14</sup> The leaders at Smithfield Foods showed a shocking lack of care for their workers as well. Shortly before the outbreak at the plant, the chief executive wrote in a letter that “[s]ocial distancing is a nicety that makes sense only for people with laptops.”<sup>15</sup> Such a minuscule fine in the face of a clear disregard for employee safety should not be acceptable.

The meatpacking industry is one of the hardest-hit groups of essential workers.<sup>16</sup> As of February 19, 2021, at least 45,000 workers in meat and poultry processing facilities have contracted the virus.<sup>17</sup> This includes at least 483 outbreaks across 30 states.<sup>18</sup> At least 240 workers from these plants have died.<sup>19</sup> These examples are just a few of the many tragic instances where the United States’ failure to protect its essential workers led to widespread infection and death during the pandemic.<sup>20</sup>

Essential workers are the backbone of America. They are our farm and factory workers, our grocery clerks, our delivery staff, our teachers, our restaurant workers, and our hospital staff. These individuals risk their own well-being and the health of

---

<sup>13</sup> Thomas M. Selden & Terceira A. Berdahl, *Risk of Severe COVID-19 Among Workers and Their Household Members*, 181 JAMA INTERNAL MED. 120 (2021).

<sup>14</sup> Steinberg et al., *supra* note 12, at 1016, 1018.

<sup>15</sup> Michael Grabell et al., *Emails Reveal Chaos as Meatpacking Companies Fought Health Agencies Over COVID-19 Outbreaks in Their Plants*, PROPUBLICA (June 12, 2020), <https://www.propublica.org/article/emails-reveal-chaos-as-meatpacking-companies-fought-health-agencies-over-covid-19-outbreaks-in-their-plants> [https://perma.cc/DGM8-UBHG].

<sup>16</sup> See Sky Chadde, *Tracking Covid-19's Impact on Meatpacking Workers and Industry*, INVESTIGATE MIDWEST (Apr. 16, 2020), <https://investigatemidwest.org/2020/04/16/tracking-covid-19s-impact-on-meatpacking-workers-and-industry/> [https://perma.cc/E5V8-FUT4].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Coronavirus Outbreak at Seattle-Area Nursing Home Fueled by Sick Workers and Lack of Supplies, CDC Finds*, CBS NEWS (Mar. 19, 2020), <https://www.cbsnews.com/news/coronavirus-outbreak-seattle-area-nursing-home-life-care-sick-workers-lack-supplies-cdc-covid-19/> [https://perma.cc/RT8N-WKDN]. COVID-19 took the lives of 35 people in a long-term care facility in Seattle, Washington. *Id.* The CDC report revealed that the facility’s staff continued to work after having symptoms of the virus. *Id.* The investigation also found that a lack of personal protective equipment, limited testing, and a lack of hand sanitizer contributed to the spread. *Id.*

their family members to go to work every day and provide a small bit of normalcy to everyone's lives. OSHA's very purpose is to protect these workers—not just during normal times, but also in unprecedented times.<sup>21</sup> Congress created OSHA to “ensure safe and healthful working conditions for working people by setting and enforcing standards and by providing training, outreach, education and assistance.”<sup>22</sup> Before the creation of this agency, workplace safety measures were scattered and ineffective.<sup>23</sup> Congress realized that employees should not have to solely depend on their employers to protect them from workplace hazards.<sup>24</sup> This motivated the inclusion of 29 U.S.C. § 655(c), which expressly provides that OSHA “shall” issue a mandatory emergency temporary standard (“ETS”) to protect employees from workplace hazards.<sup>25</sup>

This Note addresses the pressing legal question presented by OSHA's failure to properly protect essential workers during the COVID-19 pandemic. This is a complex and serious issue that will not disappear once the United States reaches herd immunity. Although infrequent, these kinds of viruses and diseases arise, and the United States needs to be better prepared to face the next one. This Note argues that the most effective way to address this issue is for OSHA to issue mandatory requirements for workplace safety. Essential workers are what keep America running, and we need to do a better job of protecting them.

Part I of this Note briefly explains the necessary background on COVID-19 and how its modes of transmission present a unique risk to essential workers. Part II looks at OSHA's current response and how it is inadequate. Next, this Note examines other states' individual responses to this crisis. This Note then examines the unsuccessful legal recourses taken so far and how they demonstrate the widespread need for such regulations. Finally, Part V proposes a solution to this issue in the form of emergency temporary standards.

---

<sup>21</sup> OSHA, *About OSHA*, U.S. DEP'T OF LAB., <https://www.osha.gov/aboutosha> [<https://perma.cc/DRP3-TUNL>].

<sup>22</sup> *Id.*

<sup>23</sup> *See* *Kiewit Power Constructors Co. v. Sec'y of Lab.*, 959 F.3d 381, 385 (D.C. Cir. 2020) (“Until [the OSH Act], workplace safety was addressed in a patchwork by federal and state regulations and, to a degree, employers' voluntary efforts. The measures were largely ineffective.” (citing S. REP. NO. 91-1282, at 3-4 (1970))).

<sup>24</sup> *Id.*

<sup>25</sup> 29 U.S.C. § 655(c).

## I. EXPLAINING COVID-19 AND ESSENTIAL WORKERS' UNIQUE RISKS

OSHA's response to the COVID-19 crisis is inadequate and is failing workers daily. As of the date of writing, the virus has infected more than 28.3 million people in the United States and taken the lives of more than 502,000 people in the United States.<sup>26</sup> Since its creation in 1970,<sup>27</sup> OSHA has never dealt with a public health crisis that has claimed the lives of more workers in such a short amount of time.<sup>28</sup> A significant portion of these individuals are essential workers.<sup>29</sup> Despite its refusal to issue an ETS, OSHA is very well-aware of the risks posed to essential workers. In March 2020, at the beginning of the outbreak in the United States, OSHA acknowledged specific industries whose exposure risk in the workplace was "high" or "very high."<sup>30</sup>

COVID-19 is caused by a coronavirus called SARS-CoV-2.<sup>31</sup> According to the CDC, older adults, the immunocompromised, and people with underlying medical conditions are at the highest risk for developing more severe complications from this illness.<sup>32</sup> Some of these underlying conditions include diabetes, emphysema, kidney and heart disease, smoking, and asthma.<sup>33</sup>

---

<sup>26</sup> These numbers are as of February 24, 2021. They are likely to have increased substantially by the time of publication.

<sup>27</sup> *About OSHA*, *supra* note 21.

<sup>28</sup> *In re AFL-CIO*, No. 20-1158, 2020 WL 3125324 (D.C. Cir. June 11, 2020).

<sup>29</sup> Selden & Berdahl, *supra* note 13.

<sup>30</sup> OSHA, GUIDANCE FOR PREPARING WORKPLACES FOR COVID-19 19 (2020), <https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf> [hereinafter WORKPLACE GUIDANCE]; *see also* Enforcement Memorandum from Patrick J. Kapust, Acting Dir., Directorate of Enf't Programs, to Reg'l Adm'rs & State Plan Designees (Apr. 10, 2020), <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19> [<https://perma.cc/KWD9-YNCL>] [hereinafter Enforcement Memorandum].

<sup>31</sup> *Basics of COVID-19*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/about-COVID-19.html> [<https://perma.cc/6VKV-D9JQ>] (last updated Nov. 4, 2021).

<sup>32</sup> *Factors That Affect Your Risk of Getting Very Sick from COVID-19*, CDC: COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/your-health/risks-getting-very-sick.html> [<https://perma.cc/7YRH-7X7A>] (last updated Aug. 11, 2022).

<sup>33</sup> *Medical Conditions*, CDC: COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://perma.cc/38V3-RFLB>] (last updated Sept. 2, 2022).

This virus is highly contagious and spreads easily.<sup>34</sup> It most commonly spreads through airborne transmission when an infected person coughs, sneezes, talks, or even breathes.<sup>35</sup> Because the respiratory droplets produced by infected persons can remain in the air for minutes to hours, the virus is capable of infecting people further than six feet away.<sup>36</sup> This type of transmission most frequently occurs in “enclosed spaces” with “inadequate ventilation.”<sup>37</sup> The virus’s mode of transmission makes it particularly easy for mass spread in places like factories and grocery stores, which employ millions of essential workers in the United States.<sup>38</sup> Additionally, the high rate of asymptomatic spread makes mass infection even more likely.<sup>39</sup> Although the virus can present itself in some people as mild cold symptoms, it wreaks havoc on the bodies of others, causing long-lasting heart, lung, and kidney damage.<sup>40</sup> For those most severely affected by the virus, the mental health toll can also be overwhelming.<sup>41</sup>

With the staggering number of essential workers in the United States that must go to work every day and risk exposure to this deadly virus,<sup>42</sup> the consequences of failing to protect them are serious. Significantly, almost half of essential workers meet the CDC increased-risk guidelines,<sup>43</sup> and the alarming issue of the risk of

---

<sup>34</sup> SARS-CoV-2 Transmission, CDC: COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html> [<https://perma.cc/6884-MWLF>] (last updated May 7, 2021).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Yea-Hung Chen et al., *Excess Mortality Associated with the COVID-19 Pandemic Among Californians 18-65 Years of Age, by Occupational Sector and Occupation: March Through November 2020*, 16 PLOS ONE 1, 2, 6 (2021).

<sup>39</sup> Nathan W. Furukawa et al., *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*, 26 EMERGING INFECTIOUS DISEASES J. e1, e4 (2020), [https://wwwnc.cdc.gov/eid/article/26/7/20-1595\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article) [<https://perma.cc/Z9WK-VDUE>].

<sup>40</sup> *Long COVID or Post-COVID Conditions*, CDC: COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html> [<https://perma.cc/A2EM-GMHC>] (last updated Sept. 1, 2022).

<sup>41</sup> Judy F. Minkove, *Shedding Light on COVID-19 Survivors’ Mental Health*, JOHNS HOPKINS MED. (May 13, 2021), <https://www.hopkinsmedicine.org/news/articles/shedding-light-on-covid-19-survivors-mental-health> [<https://perma.cc/W8ZV-CZSY>].

<sup>42</sup> More than 70% of workers in the United States are classified as essential. Selden & Berdahl, *supra* note 13, at 121. Of the 112.4 million essential workers in the United States, only 31.2 million could work from home. *Id.* This leaves over 81 million workers forced to go to work in the pandemic. *Id.*

<sup>43</sup> *Id.*

transmission to household members who live with essential workers exacerbates the potential for community spread, leading to severe consequences.<sup>44</sup>

COVID-19 illnesses and deaths have also highlighted racial disparities among America's essential workers.<sup>45</sup> Black and Hispanic residents contract the virus and die from it at much higher rates than white residents.<sup>46</sup> Although data disaggregation at a national level has been slow, many states are reporting substantially disproportionate impacts.<sup>47</sup> For instance, Louisiana reported that while their population consists of thirty-three percent Black people, this group represents sixty percent of the state's deaths from COVID-19.<sup>48</sup> Black and Hispanic workers are also employed in essential businesses at higher rates than white workers, which increases their exposure to the risk of contracting the virus.<sup>49</sup>

These factors create an alarming situation that calls for swift action from OSHA. Inconsistent implementation of workplace safety suggestions is not enough during a global pandemic that is taking the lives of essential workers. Employers should not be given the current leeway to avoid taking the highest precautions to protect their employees. This approach has only resulted in outbreaks among these people who sacrifice their own health and the health of their families.<sup>50</sup> By instituting mandatory guidelines for workplace safety during this pandemic, and future ones, the agency can provide the protection that essential workers deserve.

## II. THE INADEQUACY OF OSHA'S CURRENT RESPONSE

Businesses have little incentive to follow COVID-19 safety protocol. OSHA depends on the CDC's general guidelines, which are not mandatory.<sup>51</sup> They have

---

<sup>44</sup> Sara G. Miller, *Coronavirus Spreads Quickly Among Household Members, CDC Report Finds*, NBC NEWS (Oct. 30, 2020), <https://www.nbcnews.com/health/health-news/coronavirus-spreads-quickly-among-household-members-cdc-report-finds-n1245493> [<https://perma.cc/KNM9-K9UL>].

<sup>45</sup> Tiana N. Rogers et al., *Racial Disparities in COVID-19 Mortality Among Essential Workers in the United States*, 12 WORLD MED. & HEALTH POL'Y 311, 312 (2020).

<sup>46</sup> *Id.* at 311.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Selden & Berdahl, *supra* note 13, at 120–21.

<sup>51</sup> WORKPLACE GUIDANCE, *supra* note 30, at 12.



only issued non-binding safety memos and suggestions for employers.<sup>52</sup> This means that if businesses fall short of these guidelines, OSHA cannot enforce them.<sup>53</sup> Issuing an ETS would force employers to meet the safety guidelines or be subject to substantial consequences.

OSHA currently regulates under the General Duty Clause, which allows it to take action in response to formal complaints that involve the death or serious injury of a worker on the job.<sup>54</sup> However, the agency recognizes that this duty “is not a standard or regulation, and it creates no new legal obligations.”<sup>55</sup> This standard is insufficient to protect workers from being infected for multiple reasons. First, these guidelines do not address the specific concerns around the spread of COVID-19 because they were not created to address this kind of airborne infectious disease.<sup>56</sup> Thus, employers do not have to take many preventative measures to stop the spread of the virus.<sup>57</sup> For example, there is no requirement that employers assess the worksite for potential exposure risks, no requirement for social distancing, and no requirement for isolation after potential contact with the virus.<sup>58</sup> OSHA has even previously admitted that this General Duty Clause does not “adequately protect workers with occupational exposure to infectious diseases.”<sup>59</sup> In order to show that an employer has violated this clause, OSHA must prove that there is a recognized hazard in existence in the workplace, and that it is “feasible” for the employer to abate this hazard.<sup>60</sup> OSHA must prove this in each individual case, and with their limited resources, it is often difficult for them to do.<sup>61</sup> Another issue is that OSHA’s

---

<sup>52</sup> See generally *id.*

<sup>53</sup> *Id.*

<sup>54</sup> 29 U.S.C. § 654(a)(1).

<sup>55</sup> See generally WORKPLACE GUIDANCE, *supra* note 30.

<sup>56</sup> 29 U.S.C. § 654.

<sup>57</sup> See *id.*

<sup>58</sup> See generally OSHA, *Regulations*, U.S. DEP’T OF LAB., <https://www.osha.gov/coronavirus/standards> [<https://perma.cc/2WSK-CMAU>].

<sup>59</sup> See OSHA, U.S. DEP’T OF LAB., INFECTIOUS DISEASES SER BACKGROUND DOCUMENT (2014).

<sup>60</sup> OSHA, U.S. Dep’t of Lab., Opinion Letter on Elements Necessary for a Violation of the General Duty Clause (Dec. 18, 2003), <https://www.osha.gov/laws-regs/standardinterpretations/2003-12-18-1> [<https://perma.cc/V8SE-9HXB>].

<sup>61</sup> Alan Ferguson, *OSHA’s General Duty Clause*, SAFETY & HEALTH MAG. (Dec. 20, 2019), <https://www.safetyandhealthmagazine.com/articles/19258-oshas-general-duty-clause> [<https://perma.cc/E5VG-HFKR>]. A recent example of this difficulty presented itself in a case where despite a roofing employee

current guidelines allow employers to choose how to abate hazards. The General Duty Clause gives OSHA no authority to mandate specific, uniform abatement procedures.<sup>62</sup> However, OSHA's mandatory standards would give employers clear instructions to follow, and they would know exactly what precautions and measures to take. Additionally, it is easier for OSHA to prove violations and issue citations when there is a clear set of expectations for employers.

Despite its reluctance to issue a mandatory standard, OSHA has clear authority to do so. Section 6(c) of the Occupational Safety & Health Act of 1970 states that OSHA “shall provide . . . for an emergency temporary standard to take immediate effect upon publication in the Federal Register if [it] determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.”<sup>63</sup> Given the daily rise in COVID-19 deaths and its unique ability to spread in the workplace, the virus poses a risk that qualifies as such a “grave danger.” This emergency standard is the best way to protect the millions of employees exposed to this risk on a daily basis.

Despite thousands of COVID-19 related complaints, OSHA has issued only a few violations linked to the virus.<sup>64</sup> These fines are no more than a light slap on the wrist—insignificant amounts of money for corporations worth billions of dollars.<sup>65</sup> For example, OSHA proposed a fine of \$15,615 to a factory whose failure to protect workers from the spread of COVID-19 led to the death of eight factory workers.<sup>66</sup> Without actual consequences that affect the company, there is little incentive to protect workers. Additionally, as of September 18, 2020, OSHA decided to withhold violation details from the public.<sup>67</sup> This has a direct negative effect on employers’

---

dying of a heat stroke, OSHA was unable to prove that excessive heat was “present” at the roofing company worksite. A.H. Sturgill Roofing Inc., 2019 CCH OSHD ¶ 33712, at \*3–5 (No. 13-0224, 2019).

<sup>62</sup> See Arcadian Corp., 2005 CCH OSHD ¶ 32,756 (No. 93-0628, 2004).

<sup>63</sup> 29 U.S.C. § 655(c)(1) (emphasis added).

<sup>64</sup> OSHA, *Inspections with COVID-19 Related Violations*, U.S. DEP’T OF LAB., <https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations> [https://perma.cc/EXZ4-AGU4] [hereinafter *COVID Inspections*].

<sup>65</sup> *Id.*

<sup>66</sup> JBS Foods Release, *supra* note 6.

<sup>67</sup> Bruce Rolfsen, *OSHA Changes Policy for Releasing Workplace-Safety Citations*, BLOOMBERG L. (Sept. 18, 2020, 4:35 PM), <https://news.bloomberglaw.com/us-law-week/osha-changes-policy-for-releasing-workplace-safety-citations?context=article-related> [https://perma.cc/R7SD-3KKW].

decisions to comply with safety regulations.<sup>68</sup> If there is no threat of substantial fines or public censure, employers have little motivation to make changes.<sup>69</sup>

When OSHA has the power to use real, enforceable standards, the citations they issue are serious warnings to companies that fail to keep their workers safe. For example, after an explosion at a BP refinery in 2005 that killed fifteen people, OSHA fined the company eighty-seven million dollars.<sup>70</sup> This is a considerable sum of money that forces large companies like these to pay attention. In contrast, fines of mere thousands of dollars do nothing to gain the attention of million-dollar companies.

OSHA's response has been inadequate in other areas as well. Until May 19, 2020, their strategy was to focus only on "high-risk" areas such as hospitals, and prisons.<sup>71</sup> Up until this date, they also did not make employers keep a record of employees who got COVID-19 unless there was "objective evidence" that the employee was infected through work.<sup>72</sup> With such a broad, ambiguous definition, there is ample room for employers to avoid recording COVID-19 cases in their workforce by justifying the cases as not having enough evidence that the infection was work-related. By January 2021, more than 55,000 complaints were filed with OSHA's federal and state branches.<sup>73</sup> The agency closed more than 46,000 of these complaints—actually inspecting only a very small fraction of them.<sup>74</sup> OSHA's Principal Deputy Assistant Secretary of Labor, Loren Sweatt, testified that the reason for the low numbers was that the agency still had time to catch up on inspections due

---

<sup>68</sup> Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 AM. ECON. REV. 1866 (2020).

<sup>69</sup> *Id.*

<sup>70</sup> Guy Chazan, *BP Fined \$87 Million Over Explosion*, WALL ST. J. (Nov. 2, 2009), <https://www.wsj.com/articles/SB10001424052748703399204574505034081842414>.

<sup>71</sup> Revised Enforcement Memorandum from Patrick J. Kapust, Acting Dir., Directorate of Enf't Programs, to Reg'l Adm'rs & State Plan Designees (May 19, 2020), <https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19> [<https://perma.cc/2CRB-MZWR>]; Enforcement Memorandum, *supra* note 30.

<sup>72</sup> Enforcement Memorandum, *supra* note 30.

<sup>73</sup> OSHA, *COVID-19 Response Summary*, U.S. DEP'T OF LAB., [https://www.osha.gov/enforcement/covid-19-data#fed\\_inspections\\_open](https://www.osha.gov/enforcement/covid-19-data#fed_inspections_open) [<https://perma.cc/5VEJ-8XKE>] (last updated Sept. 13, 2022, 6:00 PM ET).

<sup>74</sup> *Id.*

to the six-month time allotted for complaints.<sup>75</sup> However, a very small amount of these inspections resulted in COVID-19-related citations.<sup>76</sup> And the amounts were mostly insignificant, ranging from fines of \$1,928 to \$32,965, with the majority around \$12,000.<sup>77</sup> Additionally, these citations did not begin until July 2020, when the pandemic was at its peak.<sup>78</sup>

This lack of an adequate response has real, deadly consequences. In April 2020, JBS employees at a beef processing plant complained that they were crammed into close quarters in their locker room and during lunch breaks even though there was “a number of positive cases of COVID-19.”<sup>79</sup> After OSHA decided not to inspect the plant or issue any citations,<sup>80</sup> over 300 hundred workers were infected with the virus.<sup>81</sup>

OSHA justifies its lack of mandatory guidelines as flexible and adequate. It points to the H1N1 virus in 2009, the United States' first pandemic in over sixty years,<sup>82</sup> and claims that it is following the same methods for COVID-19.<sup>83</sup> However, the H1N1 virus does not even come close to comparing with how widespread and deadly the COVID-19 virus has been. H1N1 was responsible for 12,469 deaths in

---

<sup>75</sup> Braden Campbell, *OSHA Tells House Panel It Just Issued First Virus Citation*, LAW360 (May 28, 2020, 6:06 PM), <https://www.law360.com/articles/1276729> [<https://perma.cc/9DLQ-235M>].

<sup>76</sup> *COVID Inspections*, *supra* note 64.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> OSHA, CLOSED FEDERAL AND STATE PLAN VALID COVID-19 COMPLAINTS 331 (2020), [https://www.osha.gov/sites/default/files/Closed\\_Federal\\_and\\_State\\_Plan\\_Valid\\_Covid-19\\_Complaints\\_through\\_May\\_10-Receipt\\_Date\\_release.pdf](https://www.osha.gov/sites/default/files/Closed_Federal_and_State_Plan_Valid_Covid-19_Complaints_through_May_10-Receipt_Date_release.pdf) [<https://perma.cc/V6TB-U2JY>].

<sup>80</sup> *Id.*

<sup>81</sup> Grabell et al., *supra* note 15.

<sup>82</sup> The previous pandemic was a major flu outbreak in 1957. *1957–1958 Pandemic (H2N2 Virus)*, CDC, <https://www.cdc.gov/flu/pandemic-resources/1957-1958-pandemic.html> [<https://perma.cc/C4L9-3P5N>]. The H2N2 virus took the lives of about 1.1 million people worldwide and 116,000 in the United States. *Id.* This pandemic was considered mild because countries caught it early and a vaccine was developed quickly using information from the first flu vaccine developed in 1942. *Id.*

<sup>83</sup> *Testimony of Loren Sweatt, Principal Deputy Assistant Secretary, OSHA, Before the H. Subcomm. on Workforce Prots. of the H. Comm. on Educ. & Lab.*, 116th Cong. (2020), <https://www.osha.gov/news/testimonies/05282020> [<https://perma.cc/L9JB-22PK>].

the United States<sup>84</sup>—a sharp contrast to the half a million dead in about the same amount of time from COVID-19.<sup>85</sup> The severity of this virus and its ability to easily spread demands a more uniform, stringent approach from OSHA.

### III. LEGAL ATTEMPTS TO REQUIRE OSHA TO PROMULGATE MANDATORY STANDARDS

Proponents of government deregulation argue that OSHA and other public safety agencies should continue to be deregulated.<sup>86</sup> They view this as a necessary step towards allowing employers more control over their own workplace.<sup>87</sup> The Trump administration supported this goal, leaving few options for workers during the pandemic who felt their employers were not providing them enough protection.<sup>88</sup> Workers' only options are to sue their employers for damages or, if they are union members, to go on strike. However, these tactics are unlikely to be successful due to the lack of regulation and general guidance during this pandemic—with workers not having much leg to stand on. The AFL-CIO and other unions have petitioned OSHA to issue a general infectious disease standard previously in 2009 with SARS.<sup>89</sup> Although the agency began the rule-making process in May 2010 after the end of the H1N1 pandemic, it never actually issued a standard.<sup>90</sup> In 2017, the procedure was listed under “long-term” action on the Department of Labor’s current regulatory agenda by the Trump administration.<sup>91</sup> This categorization means that it is unlikely OSHA will issue a general infectious disease standard in the near future.

---

<sup>84</sup> This CDC estimate is from April 12, 2009 to April 10, 2010. *2009 H1N1 Pandemic (H1N1pdm09 Virus)*, CDC, <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> [<https://perma.cc/A63V-MXWU>].

<sup>85</sup> *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, CDC, [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailytrendscases](https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases) [<https://perma.cc/H32S-9T4G>].

<sup>86</sup> *Updated OSHA Agenda Reflects Trump Administration’s Focus on De-Regulation*, SAFETY & HEALTH MAG. (Aug. 27, 2017), <https://www.safetyandhealthmagazine.com/articles/15985-updated-agenda-reflects-trump-administration-focus-on-de-regulation> [<https://perma.cc/T2ZY-E6P5>].

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Press Release, AFL-CIO, AFL-CIO Sues OSHA for Emergency Temporary Standard to Protect Workers (May 18, 2020), <https://aflcio.org/press/releases/afl-cio-sues-osha-emergency-temporary-standard-protect-workers> [<https://perma.cc/7KKN-AAJA>].

<sup>90</sup> *Id.*

<sup>91</sup> *Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions*, OIRA, [https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST](https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST)¶P

Without enforceable rules through which to gain relief, multiple organizations have turned to the legal system, filing lawsuits against OSHA to compel them to issue an ETS. On May 18, 2020, the AFL-CIO<sup>92</sup> filed a lawsuit to force OSHA to issue an ETS.<sup>93</sup> They argued that this standard would protect essential workers from further risk of exposure and infection from COVID-19.<sup>94</sup> They wrote that “COVID-19 has caused more deaths among workers in a shorter time than any other health emergency OSHA has faced in its fifty-year existence.”<sup>95</sup> They described the agency’s lack of mandatory guidelines as “a stunning act of agency nonfeasance in the midst of a workplace health emergency of a magnitude not seen in this country for over a century . . . .”<sup>96</sup> The brief argued that this failure to act “in the face of a clear statutory duty” amounts to “an abdication of statutory responsibility” that allows the court to order OSHA to issue an ETS.<sup>97</sup> Although it failed in its goal, such lawsuits are evidence of a need for OSHA to adopt enforceable rules on workplace safety.

In July 2020, employees at a meatpacking plant in Pennsylvania sued the agency, claiming that it ignored their complaints about the risks in their workplace.<sup>98</sup> According to the complaint, the company did not separate infected employees or tell other employees who might have been exposed when they worked closely together.<sup>99</sup> If true, these allegations show a blatant disregard for essential workers’ health and safety. This kind of attitude towards employee protection illustrates the need for

---

ub=true&agencyCode=&showStage=active&agencyCd=1200&Image58.x=34&Image58.y=16&csrf\_token=177A79092C1E47A6B2B94BA378496B144E6E658F6F8D0BB5FE754DA99132491073D93C6229001D21AB36EE88834C989680F6 [https://perma.cc/H7LY-GUZ3].

<sup>92</sup> The AFL-CIO is a “democratically governed federation of 57 unions.” *Our Unions and Allies*, AFL-CIO, <https://aflcio.org/about-us/our-unions-and-allies> [https://perma.cc/SG77-7D5S]. These unions include more than 12.5 million people in industries including manufacturing, transportation, and construction. *Id.* Their goal is to protect workers’ rights and advocate for more protective policies in the workplace. *Id.*

<sup>93</sup> *In re* AFL-CIO, No. 20-1158, 2020 WL 3125324 (D.C. Cir. June 11, 2020).

<sup>94</sup> Emergency Petition for a Writ of Mandamus, and Request for Expedited Briefing and Disposition at 2, *In re* AFL-CIO, No. 20-1158, 2020 WL 3125324 (D.C. Cir. June 11, 2020) (No. 19-1158).

<sup>95</sup> *Id.* at 9.

<sup>96</sup> *Id.* at 4.

<sup>97</sup> *Id.* at 6.

<sup>98</sup> Complaint and Emergency Petition for Emergency Mandamus Relief at 1, 10–12, *Does v. Scalia*, 530 F. Supp. 3d 506 (M.D. Pa. 2021) (No. 3:20-1260).

<sup>99</sup> *Id.* at 4.

OSHA to adopt actual, mandatory rules regarding workplace safety during COVID-19.

#### IV. STATE APPROACHES TO ISSUING EMERGENCY TEMPORARY STANDARDS

With the lack of a national standard, several states have stepped up to issue their own emergency temporary standards to protect essential workers.<sup>100</sup> Virginia was the first in the United States to promulgate this kind of standard on July 15, 2020.<sup>101</sup> This standard provides protection to all state and local employees and most private employees as well.<sup>102</sup> As well as being mandatory, the standard exceeds the protections outlined in the CDC and OSHA guidelines.<sup>103</sup> Some of the mandatory provisions for employee safety include notifying the Virginia Department of Health of positive COVID-19 tests and preparing infectious disease preparedness and response plans within sixty days.<sup>104</sup> The standard also provides protection for employees who communicate reasonable concerns about workplace safety in print, online, and social media.<sup>105</sup> Although this temporary emergency standard expired on January 26, 2021,<sup>106</sup> the Virginia Safety and Health Codes Board enacted a Permanent Standard on COVID-19 on January 13, 2021.<sup>107</sup> However, it still fails to prohibit employees who have come in close contact with another positive-testing person from coming into work.<sup>108</sup>

California passed its own emergency temporary standard on COVID-19 infection prevention on November 19, 2020.<sup>109</sup> These new temporary standards

---

<sup>100</sup> There are a total of 28 “State Plan” states that operate their own occupational and safety and health programs under an OSHA grant. This classification enables them to issue their own COVID-19 standards. States without this classification are limited to the federal agency’s promulgations. OSHA, *State Plans*, U.S. DEP’T OF LAB., <https://www.osha.gov/stateplans> [<https://perma.cc/QE9P-RRF6>].

<sup>101</sup> 16 VA. ADMIN. CODE § 25-220-10 (2020) (Emergency Temporary Standard).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* § 25-220-40.

<sup>105</sup> *Id.* § 25-220-90.

<sup>106</sup> *Id.* § 25-220-20.

<sup>107</sup> 16 VA. ADMIN. CODE § 25-220 (2021) (Final Permanent Standard).

<sup>108</sup> *Id.* § 25-220-40.

<sup>109</sup> CAL. CODE REGS. tit. 8, § 3205 (2020) (Emergency Temporary Standard).

apply to most workers in California not covered by Cal/OSHA's Aerosol Transmissible Diseases standard.<sup>110</sup> Meaning, it applies to almost all California employers.<sup>111</sup> The most important requirement of California's emergency temporary standard is requiring all employers to create and implement a COVID-19 Prevention Program, which mandates multiple aspects that were designed to increase employee safety in the workplace.<sup>112</sup> Employers must have a system for employees to report possible exposure without worrying about possible retaliation.<sup>113</sup> They must also investigate and report COVID-19 exposures and notify workers who were potentially exposed within one business day.<sup>114</sup> Some of the requirements are different from what was previously expected under OSHA's guidelines. For example, any employee who was potentially exposed to COVID-19 must now be provided a free test from the employer.<sup>115</sup> The plan also provides an extensive protocol for handling an outbreak in a workplace.<sup>116</sup> This protocol includes providing testing immediately to all exposed workers as well as testing one week after the first test.<sup>117</sup> The employer also must keep track of the investigation and provide notification to the local health department no later than forty-eight hours after the employer is aware of the outbreak.<sup>118</sup> Additionally, if the outbreak involves twenty or more cases within a thirty-day period, there are increased requirements such as twice-weekly testing and examining whether the employer should require respiratory protection.<sup>119</sup> In extreme

---

<sup>110</sup> CAL. DEP'T OF INDUS. RELS., STANDARDS PRESENTATION TO CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD (2020), <https://www.dir.ca.gov/oshsb/documents/COVID-19-Prevention-Emergency-txtbrdconsider.pdf> [<https://perma.cc/5DZ2-HZHW>].

<sup>111</sup> The standard does not apply to employees already covered by Cal/OSHA's Aerosol Transmissible Diseases Standard, employees who work from home or employers who only have one employee and does not come into contact with other people. *Id.*

<sup>112</sup> CAL. CODE REGS. tit. 8, § 3205(c) (2020) (Emergency Temporary Standard).

<sup>113</sup> *Id.* § 3205(c)(1)(A).

<sup>114</sup> *Id.* § 3205(c)(3)(B)(3).

<sup>115</sup> *Id.* § 3205(c)(3)(5).

<sup>116</sup> *Id.* § 3205(c)(2)(C).

<sup>117</sup> *Id.* § 3205(c).

<sup>118</sup> *Id.* § 3205(c)(8)(A).

<sup>119</sup> *Id.* § 3205(c).



cases, the standard calls for evaluation of whether the business's operations should cease.<sup>120</sup>

Michigan and Oregon have also recently promulgated similar COVID-19 standards.<sup>121</sup> However, even if all the states with "State Plans" enacted their own enforceable standards, this leaves nearly half of our country without the ability to do the same.<sup>122</sup> Essential worker protections during a pandemic should not depend on the state of the employee's residence. OSHA should promulgate its own standard to provide uniform protections to these workers nationwide. This would set practical and consistent measures that employers can clearly understand and implement to protect their workers.

## V. PROPOSED SOLUTION AND CONCLUSION

It should be an accepted practice for OSHA to promulgate emergency temporary standards to mitigate the risk of coronavirus infections. Not only would this have helped to reduce the spread of infections from 2020–2021, but the lack of guidance is an issue that should also be addressed for the future. The H1N1 flu<sup>123</sup> in 2009 was the previous pandemic, and it is only a matter of time before another virus or disease presents the United States with a similar public health issue. Even in 2006, the Bush administration was aware of this possibility, warning in its national plan for pandemic influenza that "it is impossible to predict whether the H5N1 virus will lead to a pandemic, but history suggests that if it does not, another novel influenza virus will emerge at some point in the future and threaten an unprotected human population."<sup>124</sup> This is the most effective way for the United States to prepare for the next crisis. Although the lack of an emergency temporary standard was only one of many blunders on the part of the United States to tackle and contain the spread of

---

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

<sup>121</sup> Michigan promulgated its own emergency rules on October 14, 2020. MICH. ADMIN. CODE r. 408E-2.2021 (2021) (Emergency Temporary Standard). Oregon also issued an emergency temporary standard on November 6, 2020. OR. ADMIN. R. 437-001-0744 (2021) (Emergency Temporary Standard).

<sup>122</sup> *State Plans*, *supra* note 100.

<sup>123</sup> The 2009 H1N1 pandemic arose from the emergence of a novel influenza virus. *2009 H1N1 Pandemic*, *supra* note 84. First detected in the United States, it quickly spread across the world. *Id.* The CDC estimates that from April 2009 to April 2010, there were 60.8 million cases, 274,304 hospitalizations, and 12,249 deaths in the United States as a result of this virus. *Id.*

<sup>124</sup> HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA: IMPLEMENTATION PLAN 1 (2006).

COVID-19,<sup>125</sup> implementing a protocol that allows for such standards to be quickly enacted in the future would be a step in the right direction.

The failure to promulgate an emergency temporary standard hurts the United States' effort to mitigate the risk of the virus. This absence of an ETS limits OSHA's regulatory power and restricts how much protection from infectious diseases they can offer to essential workers. OSHA is authorized to issue an ETS if it determines that "employees are exposed to grave danger" from a new hazard in the workplace, and an ETS is "necessary to protect [them] from that danger."<sup>126</sup> There is arguably no more fitting purpose to use this power than to curtail a global pandemic.

America's essential workers are faced with an impossible choice: protect their health or protect their livelihood. Those who suffer from serious preexisting health conditions and feel it necessary to quit their job in order to prevent exposure face extremely high unemployment rates.<sup>127</sup> Additionally, if they quit, they are likely not eligible for unemployment benefits.<sup>128</sup> Essential employees work far too hard to be so unprotected. The COVID-19 pandemic highlighted how much America relies on essential workers for every facet of its economy. Across America, the news and social media are full of tributes and appreciation for our essential workers. If we truly care about the sacrifice these heroic people make every single day, we need to give them more than empty praise.

With the change of the new administration,<sup>129</sup> President Joe Biden signed an executive order on January 21, 2021, that requires OSHA to issue "revised guidance

---

<sup>125</sup> Despite its vast resources, the United States' response to the COVID-19 pandemic paled in comparison to other countries' efforts at fighting the virus. Some of its blunders include the slow response at the emergence of the virus, the dismantling of an office created specifically for such public health issues, and the disregard for multiple warnings from American intelligence agencies and the Secretary of Health and Human Services Alex Azar.

<sup>126</sup> 29 U.S.C. § 655(c).

<sup>127</sup> Unemployment rates for United States' citizens spiked in April 2020, at 14.8%. *Civilian Unemployment Rate*, U.S. BUREAU OF LAB. STATS., <https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm> [<https://perma.cc/B53B-AQUR>]. This was the highest unemployment rate since the Great Depression. (Even during the 2008 recession, rates did not go above 10%.) Since then, rates have slowly fallen. The unemployment rate as of December 2020 was 6.7%. *Id.*

<sup>128</sup> *Voluntary Quit*, OFF. OF UNEMPLOYMENT COMP., <https://www.uc.pa.gov/unemployment-benefits/Am-I-Eligible/benefit-eligibility/Pages/Voluntary-Quit.aspx> [<https://perma.cc/48RK-ZKEK>].

<sup>129</sup> The Trump administration (2016–2020) favored the kind of deregulation that encouraged employers to provide for workers' health and safety rather than federal agencies.

to employers on workplace safety during the COVID-19 pandemic.”<sup>130</sup> The executive order also requires OSHA to “consider whether any emergency temporary standards . . . are necessary” for worker protection.<sup>131</sup> Additionally, the order requires OSHA to review their efforts thus far and “identify any short-, medium-, and long-term changes that could be made to better protect workers and ensure equity in enforcement.”<sup>132</sup> OSHA finally complied with this order five months after Biden’s executive order and released updated guidance for employers on how to prevent both the exposure and spread of COVID-19 in the workplace.<sup>133</sup>

The House Select Subcommittee on the Coronavirus Crisis is also launching an investigation into COVID-19 cases, specifically in meatpacking companies and plants in the United States.<sup>134</sup> The goal of this investigation is to determine whether OSHA adequately enforced worker safety laws in these workplaces.<sup>135</sup> While these methods are not as effective as an ETS would have been a year ago, it is a step in the right direction. In the future, the protection of America’s essential workers should not depend on what party is in control at the moment. Public health and safety are too important to be dictated by the frequent swings of political change.

While deregulation is a complex, debatable topic, in the face of a global pandemic that has taken the lives of more than 2.6 million people across the world,<sup>136</sup> the normal arguments for a free market no longer apply so straightforwardly. The question of agency control needs to be examined in the context of the current situation. A temporary emergency standard is just that: temporary. It goes into effect until superseded by a permanent standard within six months to provide minimum

---

<sup>130</sup> Exec. Order No. 13999, 86 Fed. Reg. 7211 (Jan. 26, 2021).

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

<sup>132</sup> *Id.*

<sup>133</sup> OSHA, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, U.S. DEP’T OF LAB., <https://www.osha.gov/coronavirus/safework> [<https://perma.cc/2GM9-BVUL>].

<sup>134</sup> Press Release, Select Subcomm. on the Coronavirus Crisis, Select Subcommittee Launches Investigation into Widespread Coronavirus Infections and Deaths in Meatpacking Plants (Feb. 1, 2021), <https://coronavirus.house.gov/news/press-releases/select-subcommittee-launches-investigation-widespread-coronavirus-infections-and> [<https://perma.cc/3Z2H-XL2J>].

<sup>135</sup> *Id.*

<sup>136</sup> Jaclyn Diaz, *The COVID-19 Pandemic Has Now Killed 5 Million People Around the World*, NPR (Nov. 1, 2021), <https://www.npr.org/2021/11/01/1051020063/the-covid-19-pandemic-has-killed-5-million-people-globally> [<https://perma.cc/DF4V-JHKT>].

guidance for a pressing hazard as soon as possible.<sup>137</sup> During the COVID-19 pandemic, the first six months were a crucial period where over 189,000 people lost their lives.<sup>138</sup> If OSHA had issued an ETS for barriers between employees, social distancing, masks, and sanitization when the virus first started to spread, thousands of illnesses and deaths could have been prevented. Although a few states began to implement their own temporary emergency standards to counter the effects of the lack of measures taken by the federal government,<sup>139</sup> the responsibility to provide such protections should not fall at the state level. In a crisis that has the potential to take hundreds of thousands of lives, a clear, uniform federal standard is necessary to make sure that all workers are equally protected.

---

<sup>137</sup> OSHA, *OSHA Standards Development*, U.S. DEP'T OF LAB., <https://www.osha.gov/laws-regs/standards-development> [<https://perma.cc/N8MN-872G>].

<sup>138</sup> This number accounts for deaths in the United States from March 2020 to August 2020. NCHS, *Daily Updates of Totals by Week and State*, CDC, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> [<https://perma.cc/UT9K-C3S8>] (last updated Sept. 19, 2022).

<sup>139</sup> Virginia, Oregon, Washington, and California have implemented their own emergency temporary standards to provide more protection to their workers.

